

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1181 – CT 2039/2017 – Tender for the Refurbishment and Upgrading Works (Phase 2) at the Deep Water Quay, Marsa, Malta**

The publication date of the call for tenders was the 11<sup>th</sup> July 2017 whilst the closing date of the call for tenders was the 11<sup>th</sup> August 2017. The estimated value of the tender (exclusive of VAT) was € 20.5 million

Bezzina Maritime Services Ltd filed an appeal on 16<sup>th</sup> April 2018 against Transport Malta which had cancelled the tender following Appellants being disqualified on the grounds of being technically non-compliant. A deposit of €50,000 was paid.

On 19<sup>th</sup> June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Bezzina Maritime Services Ltd**

Dr Ron Galea Cavallazzi	Legal Representative
Dr Steve Decesare	Legal Representative
Mr Anthony Bezzina	Representative
Mr Ranier Bezzina	Representative
Mr George Farrugia	Representative
Architect Patrick Griscti Soler	Representative

#### **Contracting Authority – Transport Malta**

Dr Joseph Camilleri	Legal Representative
Mr Clifton Borg	Chairperson Evaluation Committee
Ms Mary Grace Pisani	Secretary Evaluation Board
Architect John Demicoli	Member Evaluation Board
Architect Elaine Farrugia	Member Evaluation Board
Mr Ludwig Xuereb	Member Evaluation Board
Ms Liz Markham	Representative

#### **Department of Contracts**

Dr Franco Agius	Legal Representative
Mr Jonathan Bugeja	Procurement Manager

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Joseph Camilleri, Legal Representative of Transport Malta, wished to make two preliminary points before any submissions were made. The Appellants were contesting two issues on which they had been disqualified – these issues were in regard to key experts and a number of shortcomings. One of these shortcomings was the point about stockpiling and storage of materials on which the Contracting Authority now accepts that the information in the tender is valid. Regarding the key experts the Authority now accepts that the form detailing the key experts was signed but not fully completed.

Dr Ron Galea Cavallazzi, Legal Representative for Bezzina Maritime Services Ltd, stated that this appeal was based on the Contracting Authority's letter of 6<sup>th</sup> April 2018 advising bidders that their offer was technically non-compliant. His clients offer was in the region of € 18m against an approximate contract value of € 20m. The Authority had already made an attempt to cancel the previous tender on the same grounds, but on appeal the decision had gone in favour of his clients, when it was decided that the basis of proportionality had to be applied. In this present Case before the Board it was again a fact that the principle of proportionality had not been applied. At the end of January 2018 Appellant had received and provided extensive documentation requesting details on every individual to be employed by the bidder on this tender. Four days later further clarification was sought on technical points – this was followed by cancellation of the tender on the 6<sup>th</sup> April 2018. The reasons quoted for the cancellation are not justified. According to the Authority's letter referred to, bidder had failed to complete one single column out of seven on the self-assessment form and the inversion of two of the names of key personnel, plus some other minor points. In the form the tenderer had to indicate (by a tick) if the experts were non-compliant or otherwise, and this had been missed out – this despite the fact that in the rest of the documents there was enough information that these experts met all other requirements. In all 120 pages of information had been supplied to the Authority confirming that all key people conform to the requirements – certainly enough to satisfy all requested information.

The declaration form regarding the key experts requested the appointment of a Works Manager and a Planning & Logistics Manager. This information was available in the original submission and contrary to the Authority's claim there were no changes in the personnel or in their qualifications, nor in their allegation that Architect George Farrugia's experience did not satisfy the tender's requirements. Architect Farrugia, even in the role of Works Manager was well qualified with extensive experience and no indication was given by the Authority why they considered him not qualified. Two points were worth considering concerning the Authority's decision – there was a clerical mistake which did not materially change anything and there were no changes in the key personnel in the tender submissions.

Apart from the key experts contention there are several other points why the Authority considers the tender not technically compliant according to their letter. However, the overall consideration is that the points raised were minor and dealt with the preliminaries and should not lead to disqualification as they were immaterial in the context of such a major contract. The intention of the tender was that these points were likely to change at finalisation with the supervisor within three weeks of signing of the contract. There is ample proof of this as there are several references in the documents that these points may change and that they are subject to agreement at a later stage. The Applicant is requesting the revocation of the cancellation of the tender on the basis of proportionality.

Dr Joseph Camilleri, Legal Representative of Transport Malta, said that the Contracting Authority did not wish to exclude Appellant, but there was no alternative as there were points missing according to the terms of the tender. The self-assessment document on the key experts had to be duly completed – if not, that was enough reason to disqualify, as this was not subject to rectification (Note 3). The Evaluation Committee felt that the experience of Architect Farrugia, in the areas of marine construction and piling, did not meet the stipulated requirements according to the set terms. Even as Works Manager his experience was lacking as apart from the shortcomings mentioned earlier he had not undertaken any major project exceeding €5m. The indication was that he had been involved in a project of only €2.5m. After clarification had been sought the bidder switched the key experts – this amounted to rectification of the original offer and if accepted it would be denying the rights of other bidders apart from going against public procurement regulations.

There were a number of missing details and on a major contract the Authority's purpose in putting them there is to find out how bidder is going to tackle the job and if can meet the requested requirements and ensure compliance. This particular project was complex as the two phases (2A and 2B) overlapped and had to follow on, and hence one of the requirements was that bidder was to present two separate detailed plans indicating how the phases were to be undertaken. These two plans were not provided and the Evaluation Committee requested their submission together with extra plans showing location of staff and welfare facilities, offices and toilets. The bidder replied that the plan submitted by them covered both phases of the project with no indication of the separate phases. There was no indication that the bidder understood the two phases or how he was going to deal with the works. A Gantt chart had been supplied instead of the requested Critical Path Analysis and bidder had claimed that no critical path analysis was required as the work phases were independent of each other. This point remained unclear even after clarification was sought.

Mr Clifton Borg (59875M) testified on oath that he was the Chairman of the Evaluation Committee. He stated that there were three evaluators – two architects, plus one other and a secretary. He saw his role as ensuring that the evaluation process was carried out correctly and where something was not clear to seek clarification. He was not involved in the technical side of the bid – the evaluation was carried out jointly and the technical people agreed the technical

aspects. There was no pressure on the evaluators who carried out individual examination of the bid documents. In reply to a question witness stated that the technical part of the evaluation was carried out from sometime in January 2018 onwards.

Architect Patrick Griscti Soler (93552M) stated on oath that he has been practicing as an architect since 1977, has been involved in diverse marine projects similar to the one being proposed in the tender and had experience of adjudging marine tenders. He had been responsible for major works at Hay Wharf and involved in major repairs at the Deep Water Quay. He was aware of the points listed in the disqualification letter sent to the Appellants and made an observation that in his experience, quite often, minor details were given precedence over substantial points in tenders. In this particular tender Appellants were not given access in Phase 2A to view the site - they had to peer over a wall when the work was practically finished. It was clear that there was insufficient space to locate the compound there as it would have meant either moving the casings or else double and treble handling which is not beneficial on a contract. The facilities had been shown on the plan but in a different area and the site boundary had also been indicated on the CPM Plan submitted, albeit a small part had been missed or overlooked where no works were to be carried out or where the casings were stored.

Continuing his testimony, witness dealt with the many other points raised by the Authority in their disqualification letter. He stated that there were two access gates available for use by vehicles - Gate A in Mill Street (which was very busy) and Gate B at the other end of the site. Using Gate A would have meant that to furnish materials for Phase 2B vehicles had to go over work in progress which is not desirable. With regard to the temporary accommodation, or compound as it was referred to – namely offices, ablutions, welfare facilities- these were indicated on the Plan next to Gate B. It was made clear in the General Environment Plan submitted (Tabled as Document B) that the Waste Management will include different skips on barges with location depending on the area where work was underway. The Deep Water Quay had restricted loading and there were technical reasons why parking for vehicles and plant was not shown on Plan. With regard to the location of the Workshop, witness said that the precasting, formwork and fabrication would be done off-site and the site used merely for assembly with the major work taking place on barges. This made sense as having the workshop on site restricted other activities. Bidders had been advised that no private cars would be allowed on site – there was not much point therefore in providing parking facilities. The location of fire fighting and similar safety equipment would not be static but would be moved as the work progressed – to deal with emergencies the fire fighting equipment had to follow the work

In reply to questions by Dr Franco Agius, Legal Representative of the Department of Contracts, witness confirmed that they had not made a request to have better access to the site but had followed the instructions of the Contracting Authority as work on parts of the project had not yet been detailed or known. On an additional Plan submitted (tabled by witness and referred to as Schedule A) both Phases of the project were identified. Phase 2A was a minor fraction of the contract, and it was a question of three or four weeks work. Witness stated that at a site meeting

no importance was given to the small points which the Authority was now using as its basis for disqualification. Regarding the wording of the tender request for a Site Plan, this could be interpreted either way – either one plan showing both phases or separate plans for Phase 2A and Phase 2B. On Waste Management witness explained that a marine site generated certain types of waste (such as silt, concrete etc.) – this made it difficult to show location as a static site since the waste moved with the work as it progressed. On Traffic Management access through Gate A was impossible and it was misleading to suggest it - it was possible to negotiate with third party for the use of Gate B, the use of which was highly practical. The location of the facilities area referred to as the Accommodation Block was indicated on the Plan but no detailed sketches were supplied on this minor point, while it was not felt that a Critical Path Analysis was necessary in this instance. Most activities on this project would run concurrently and in parallel and to provide an Analysis one would have to split up the site into say ten units, do an analysis for each part and then join them up – this would not make sense as it would take a longer time span to complete. On the point of Mitigation Measures these had been dealt with under the risks section of the Risk Management Plan.

Architect John Demicoli (294976M) testified on oath that he was the technical evaluator of the tender. He was an Architect by profession and he described how the evaluation process had proceeded. All decisions had been taken by the full committee at several meetings. No pressure had been put on the Evaluation Committee to change their views. The Committee had asked for clarification on Architect Farrugia as a key expert because from the available documents there was no indication that he had the necessary experience in piling and marine works. The confidential document stating that his experience covered a project in excess of € 2.5m did not offer the necessary comfort as they had assumed that greater than 2.5m is less than 5m.

Under oath Architect Elaine Farrugia (114085M), a member of the Evaluation Board, said that she had ten years experience as an Architect, four of them at Transport Malta. The technical offer requested four plans – a separate one for each phase and two for the accommodation and welfare facilities. The bidder confirmed that they had submitted only one plan from which details about the site set up were missing. The details regarding toilets, offices, kitchen were not indicated, site boundaries were missing in part and there was vague references to waste management, workshops, fire fighting facilities and security management. Additional information was provided after clarification but it was still insufficient.

On being questioned by Dr Galea Cavallazzi witness replied that the tender did not oblige or specify where the facilities had to be located, or why four plans had been insisted upon. She confirmed that the requirement regarding the access gate was that it merely had to be indicated and the Committee had assumed that bidder cannot use the third party gate. With regard to the fire fighting equipment and other services such as waste collection area witness agreed that the tender did not specify that they had to be static and that there was reference to waste skips in the tender – however she pointed out that there was no reference to a waste collection area. It was also confirmed by witness that tender specified that finalisation of details was to be agreed

within three weeks of the tender award. Despite the points made that works would be running concurrently on site, witness felt that a Critical Path Analysis was still necessary.

Dr Galea Cavallazzi then went through the several points one by one raised in the disqualification letter. He mentioned that these points all referred to the technical offer and all referred to the contractor not the bidder – as such these clauses could not be the basis on which to disqualify a tender. The submissions as they appear in bidders' tender documents were as follows:

- Site Set up and Hoarding - indicated on CPM Plan
- Access Gate – indicated on the CPM Plan
- Temporary Welfare Facilities Accommodation – indicated on CPM Plan
- Waste Management – included in General Environment Plan Sec.5.6 and 5.7 (includes reference to skips)
- Mitigation of Waste – included in General Environment Plan paragraph 13
- Vehicle Parking Areas – not indicated as parking moves with work flow
- Workshop – not indicated as not on plan as fabrication and preparation of work not done on site but in bidders' workshop
- Staging and Preparation Area – included in CPM Plan section 6
- Vehicles Traffic Routes – not identified on plan but covered in Risk Assessment Plan
- Fire Fighting Equipment – not shown on Plan as moveable with work flow but appears in CPM Plan pages 9 and 20
- Environment Control Equipment – covered under five different points in the General Environment Plan and Section 13 of the CPM Plan
- Health & Safety – covered in Risk Assessment Plan pages 17 and 45 and in CPM Plan page 2
- Safety Boat – not indicated on Plan as movable with the work flow and would be available for use in several parts of the jetty
- Risk & Security Plan – indicated in the CPM Plan under Risk Assessment
- Security Management Plan – indicated in pages 37 and 40 of the Risk Assessment Plan

He pointed out that the relevance of these points to the overall tender was minimal and no fault had been found in the substantial parts in the tender.

Architect John Demicoli was recalled to the witness stand. He confirmed that the General Environment Plan (tabled as Document B) had been seen by the Evaluation Committee and had been referred to in the disqualification letter. He stated that the tender requested two separate plans each covering one of the Phases of the project – instead they had found only one document – the CPM Plan with schematic drawings. The Evaluation Committee had examined each document submitted to check if the requirements specified had been included.

The Chairman pointed out to the witness that the tender documents asked for 'a plan' not 'plans'

Continuing witness said that a small amount of site hoarding had been omitted on plan as maybe bidder decided it was not required and the site boundary had not been totally identified on CPM Plan in part of Phase 2. The vehicular route chosen went over third party property which was not what the tender recommended, but it was noted by witness that the route proposed by the Authority was not mandatory.

In reply to questions put by Dr Galea Cavallazzi and Dr Agius witness agreed that the part of the site left out of the plan did not matter, since as far as he was aware no work would be carried out there during Phase 2B, but it still did not conform to the tender requirements. Only the location had been shown on the Plan for welfare facilities rather than sketches, as requested, and the vehicle route recommended by the Authority was only meant as a guide and was not mandatory. The locations under the Waste Management Plan should have been indicated on Plan PCM, but he saw no difficulty with using movable skips on site.

The Chairman pointed out to witness that the Evaluation Committee felt that it needed certain clarifications on certain points. When clarifications were received the Committee claimed that they were not according to Plan even though they were indicated elsewhere in the tender documents albeit not on the plan.

When witness mentioned that no provision had been identified for parking plant and vehicles Dr Galea Cavallazzi pointed out that there was no need for this since plant and machinery followed the work flow and were not static. Similarly, said the latter, there was no need to identify areas for workshop as prefabrication would take place off site – the claim that there had to be a workshop on site was not tenable.

Witness went on to mention that the Staging and Preparation Areas, the Fire Fighting Equipment Area and the Safety Boat had not been indicated, and pointed out that the vehicle routes had been recommended to avoid risks to workers on site.

Witness told Dr Galea Cavallazzi that he had 18 years experience in roads infrastructure but no background in marine projects. He had no experience in fire fighting risk assessments, and confirmed that no deficiencies had been found in the substantial part of the tender.

Architect Elaine Farrugia was recalled to answer questions from Dr Galea Cavallazzi. She said that there was work required in Phase 2A. The work required was piling, grillage and back steps but this was not necessarily in the part left out of the Plan. She confirmed that the Evaluation Committee had found no deficiencies in the substantial part of the tender.

The hearing of witnesses was concluded at this stage.

Dr Galea Cavallazzi claimed that the minor details which the Authority had gone into were not material enough to detract from the contract or to lead to disqualification. Two witnesses, on oath, had stated that there were no deficiencies in the substantial part of the contract. All the small points raised refer to the special conditions binding the contractor not the bidder. On the point of the inversion of the details of the key experts the Authority claims that it is clear that the inversion was evident – if it was so evident should it not have been queried and clarified? The Evaluation Committee ignored the inversion and just declared that Architect George Farrugia was not compliant. They requested evidence of previous experience including one project worth in excess of € 5m but their interpretation was that the 5m had to be in piling and a marine project which was not what was required. References regarding Architect Farrugia show that he did work valued at € 15m at St Elmo, and a confidential contract worth in excess of € 2.5m which no one had the decency to check if it exceeded the 5m. It is accepted that the bidder should have been clearer in his submissions but similarly the Evaluation Committee should have been much clearer in their tender specifications and in clarifying points which they used to disqualify this bid. A clerical mistake was made by inverting names in completing the document but this did not change anything in the tender as Architect Farrugia was qualified nonetheless and should not have been disqualified. In the context of the size of this contract the minor points to which the Authority attached great importance could have been resolved in the three weeks allowed to discuss and finalize the contract after the tender award, if the Authority had taken proportionality into consideration.

Dr Camilleri referred to two decisions by the ECJ – numbers 523/16 and 536/16 both of which dealt with areas where proportionality and rectification apply. Rectification is possible so long as it does not jeopardise the objectives of the attainment of equal treatment and non-discrimination. Article 51 should not be interpreted as allowing any rectification or omission which expressly leads to the exclusion of a tender. The failure to fill the key experts form correctly therefore leads to rectification which Note 3 prohibits. Architect Farrugia did not meet the requirements of the Works Manager position while in regard to the small points bidder claims that they were preliminary points and not important. Lack of information is not acceptable – if it was requested it was wanted, and the claim that they were not important does not hold.

Dr Franco Agius stated that there are specific reasons for requesting information, primarily to indicate that the work will be carried out. The Authority did not want to disqualify Bezzina Maritime Services Ltd – there simply were serious errors in their submissions.

Dr Steve Decesare, Legal Representative for Bezzina Maritime Services Ltd, said that the Appellant had asked for clarification not rectification. Architect Farrugia still had the necessary qualifications as Works Manager - nowhere was it indicated that his experience had to be in marine projects and in piling.

Dr Agius replied by saying that Article A42.2 in the tender required involvement in one project in marine construction and piling.

The Chairman thanked the parties for their submissions and declared the hearing closed.

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**This Board,**

**Having noted this Objection filed by Bezzina Maritime Services Limited, (hereinafter referred to as the Appellant) on 16 April 2018, refers to the contentions made by the same Appellant with regard to the cancellation of Tender of Reference CT 2039/2018, issued by Transport Malta and listed as Case Number 1181 in the records of the Public Contracts Review Board.**

**Appearing for the Appellant: Dr Ron Galea Cavallazzi**

**Dr Steve Decesare**

**Appearing for the Contracting Authority: Dr Joseph Camilleri**

**Appearing for the Department of Contracts: Dr Franco Agius**

**Whereby the Appellants contend that:**

- a) **The Contracting Authority's decision to cancel the Tender on the alleged grounds that their offer was technically non-compliant is**

**incorrect. The Authority referred to deficiencies with regards to Key Experts and other minor issues.**

**In this respect, Bezzina Maritime Services Limited contend that, with regards to the issue of Key Experts, their offer was technically compliant and with regard to other minor issues mentioned in the Contracting Authority's "*Letter of Rejection*", the Appellants insist that they represent minor factors which are normally established at the award of the Tender and not at tendering stage.**

**This Board also considered the Contracting Authority's "*Reasoned Letter of Reply*" dated 23 April 2018 and its verbal submissions during the Public Hearing held on 19 June 2018, in that:**

- a) Transport Malta contends that the Appellants' offer was deficient in the provision of qualified and experienced Key Experts and other points mentioned in its "*Letter of Rejection*" dated 23 April 2018. The Contracting Authority insists that, even after a request for clarifications, Bezzina Maritime Services Limited failed to conform to the dictated specifications of the Tender Dossier. In fact, the Appellants**

**gave the impression that they were not fully aware of the mode of execution of these tendered works.**

**This same Board also noted the testimony of the witnesses namely:**

- 1. Mr Clifton Borg, Chairman of the Evaluation Committee, duly summoned by Bezzina Maritime Services Limited;**
- 2. Perit Patrick Griscti Soler, duly summoned by Bezzina Maritime Services Limited;**
- 3. Perit John Demicoli, duly summoned by Bezzina Maritime Services Limited;**
- 4. Perit Elaine Farrugia, duly summoned by the Department of Contracts.**

**This Board also noted the documents submitted by Perit Patrick Griscti Soler which consisted of a CMP Plan and a General Environment Plan**

**This Board, after having examined the relevant documentation to this Appeal and heard lengthy submissions by the parties concerned, including the**

testimony of the witnesses duly summoned, opines that the issues to be considered are the following:

- **Key Experts;**
- **Site Set Up and Hoarding;**
- **Access Gate;**
- **Temporary Welfare Facilities Accommodation;**
- **Waste Management;**
- **Mitigation of Waste;**
- **Vehicle Parking Areas;**
- **Workshop;**
- **Staging and Preparation Area;**

- **Vehicles Traffic Routes;**
- **Fire Fighting Equipment;**
- **Environment Control Equipment;**
- **Health & Safety;**
- **Safety Boat;**
- **Risk & Security Plan;**
- **Security Management Plan;**

**Each of the above mentioned issued will be considered on their own merits, as follows:**

- **Key Experts**

**With regards to this issue, this Board acknowledges the fact that the requirement of Key Experts is of the utmost importance for the proper**

execution of the tendered work so that the Authority's concern, in this regard, is well and truly justified.

In this particular case, the Tender Dossier stipulated that the role of a "*Works Manager*" had to carry with it, a proven experience in managing complex construction projects, including experience in marine works during the last ten years and this must include, at least, one project worth over € 5 million. Bezzina Maritime Services Limited, in this respect, nominated *Perit* George Farrugia for this particular assignment, (Key Expert 2).

The Tender specifications also stipulated another Key Expert under the heading of a "*Planning and Logistics Manager*" and the latter had to be academically qualified at MFQ Level 4 and knowledgeable in the management of projects and construction. In addition this role entailed, at least, seven years in a general professional experience and three years' experience in planning and logistic works in complex construction projects, specifically, in a leading role in, at least, one major construction project worth over € 2.5 million. In this regard, the Appellants nominated Mr Eugenio Gambin for this assignment, (Key

**Expert 3). So that, in their original submissions, the Appellants' offer reflected the following nominations:**

<b>Position</b>	<b>Name and Surname</b>	<b>Nationality</b>	<b>Age</b>	<b>Education &amp; Qualifications</b>	<b>Details of General, Specific and Project Experience</b>	<b>Project Value</b>
<b>Works Manager</b>	<b>George Farrugia</b>	<b>Maltese</b>	<b>36</b>	<b>A &amp; CE</b>	<b>+10 Years</b>	<b>Various Projects + € 8 M</b>
<b>Planning and Logistics Manager</b>	<b>Eugenio Gambin</b>	<b>Maltese</b>	<b>56</b>	<b>NA</b>	<b>+35 Years</b>	<b>Various Projects + € 12 M</b>

**During the evaluation process, the Evaluation Committee requested further clarifications with regards to the Key Experts' details and experience and with particular reference to Key Experts 2 and 3, it was noted that there was a switch in that Expert 2 had been switched to Expert 3 and vice versa. This Board notes that, through the reply to the clarification request, the Appellants were compliant; however the switch of names was disregarded by the Evaluation Committee, as it was deemed as a rectification of the original offer.**

**In this respect, the switch of roles which the Appellants affected upon clarification related to Perit George Farrugia, (originally designated as**

**Works Manager) and Mr Eugenio Gambin, (originally nominated as Planning & Logistics Manager), both roles requiring different experience and qualifications.**

**At the same instance, from documentation available, this Board notes that Perit George Farrugia is compliant for both the roles of “*Works Manager*” and “*Planning and Logistics Manager*”, so that, in actual fact, there was only a switching of names of experts who were included in the original offer and which does not, in any particular manner effect the technical compliance of the Appellants’ offer in this regard.**

**This Board would respectfully, emphasize the importance and incidence of the application of the principle of “*substance over form*”, in that, although it is deemed appropriate for the Evaluation Committee to adhere to the principle of self-limitation, one should also consider and evaluate the materiality of this switching of experts’ names and its effect on the actual execution of the tendered works. In this regard, this Board establishes that such a switch of names does not affect the price or mode of execution of the works involved except for the fact that the roles of “*Works Manager*” and “*Planning and Logistics Manager*”, which remained the same, will be carried out by the same persons, both**

**of whom were nominated to carry out such works in the Appellants' original offer but in inverted roles.**

**At the same instance, this Board is not implying that the Evaluation Committee should not adhere to the principle of self-limitation but in doing so, one has to consider the fact that the names of the Key Experts have not changed so that there was no change of experts which were not duly nominated in the Appellants' original submission. In this respect, this Board is not convinced that, in their original offer, Perit George Farrugia was not compliant, as in fact, he is qualified for both the role of "*Works Manager*" and "*Planning and Logistics Manager*", so that the switch of names was not done intentionally but rather to correct a careless clerical error, which in the opinion of this Board, does not alter the substance of the objective of the technical requirement. In this regard, this Board does not find any justification in the discarding of Bezzina Maritime Services Limited's offer due to this issue.**

**With regards to the fact that the Appellants failed to provide details in the last column of the "*self-assessment form*", this Board would respectfully point out that the last (eight) column of this form denoted only the ticking of a "*Yes*" or a "*No*" to the already denoted details duly**

stated on the same form. In this respect, this Board would justifiably point out that the details given in the preceding seven columns determine whether the Key Expert is compliant or not and not the ticking of the Yes or No in the last column of the same form. The principle of “*substance over form*” should prevail and in this regard, this Board does not find any justification that merits a disqualification of the Appellants’ offer.

- **Site Set-Up and Hoarding**

The major deficiency which Transport Malta detected on the CMP plan submitted by the Appellants was that, it did not cover or show the complete site allocated to the project. This Board notes that such non-inclusion was also confirmed by Bezzina Maritime Services Limited, however, it was further amplified that the area omitted from the CMP Plan did not form part of the area where works are to be carried out. In this regard, this Board would refer to extracts from the testimony of Perit Patrick Griscti Soler, one of the technical witnesses, as follows:

*“Xhud: Is-Site Boundary hija indikata fil-pjanti li taw mat-Tender huma, is-site boundaries u ahna bi žvista hallejna barra biċċa minnha,*

*hallejna barra biċċa fejn pratikament mhux ser isiru xogħlijiet  
f'din il-parti li hallejna barra*

*Chairman: Mela għas-site boundary indikajtuha pero' kien hemm xi biċċa  
nieqsa, am I right?*

*Xhud: Hekk hu.*

*Chairman: U dil-biċċa nieqsa f'hiex tikkonsisti?*

*Xhud: Din hemm il-casings storjati hemmhekk. Casings kbar, enormi.*

*Site Boundaries hemm is-site li tawna huma fejn se jsir ix-  
xogħlijiet, sewwa maqsuma fi tnejn. Maqsuma f'Section 2A, Phase  
2A u Phase 2B.*

*Chairman: Allura għaliex kien hemm biċċa nieqsa?*

*Xhud: Issa fil-biċċa nieqsa m'hu se jsiru ebda xogħlijiet fiha"*

At this stage of consideration, this Board notes that the Appellants are insisting that the omitted area of the site plan does not involve works to be executed. On the other hand, this same Board would also refer to the testimony of Perit Elaine Farrugia, one of the evaluators, in that:

*“Dr Ron Galea Cavallazzi: Jekk ngħidlek li fuq parti mis-site hemm numru ta’piles u ma tistax tintuża, li waqt is-site visit li kien hemm qalulhom li xejn ma tista’ tintuża għal dil-funzjoni u li t-Tender Document stess jgħidlek li fejn inti jgħidlek il-moll u usable space ma tistax tużah għal din il-funzjoni u li l-bqija ta’dik il-parti, -l isfel ta’mal-baħar proprja jridu jsiru x-xogħlijiet u allura ovvjament ma tistax tintuża?”*

*Xhud: Jiena din il-parti komuni ma speċifika mkien li bilfors irid jużaha, pero’ kienet parti mis-site u tibqa’ xorta l-fatt li għet injorata l-boundaries tas-site kif kienu ndikati fit-Tender li jibqa’ parti mill-iskop tal-proġett ma għewx ikkunsidrati mill-bidder.*

*Dr Ron Galea Cavallazzi: Fl-ittra stess hawn miktub, u jien qed nassumi li dan huwa extract mill-Evaluation Report,*

*“The Tender drawings indicated a common area overlapping between both Phase 2A & Phase 2B with the intention for such facilities to be allocated therein.”*

*Jigifieri l-intenzjoni jidher li kienet li jkunu hemmhekk effettivament, mentri fil-verita' kif qal il-Perit Griscti Soler ma kienx possibbli.*

*Xhud: Il-fatt komuni kien....*

*Dr Ron Galea Cavallazzi: Li m'ghandniex Perit?*

*Xhud: Il-parti komuni ta'bejn il-proġetti kienet tinkludi ukoll parti tax-shed kif qiegħed jghid sewwa l-Avukat pero' kienet tinkludi anke area oħra li kienet esterna li sa fejn naf jien jekk m'inix sejra żbaljata hija art li tista' tintuża kif qed ngħidu għall-istorage.*

*M'ahniex qed nintrabtu li bilfors irid juzaha, imma lanqas li jekk ahna tajnieh parti mis-site imbaghad jigi jinjoraha totali.*

*Dr Ron Galea Cavallazzi: Parti li ma gietx injorata. Pero' kien hemm xi obbligu li jsir hemmhekk dil-haga li qed nghid?*

*Xhud: Fit-Tender ma kienx qed jispeçifika jew jobbliga."*

From the above testimony, it is being deduced that the Authority confirms that the Tender Document did not, in actual fact, specify if any type of work is to be carried out on the omitted area, but the fact remains that the Appellants did not submit a complete CMP plan.

At the same instance, this Board also noted the evidence given by Perit John Demicoli, one of the evaluators, who stated that no work is to be carried out in the part of site plan omitted by the Appellants, in that:

*"Question: Li ha nistaqsi huwa jekk tistax tindika fuq il-pjanta liema hi dik il-parti li m'ghedtx li hi ndikata?*

*Answer: Nista' nindikalek...*

*Question: One, ma kienx hemm bżonn isir xi xoghol fiha.*

*Reply: Eżattament.”*

From documentation made available to this Board, it was noted that the hoarding of the site boundary is shown by green lines in the CMP plan given in the supporting documentation of the Appellants’ Bid. In this regard, Bezzina Maritime Services Limited indicated by green lines the areas which are not currently physically bounded and separated from the public. In fact, one of the areas where hoarding has been indicated is between Phase 2A area and Phase 2B.

Regarding this issue, this Board would emphasize the fact that it is of the utmost importance to establish whether works which form part of the tendered project, are to be carried out or not in the Appellants’ omitted area. From the submissions and testimony of the witnesses, such a fact could not be credibly established. This Board had to rely substantially on the technical evidence of the witnesses, however the corresponding submissions were somewhat contradicting and inconclusive and unless it is credibly evidenced whether the omitted

**area by the Appellants involves works to be carried out or not, this Board will not be in a position to render its adjudication in a just and fair manner. In this regard, the action which needs to be taken will be reflected in the conclusion of these findings.**

**This Board will now consider the issues relating to the following:**

- **Access Gate;**
- **Welfare Facilities & Waste Management;**
- **Vehicle Parking Area;**
- **Workshop;**
- **Vehicle Traffic Routes;**
- **Fire Fighting Equipment;**
- **Health & Safety;**
- **Safety Boat;**
- **Risk & Security Plan;**
- **Security Management Plan.**

**This Board notes that all of the above issues have been dealt with by Bezzina Maritime Services Limited either under the CPM Plan or the General Environment Plan apart from the items which will be specifically dealt with below.**

- **Access Gate**

**Transport Malta maintains that the Appellants, in their submissions, indicated an access gate which is located on third party property and not as indicated in the plan provided by the Authority. On the other hand, Bezzina Maritime Services Limited is insisting that the utilisation of the area on which the access gate is indicated, can be utilised through an arrangement with the third party which would lead to a better traffic flow.**

**In this regard, this Board does not find any justifiable technical obstacle that would affect the execution of the tendered works and at the same instance; it would be the responsibility of the Contractor to carry out the works, as long as they are within the technical specifications of the Tender Dossier. Access gates are normally decided upon as soon as works are commenced and in this regard, this issue should be decided and agreed upon, at contract stage.**

- **Welfare Facilities & Waste Management**

**This Board acknowledges the fact that such issues are not properly demonstrated in the CMP Plan; however such issues had been addressed in the programme of works duly submitted by the Appellants. At the same instance, in the case of Waste Management, this will be moved in accordance with the movement of works to be carried out so that, no such fixed location for these facilities can be determined at tendering stage. In this regard, this Board opines that the non-amplification of such facilities on the CMP Plan, does not justify the rejection of the Appellants' offer, on technical grounds.**

- **Vehicle Parking Area and Workshop**

**With regards to these alleged deficiencies, this Board takes into consideration the very basic and practical fact that, in such complex projects, the location and positioning of such facilities are usually dictated through the movement of the works being carried out, taking into account the welfare and well-being of the workers on site and in this respect, this Board opines that it would be futile, at tendering stage, to indicate the exact location. At the same instance, this Board notes that**

**such facilities were mentioned in the programme of works submitted by the Appellants and this should suffice at this stage of tendering.**

**This same consideration should also apply to “*Vehicle Traffic Routes*”, “*Fire-Fighting Equipment*”, “*Health and Safety*”, “*Safety Boat*”, “*Risk & Security Plan*” and “*Security Management Plan*”.**

**In conclusion, this Board after having considered all the issues relating to this Appeal, would justifiably opine that apart from the first two issues duly considered, the majority of other issues do not represent technical deficiencies in the offer submitted by Bezzina Maritime Services Limited, however they do indicate a misinterpretation of what is required, in such cases, at tendering stage and what is expected at contract stage. It is stated in the Tender Document that, certain procedures of the execution of works will be discussed with the Supervisor, duly appointed by Transport Malta and such an issue can only be established once the contract is awarded.**

**This Board also noted that the Evaluation Committee confirmed that, apart from the issues mentioned in the “*Letter of Rejection*”, the Appellants’ offer was otherwise technically compliant and in this**

**regard, this Board would refer to the testimonies of both Perit Elaine Farrugia and Perit John Demicoli as follows:**

**Extract from the testimony of Perit Elaine Farrugia**

*“Question: It-tieni mistoqsija. Fl-Evaluation instab xi nuqqas fit-Tender rigward ix-xoghol sostantiv apparti l-preliminaries?”*

*Perit Elaine Farrugia: Kif qal il-kollega l-iehor, ma kien hemm ebda kjarifika jew xi haga li tindika.*

*Question: Jigifieri Le? Kien hemm jew ma kienx hemm?*

*Perit Elaine Farrugia: Nothing to comment at all*

*Question: Kien according to tender.”*

**Extract from the testimony of Perit John Demicoli**

*“Question: Ta’ go dil-formola ghalija, mela tkellimna fuq nuqqasijiet, fuq il-permits, fuq xoghol sostantiv illi ghandna bżonn biex jiġi rrangat u komplut b’dan il-mod, instabu xi nuqqasijiet?”*

*Perit John Demicoli: Kitbulkomm in-nuqqasijiet.*

*Question: Le.*

*Perit John Demicoli: Mela ma nstabx.”*

From the above extracts of the testimony of both Architects who were also members of the Evaluation Committee, this Board concludes that apart from the issues raised by the Authority, the Appellants’ offer was technically compliant.

This Board, after taking all the facts into consideration, finds that the majority of “*other issues*”, are not to be treated as being technically non-compliant. However, this same Board justifiably notes that the Appellants’ offer did not include a complete CMP plan and at the same instance, from a conflicting testimony of the technical witnesses, this Board could not credibly establish whether any work related to the

**project was to be carried out on the area omitted by the Appellants on the CMP plan.**

**This Board, also acknowledges that this particular project is of national importance to the infrastructure and any further delays in the commencement of works is a detriment to national projects and to the general public at large. At the same time, this Board is aware that this project's tendering process has been going on for quite a long period of time, thus delaying the implementation of the project itself.**

**In view of the above considerations, this Board:**

- i) Does not uphold Transport Malta's decision to cancel the Tender;**
- ii) Instructs the Contracting Authority to process the same Tender through a "*Negotiated Procedure*" with the already participated Economic Operators;**
- iii) Orders the Contracting Authority to take into consideration this Board's adjudication on the issues of this Appeal;**

- iv) Instructs that the Evaluation Committee in the “*Negotiated Procedure*” is to be composed of different members and to include an Architect with the necessary experience in marine works and a Marine Engineer;**
- v) Recommends that the deposit paid by Bezzina Maritime Services Limited is to be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*10<sup>th</sup> August 2018*