

PUBLIC CONTRACTS REVIEW BOARD

Case 1479 – MHSE/336/2020 – Expression of Interest for a Negotiated Procedure for the Leasing of an Accommodation Vessel

The **Expression of Interest** was published on the 30th July 2020 and the closing date for submissions was the 3rd August 2020. The estimated value of the proposal (exclusive of VAT) was € 1,000,000.

On the 21st August 2020 VPJ Ltd filed an appeal against the Ministry for Home Affairs, National Security and Law Enforcement as the Contracting Authority objecting to their disqualification on the grounds that their bid was not compliant with the requirements of the Expression of Interest.

A deposit of € 5,000 was paid.

There were twelve (12) bidders.

On 27th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – VPJ Ltd

Dr Mark Refalo	Legal Representative
Mr Joseph Zammit	Representative
Mr Alistair Zammit	Representative
Ms Carolyn Zammit	Representative

Contracting Authority – Ministry for Home Affairs, National Security and Law Enforcement

Dr Miguel De Gabriele	Legal Representative
Mr Charles Vella	Chairperson Evaluation Committee
Ms Doreen Seracino	Secretary Evaluation Committee
Mr Mauro Farrugia	Member Evaluation Committee
Mr Kyle Mifsud	Member Evaluation Committee

Recommended Bidder – Walmar Marine Ltd

Dr Shazoo Ghaznavi	Legal Representative
Mr Sean Linwood	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Mark Refalo Legal Representative of VPJ Ltd after receiving confirmation that documents exhibited by him tallied with those in the hands of the Board requested the hearing of witnesses.

Mr Anthony Cachia (142658M) called as a witness by the Public Contracts Review Board explained the procedure used in the issue of the Expression of Interest (EOI) and confirmed that as Director of Contracts he had given his approval for a Negotiated Procedure under Reg 154(1)(c) of the Public Procurement Regulations.. This was not restricted as regard the number of economic operators who could participate. The EOI was the first step leading to negotiations.

Mr Charles Vella (434067M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the Evaluation Committee. He stated that he was not involved in the drafting of the tender which was necessitated by the unusual circumstances of Covid-19 and the number of migrants likely to turn up at any time. It was thus that the use of a vessel with a number of cabins was requested as other facilities were full. In lieu of a direct order the Contracting Authority used the EOI to open up competition to all wishing to participate. The EOI did not state the number of cabins required and there were certain conditions which bidders had to conform to, but the boat capacity was the major requirement. Several offers were not compliant.

Witness was referred to letter dated 12 August from the Ministry to Shipone Agency Ltd and asked to confirm that in that letter there is no reference to the number of cabins and shows only the pure charter rate on a daily basis and there was also no reference to any other point except the financial offer. Witness confirmed the above and stated that letters of rejection had been sent to all parties indicating why their offers were not compliant.

Dr Refalo referred to the letter sent by Walmar Marine Ltd and pointed out the omission in their offer of requirements 4 (tracking of temperature) and 6 (stock of supplies [without period of time]). Witness said that the conditions will be fully dealt with in the contract. Witness further stated that not every condition was included when asked if the availability of the vessel in four or five days' time was acceptable. With regard to all fuels required for the operation of the vessel (condition 5) witness stated that Walmar's offer excluded only fuel used for the movement of the vessel to different locations.

Turning to the offer by VPJ Ltd witness stated that the term 'all inclusive' in their offer was not clear and their vessel offered 200 places as against the winning bid which although at a higher price offered accommodation of 360 places.

Questioned by Dr Miguel De Gabriele Legal Representative for the Ministry for Home Affairs, National Security and Law Enforcement witness agreed that Walmar had included the provision of supplies without confirming the period requested. There were no details in VPJ Ltd offer – it merely stated 'all inclusive' and this was so broad that to save time they did not ask for any clarifications.

In reply to questions from Dr Shazoo Ghaznavi Legal Representative for Walmar Marine Ltd witness stated that the evaluation committee had first checked the compliancy of bids then went on to check the financial offers. The offers of Shipone Agency Ltd and Walmar were both fully complaint, whilst VPJ's offer was not clear but was not the cheapest and therefore there was no the need to seek clarification or discuss it any further.

Mr Joseph Zammit (538446M) called as a witness by Appellants testified under oath that he is a Director of VPJ Ltd. He stated that the use of the words 'all inclusive' were meant to cover all the requirements and conditions set out in the tender and they expected that the Authority would discuss their offer with them. The vessel they were offering compared very similarly to the Walmar one with the advantage that the vessel they were offering had room for further accommodation if the configuration of certain areas such as the lounges and the car deck was changed.

Questioned by Dr De Gabriele witness confirmed that his company's offer was for 60 cabins accommodating 220 persons and on the basis of this offer he expected the Authority to discuss it further. Witness indicated that the formula used to evaluate the offer was not correct as there was no indication in the tender that the financial offer was linked to the number of persons.

Lt Col James Grech (408277M) called as a witness by the Public Contract Review Board testified under oath that he held the rank of Lt Col in the Armed Forces of Malta with responsibility for Maritime Operations. The role of the latter included the rescue of migrants at sea, whilst the segregation of infected migrants was the responsibility of the Health Authority. The dimension of both vessels under discussion fitted the requirements of the tender and whilst 'Galaxy' offered 426 berths the 'Damian' offered 220.

Questioned, witness stated that the stability of the vessels was an issue for a marine surveyor, but he did state that overall the stability of a vessel was affected by the number of passengers on board.

Dr Refalo said that Dr Cachia in his testimony had stated that this was a negotiated procedure which straightaway eliminated some of the points raised in their appeal. Although the tender was very broadly based it still had to adhere to the principles of certainty, transparency and proportionality. The person responsible for the EOI had explained that the Authority was not aware of the number of passengers that needed to be provided for, and as they did not know what was needed, not to exclude anyone, they failed to lay down selection criteria.

In the case of the VPJ offer, this may well be compliant but they were excluded without any questions being asked. Conversely, Walmar were asked questions and somewhere between the VPJ and the Shipone offers the goalposts were changed thus producing uncertainty in the outcome. The tender simply stated 'number of cabins' without quantifying the number and the bidders were therefore at a loss what to offer. According to Reg. 123 of the Public Procurement Regulations there is a requirement to identify the need and to provide the necessary information. On the basis that the criteria were unknown there was no right to eliminate any offer even the one offering the lowest number of cabins. VPJ's offer is fully complaint and should stand.

Dr De Gabriele stated that as has already been established the tender was issued under Reg. 154 and was published as an EOI to open it to all. It stands to reason that if one offer met all the requirements then it would be awarded the tender. Contrary to what was implied the Authority did not negotiate with any party – they merely sought confirmation on certain points and one must bear in mind that the procedure was rushed due to the urgent national need. This was a transparent and competitive process but VPJ Ltd were not competitive enough.

Dr Ghaznavi said that it had been fully explained that the procedure was issued under Reg. 154 with extreme urgency and for reasons clearly explained. If Appellants are now attacking the procedure they should have had recourse under Reg. 262 for a precontractual remedy. VPJ's offer was not the best price and their late offer that they could adapt their vessel to increase accommodation means that their vessel is not available and therefore not compliant.

Dr Refalo pointed out that in the case of the EOI which was published on a Thursday with a following Monday deadline there was no opportunity to call for a precontractual remedy. He re-iterated that the call did not specify the number of cabins – the number might have been in the Authority's mind but it was not what the tender stated. Once the tender was so issued the Authority should at least have discussed suitable offers. Appellants were offering the use of a vessel at six hours notice whilst the winning bid would be providing a vessel in four or five days.

The Chairman said that the Board will consider the representations made bearing in mind the urgency and importance of the matter. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by VPJ Ltd (hereinafter referred to as the Appellants) on 21st August 2020, refers to the claims made by the same Appellants with regard to the 'Expression of Interest' of reference MHSE/336/2020 listed as case No. 1479 in the records of the Public Contracts Review Board recommended for award by Ministry for Home Affairs, National Security and Law Enforcement (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Mark Refalo

Appearing for the Contracting Authority: Dr Miguel De Gabriele

Appearing for the Preferred Bidder: Dr Shazoo Ghaznavi

Whereby, the Appellants contend that:

- a) The manner in which the ‘Expression of Interest’ (EOI) was conducted was irregular.**
- b) Their offer was fully compliant with the requirements, as published in the EOI.**
- c) The Contracting Authority was in duty bound to seek clarifications prior to the finalisation of recommendation of the Bidder for a negotiated procedure.**
- d) Their offer should not have been discarded, as the reasons for Appellants’ offer rejection are not related to any of the conditions laid out in the EOI.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 25th August 2020 and its verbal submissions during the virtual hearing held on 27th August 2020, in that:

- a) The Authority maintains that, the EOI was issued in accordance with the Public Procurement Regulations, under very urgent circumstances.**
- b) Appellants’ offer did not satisfy all the requirements and conditions set out on page 1 of the EOI document and was not the cheapest.**

- c) The Authority insists that, it had no obligation to seek clarifications, as the non-inclusion of the minimum requirements were not subject to negotiation.**
- d) Appellants' offer was discarded simply due to non-compliance with the requirements and conditions as stipulated in the EOI.**

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

Mr Anthony Cachia duly summoned by VPJ Ltd

Mr Charles Vella duly summoned by Ministry for Home Affairs, National Security and Law Enforcement

Mr Joseph Zammit duly summoned by VPJ Ltd.

Lt. Col. James Grech duly summoned by Ministry for Home Affairs, National Security and Law Enforcement

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, opines that, this particular case refers to an urgent national requirement under extraordinary and exceptional circumstances.

- 1. This Board would point out that since, the publication date of this EOI was 30th July 2020, having a closing date of 3rd August 2020, it feels that, although the majority of the issues raised by Appellants would have been discarded, under normal circumstances, Appellants did not have a reasonable time to file a 'Call for Remedy' prior to the closing date. So that, in this regard, an**

exception is being made to treat Appellants' issues in their merit during this hearing.

- 2. With regard to Appellants' first grievance, in that the manner in which this EOI was conducted, one has to appreciate the urgency and objective of this particular expression of Interest (EOI). In this respect, a vivid description of the urgency and objectives of such a request for interest, is clearly accentuated through the testimony of Mr Charles Vella, Chairman of the Evaluation Committee, as follows:**

“Xhud : Ha naghti ftit background zghira. Irrid nghid li dawn kienu cirkostanzi straordinarji fejn il-pajjiz barra l-COVID qed jiffaccja zieda fl-immigrazzjoni. Kif jaf kulhadd, hemm threat ta' numru ta' dghajjes fis-search and rescue area taghna. Il-probabilita li dawn ikunu COVID positive kibret hafna hafna fl-ahhar gimghat u allura ttiehdet id-decizjoni minhabba li c-centri taghna huma mimlijin, li jigi leased vessel biex malli jaslu fuq ix-xtut taghna jsirilhom dan it-test, jew jekk mhux fix-xatt jsirilhom forsi 'l barra skont l-operazzjoni u dawn imorru quarantine quarters go dan il-vessel. Allura l-ewwel requirement tal-EOI, ahna tlabna a number of cabins to hold migrants for a specific period of time. Agreed with the contracting authorities, skond kif imexxuna l-Health. Issa ahna minkejja l-urgenza, ridna nkunu trasparenti u fair ma kulhadd u minkejja li stajna mmorru

direct order ghax it-threat kienet hemm u qeghda hemm, iddecidejna ghax tender ma stajniex nohorgu ghax kienu ser jiehdu numru ta' gimghat, hrigna expression of interest, tajna windows area veru minhabba l-urgenza imma hallejniex miftuha biex jibbiddja kulhadd. Ma ridna nhallu lil hadd barra. Ma ridniex nghidu li ghandna bzonn 300 jew 400 ghax konna immedjatament jekk naghmlu hekk naqtghu potential offers li kien hemm fis-suq. Issa minkejja li ghamilna hekk, ahna ghamilna 17-il kundizzjoni fl-expression of interest li dak li jkun irid ikun konformi magghom. Dahlu 16-il wahda, propja 14 ghax tnejn kienu l-istess, evalwajna dawn l-offerti li dahlu fuq dawn il-kundizzjonijiet. Dik bhala background”

- 3. This Board would respectfully point out that, it cannot identify any irregularity in the manner in which this EOI was conducted as, after close examination of the action taken by the Contracting Authority, all the necessary transparent action was taken by the Authority to issue this EOI, obtaining all the necessary approvals from the Department of Contracts for the second phase of this process, that is, the negotiation procedure. In this regard, this Board does not uphold Appellants' first grievance.**
- 4. With regard to Appellants' second grievance in that, their offer was fully compliant, this Board would refer to the requirements and conditions as set out on page 1 of the EOI document, as follows:**

“Requirments:

Accomodation Vessels shall have:

- 1. A number of cabins to hold migrants for a specific period of time agreed with the contractual authorities;*
- 2. Segregation areas for different groups of migrants according to the advice of the competent authorities;*
- 3. Provide basic services including, but not limited to, food. cleaning and security services;*
- 4. Tracking of temperature and alert mechanism in case of medical emergencies;*
- 5. Provision of all basic necessities which include, but not limited to, toiletries, beddings and other sanitary facilities;*
- 6. Stock of supplies in point 3 and point 5 shall be on board and be sufficient to last a minimum of two weeks;*
- 7. Support through the supply of provisions, garbage and waste collectors, crew changes and other services shall be the responsibility of the selected bidder;*
- 8. Adequate number of crew members which reflects the number of occupants at any given point in time;*
- 9. Vessels shall be available with immediate effect.*

Conditions:

- 1. The Vessel shall be moored at a designated zone as instructed by the competent authorities;*

2. *Bunkering and supply of vessel must be performed without interrupting the quarantine and isolation arrangements;*
 3. *The crew, as well as other personnel who will be on board the vessel, must work with adequate Personal Protective Equipment at all times during the operation;*
 4. *Payment of all crew wages shall be covered by the owner of the vessel;*
 5. *All fuels, lube oils, other lubricants and all materials required for the operation to be paid by the owner of the vessel;*
 6. *The contractual authorities or any other third party commissioned by the contractual authority shall have the authority to inspect the vessel at any given point in time during the service period;*
 7. *The contractual authorities shall have sole discretion on persons boarded or disembarked from the vessel.*
- 5. The above specifications are quite open and it has been established, through the testimony of the Chairman of the Evaluation Committee that, the Authority wanted to allow as many bidders, as possible, to submit their offer, after having taken into consideration the general objective of this expression and the basic stipulated requirements. This Board also took into consideration, the credible testimony of Mr Charles Vella who explained the following:**

“Avukat : *Jigifieri you went in with an open mind, ma tafux kemm ser ikun hemm bzonn sodod so it is all open u ghadkom sal-lum ma tafux kemm ser ikun hemm bzonn sodod*

Xhud : Mhux ma nafux. Morna with an open mind, anzi hallejnieha miftuha ghal kulhadd biex ikun jista' jibbiddja kulhadd. Ovjament l-ewwel requirement tal-EOI, the number of cabins to hold migrants hija l-ewwel requirement. Ovjament din ser ikollha weight kbir ghax inutli ggib vapur, kellna offerti li l-capacity kienet 30 jew 12. Ma kienux tajbin ghall- affarijiet li ghandna bzonn ahna. Nahseb kulhadd jifhimha din. Jekk tidhol dghajsa, hafna drabi tkun 100 jew 120, so il-capacity hija a major requirement tal-EOI”

6. With regards to Appellants’ offer, the latter had the following shortcomings namely:

- **The term “all inclusive” in their offer was not clear**
- **Their vessel offered 200 places as against the winning bid which although at a higher price offered accommodation of 360 places**

In this regard, Appellants’ offer did not meet the EOI requirements whilst, the recommended bidder’s offer was compliant as correctly denoted by the same witness. Mr Vella viz:

“Avukat : *U intom meta gejt u biex tahdmu d-daily price hdimtuha fuq l-informazzjoni li taww huma stess*

Xhud : Of course. Ahna qabbilna u ta' min jghid li l-specifications ta' Walmar jghidu li ghandu berths over 400 imma ahna xorta hdimnieha fuq it-360 biex inqabblu like with like. Jigifieri l-vapur li ahna qed nirrakkomandaw li qed jigi offrut mal-offerta addirittura ghandu iktar minn 360 berths. Jigifieri ahna xorta hdimna fuq 360 imma jidher car mill-ispecifications tal-vapur li dan ghandu over 400 berths."

In this respect, this Board does not uphold Appellants' second contention.

7. With regard to Appellants' third contention, in that, the Contracting Authority should have asked Appellants for clarification, it must be pointed out that, Appellants' offer did not meet some of the basic requirements and the Contracting Authority, during their adjudication process were not obliged to seek clarifications on Appellants' offer so that, this Board does not uphold Appellants' third grievance.

8. With regard to Appellants' fourth contention, this Board refers to the 'Rejection Letter' dated 12th August 2020 wherein, the reasons for discarding Appellants' offer are clearly defined and identified to be related to the requirements listed on page No. 1 of the EOI document;

In conclusion, this Board opines that:

a) Due to the very limited time made available to Appellants, to file a 'Call for Remedy', this Board allowed an exception to treat the issues raised by Appellants during the hearing of this appeal.

- b) The EOI was issued and conducted in an appropriate manner, conforming with Regulation 154 (c) of the Public Procurement Regulations, after having obtained the necessary approval from the Department of Contracts, as duly stipulated.**
- c) Appellants' offer was not fully compliant with the requirements and conditions as duly dictated in the EOI document.**
- d) The Contracting Authority could not ask for clarifications on Appellants' offer which lacked some of the basic requirements at the onset.**
- e) The reasons for Appellants' offer rejection were clearly denoted by the Authority in its 'Letter of Rejection' dated 12th August 2020. At the same instances, same reasons relate directly to the requirements as duly stipulated in the EOI document.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in its recommendation for the successful offer to proceed for a negotiated procedure,**
- iii. directs that this procurement process be resumed without delay, due to the urgent exceptional circumstances,**
- iv. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

31st August 2020