



25 March 2024

Public Contracts Review Board
Notre Dame Ditch
Floriana FRN 1601
Malta

Dear Sirs,

RE: Negotiated Procedure Reference 033-6006/24-CPSU1396/19 for the leasing of non-emergency ambulances plus drivers, porters and booking officers for the non-emergency ambulance garage (the "2024 Negotiated Procedure")

1. We have been instructed by **Malta Red Cross Society (LPA 110)** (the "**Appellant**") to lodge an application in terms of Regulation 270 of the Public Procurement Regulations (the "**PPR**") in connection with the above-captioned 2024 Negotiated Procedure.
2. The Appellant is aggrieved by the Contracting Authority's decision on the 2024 Negotiated Procedure for three reasons:
 - a. the preferred bidder's offer appears to be abnormally low and the Contracting Authority had an obligation to request clarifications on the price or costs proposed. To the Appellant's knowledge, it did not do so;
 - b. the preferred bidder's offer appears as €188,854.35 on ePPS and €234,738.10 in the Appellant's letter of rejection. No bidder may be permitted to change its financial offer *ex post facto*. Therefore, the Contracting Authority has erred in allowing for an upward adjustment of €45,883.75; and
 - c. the amount of €10,000 as appears on the Schedule of Award in terms of the deposit payable for filing this objection is incorrect according to law.

A. The Facts: The 2024 Negotiated Procedure for Non-Emergency Ambulances

3. On 8 February 2024, the Contracting Authority published the above-captioned 2024 Negotiated Procedure.
4. The 2024 Negotiated Procedure carries an estimated total value of €322,900 for a contract duration of 2 months.

5. By the closing date of 15 February 2024, 4 bids were received:

EO name	Tender Id	Financial Value (EUR)
Emergency Malta Private Medical Service Ltd	205233	188,854.35
A. Medical	205151	264,510.00
Malta Red Cross Society	205212	290,099.00
HEALTH JV	205207	308,412.00

6. On 13 March 2024, the Appellant received a letter of rejection from the Contracting Authority whereby it was informed that its offer was being rejected because although being technically compliant, it was not the cheapest offer.
7. Instead, the 2024 Negotiated Procedure was being recommended for award to Emergency Malta Private Medical Services Ltd (the "**Preferred Bidder**") "*for the amount of €234,738.10 excluding VAT, this being the cheapest priced offer satisfying the administrative and technical criteria.*"
8. The Preferred Bidder's financial offer of €188,854.35 upon opening does not tally with its financial offer of €234,738.10 disclosed in the letter of rejection (attached and marked as "**Document KCL1**"). There is an unexplained discrepancy of €45,883.75.
9. The Preferred Bidder's financial offer is at least €88,161.90 and at most €134,045.65 less than the estimated procurement value. It is also at least €39,701.68 and at most €74,114.49 less than the average of the 4 bids received.
10. The Appellant is lodging this appeal because it is aggrieved by the Contracting Authority's decision to recommend the award of the contract for the 2024 Negotiated Procedure to the Preferred Bidder.

B. The First Ground of Appeal: the Preferred Bidder's offer appears to be abnormally low

11. According to procurement law as implemented by the CJEU and our jurisprudence, the Appellant submits that the abnormally low appearance of the Preferred Bidder's offer triggers the investigation in terms of Regulation 243 of the PPR.
12. As this Board knows, the purpose of the investigation is to ensure that the price offered by the recommended bidder is economically sustainable. In other words, it is necessary to confirm that the apparently abnormally low offer is not due to, for instance, non-compliance with the would-be contractor's employment and environmental obligations.

13. Regulation 243 of the PPR, which is modelled on Article 69 of the Classic Directive, imposes an obligation on the Contracting Authority to request explanations from a bidder whose financial bid appears to be abnormally low:

“Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.”

14. In decisions concerning Regulation 243,¹ this Board has suggested that the methods for identifying whether an offer is abnormally low or not may assume various forms:
- comparing the recommended bidder's price to the estimated procurement value;
 - comparing the recommended bidder's price to the other competing offers; or
 - comparing the recommended bidder's price with the object of the procurement.

15. This methodology is also reflected in judgements of the Court of Appeal. In *X Clean Limited vs Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità et*,² the Court stated:

“huwa aktar loġiku li l-prezz tal-offerta jitqabbel mal-prezz stmat mill-awtorità kontraenti milli mal-prezz tal-ogħla offerta. Dan għaliex il-prezz stmat huwa msejjes fuq riċerka dwar il-kundizzjonijiet tas-suq u għandu għalhekk jitqies bħala realistiku”.

16. Therefore, if the estimated procurement value of the 2024 Negotiated Procedure is based on market research, the Preferred Bidder's offer appears to be abnormally low and requires investigation by the Contracting Authority in terms of Regulation 243.

17. As stated in *Medbiologix Company Limited vs Enemalta plc et*:³

“il-prezz [...] huwa baxx biżżejjed illi dwaru hemm bzonn spjegazzjoni u verifika skont il-liġi qabel ma l-Awtorità' kontraenti tgħaddi biex tagħtiha l-kuntratt.”

18. In this case, the Preferred Bidder's offer is a significant €88,161.90 lower than the estimated procurement value which is equivalent to a 27% difference.
19. In comparison with the 4 bids submitted, the Preferred Bidder's offer is €39,701.68 cheaper than the average bid which is equivalent to a 15% difference.

¹ Case 1468 decided on 10 August 2020 and Case 1292 decided on 11 April 2019.

² Court of Appeal, *X Clean Limited vs Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità et* delivered on 21 August 2021.

³ Court of Appeal, *Medbiologix Company Limited vs Enemalta plc et* delivered on 14 March 2024.

20. Within this context, the Appellant humbly points out the specific obligations and requirements in the 2024 Negotiated Procedure which will necessarily result in costs incurred for the eventual contractor *inter alia*:
 - a. **Routine Maintenance Costs** – the non-emergency ambulances must be well-kept at all times. Any repairs, including those arising from normal wear and tear, will be borne solely by the contractor (paragraph 23 to Clause 1 of the technical specifications).
 - b. **Salary Costs** – the contractor will be responsible for the payment of the salaries of the personnel employed under the contract. These include drivers, porters, booking officers and Mater Dei Hospital coordinators.
 - c. **Health and Safety Costs** – the contractor will be responsible for all costs related to health and safety. Additionally, the contractor will be bound to ensure that all members of staff are given adequate and periodic refresher training as may be necessary from time to time (Clause 8 to the technical specifications).
 - d. **Insurance Costs** – the ambulance must be covered by a fully comprehensive insurance policy that includes coverage for patients, porters and any other third parties or property on board in case of an accident. It must also cover the driver, either as part of the vehicle's comprehensive insurance or through life insurance issued on the driver (Clause 13 to the technical specifications).
21. In view of the above, it is difficult to comprehend how the Preferred Bidder's offer is economically sustainable.
22. The Appellant humbly submits that the acceptance, at least in principle, of the Preferred Bidder's bid, is in violation of the general principles of public procurement, in particular, that relating to the promotion of genuine competition. Its bid seems to have been designed with the specific intention of winning the tender at all costs, irrespective of its legal obligations and the harmful effects on competition on the relevant markets.
- C. The Second Ground of Appeal: the Preferred Bidder should not have been allowed to adjust its financial offer after the closing deadline**
23. During the opening session on 15 February 2024, the Preferred Bidder's offer stood at €188,854.35.
24. However, the Appellant's letter of rejection revealed the Preferred Bidder's price as €234,738.10 - a €45,883.75 difference. It is a basic tenet of public procurement law that the substance of a submitted offer crystallises at the moment of the passing of the closing deadline.

25. Tenders can be amended, or even withdrawn, only up until the deadline for submission. There is good reasoning behind this rule. A contrario sensu, a bidder can submit an offer, wait for the opening session to identify the competing bids and their prices, and then adjust its own tender accordingly.
26. If this were the case, the Contracting Authority has sanctioned a breach of the principles of equal treatment and transparency as upheld in Regulation 39. As a result, the Preferred Bidder has gained an undue advantage over the remaining 3 bidders.
27. The Preferred Bidder was allowed to adjust its bid upward of €45,000 – 14% of the estimated procurement value(!) Even with this adjustment, the Preferred Bidder safely maintained its ranking as the lowest-priced bid, ensuring that it was recommended for award while at the same time allowing it to rake in an additional €45,000.
28. The Appellant humbly submits that the Contracting Authority must explain the proceedings of the evaluation committee on this issue—at face value, and based on the information available to the Appellant, the Contracting Authority's decision should be quashed by the PCRB.

D. The Third Ground of Appeal - the deposit payable according to the Schedule of Award is incorrect

29. The Schedule of Award (attached and marked as “**Document KCL2**”) states that the deposit payable for filing an objection in the records of the PCRB is €10,000. This is incorrect.
30. The estimated procurement value of the 2024 Negotiated Procedure is €322,900. A screen grab from the ePPS portal is attached and marked as **Document KCL3** as evidence of the estimated procurement value.
31. According to Regulation 273 of the PPR:

“The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender [..].”
32. Therefore, the deposit payable by the Appellant for lodging this objection is €1,614.50.

THEREFORE, the Appellant humbly demands that this Honourable Board should:

- a. declare that the Contracting Authority's decision of 13 March 2024 recommending the award of the 2024 Negotiated Procedure was wrong and/or contrary to law, and consequently, quash and, or revoke that decision;

- b. order that the evaluation committee reviews and/or investigates the bid submitted by Emergency Malta Private Services Ltd as the Preferred Bidder in terms of Regulation 243 of the PPR;
- c. order the deposit payable to be revised to €1,614.50;
- d. order the refund of the deposit paid by the Appellant;

subject to any declaration or order as it deems fit and opportune.

Yours sincerely,
Ganado Advocates



Dr. Clement Mifsud Bonnici
(cmifsudb@ganado.com)



Dr. Calvin Calleja
(ccalleja@ganado.com)



Dr. Krista Refalo
(krefalo@ganado.com)



Date: 13th March, 2024.

CFT Reference: 033-6066/24 - CPSU 1396/19

Tender ID 205212

Messrs Malta Red Cross Society

Dear Sir/Madam,

Re: Supply of <NEGOTIATED PROCEDURE FOR THE LEASING OF NON-EMERGENCY AMBULANCES PLUS DRIVERS, PORTERS AND BOOKING OFFICERS FOR THE NON-EMERGENCY AMBULANCE GARAGE>

Thank you for participating in the above-mentioned procurement procedure. However, this Entity regrets to inform you that the procurement proposal submitted by your company was not financially compliant. The main reason/s why your procurement proposal was non-compliant is/are as follows:

Reason for Rejection: *Although your offer is Eligibility compliant, technically compliant and within estimated budget, it is not the cheapest offer financially.*

The procurement was recommended for award to Messrs Emergency Malta Private Medical Service Ltd for the amount of €234,738.10c excluding VAT, this being the cheapest priced offer satisfying the administrative and technical criteria.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case must be lodged electronically with the Public Contracts Review Board, by sending an email on: info.pcrb@gov.mt by noon of Monday, 25th March, 2024 against a deposit as stipulated in the published schedule.

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Castille Place, Valletta	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

The official 'recommendation for award' schedule can be accessed on the website: www.etenders.gov.mt. In addition, the said schedule can also be accessed on the CPSU website.



Although we have not been able to make use of your services on this occasion, I trust that you will continue to take an active interest in our initiatives.

Yours sincerely

<Trevor Attard>
f/Evaluation Committee

DOCUMENT KCL2



CENTRAL PROCUREMENT & SUPPLIES UNIT
MINISTRY FOR HEALTH
UB002, Industrial Estate, San Gwann - SGN3000
Tel: (+356) 2540 4000 E-mail: info.cpsu@gov.mt



Following the submission of your offer, in the above-mentioned Negotiation Procedure without prior publication, the evaluation committee has made the following recommendation.

Advert No.	Subject	Decision Award / Cancelled	Recommended Tenderer	Price - Excluding VAT	Deposit
033-6066/24	NEGOTIATED PROCEDURE FOR THE LEASING OF NON-EMERGENCY AMBULANCES PLUS DRIVERS, PORTERS AND BOOKING OFFICERS FOR THE NON-EMERGENCY AMBULANCE GARAGE	Award	Emergency Malta Private Medical Service Ltd	€234,738.10c	€10,000.00c
		Decision			€
		Decision			€
		Decision			€

Tenderers are informed that any objection to the decisions listed above must reach the Public Contracts Review Board (PCRB) by not later than the 25th March, 2024, or ten (10) calendar days from the date of notification to the respective bidder. Objections must be accompanied by a deposit to the amount indicated against each advert; otherwise, they will not be considered. Tenderers are to note that this information does not imply any obligations on the part of the Government to actually implement any of the decision indicated.

Trevor Attard

Chairperson - Evaluation Committee
f/Central Procurement and Supplies Unit

13th March, 2024

Date



CENTRAL PROCUREMENT & SUPPLIES UNIT
MINISTRY FOR HEALTH
UB002, Industrial Estate, San Gwann - SGN3000
Tel: (+356) 2540 4000 E-mail: info.cpsu@gov.mt



Following the submission of your offer, in the above-mentioned Negotiation Procedure without prior publication, the evaluation committee has made the following recommendation.

Advert No.	Subject	Decision Award / Cancelled	Recommended Tenderer	Price - Excluding VAT	Deposit
		Decision			€

Tenderers are informed that any objection to the decisions listed above must reach the Public Contracts Review Board (PCRB) by not later than the 25th March, 2024, or ten (10) calendar days from the date of notification to the respective bidder. Objections must be accompanied by a deposit to the amount indicated against each advert; otherwise, they will not be considered. Tenderers are to note that this information does not imply any obligations on the part of the Government to actually implement any of the decision indicated.

Trevor Attard

Chairperson - Evaluation Committee
f/Central Procurement and Supplies Unit

13th March, 2024

Date

DOCUMENT KCL3



gov.mt

CFT: NEGOTIATED PROCEDURE FOR THE LEASING OF NON-EMERGENCY AMBULANCES PLUS DRIVERS, PORTERS AND BOOKING OFFICERS FOR THE NON EMERGENCY AMBULANCE GARAGE (STATUS: TENDER SUBMISSION)

TENDER SUBMISSION DEADLINE IN (DAYS/HOURS):	2/21
NAME OF CONTRACTING AUTHORITY:	Central Procurement and Supplies Unit (MFH)
PUBLISHED ON BEHALF OF:	Central Procurement and Supplies Unit (MFH)
TITLE:	Negotiated procedure for the leasing of non-emergency ambulances plus drivers, porters and booking officers for the non emergency ambulance garage
CFT CA UNIQUE ID:	033-6006/24 - CPSU 1396/19
EVALUATION MECHANISM:	Price/Cost Effectiveness
DESCRIPTION:	Negotiated procedure for the leasing of non-emergency ambulances plus drivers, porters and booking officers for the non emergency ambulance garage
PROCUREMENT TYPE:	Services
CPC CATEGORY:	Health and social services
DIRECTIVE:	2014/24/EU (Classic)
PROCEDURE:	Negotiated without prior publication (one stage)
CFT INVOLVES:	A Public Contract
ARTICLE NUMBER:	Directive 2014/24/EU Art. 32, par. 2, point (c) - S.L. 601.03. Regulation 151(c), 153(c), 154(c)
CPV CODES:	60000000-Transport services (excl. Waste transport) 85000000-Health and social work services
INCLUSION OF E-AUCTIONS:	No
NUTS CODES:	MT00
ESTIMATED CONTRACT VALUE (EUR):	322,900
ABOVE OR BELOW THRESHOLD:	Above
TIME-LIMIT FOR RECEIPT OF TENDERS OR REQUESTS TO PARTICIPATE:	15/02/2024 09:30
DEADLINE FOR DISPATCHING INVITATIONS:	16/02/2024 00:00



Eurozone-SEPA payment

You have authorised this payment

The status for payment 47316UD018QI is: Forward dated instruction received by bank

Pay from	MALTA RED CROSS SOCIETY TY MT MTHBMTCA033-143371-001 EUR
Instruction reference number	47316UD018QI
Transaction type	Eurozone-SEPA payment
Total amount	EUR 1,614.50
Expected value date	Mon 25 Mar 2024 This is the date we expect to debit your account. Please ensure that the debit account has enough funds, otherwise the payment will be rejected.
Your payment reference	033-6006/24
Total entries	1

Transactions

Entry	Beneficiary	Payment details	Amount (EUR)
1	Beneficiary name: Cashier Malta Government Beneficiary address: Castille Place, Valletta, IBAN: MT55MALT011000040001EURCMG5001H SWIFT-BIC: MALTMTMT Reference: 033-6006/24-CPSU1396/19	Purpose of payment: GOVT GovernmentPayment Transaction is a payment to or from a government department. Remittance information: Deposit on Appeal - Negotiated Procedure Ref. 033-6006/24- CPSU1396/19.	1,614.50

Time of report: 25 Mar 2024 11:49:49 GMT