

PUBLIC CONTRACTS REVIEW BOARD

Case 2003 – SPD8/2023/147 – Works Tender for Electrical and Mechanical Works and Supply and Installation of Pumps, Filtration, Plumbing and Effluent System for the Department of Fisheries and Aquaculture

16th December 2025

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Sammut Marine Limited, (hereinafter referred to as the appellant) filed on the 26th February 2024;

Having also noted the letter of reply filed by Mr Bjorn Callus acting for and on behalf of the Department of Fisheries and Aquaculture (hereinafter referred to as the Contracting Authority) filed on the 5th March 2024;

Having heard and evaluated the testimony of the witness Mr Marixei Callus (Chairperson of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Sammut Marine Limited;

Having heard and evaluated the testimony of the witness Ing Mario Sammut as summoned by Dr Clement Mifsud Bonnici acting for Sammut Marine Limited;

Having heard and evaluated the testimony of the witness Mr Benjamin Sammut (Representative of Sammut Marine Ltd) as summoned by Dr Clement Mifsud Bonnici acting for Sammut Marine Limited;

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 30th April 2024 hereunder-reproduced.

Minutes

Case 2003 – SPD8/2023/147 – Works Tender for Electrical and Mechanical Works and Supply & Installation of Pumps, Filtration, Plumbing & Effluent System for the Department of Fisheries and Aquaculture

The tender was issued on the 25th October 2023 and the closing date was the 15th November 2023.

The estimated value of this tender, excluding VAT, was € 432,955.

On the 26th February 2024 Sammut Marine Ltd filed an appeal against the Department of Fisheries and Aquaculture objecting to its disqualification on the grounds that its bid was technically not compliant.

A deposit of € 2,165 was paid.

There was only one bid.

On the 30th April 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Sammut Marine Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Dr Krista Refalo	Legal Representative
Mr Benjamin Sammut	Representative

Contracting Authority – Department of Fisheries and Aquaculture

Dr Edric Micallef Figallo	Legal Representative
Mr Marixei Callus	Chairperson of the Evaluation Committee
Mr Jean Paul Bonnici	Evaluator
Mr Iman Busuttil	Evaluator
Mr George Ebeyer	Evaluator
Dr Audrey Balzan	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Sammut Marine Ltd said that conflict of interest creates distortion of competition and the tender should be re-evaluated as an incorrect outcome has been reached by the Tender Evaluation Committee (TEC) in this case.

Dr Edric Micallef Figallo Legal Representative for the Department of Fisheries and Aquaculture (DFA) stated that the position of the Contracting Authority was clear from its letter of reply. There was no bad faith in the decision reached.

Dr Mifsud Bonnici requested that witnesses be heard.

Mr Marixei Callus (182281M) called to testify by Appellant stated on oath that he was at the time an Assistant Director at DFA and Chairperson of the TEC and was in charge of the drafting of the tender. He provided details of the other members of the TEC. He explained that the key expert appointed by the appellant and the technical adviser appointed by the DFA was the same individual and who has therefore submitted a false declaration. This individual was involved in all stages of the tender including evaluation and progress of the project. A declaration of impartiality and a CV had been submitted in the bid in the name of the individual. The TEC considered seeking a clarification but decided that nothing would change as the conflict was ongoing and would remain. The changing of the key expert would not change the affiliation which the individual had with the appellant. There was only one bid submitted in this tender.

Questioned by Dr Micallef Figallo, witness said that no other factors in the bid were considered as the evaluation stopped as soon as the conflict of interest of the double role of the individual was noticed.

In reply to questions from Dr Debono, acting for the Department of Contracts, witness stated that the TEC did not see the need for rectifications or clarifications as the ongoing position of conflict would not change. The TEC was very clear on the matter of the conflict.

Engineer Mario Sammut (438288M) called to testify by the appellant said on oath that he was an Electrical Engineer and offered his services to various contractors. The Authority had engaged him to draw up the technical specifications of the tender and his involvement stopped there. Witness was not involved in Sammut Marine's part of the bid – he was simply asked to be a key witness and was not aware that this request referred to the same tender. He never discussed the tender with the appellant.

Questioned by Dr Micallef Figallo, witness confirmed that he was not aware that this was the same tender as the one where he was engaged by the DFA and only became aware when the matter of the key expert conflict came up. He was only going to be involved in implementing the contract.

In reply to a question from Dr Debono, witness said that he had signed the declaration on behalf of Sammut Marine in his own name.

Mr Benjamin Sammut (5597M) called to testify by the appellant stated on oath that he was the Operations Manager at Sammut Marine and he deals with tenders submissions. Engineer Mario Sammut was engaged by the company as a key expert and did not mention that he was involved in the tender prior to this. He was engaged solely as a key expert with no other roles and he did not impart any information about the tender nor was the tender offer shared with him.

In reply to questions from Dr Micallef Figallo witness said that Engineer Sammut had been involved with Sammut Marine for about three years and that he was a cousin of the witness. Replying to further questions witness stated that Engineer Sammut was used regularly in past tenders and that he is a supplier to Sammut Marine.

This concluded the testimonies.

Dr Mifsud Bonnici said that distinction must be drawn between an economic operator and a key expert – the latter is a sub-contractor. There is no doubt that a conflict exists but the economic operator has no conflict as the key expert has no involvement in the bid decision. There has, therefore, been no market distortion. So long as the key expert has no knowledge of the bid there is no conflict. This is a genuine case that appellant was not aware that Engineer Sammut was already involved and it was given no opportunity to explain through a clarification. A clarification would have avoided this situation, especially as this was a Note 2 matter. The position is redeemable as there was only one bid in this case and therefore there is no risk of distortion. The decision should be revoked and there is a raft of CJEU cases supporting the principle of proportionality in similar cases. The cases quoted were C-21/03 (para 32-34); C-376/08 (paras 38-40); C-395/18 (paras 51-54) and C-210/20 (paras 39-41) which generally all deal with the point that discretion for exclusion must pay attention to and be cautious of following, the principle of proportionality.

It is clear, continued Dr Mifsud Bonnici, that the Authority had options. General Rules Article 21 and Regulation 194 of the Public Procurement Regulations as well as the Directive all allow for rectifications- instead of using these measures the Authority went for the most onerous solution and was in breach of the principle of proportionality. The declaration was not false but incorrect.

Dr Debono said that the Authority had not doubt that there was a conflict of interest and it was up to them to decide if they sought clarification or rectification. The General Rules allows the TEC to make decisions. In Court of Appeal Case 84/19/1 *Servizzi Malta* it was held that recourse to rectifications or clarifications must ensure that they do not give any advantage to any party.

Dr Micallef Figallo said that the letter of reply already covers most of the Authority's submissions. The TEC was faced with a situation where a conflict of interest was certainly perceived. Faced with this situation they had no option. Could the situation have been saved? According to the testimony heard the relationship between the key expert and the appellant is ongoing and the past cannot be changed.

Dr Mifsud Bonnici said that Regulation 194 deals with the basis of exclusion unless a bid can be remedied. If Engineer Sammut's position had been clarified there would have been no need for this onerous decision.

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 30th April 2024.

Having noted the objection filed by Sammut Marine Limited (hereinafter referred to as the Appellant) on 26th February 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2023/147 listed as case No. 2003 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Edric Micallef Figallo

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) ***First Ground of Appeal: The Appellant has complied with Article 21.2 of the GRGT -***

As shall be submitted below, the Appellant has no conflict of interest, and further, it has complied with the requirements of Article 21.2 of the GRGT. First, Article 21.2 of the GRGT applies to "candidates or tenderers". This Article requires the disclosure of any "potential conflict of interest" or "link with other tenderers or parties involved in the project that the candidate or tenderer has. In this case, the Appellant was not aware that the key expert nominated was allegedly same body

appointed by the Contracting Authority to serve as technical advisor. For the sake of the record, it must be said that the Key Expert was not involved in the drafting of the bid, whether from a technical or financial perspective. The Key Expert was simply asked to provide the following documentation: i) Statement of Availability Form ii) Self-declaration form for Key Experts (relating to public employees) iii) CV. As per Regulation 2 of the PPR, the economic operator who submits the bid, in this case the Appellant, 2 of the PPR and any sub-contractors or key experts, are separate. In this case, and if at all, the Appellant submits that the relevant "conflict of interest" or "link" was had by the Key Expert, and not by the Appellant. Second, the Appellant has acted correctly and in line with Article 21.2 of the GRGT.^[11] The Appellant made the required self-declarations on conflict of interest in the European Single Procurement Documentation, as integrated in the Tender Response Format. However, the Appellant could not have disclosed a "conflict" or a "link" that: (i) first, did not affect the Appellant qua tenderer; and (ii) second, was not known to the Appellant. Furthermore, Article 21.2 of the GRGT goes on to provide that "a false declaration shall lead to the disqualification of the candidate or economic operator". The Appellant at no point made a false declaration because he was not aware of the conflict of interest in question for the above-mentioned reasons.

b) ***Second Ground of Appeal: The Contracting Authority has acted disproportionately and has ignored less instructive measures -***

The Appellant is further aggrieved by the fact that the Contracting Authority did not request a rectification of the Key Expert and/or did not give the Appellant the opportunity to explain its position on the perceived breach of Article 21.1 of the GRGT. The Appellant, respectfully, submits that the Contracting Authority opted for the most onerous option of disqualifying the Appellant's bid and of cancelling the Tender. The Contracting Authority ignored less onerous options which were available to it. First, the Appellant was entitled to rectify and to replace the Key Expert given that this was a Note 2 matter. The Appellant has been deprived of any such opportunity-despite the clear and unambiguous wording of the Tender. Second, even Article 21.2 of the GRGT considers "*less intrusive*" remedies to address a perceived conflict of interest. The first paragraph reflects Regulation 194(b) of the PPR which permits the exclusion of an "*economic operator*"-not a tenderer or candidate which is subject to a conflict of interest where it "*cannot be effectively remedied by other less intrusive measures*". This transposes the wording in Article 57(4)(e) of Directive 2014/24. The Appellant submits that the rectification request for the replacement of the key expert is that less intrusive measure. Third, and in any case, the Appellant was entitled to explain its position on the allegation that it has a "conflict" or a "link" which merited the disqualification of its offer.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5th March 2024 and its verbal submission during the hearing held on 30th April 2024, in that:

- a) It is agreed that, at the relevant stage of the procurement process at which the decision was issued the bone of contention for the TEC's finding of non-compliance was related to a conflict of interest between the Key Expert identified by Sammut Marine Limited (hereinafter "SML."). This Key Expert also acted and was meant to act and continue to act as technical advisor for the Department of Fisheries and Aquaculture for the works and supplies involved in this tender process. Given that this particular finding was deemed fatal, no other considerations were made and this is without prejudice to other possible shortcomings that could result should the procurement process start where it left off upon the challenged decision. Nonetheless, while the main reason was as identified in Document SM1 as found in SML's appeal, there are and could be other pertinent reasons at law leading to a disqualification or lack of award. DFA refers to para. 6 in SML's appeal and the reference to an alleged "oversight" by its Key Expert, Ing. Mario Sammut, to disclose any conflict of interest to SML for SML's consideration and eventual submission in this procurement process. DFA states that this is: (i) highly untenable considering the time period in which said Ing. Mario Sammut was involved as a technical advisor to the Contracting Authority and also apparently involved with SML's tendering and eventual implementation of the project should it have been awarded the tender. DFA also states that this is: (ii) a *res inter alios acta* between SML and its Key Expert, who in the matter was in the least negligent with respect to both SML and the Contracting Authority. In this regard, with prudence being an important consideration, it cannot be accepted as a matter of fact that this was a simple case of an "oversight" by a presumably highly experienced warranted professional for which conflicts of interest are also provided against in their professional codes of ethics (and as we shall see, not only).
- b) Turning to the grounds of appeal, as to the first ground of appeal by SML, it states that SML has complied with Article 12.2 of the GRGT. It must be stated *ab initio* that conflict of interest is not only to be considered according to Article 12.2 of the applicable GRGT, but also inter alia by the definitions and provisions in the Public Procurement Regulations (S.L. 601.03, hereinafter "PPR") themselves. With respect, in relation to the aforementioned Ing. Mario Sammut, who falls in the least under "any person", is definitely subject to a conflict of interest by his dual role with the tenderer SML and the contracting authority DFA. Emphasis is laid on the fact that his situation vis-à-vis the parties is in the least a situation ("any situation" in the procurement procedure which in the least "might be perceived to compromise their impartiality and independence". In this regard, reference is made to the TEC's finding of non-compliance referred above, and the roles of Ing. Mario Sammut with both parties, and also his involvement "to serve as a technical advisor on this TEC. Furthermore, the same expert was appointed by the Contracting Authority to prepare the tender specifications and BOQ of this tender". It is to be noted that "conflicts of interest" are defined at law on an "at least" basis, meaning that that is a minimum level and the TEC and anyone involved in the procurement procedure can or should also adopt a higher standard if reasonably fit to do so. This is being said by way of legal interpretation, not as a declaration as to the TEC's

actions in this case. In this regard though, it further shows that the TEC was a fortiori more than justified to apply the provisions involved when it gained knowledge of the dual role of Ing. Mario Sammut, as referred above. DFA further submits that in the context of this case, SML and its chosen Key Expert had and are to be considered as one package, so to speak, for the purposes of the reasonable consideration of SML's offer. Any other consideration in the context of this case is untenable. Further to the first ground of appeal by SML, particularly para. 19 of SML's appeal, it should be noted that the offer made by SML is factually false in the sense that a blatant conflict of interest could in the least be perceived through its choice of Key Expert and this situation is the doing of the latter and, or SML, plus it is a matter that should be between themselves to redress. DFA submits that "false declaration" does not require an intent to deceive and, or gain advantage, but includes an objective finding of a lack of truthfulness in the submissions or offer made. Moreover, Article 21.2 of the GRGT provides as a whole on more than a "false declaration" or rather that "false declaration" should be interpreted in the light of the whole provision. DFA humbly submits that SML seems to seek to ascribe a conveniently restrictive, limited meaning to "false declaration" in the field of "conflicts of interests"^[1]. This is incorrect especially considering that these provisions are meant to be of wide interpretation due to their prudential underpinning and the public financial interests they are meant to safeguard. In this sense, it could be that SML is interpreting "false declaration" akin to criminal law provisions, which requires an intent and are necessarily restrictive in interpretation. This should not be applied in this given case by the Honourable Board.

- c) Turning to the second ground of appeal by SML, this relates to possible remedies to its situation which SML burdens the Contracting Authority or DFA for their application. In relation to the second ground of appeal, DFA believes that this ground ought to be refused and the reason is shown above and also in the testimony that DFA can provide in relation to the conflicts of interest situation generated by the involvement of Ing. Mario Sammut with both DFA and SML. With respect, any rectification or remedy referred by SML in its appeal cannot and could not be entertained, as may be proven in due course in these proceedings. Ing. Mario Sammut was too deeply involved in the procurement process for SML to rectify the situation. In this regards a substitution of the same Key Expert by SML would not resolve the situation on two accounts: (i) DFA cannot reasonably dismiss potential conflicts of interest and inside knowledge as to the procurement procedure which could have already been passed on to SML or could be passed on to it. Naming another Key Expert does not ensure an adequate level of security and transparency. Possibly more importantly (ii) it is to be understood that for the whole situation to be rectified, and without prejudice to point (i), it is not enough for SML to change its apparent Key Expert but the Contracting Authority must also make substantial fundamental changes to ensure it at least prevents a potential conflict of interest considering the involvement of Ing. Mario Sammut with the Contracting Authority. In this regard, changes need to be done at the Contracting Authority's

end to ensure that no conflicts of interests could be reasonably perceived. This scenario makes the application of the remedies referred by SML in its second ground of appeal inapplicable in the given case. In view of the preceding paragraph, DFA submits that what SML was subject to was not an "automatic exclusion" as it incorrectly stated, but a duly considered decision borne out of the situation the TEC was faced with in SML's offer and due to its Key Expert and his role(s) in the interests of SML and of DFA itself.

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.

- a) The appeal centres on whether the Contracting Authority was justified in excluding the appellant outright on the basis of an alleged conflict of interest arising from the involvement of the proposed key expert, Engineer Sammut, in earlier stages of the project. The Board notes the appellant's submission that a clear distinction must be drawn between the economic operator submitting the tender and the key expert engaged as a subcontractor or external consultant. The evidence shows that the key expert had no role in the appellant's internal decision-making process regarding whether to bid, how to structure the offer, or what price to submit.
- b) On the basis of the documentation and testimony heard, the Board accepts that a potential conflict existed in relation to the key expert's prior involvement with the Contracting Authority, but there is no indication that this translated into a conflict, or any undue advantage, at the level of the economic operator itself. There is no evidence that the key expert had access to confidential information concerning competitors' offers, evaluation criteria beyond what was published, or any other privileged data capable of distorting the outcome of the procedure. In these circumstances, the Board agrees with the appellant that no actual market distortion has been demonstrated.
- c) The Board further observes that the matter in question was classified as a Note 2 requirement, and that the declaration concerning conflicts of interest, while incorrect, cannot on the evidence be characterised as intentionally false. The applicable rules, including the General Rules governing tenders and Regulation 194 of the Public Procurement Regulations, contemplate the possibility of rectifications and clarifications in appropriate cases, particularly where issues can be remedied without prejudicing equal treatment or transparency. In the Board's view, the Authority had less onerous options at its disposal, such as seeking a clarification, requiring the replacement of the key expert, or imposing safeguards to ensure that no confidential information could be misused.
- d) The Board is persuaded by the proportionality arguments advanced by the appellant, including the reference to the established case-law of the Court of Justice of the European Union, which emphasises that exclusion measures must be proportionate to the gravity and consequences of the irregularity found. In the present case, the exclusion of the only bid, without first affording the

appellant an opportunity to clarify or remedy the position of the key expert, resulted in the most severe possible outcome, notwithstanding the absence of evidence of any concrete risk of distortion of competition.

- e) In light of the above, the Board concludes that the Contracting Authority erred in resorting directly to exclusion instead of making use of the remedial mechanisms available under the applicable procurement framework. The response adopted was disproportionate to the nature of the irregularity and failed to give due weight to the distinction between the economic operator and the key expert, to the absence of demonstrated market distortion, and to the curative possibilities inherent in a Note 2 matter. The decision to exclude the appellant's offer is therefore vitiated by a breach of the principle of proportionality and cannot be upheld.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Cancellation' letter dated 15th February 2024;
- c) To cancel the Letters of Rejection dated 15th February 2024 sent to Sammut Marine Limited;
- d) To order the contracting authority to re-evaluate the bid received from Sammut Marine Limited in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Keith Victor Grech
Member