

PUBLIC CONTRACTS REVIEW BOARD

Case 2042 – CT3048/2023 – PQQ for the Design, Implementation, Commissioning and Maintenance of the Fisheries Information Integrated System Department of Fisheries and Aquaculture

3rd December 2024

The Board,

Having noted the letter of objection filed by Mr Jon Ingi Bjornsson acting for and on behalf of Trackwell FiMS, (hereinafter referred to as the appellant) filed on the 20th September, 2024;

Having also noted the letter of reply filed by Mr Bjorn Callus acting for and on behalf the Department of Fisheries and Aquaculture (hereinafter referred to as the Contracting Authority) filed on the 27th September, 2024;

Having also noted the letter of reply filed by Dr Damien Degiorgio [to the reply filed by the aforementioned Contracting Authority] acting for and on behalf Trackwell FiMS (hereinafter referred to as the appellant) filed on the 16th October, 2024;

Having heard and evaluated the testimony of the witness Mr Porvarour Kjerulf Sigurjonsson (Representative of Trackwell FiMS) as summoned by Dr Damien Degiorgio acting for Trackwell FiMS;

Having heard and evaluated the testimony of the witness Mr Kristinn Kristinsson (Representative of Trackwell FiMS) as summoned by Dr Damien Degiorgio;

Having heard and evaluated the testimony of the witness Ms Rita Spiteri (Chairperson of the Evaluation Committee for the Department of Fisheries and Aquaculture) as summoned by Dr Edric Micallef Figallo acting for the Department of Aquaculture;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 28th November 2024 hereunder-reproduced.

Minutes

Case 2042 – CT 3048/2023 – Competitive Dialogue: Pre-Qualification Questionnaire (PQQ) for the Design, Implementation, Commissioning and Maintenance of a Fisheries Information Integrated System – Department of Fisheries and Aquaculture.

The tender was issued on the 18th February 2024 and the closing date was the 18th April 2024.

The estimated value of this tender, excluding VAT, was € 4,500,000.

On the 20th September 2024 Trackwell FiMS filed an appeal against the Department of Fisheries and Aquaculture objecting to the decision not to shortlist them for the next stage of the competitive dialogue process.

A deposit of € 22,500 was paid.

On the 28th November 2024 the Public Contracts Review Board composed of Dr Vincent Micallef as Chairman, Mr Keith Grech and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Trackwell FiMS

Dr Damien Degiorgio	Legal Representative
Mr Jon Ingi Bjornsson	Representative (Online)
Mr Kolbeinn Gunnarsson	Representative (Online)
Mr Porvaour Kjerulf Sigurjonsson	Representative
Mr Kristinn Kristinsson	Representative (Online)

Contracting Authority – Department of Fisheries and Aquaculture

Dr Edric Micallef Figallo	Legal Representative
Ms Rita Spiteri	Chairperson Evaluation Committee
Mr John Paul Bonnici	Secretary Evaluation Committee
Ms Audrey Balzan	Evaluator
Mr Marvin Seguna	Evaluator
Mr George Ebeyer	Representative

Dr Vincent Micallef Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Damien Degiorgio Legal Representative for Trackwell FiMS said that the appellant had been disqualified on two points yet all the necessary information had been provided in the original submission.

The lack of a signature on the audited accounts was a mere error whilst the missing figures for the 2021 accounts could be inferred and were available from the later accounts. The turnover had been confirmed by PwC as exceeding € 5 million. Notwithstanding all this Trackwell had been disqualified.

Dr Edric Micallef Figallo Legal Representative for the Contracting Authority said that the letter of reply had dealt with both above points raised. The question was a matter of timing and modified accounts being submitted late. At the original submission not all documents were submitted.

Mr Þorvarour Kjerulf Sigurjonsson (ID 0412824369) called to testify by the appellant stated on oath that he was the International Procurement Manager for Trackwell and that he was responsible for submitting the tender.

Trackwell provided systems internationally and were currently providing the Fisheries Department with which they had a good relationship with services related to VMS and FLUX systems. The Authority requested audited accounts for the years 2020, 2021 and 2022 but through an oversight the 2021 accounts were not submitted although the figures were available by reference to the 2022 accounts. These accounts confirmed that the turnover exceeded €5 million.

The apparent discrepancy in turnover arose through a different accounting system to the European one, since in Iceland one shows revenue after deduction of costs. PwC provided confirmation that this was so by letter dated 16th November (tabled as Doc 1). As regard the rate of conversion of the Icelandic currency, whichever rate was used the turnover still exceeded € 5 million.

Questioned by Dr Micallef Figallo, witness re-iterated that the currency conversion rate does not matter as turnover was over € 5 million every time. Asked why three different turnover figures were presented to the Authority, witness stated that this was due to the accounts being adjusted to reflect international standards.

Mr Kristinn Kristinsson (ID 0908735049) called to testify by the appellant stated on oath that he was a Public Accountant working with PwC in Iceland and had been Trackwell auditors since 2020. Witness confirmed that the figures for 2021 were easily available from the 2022 accounts.

In a letter of the 18th July 2024 PwC had explained that a firm can choose how revenue is treated but this does not affect the profit. That letter had also confirmed that the turnover was € 5.2 million. The conversion rate used was the average exchange rate for each year.

Ms Rita Spiteri (67171M) called to testify by the Contracting Authority stated on oath that she was the Chairperson of the Evaluation Committee. Appellants failed to submit the financial statements for 2021 and this error was not rectifiable. The financial statement for the year 2022 was not signed and could not be considered as part of the submissions.

The average conversion rate was not as requested in the BPQR tender. A company was outsourced to confirm the shortcomings in the accounts.

Questioned by Dr Degiorgio witness said that the Authority was precluded from asking for a rectification. The Evaluation Committee were advised by the outsourced company (WDM International Ltd) which were provided with all submitted documents, that audited accounts had to be signed. Witness agreed that although the 2021 figures were available from the 2022 accounts, the latter were not signed.

This concluded the testimonies.

Dr Degiorgio said that the package of documents submitted by appellant contained all documents necessary to qualify. Trackwell are already clients of the Authority and are well respected. The 2014 Directive in Article 3 states that if there is a problem with documents a clarification should be sought. The Evaluation Committee referred the appellant's papers to an outside unknown entity without letting appellant know.

The accounts presented were audited and there is no set standard which states that these have to be signed. The Authority should have asked for any missing documents and cited Court of Appeal Case 236/2018 which held that information given in another part of the documents needs to be taken into consideration.

This was a serious bidder with a good offer and the information required was there and could be discovered. PwC have confirmed that the average conversion rate was correctly dealt with and satisfied the requirements of the PQQ. Iceland has a particular system of accounting for revenue but bidders still met the tender requirements. The later documents submitted merely confirmed details already in the hands of the Authority.

Dr Micallef Figallo said that the Company's track record was immaterial to this case. The facts are that initially the 2021 accounts were not submitted and the 2022 accounts were not signed. The procurement procedure is taking place in Malta, not in Iceland and what applies there may not apply here. The Evaluation Committee went the extra length not to disqualify appellant and even consulted an outside firm.

The PQQ makes it clear that bidders had to take full responsibility for their submissions with further other conditions. Court of Appeal Case 22/2024/1 stressed that bidders are expected to follow what is requested in a tender and likewise a contracting authority is subject to self-limitation. The Evaluation Committee could only judge on what was submitted to it and could not have asked

for rectification as this was not permitted. Public Procurement Regulations do not allow deadlines to be extended.

Dr Degiorgio re-iterated that all documents were available to the Authority from the start and were available before the deadline.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 28th November 2024.

Having noted the objection filed by Mr Jon Ingi Bjornsson for and on behalf of Trackwell FiMS (hereinafter referred to as the Appellant) on 20th September, 2024, refers to the claims made by the same Appellant with regard to the tender of reference CT3048/2023 listed as case No. 2042 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Damien Degiorgio

Appearing for the Contracting Authority: Dr Edric Micallef Figallo

Whereby, the Appellant contends that:

The financial statements originally submitted by Trackwell were fully audited and signed; however, due to a technical error during the document preparation process, the electronic signatures did not appear in the PDF files, and the statement for 2021 was inadvertently lost in a copy-paste action. Appellant have attached the original, signed financial statements for 2020, 2021, and 2022 to rectify the matter. These documents clearly demonstrate Trackwell's compliance with the required criteria.

As explained in the accompanying letter from PWC, in Iceland, the reimbursed development costs is typically recognized as "Other Revenue", rather than subtracted from total costs, which was the method used in the originally submitted accounts, with the explanation from PWC that following the more standard method would result in the average turnover per year 2020-2022 as 5.247.115. When these reimbursed development costs are correctly accounted for as revenue, Trackwell's average turnover for the relevant period exceeds the required threshold.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th September 2024 and its verbal submission during the hearing held on 28th November 2024, in that:

- a. The current objector made its submission within that deadline but as will be explained hereunder it failed in making the required submissions within the deadline, and therefore the evaluating committee deemed it to be administratively non-compliant. This was communicated to the current objector by letter dated 11th September 2024. Said letter gave the grounds for such a finding and these were adequately communicated as follows:

"Trackwell did not submit financial statements for 2021. The Evaluation Committee was able to determine the turnover for this year from the comparative figures included in the 2022 financial statements. The latter were not signed by the directors and the audit report is also not signed by the auditors, such that these cannot be considered as audited financial statements. Trackwell also provided a confirmation from their auditors, PwC, that the average turnover for the period 2020 to 2022 amounted to €5,247,115 based on the average currency rate for the period. According to the article 8.1 - Notes to Candidates of the Pre-Qualification Questionnaire document, the conversion date quoted shall be as at the date of the financial statements. Upon converting the turnover reported in ISK into Euro for each year at the year-end ECB rates for the respective years, the turnover amounted to €4,454,802. Since this is less than €5 million turnover required in Form B.1.4.2-Average Total Turnover, and no rectification is allowed in respect of the documentation as outlined in Section B-Technical Capacity, this bidder is being recommended for disqualification."

- b. The Contracting Authority stresses that in its objection the objector is admitting to its own failings and it is not really contesting the above quoted reasoning and findings of the Evaluation Committee, and therefore the findings of the Evaluation Committee are established as facts. By its objection, the objector seems to seek to rectify its position by claiming errors in its own submissions and attempting to rectify them through its appeal to the PCRB.
- c. The Contracting Authority humbly submits that there is no available procedure for the rectification of shortcomings by the objector following the deadline for submissions and an appeal with the PCRB is not an appropriate action for so doing. In addition, the evaluation committee and, or the Contracting Authority cannot *ex post facto* be adjudged to have decided wrongly when at the moment of their decision they did not have the documentation which would have led it to decide in favour of the objector (being shortlisted for the next stage in the competitive dialogue procedure). In essence, the current action in front of the PCRB is objecting to said decision, which decision was entirely in order for all intents and purposes of this competitive dialogue procedure. In reality, the objector's (sic) does not clearly state the remedies being sought with this appeal. Where it to be a return to the *status quo ante* the decision objected to we would create an anomalous situation which vitiates the procurement procedure and is unfair with all involved. This, because the objector failed in its own submissions by the time the deadline had expired.
- d. The Contracting Authority would like to stress that time limits for submissions are to be adhered to strictly, and this for inter alia (i) as otherwise they would be senseless; (ii) an economic operator cannot and should not be allowed to nullify those time limits by their own shortcomings; (iii) if that was allowed it could give an unfair advantage over diligent and compliant economic operators, (iv) in deference to the legal maxim *ubi lex voluit dixit, ubi noluit tacit*, the applicable legislation does provide on time limits but it does not provide for their extension *ex lege*. Of note, is that Reg. 142 of the PPR speaks of time limits, and even though it sets a minimum time limit for the Contracting Authority, this provision also highlights the importance of respecting time limits for all concerned.

- e. An extension could have been applied, but this is at the discretion of the Department of Contracts and the Contracting Authority to be exercised in the interest of public procurement. This is so according to Clause 2.11.1 of the Competitive Dialogue document CT3048/2023, which provides as follows:

"2.11.1 The Central Government Authority/Contracting Authority may, at its own discretion extend the deadline for submission of tenders to give Candidates sufficient time to take clarification notes into account when preparing their PQQ. Candidates will be notified with any such extension through the issuing of a clarification note. In such cases, all rights and obligations of the Central Government Authority/Contracting Authority and the Candidate regarding the original date specified in the contract notice will be subject to the new date".

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances as follows in their entirety.

Financial Statements Issue

- a. It was clearly proven during the course of the sitting that (i) the financial statements of the year 2021 were not duly submitted and (ii) that the financial statements for the year 2022 were not signed. This was also confirmed both in the text of the letter of objection and also in the testimony of the witnesses summoned by the appellant. The appellant defended its position by stating that albeit that the financial statements of 2021 were not submitted, yet, the evaluation Committee could have easily extrapolated the 2021 financial statements from the 2022 financial statements. Therefore, by so doing, the Evaluation Committee could have avoided rejecting the appellant from the competitive dialogue.
- b. In the opinion of this Board, the Evaluation Committee is bound by the terms stipulated in the tender document, in this case, the Pre-Qualification Questionnaire (**hereinafter referred to as PQQ**) in line with the principle of self-limitation. The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document. This will ensure predictability and transparency.
- c. The case law of the General Court of the Court of Justice of the European Union (CJEU) defines clearly that the doctrine of self-limitation cannot be read without reference to the principle of equal treatment of economic operators: *"it must be borne in mind at the outset that*

where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates [emphasis of the Board]. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.”¹

- d. The aforementioned is also reflected in a number of Court of Appeal judgements. In the case [Rikors numru 35/22/1] **NQUAYMT konsorzju kompost minn (i) Bonnici Bros. Services Limited (C57464) u (ii) Korfezdeniz ins Taah. San. Ve Tic. Ltd. Sti, soċjeta` estera v. (i) Aġenzija għal Infrastruttura Malta (ii) EXCEL SĪS ENERJĪ ÜRETİM CONSTRUCTION konsorzju kompost minn (i) Excel Investments Limited (C81721) u (ii) Sis Enerji Uretim Anonim Sirketi (Reg. No 642964), soċjeta` estera**, the Court of Appeal held that:

*“...il-bord ta’ evalwazzjoni ma jistax isalva dik l-offerta billi joqghod jigi wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu. F’dan il-każ, il-konsorzju appellat ingħata kull ċans jissottometti rubu għat-talbiet tal-awtorita` kontraenti, u imputet sibi jekk baqa’ jitraskura dak li kellu jaqgħmel. **L-eċċess fil-manjamina` u fit-tfittix sabiex jigu salvati offerti akkost ta’ kollox mhux espressjoni ta’ proporzjonalita` imma huwa sproporzjon kontra min kien “compliant” mill-bidu nett. Din il-Qorti mhux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorożimament dak li trid is-sejha għall-offerti u m’għandux jippretendi li jigi mitlub “jirraġa” l-offerta biex ikun kompatibbli ma’ dak mitlub.***

- e. The Chairperson of the Evaluation Board confirmed on oath that (i) the failure to submit the financial statements for the year 2021 along with (ii) the appellant’s submission of unsigned financial statements for year 2022, rendered such submission inherently non-rectifiable.

¹ Case T-415/10, Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy, judgment of the 20th of March 2013, paragraph 80.

- f. Moreover, on this point the Board observes that the audited financial statements presented with the appeal are dated the 18th September 2024 and received at the offices of the Public Contracts Review Board on the 20th September, 2024. This clearly means that the *ex post facto* dated audited accounts as presented with the appeal's application could have never been available to the Evaluation Committee before the tender expiry date. Furthermore, the figures in the original documentation presented at tendering stage vary from the figures of the final audited accounts that were presented with the appeal. Paradoxically, the figures as shown in the audited financial statements presented at tendering stage did not meet the threshold according to the tender, whereas the figures presented in the audited "signed" financial statements were satisfying the criteria of the tender.

Revenue Calculation Clarification

- a. In this context, the Board must now proceed with dealing with the revenue calculation issue. This grievance revolves around two main witnesses [on the side of the appellant] which were summoned to testify under oath during the course of the review.
- b. Mr Porvarour Kjerulf Sigurjonssen confirmed on oath that the method used which gave rise to the revenue calculation problem was the **"average conversion mechanism"**. In point of fact, this was also reconfirmed by PwC representative Mr Kristinn Kristinsson a witness summoned by and on behalf of the appellant. By reference to the minutes of the appeal's sitting, Mr Porvarour Kjerulf Sigurjonssen stated that: *"the apparent discrepancy in turnover arose through a different accounting system to the European one, since in Iceland one shows revenue after deduction of costs."*
- c. On the other hand, also by reference to the minutes taken during the course of the appeal, Mr Kristinn Kristinsson confirmed on oath that *"...the conversion rate used was the average rate for each year"*.
- d. This necessitates the Board to cross-refer to the document of the call, precisely page 44 of the document under the sub-heading "Financial Documents B.1.2". For all intents and purposes this Board will be reproducing the text *ad verbatim*. The document stipulates:

Financial Statements. *As a proof that the information provided is accurate, the candidates shall submit Financial Documents for the year 2020, 2021 and 2022 to support the information provided.*

This is a mandatory criterion. Failure to submit the requested Financial Documents will automatically disqualify the Candidate.

*All figures are to be denominated in Euro. In the event where the reporting currency of the company is in a different currency, the figures must be converted to Euro. **The conversion date quoted shall be as at the date of the financial statements [emphasis of the Board].** These adjusted financial statements must be accompanied by an audit certificate.*

- e. It is therefore indelibly clear that the mechanism resorted to according to the document of the call should have been “as at the date of the financial statements” and not the “average conversion rate for each year” as confirmed by Mr Porvarour Kjerulf Sigurjonssen and reiterated under oath by Mr Kristinn Kristinsson of PwC. End-of-year exchange rates reflect the valuation of currency at a specific point in time, for instance, at the end of a calendar year. In contrast, the average rate mechanism calculates a mean exchange rate over a specific period, for example, an average rate covering the period starting from 1 January 2020 to 31 December 2020. The board therefore observes that, without any doubt, the tender document requested end-of-year exchange rates to be used for each of the years, being the prevailing exchange rates as at 31 December 2020, 31 December 2021 and 31 December 2022.

Therefore, this Board does not uphold Appellant’s grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a. Not to uphold Appellant’s Letter of Objection and contentions;
- b. Confirms the decision of the Evaluation Committee in its entirety;
- c. Directs that the deposit paid by Appellant not to be reimbursed.

Dr Vincent Micallef
Chairman

Mr Richard Matrenza
Member

Mr Keith Victor Grech
Member