

DIPARTIMENT TAL-KUNTRATTI
Notre Dame Ravelin
Floriana FRN 1600 – MALTA



DEPARTMENT OF CONTRACTS
Notre Dame Ravelin
Floriana FRN 1600 – MALTA

Telephone: (0356) 2378 1000
e-Mail: info.contracts@gov.mt
website: www.contracts.gov.mt

The Secretary

The Public Contracts Review Board

Notre Dame Ravelin

Floriana

info.pcrb@gov.mt



Friday, 8th March 2024

Dear Sir,

Re: NP03/2024 - Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

Reasoned Letter of objection of the Department of Contracts to the reasoned letter of reply of Messrs. Bad Boy Cleaning Services Limited (the appellant)

Whereas:

1. The Active Aging and Community Care (the Contracting Authority) has conducted procurement where the incumbent economic operator has been chosen to be recommended for award.
2. Messrs. Bad Boy Cleaning Services Limited has considered itself prejudiced by this award and proceeded to lodge a reasoned letter of objection where it is stated that the current supplier is the recipient of direct awards.
3. This statement carries a weighting that the objector is required to prove in terms of the burden of proof under article 562 of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta. Therefore, prudence dictates that the appellant is to have had adequately substantiated this claim. Without prejudice, it is submitted that such statements are not relevant to the subject matter of the present procurement since these go beyond the objective intended in the remedy afforded to economic operators in terms of regulation 270 of the Public Procurement Regulations, 2016 (S.L.601.03 of the Laws of Malta).



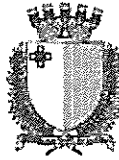
4. The Department of Contracts refers to the reasoned letter of objection filed by Messrs. Bad Boy Cleaning Services Limited lodged on 1st March 2024
5. In particular, the Department of Contracts objects to the reference to the call for tenders CT2390/2022 since this call for tenders is unrelated to the procurement procedure forming the subject matter in caption.
6. The appellant should desist in making irrelevant comments in this objection.

Preliminary Plea – The Deposit

7. Preliminary, the DoC submits that this Honourable Public Contracts Review Board is to dismiss this objection on the basis that the deposit for the hearing of the appeal has not been satisfied.
8. In terms of regulation 273 of the Public Procurement Regulations, 2016 (the appellant has not paid the full amount required to lodge this appeal since the amount paid is only five thousand fifty-five euro (€5,055.05) that is not sufficient to cover the 0.5% deposit in terms representing the ten million five hundred nineteen thousand euro (€10,519,000) representing the estimated procurement value in terms of section 1.3 of the tender document.
9. The deposit that should have been paid is fifty two thousand five hundred and ninety five euro (€52,595), which amount is to be reduced to the maximum of fifty thousand (€50,000).

Preliminary Plea – Legitimate defendant

10. In terms of the documentation presented, it is clearly evident that the Contracting Authority is not the Department of Contracts and consequently the Public Contracts Review Board is to declare the Department of Contracts as not being the legitimate defendant.



Merits

First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor

11. Whilst the consent for the use of the negotiated procedure is required *ex lege* and therefore, the statement that the prior approval was not obtained is to be proven. The appellant may not be allowed to make conjectures and assumptions in particular in the field of public procurement.
12. The appellant may not be allowed to utilise the remedy afforded in terms to impugn the procedure since this remedy is to be utilised in regulation 262(1)(e) of the Public Procurement Regulations, 2016 () where the prospective tenderer is allowed a time window of two thirds of the time allowed for the filing of tender offers, to file a call for remedies in order to cancel a call for competition on the basis that the call for competition is violation of Law or that it is likely to violate the Law. Therefore, the Public Contracts Review Board is not to abstain from hearing the grievances of this objection on the basis that the appellant had at its disposal remedies that were to be exercised at the opportune time.
13. The action of the appellant in seeking to impugn the decision of the Contracting Authority on the basis that the use of the negotiated procedure is unfounded in Law since the time allowed to contest the procedure has lapsed, this having to be filed within the first two thirds of the time allowed for the receipt of tenders.
14. The only grievances that may be raised by the appellant in the present objection refer to whether the recommended tenderer is in conformity with the contents of the tender document and since these have not been raised within the ten day time limit provided in regulation 271 of the Public Procurement Regulations, 2016 (Subsidiary Legislation 601.03 of the Laws of Malta), these are to be considered as waived and renounced.
15. Without prejudice, even if the Public Contracts Review Board were to admit the hearing of the action of the appellant for the contestation of the use of the negotiated procedure, it is submitted that there are specific grounds upon which the approval for the use of the negotiated procedure is justified subject to the circumstances provided by the Public Procurement Regulations, 2016, and these requirements in order to address the



functional requirements of the Contracting Authority. Therefore, the Contracting Authority shall be required to explain its requirement for undergoing the procurement procedure.

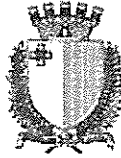
16. The appellant may therefore not challenge the administrative discretion afforded to the Contracting Authority in obtaining permission avail itself of the Negotiated Procedure, unless the appellant proves that there has been a misuse of power.
17. The Department of Contracts refers to the judgement in the names of Zamestnik-ministar na regionalnoto v Obshtina Razlog¹ that had held that Contracting Authority have an element of leeway in the choice of Negotiated Procedure in the case that there is no substantial alterations to the conditions of the contract:

'Article 32(2)(a) of Directive 2014/24/EU....must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alteration, the initial conditions of the contract that were mentioned in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable'

Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law

18. With all due respect, stating that the notice published by the Contracting Authority is sufficient for prospective tenderers to be notified of the procurement made by the same Contracting Authority.
19. Without prejudice, the submissions of the appellant are completely untruthful since the Contracting Authority has indeed published the voluntary ex ante transparency notice (Vide Doc 'VEAT')
20. On this basis, the Public Contracts Review Board should dismiss the grievance of the appellant as being unfounded in fact and in Law.

¹ Zamenstnik-ministar na regionalnoto razvitiie i blagoustroystvoto v Obshtina Razlog, European Court of Justice, Judgment of the Court (Eight Chamber), Case C-376/2021, 16th June 2022



Application for the disclosure of information

21. In view of the circumstances, the Department of Contracts strongly objects to the application of the Appellant lodged contemporaneously with the reasoned letter of objection requesting the Public Contracts Review Board to obtain the disclosure of information since these are internal working documents of the Contracting Authority.
22. It is the submission of the Department of Contracts that the disclosure of all documents requested is, in terms of regulation 242(3) of the Public Procurement Regulations, 2016 (Subsidiary Legislation 601.03 of the Laws of Malta), contrary to the public interest.
23. In support of this submission, the Department of Contracts refers to the judgment in the names of Varec vs Belgium², Antea Polska and Others vs Panstwowe Gospodarstwo Wodne Wody Polskie³ and the European Commission vs Republic of Poland⁴ it had been held that: *'(T)he confidentiality of data can, in principle, be ensured by means of a duty of secrecy, without it being necessary to contravene the public procurement procedures laid down by Directive 2014/24'*

In terms of the Public Procurement Regulations, 2016, the Department of Contracts reserves all its procedural rights to make further submissions, to produce any documentation and to summon any witness in order to prove that the reasoned letter of objection is procedurally incorrect and that the present objection is legally unfounded.

Request of the Department of Contracts

In view of the aforesaid, the Department of Contracts requests the Public Contracts Review Board that, bar any decision fit and opportune:

1. To forthwith dismiss the reasoned letter of objection of the Appellant on the basis that the payment of the deposit has not been effected as provided in regulation 273 of the

² Varec v Etat Belge, Judgment of the Court (Third Chamber), Case C-450/2006, 14th February 2008 – Furthermore, both by their nature and according to the scheme of Community legislation in that field contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators.

³ Antea Polska S.A., vs Panstwowe Gospodarstwo Wodne Wody Polskie, Judgment of the Court (Fourth Chamber), Case C-54/2021, 17th November 2022

⁴ European Commission vs Republic of Poland, Judgment of the Court (First Chamber), Case C-601/2021, 7th September 2023



Public Procurement Regulations, 2016 (Subsidiary Legislation 601.03 of the Laws of Malta);

2. Without prejudice, declare that the Department of Contracts is not the legitimate defendant in these proceedings.
3. Without prejudice, reject the request for the declaring the use of the negotiated procedure as being unfounded in Law and in fact
4. Confirm and uphold the use of Negotiated Procedure and the proposed award of the 2024 Negotiated Procedure.
5. Order the forfeiture of the deposit lodged by the Appellant for the objection.

With respect.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'M. Debono', written over a horizontal line.

Av. Mark Anthony Debono

Junior Legal Officer

Department of Contracts

Notre Dame Ravelin

Floriana

mark-anthony.debono.1@gov.mt

List of Witnesses

Representatives of Bad Boy Cleaners Ltd, Representatives of the Contracting Authority, Representatives of Support Services Ltd, The Director General Contracts, Representatives of the Department of Contracts, Av. Clement Mifsud Bonnici and any other witness that may be deemed relevant to be summoned to testify regarding the procurement in question.

List of Documents

Doc 'VEAT' – Voluntary *ex ante* transparency notice issued in the name of the Active Ageing and Community Care being the buyer.

125373-2024 - Direct award preannouncement

Doc 'VEAT'

Notice View

Notice View

Summary

Direct award preannouncement

Malta: **Accommodation cleaning services**

Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

Type of procedure: Negotiated without prior call for competition

Buyer

Buyer: Active Ageing and Community Care

Malta, Gormi

LOT-0001: Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

Accommodation cleaning services

Results

Value of all contracts awarded in this notice: 1 011 010,00 EUR

Languages and formats

Official language (Signed PDF)

BG CS DA DE EL ES EN ET FI FR GA HR HU IT LT LV MT NL PL PT RO SK SL SV



PDF

BG CS DA DE EL ES EN ET FI FR GA HR HU IT LT LV MT NL PL PT RO SK SL SV



Machine translation HTML

BG CS DA DE EL ES EN ET FI FR GA HR HU IT LT LV MT NL PL PT RO SK SL SV

Notice

Official language ⓘ

125373-2024 - Direct award preannouncement

Malta – Accommodation cleaning services – Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

OJ S 43/2024 29/02/2024

Voluntary ex-ante transparency notice

Services

1. Buyer

1.1. Buyer

Official name: Active Ageing and Community Care

2. Procedure

2.1. Procedure

Title: Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

Description: Negotiated Procedure for the Provision of Home Help in the Community Services in Malta - AACC

Procedure identifier: 5576eae4-dc98-4343-975b-69eeb2554e2e

Type of procedure: Negotiated without prior call for competition

2.1.1. Purpose

Main nature of the contract: Services

Main classification (cpv): 90911100 Accommodation cleaning services

Additional classification (cpv): 98513310 Home-help services, 98514000 Domestic services, 79622000 Supply services of domestic help personnel

2.1.4. General information

Legal basis:

Directive 2014/24/EU

5. Lot

5.1. Lot: LOT-0001

Title: Negotiated Procedure for the Provision of Home Help in the Community Services in Malta

Description: Negotiated Procedure for the Provision of Home Help in the Community Services in Malta - AACC

Internal identifier: na

5.1.1. Purpose

Main nature of the contract: Services

Main classification (cpv): 90911100 Accommodation cleaning services

Additional classification (cpv): 98513310 Home-help services, 98514000 Domestic services, 79622000 Supply services of domestic help personnel

5.1.4. Renewal

Maximum renewals: 0

5.1.6. General information

Procurement Project not financed with EU Funds.

The procurement is covered by the Government Procurement Agreement (GPA)

5.1.15. Techniques

Framework agreement: No framework agreement

Information about the dynamic purchasing system: No dynamic purchase system

5.1.16. Further information, mediation and review

Review organisation: Public Contracts Review Board

Organisation providing offline access to the procurement documents: Active Ageing and Community Care

6. Results

Value of all contracts awarded in this notice: 1 011 010,00 EUR

8. Organisations

8.1. ORG-0001

Official name: Active Ageing and Community Care

Registration number: MT 27810915

Department: Ministry for Health and Active Ageing

Postal address: 346, FXB Buildings, Mdina Road

Town: Qormi

Postcode: QRM 9014

Country: Malta

Email: procurement-aacc@gov.mt

Telephone: +356 22788800

Roles of this organisation:

Buyer

Organisation providing offline access to the procurement documents

8.1. ORG-0002

Official name: Support Services Ltd

Registration number: C30778

Department: n/a

Postal address: JPR Buildings, Level 01, Triq Ta' Zwejti,

Town: SAN GWANN [San Gwann]

Postcode: SGN 4197

Country: Malta

Email: info@healthmark.com.mt

Telephone: +356 22797000

Roles of this organisation:

Tenderer

8.1. ORG-0003

Official name: Public Contracts Review Board

Registration number: TBD

Department: Ministry for Finance and Employment

Postal address: Notre Dame Ditch

Town: Floriana

Postcode: FRN 1601

Country: Malta

Email: info.pcrb@gov.mt

Telephone: +356 2139095

Roles of this organisation:

Review organisation

8.1. ORG-0004

Official name: European Dynamics S.A.

Registration number: 002024901000

Department: European Dynamics S.A.

Town: Athens

Country: Greece

Email: sproc-esender@eurodyn.com

Telephone: +30 2108094500

Roles of this organisation:

TED eSender

11. Notice information

11.1. Notice information

Notice identifier/version: 9c20b621-fb91-41fe-bd1e-b4625bc44c9d - 01

Form type: Direct award preannouncement

Notice type: Voluntary ex-ante transparency notice

Notice dispatch date: 28/02/2024 13:13:00 (UTC+1)

Languages in which this notice is officially available: English

11.2. Publication information

Notice publication number: 125373-2024

OJ S issue number: 43/2024

Publication date: 29/02/2024