

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 2041 - HO/T/4114PCS/2023 (6565) – Appointment of Financial Auditors (2023-2027)**

**10<sup>th</sup> January 2025**

The Board

Having noted the letter of objection filed by Dr Kris Borg on behalf of Kris Borg & Associates acting for and behalf of PKF Assurance (Malta) Limited (hereinafter referred to as the appellant) filed on the 24<sup>th</sup> June 2024;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici, Dr Calvin Calleja & Dr Krista Refalo on behalf of Ganado Advocates acting for and on behalf of Enemalta plc (hereinafter referred to as the Contracting Authority) filed on the 4<sup>th</sup> July 2024;

Having taken cognizance 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 28<sup>th</sup> November 2024 hereunder reproduced:

### **Minutes**

#### **Case 2041 – HO/T/4114/PC5/2023 (6565) – Appointment of Financial Auditors (2023 - 2027)**

The tender was issued on the 8<sup>th</sup> February 2024 and the closing date was the 13<sup>th</sup> March 2024

The estimated value of this tender, excluding VAT, was € 800,000.

On the 24<sup>th</sup> June 2024 PKF Assurance (Malta) Ltd filed an appeal against Enemalta plc objecting to the decision to cancel the tender.

A deposit of € 4,000 was paid.

There were four bids.

On the 28<sup>th</sup> November 2024 the Public Contracts Review Board composed of Mr Lawrence Ancilleri as Chairman, Mr Keith Victor 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 – PKF Assurance (Malta) Ltd**

Dr Kris Borg	Legal Representative
Dr Robert Spiteri	Representative
Ms Miriam Sultana	Representative

## **Contracting Authority – Enemalta plc**

Dr Calvin Calleja	Legal Representative
Dr Krista Refalo	Legal Representative
Mr Duncan Baldacchino	Chairperson Evaluation Committee
Mr Stephen Caruana	Evaluator
Ms Mary Grace Zammit Fenech	Evaluator
Mr Jonathan Zarb	Evaluator

Mr Lawrence Ancilleri B.A., M.A. Acting Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Kris Borg Legal Representative for PKF Assurance (Malta) Ltd (hereunder PKF) outlined the reason for the appeal, mentioning that there were four bids submitted with PKF being the cheapest bid. All four technical requirements in the tender were satisfied by the bidder with the support of associate firms of the appellant and a letter from the Head of Assurance for PKF Global outlining the appellant quality assurance process covering inspections at international level. This latter document fulfilled the request for an external quality assurance review. Further, an external quality assurance review opinion for the years' 2016 to 2023 was carried out by Mr Renzo Farrugia indicating that the review was satisfactory, appellant thus met all tender requirements. The Tender Evaluation Committee (TEC) cancelled the tender maintaining that the quality assurance report did not satisfy the requirements and neither did the report produced by Mr Farrugia.

Appellant is aggrieved, as the TEC does not seem to know what it had in mind when requesting the external assurance. PFK fulfilled the requirement by providing the assurance from PKF International with which there is no common ownership and which followed established international criteria. It is also surprised why the report by Mr Farrugia was not acceptable. The Contracting Authority now appear to have changed the goalposts by requesting one key expert.

Dr Calvin Calleja Legal Representative for Enemalta plc said that on a preliminary point it should be pointed out that, contrary to what appellant claims, the Public Contracts Review Board (PCRB) cannot award contracts but is there to ensure that an evaluation is correctly carried out. The Authority quite rightly decided to cancel the tender for which four bids were submitted, when it was realized that tender requirement 5(B)(d) could not be met by any participant and therefore no party was compliant. Since this was covered by Note 2 the TEC requested rectification – three bidders provided the same reply whilst PKF instead provided letters from connected firms. All bidders were therefore treated equally. The Accountancy Board made it very clear that it could not divulge the necessary reports on grounds of confidentiality and well informed and diligent tenderers understood this point.

Dr Calleja further stated that the Accountancy Board is established by the laws of Malta as the only body to provide assurance reviews. This is clear from the tabled document ENE7. The Authority could never accept assurance reviews except those emanating from the Accountancy Board. EU Directive 2006/43, translated in Malta into the Accountancy Proficiency Act, lays down clearly by whom assurance review functions can be carried out. The Authority's hands were tied by the requirements of the Accountancy Board. The involvement of Mr Renzo Farrugia begs the question as to why he was engaged as he is not an external approved quality reviewer.

The Board should confirm the decision of the TEC as no bidder could meet the requirements of the tender and faced with four non-compliant bids it had no alternative. Rule 18.1 of the General Rules Governing Tenders gives the Authority the right to cancel the tender and that right was used proportionately. There is no change of goalposts, said Dr Calleja, no market distortion and no exchange of commercially sensitive information especially since this was a BPQR basis tender.

Dr Borg stated that the Board should consider revoking the cancellation which leaves the one compliant tender. The Authority published the prices submitted and therefore removed the aspect of fairness putting the appellant at a disadvantage. Section 5(B)(d) simply states that an external assurance review is required with no mention of the Accountancy Board. This has now been changed to the requirement of a key expert. Bad drafting of the tender means additional costs to the bidder.

Dr Calleja said that all the appeal is about is a knee jerk reaction to try to save the bid. There is no need to specify in the tender that each offer has to abide by the law. The rectification request made it clear that certification had to be by the Accountancy Board.

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

End of Minutes

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**Hereby resolves:**

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

Having noted the objection filed by PKF Assurance (Malta) Limited (hereinafter referred to as the Appellant) on the 24th June, 2024, refers to the claims made by the same Appellant with regard to the tender of reference HO/T/4114/PC5/2023 (6565) listed as case No. 2041 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Kris Borg

Appearing for the Contracting Authority:

Dr Calvin Calleja & Dr Krista Refalo

Whereby, the Appellant contends that:

- a) The Appellant's grievance is that it was in fact compliant with the eligibility criteria.
- b) The Appellant wishes to note that the submitted quality assurance opinions, as submitted following the request for rectification by the Evaluation Committee, are the concluding remarks following a full inspection as carried out by the approved external quality assurance reviewer. The external quality assurance reviewer, Mr. Renzo Farrugia is approved by the competent body in Malta; the Accountancy Board.
- c) It should also be noted that PKF provided conclusions for the years 2016 to 2023. The submission of all the quality external assurance review opinions for all the years (as against the requirement of submitting an external quality review) is over and above what was requested by the evaluation committee, and should provide enough comfort that our firm has never been sanctioned and all the reviews have been concluded with clean results.
- d) The letter dated 14th June 2024, further notes that details on sanctions may not be appropriately updated on the Accountancy's Board's website. PKF does not have any control over the Accountancy Board's publications, and as such should not be punished for matters over which control cannot be exercised.
- e) The submission of commitment letters signed separately between PKF Assurance (Malta) Limited and PKF Fassett and PKF Wulf, is in line with the request for clarification by the evaluation committee. The submission of such is compliant with Article 2.5 of the General Rules Governing Tenders which stipulates that *"an economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links it has with them"*.
- f) Furthermore, the complete cancellation of the tendering procedure will cause a market distortion as the bids for the requested service are now known to all market players. Any future tender procedures will be biased and subjected to the previous bidders' price submissions, creating a complex economic price war in an already highly competitive market to the detriment of market players.
- g) As confirmed by Enemalta's representative, the tender procedure is being cancelled on the basis that none of the bidders were in a position to provide the Contracting Authority with a copy of the full external quality assurance review. This suggests that the terms of reference for the fresh tender procedure will not deviate in terms of requirements, and thus it is unreasonable for the current procedure to be cancelled altogether and create an element of lack of level playing field within the market.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4<sup>th</sup> July 2024 and its verbal submission during the hearing held on 28<sup>th</sup> November 2024, in that:

a) ***Preliminary – There is no ground of appeal on the first rectification request regarding proof of experience***

Although it is not clear from the letter of appeal, the Appeal's Preamble is divided into two sections: one addresses the TEC's rectification request on the proof of experience submitted in the bid while the other addresses the proof of satisfaction of the Tender Requirement, that is, clean results following an external quality assurance review. The Appeal's Preamble reflects the content of the rectification request and of the letter of rejection which was communicated to the Appellant on the 24<sup>th</sup> of June 2024. Admittedly, the letter of rejection stated that the Appellant's offer "was found to be non-eligible" and then proceeded to cite the two rectification requests. However, only the "first" reason of rejection was substantiated in the sense that the bid was found to be administratively non-compliant because it failed the Tender Requirement. The second rectification request on the reliance aspect of the Appellant's tender was not a reason for rejection. This was cited by the Contracting Authority by way of oversight in the letter of rejection. In fact, the Appellant does not object to the decision of the Contracting Authority in this respect but merely explains in paragraph 5 to its grievance, amidst its argumentation on the proof of clean results following an external quality assurance review, the motions of the rectification request and the reply which it submitted for the TEC's consideration. Since no grievance was raised in the Appeal, the Contracting Authority shall proceed to address the sole ground of appeal on the first reason of rejection as quoted in paragraph 8 to this reply.

b) ***Reply to the Ground of Appeal: No clean results following an external quality assurance review was submitted and none could have been submitted***

As already explained, Section 5(B)(d) of the Tender requested bidders to submit "*proof of an external quality assurance review having been conducted with clean results within the last seven (7) years (2016-2023).*" The Appellant did not satisfy this requirement with its bid submission, Initially, the Appellant had submitted a copy of its inspection report dated December 2020 as compiled by PKF International Limited. The Contracting Authority humbly submits that the TEC was correct in its assessment that an inspection carried out by the international body of which the Appellant forms part is not the same as an external (emphasis added) quality assurance review. The Appellant now tries to argue that firstly, the definition of quality assurance review was not disclosed in the Tender and secondly, the Appellant is obliged, as a PKF member firm, to comply with their international professional standards manual which is allegedly based on the rules adopted by the Independent Standard Setting Boards of the International Federation of Accountants. As to the definition of quality assurance review, it is submitted that the alleged lack of this definition has been in existence since the publication of the Tender on the 8<sup>th</sup> of

February 2024. However, no bidder— the Appellant included, raised a clarification request or filed a pre-contractual remedy to challenge this ambiguity. Rather, the Appellant forged ahead and submitted a bid. Therefore, it is to be taken that the Appellant has wholly acquiesced to the terms and conditions of the Tender in accordance with Rule 9.4 of the General Rules. Now that the Appellant actively chose not to avail itself of its legal remedies, it cannot, in retrospect lament the existence-or absence-of a particular definition in the tender document. Furthermore, the Contracting Authority humbly submits that it is not for those individuals who drafted the tender to decide on the definition of quality assurance review. Quality assurance review is a technical area which is highly regulated both by EU as well as local law.

As to the second leg of the Appellant's argument, that the inspection report compiled by the PKF international body amounts to an external quality assurance review, this is simply not the case. EU Directive 2006/43/EC' lays down stringent rules on how a quality assurance review is to be carried out-and by whom. The competent authority designated in Malta to carry out its quality assurance review function is the Malta Accountancy Board. Therefore, the only body which is competent to provide proof of clean results following an external quality assurance review is the Quality Assurance Unit set up under the auspices of the Malta Accountancy Board. This is explained in Recital 14 to EU Directive 2014/562 which amends and supplements the earlier EU Directive 2006/43/EC. Furthermore, one of the fundamental requirements for statutory auditors is the need for "independence". This is recognised in Recital 6 and Recital 7 to EU Directive 2014/56. The Contracting Authority humbly submits that if it is important for independence to be ensured in the conduct of a statutory audit, it is likewise essential for independence to be guaranteed within the context of a quality assurance review. A review which is carried out by a member of the same network to which the Appellant belongs certainly cannot be said to be either external or independent.

The Contracting Authority humbly submits that the TEC was correct not to accept the inspection report on the Appellant as prepared by PKF International Limited Global Monitoring in satisfaction of the Tender Requirement. However, since the Tender Requirement is marked as a Note 2 document, the TEC sent out a rectification request to the Appellant on the 13 of May 2024 to give the Appellant the opportunity to rectify its bid submission.

For reasons already given, the only relevant reply was the confirmation that a quality assurance review was conducted by the Quality Assurance Unit in 2023. However, no proof of clean results issued by the unit were attached to the rectification reply. Therefore, even this reply was insufficient for the purpose of meeting the Tender Requirement under Section 5(D)(d) of the tender. The opinion which was submitted by Mr. Renzo Farrugia is not equivalent to clean results issued by the competent authority following an external quality assurance review. It is an opinion issued by an individual in

favour of the Appellant-and presumably, as funded by the latter-which puts into question the independence of the issuer of the opinion.

c) ***Reasons for Cancellation: The Technical parameters of the projects have been altered***

As it turns out, no participant was able to satisfy the Tender Requirement under Section 5(B)(d). In the spirit of equal treatment, the Contracting Authority requested a rectification from all 4 bidders to obtain proof of clean results following a recent external quality assurance review. All rectification requests were sent out on the 13th of May 2024. The Contracting Authority ascertained that the reports issued by the Accountancy Board are confidential and the latter does not divulge the contents or the results of these reports following external quality assurance reviews. In fact, the TEC received letters sent by the Accountancy Board itself as proof by several bidders that the Tender Requirement under Section 5(B)(d), cannot be satisfied. Other prospective economic operators might also have been disincentivised from participating on the basis that it was not possible to satisfy the Tender Requirement and provide proof of clean results following an external quality assurance review by the Quality Assurance Unit. As a result, the Contracting Authority humbly submits that the only option left to it, was to cancel the Tender and to re-issue without the Tender Requirement on the basis that the technical parameters of the project have been altered.

d) ***No distortion of competition has taken place as alleged by the appellant***

The Contracting Authority firmly rebuts the allegation that the cancellation of the Tender has distorted competition. Firstly, this Tender was not based on the sole award criterion of price, but, on a complex BPQR mechanism where according to Clause 6.1, the price carried only 40% of the total weight. Secondly, the fact that the global sum of the individual bids submitted is published is a characteristic of the ePPS system which is maintained by the Department of Contracts. Regardless of whether the Tender was cancelled or awarded, bidders knew the global sum submitted by their competitors on the closing deadline for submissions. The global sum is not a confidential aspect of the bid. Therefore, its publication cannot impact competition because this information is not capable of influencing the commercial strategy of the remaining bidders. This is the test that is consistently applied by the European Commission.

e) ***Appellant's claim to award the contract to it cannot be upheld***

By means of its third claim, the Appellant requests the Board to award the contract subject-matter of the Tender to it. As this Board has observed on countless occasions, the Board does not have the power to award any public contract directly to the appellant or other bidder. Its function is not to replace the TEC, but to determine whether the exercise carried out by the TEC was lawful and in line with the principles of public procurement.

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

### 1) Ambiguity in the Tender's requirements

Article 262 of the Public Procurement Regulations stipulates exactly the timeframe when bidders may file a reasoned application before the Board to challenge such alleged ambiguity. Specifically, article 262 (1)(d) states that one of the reasons of such pre-contractual remedy is:

*"To correct errors or to remove ambiguities of a particular term or clause included in a call for competition..."*

Rule 9.4 General rules governing tender also clearly and unequivocally stipulates that:

*"In submitting a tender (unless otherwise indicated) a tender offer above 100MB will not be accepted by the system (ePPS), the tenderer accepts in full and in its entirety, the content of this tender document, including subsequent Clarifications issued by the Central Government Authority/Contractual Authority (CGA/CA), whatever the economic operator's own corresponding conditions may be, which through the submission of the tender is waived. Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document"*

Furthermore, in a number of judgements delivered by the Court of Appeal, it was held that if a bidder fails to exercise such pre-contractual remedy, the bidder cannot subsequently, and after being unsuccessful in the competition, challenge any aspect of the procurement document which it could have done before the closing date of the competition. Reference is made to the Court of Appeal decision of the 30 June 2021 in the names of **Truevo Payments Limited v Direttur tal-Kuntratti, Ministeru ghall-Finanzi u x-xoghol u Credorax Bank Limited Appeal** no 95/21/1, where the court held that:

*"Hu car li l-ilmenti tas-socjeta Credorax Ltd huma diretti lejn il-procedura wzata u ma humiex marbuta mas-sustanza tal-offerta. Din is-socjeta qed tilmenta mill-uzu tal-procedura tal-ghoti tal-kuntratt b'negozjati, fuq il-mod kif gie mfassal il-process ta' din il-procedura u li ma kienx hemm l-approvazzjoni tad-Direttur tal-Kuntratti ghall-uzu ta din il-procedura. Dawn it-tlett aggravji li abbazi taghhom il-kumpanija appellata Credorax Ltd ppprezentat l-appell taghha jirrigwardjaw materji illi kienu jezistu sa mill-bidu nett tal-procedura in kwistjoni, u ghal dawn l-ilmenti kienu jezistu rimedji taht ir-Regolament 262. Dawn l-ilmenti kellhom jitresqu qabel id-data tal-gheluq ta' sejba ghall-kompetizzjoni u mbux, bhall filkas tallum, wara dik id-data, u sabansitra wara id-decisjoni dwar l-ghoti tal-Kuntratt."*

Hence, the Appellant's argument that the tender document did not contain a definition of what is an "external quality assurance review" cannot be upheld by the Board.

## 2) Conformity with Tender's requirements irrespective of ambiguity

Directive number 4 issued in terms of the Accountancy Profession Act, Chapter 281 of the laws of Malta and the Accountancy Profession Regulations 2009, ("the Quality Assurance Directive"), transposes the requirements of the EU Directive 2006/43/EC and EU Directive 2014/56. EU Directive 2014/56 recital 14, states that:

*"In order to enhance the credibility and transparency of the quality assurance reviews performed in the Union, Member States' quality assurance systems should be governed by the competent authorities designated by the Member States to ensure public oversight (emphasis of the board) of statutory auditors and audit firms. Quality Assurance reviews are designed to prevent or address potential deficiencies in the manner in which the statutory audits are carried out."*

In such context, the Quality Assurance Directive clearly lays down that the Quality Assurance Unit ("QAU") is the Unit set up under the provision of rule 14 of the Directive, which specifies that the QAU shall act on behalf of the Board in the implementation and supervision of the Quality Assurance Process contemplated in the provisions set out in this Directive. Rule 9 further explains that the Quality Assurance Process is intended to be a means through which the board provides assurance as to the quality of the professional work of statutory audit firms and on the maintenance of appropriate levels of professional standards thereby.

There was an absence of sufficient evidence presented to the Board, both during the meeting and in the submitted documentation, that supports the existence of public oversight as mandated by the Quality Assurance Directive. In this context, the reports submitted were prepared by a related party (a network firm) and a private individual. The Board also observes, that, according to ISQC1 (the international standard on quality control adopted by law under the Accountancy Profession Act), such reports are integral to the firm's monitoring process concerning internal control, an area, amongst others, a Quality Assurance Review is designed to evaluate.

## 3) Consequences of Tender Cancellation – Market Distortion

In the opinion of this Board, once none of the bidders could satisfy the requirements of the tender dossier, the only avenue left to the evaluation committee was the recommendation of cancellation of the tender procedure.

#### 4) Consequences of Tender Cancellation – Market Distortion

Clearly, the appellant is invoking the violation of the confidentiality principle set forth in regulation 40 of the PPR (which mirrors Article 21 of the Public Procurement Directive 2014/24/EU). The Appellant argues that the automatic disclosure of the global sum on the procurement system (ePPS) after the closing deadline for submissions, is tantamount to disclosure of confidential information which is discriminatory towards the Appellant, since the bids of the requested services are now known to all market players. It is the Appellants' opinion that:

*“any future tender procedures will be biased and subjected to the previous bidders' price submissions, creating a complex economic price war in an already highly competitive market”.*

Article 40 (1) of the PPR states that *“a Contracting Authority, the Director or the Ministerial Procurement Unit shall not disclose information forwarded to it by economic operators which they have **designated** as confidential, including but not limited to, technical or trade secrets and the confidential aspects of tender.”*

Therefore, the board considers that once the submission deadline had elapsed, and hence the bidders were not able to further alter their bids, the disclosure of the global sum of each bidder did not constitute confidential information, since on its own it does not divulge any technical or trade secrets or any pricing structure details, which could influence other bidders to potentially alter their bids.

Furthermore, one can extend the appellant's reasoning to prior tenders, where awarded bidders might perceive a disadvantage as their bid amount are known to participants in subsequent tenders. The Board is of the opinion that each tender should be treated as a distinct competitive process, with the principles of procurement applied independently to each tender. Therefore, all participants will engage in a new competitive bidding process, with equal opportunity to submit new bids. Additionally, the appellant retains the opportunity to revise and potentially improve their bid in this context.

#### 5) Claim to award the tender to the Appellant

The appellant in his letter of objection is requesting the Board to:

*“C. Award the tender to PKF Assurance (Malta) Ltd.”*

The powers of the Public Contracts Review Board (“PCRB”) are enshrined and listed in the Public Procurement Regulations S.L. 601.03. Once this power is not vested within the PCRB any further relevance to this request, by the Board, would render its decision as *ultra vires*.

Therefore, in conclusion, this Board will not consider this request of the appellant any further.

**The Board,**

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision recommending the cancellation of the tender procedure,
- c) Directs that the deposit paid by the Appellant not to be reimbursed.

**Mr Lawrence Ancilleri**  
**Chairman**

**Mr Keith Victor Grech**  
**Member**

**Mr Richard Matrenza**  
**Member**