

## **PUBLIC CONTRACTS REVIEW BOARD**

**CT 2150/2020**

**Tender to Engage an Architect and Civil Engineer (together with Mechanical and Electrical Engineers) in Connection with Phase 2 of the Shooting Range at Ta' Kandja for Sport Malta**

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**Case 1536**

**DATE: 18<sup>th</sup> March 2021**

**This Board,**

Having noted the Appeal filed by Perit Frank Ellul on behalf of MADE Studio, (hereinafter referred to as the Appellant) and the contents of the correspondence received by the Board on the 14<sup>th</sup> December 2020.

Having also noted the contents of the Contracting Authority's letter of reply received by the Board on the 12<sup>th</sup> January 2021 and filed by Dr Peter Fenech on behalf of SportMalta;

Having taken cognisance and evaluated the witnesses produced, all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties.

Having noted and evaluated the minutes of the Board sittings of the 27<sup>th</sup> January 2021 and the 26<sup>th</sup> February 2021 hereunder re-produced:

The tender was published on the 8<sup>th</sup> July 2020 and the closing date of the tender was the 3<sup>rd</sup> September 2020. The estimated value of the tender (exclusive of VAT) was € 255,000.

On the 14<sup>th</sup> December 2020, MADE Studio filed an appeal against Sport Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 1,275 was paid.

There were eleven (11) bidders.

On **26<sup>th</sup> January 2021** 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:

**Appellants – MADE Studio**

Dr Carl Grech	Legal Representative
Arch Frank Ellul	Representative

**Contracting Authority – Sport Malta**

Dr Farrugia Scerri	Legal Representative
Mr Sinclair Cassar	Chairperson Evaluation Committee
Ms Maria Seychell	Member Evaluation Committee
Mr William Galea	Member Evaluation Committee
Mr Marcon Cassar	Representative

**Recommended Bidder – EMDP Ltd**

Dr Charlon Gouder	Legal Representative
Dr Ramona Attard	Legal Representative
Arch Mariello Spiteri	Representative

**Department of Contracts**

Mr Nicholas Aquilina	Representative
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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 Carl Grech Legal Representative for MADE Studio referred to the letter of disqualification from the Contracting Authority stating that Appellants offer was not technically compliant since they had failed to provide certification of ‘Masters in Project

Management'. Confusion arose as the person offered for this role was Architect Peter Zammit (ID No 279562M) also known as Pierre. Despite providing copy of Architect Zammit's University Degree Award and a copy of his identity card, Appellants were still listed as non-compliant. This was not a case of replacing a key expert and the tender should not have been considered as not complying especially as it was some €23,000 cheaper than the winning bid. Reference was made to CJEU Cases 211/02, 599/10 and 319/95 which deal with correction of obvious errors in tenders, the duty to exercise care in evaluation and clarifying matters with tenderer if some point is unclear. Reference was also made to a United Kingdom Court decision wherein it was held that an evaluation on a favourable bid should not fail without clarification. This was the first time this problem had arisen as Architect Zammit had been awarded previous tenders under the name of Pierre.

Dr Farrugia Scerri, Legal Representative for Sport Malta said that Sport Malta do not dispute the facts as presented. However, in the 23<sup>rd</sup> October 2020 letter the bidder complied with the clarification requested but was found to be technically non-compliant as the clarification submitted indicated Architect Pierre Zammit as Project Manager whilst the original bid related to Architect Peter Zammit. There was never any indication that these two names referred to the same person.

Mr Sinclair Cassar (279971M) 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 in the submissions made including the clarification sought there was no indication that Peter Zammit and Pierre Zammit is the same person. The Committee decided that the two names did not refer to the same person.

Questioned by Dr Grech, the witness stated that there was no reference to the individual's identity card in the CV submitted. Certificates submitted later were in the name of Peter but there was no indication given that they referred to the same person previously listed as Pierre and no copy of identity card was provided. After receipt of clarification the evaluators took no further action.

Dr Charlon Gouder, Legal Representative for EMDP Ltd said that Appellants' reply to the clarification created more confusion as there are several architects listed under both names used and hence the Authority could not have peace of mind that the identity card presented to them referred to the same person. The Board might be creating a precedent if they accepted the ID card as an additional document as it was submitted outside the statutory time limit for replying to clarifications. Appellants were using the appeal to circumvent their lack of proper action earlier. There are several Public Contracts Review Board cases relating to the need for transparency and certainty and on that basis this appeal should not be upheld. It was only after the appeal and on receipt of the copy of the ID card that it became known that Peter and Pierre Zammit is one and the same person.

Dr Grech said that it seemed that Dr Gouder was contesting the identity of the person of Peter Zammit. The submission of the ID card was late in the process but the evaluation committee, on the testimony of the Chairperson, confirmed that they stopped the process when a different

name was submitted when it would have made more sense to check further. The Architect's warrant number was clearly stated and it was obvious that the two names referred to the same person but the evaluators did not even consider checking this simple fact – if there were any doubts why not clarify?

Dr Farrugia Scerri said that the information was not there to check as the Masters award was in the name of Peter Zammit. Page | 4

Dr Gouder said that the warrant number (268) refers to Pierre Zammit whilst the degree award refers to Peter Zammit and a different warrant number – in such a situation the Authority could not seek further clarifications.

Dr Grech stated that Appellants claim that if there was any ambiguity in the documents before the Authority the right course should have been to address them not to stop there – clarification would have been a simple step which they are obliged to take. The first step taken by the Authority was a rectification and therefore they were still able to clarify this ambiguity, but they failed to take the next logical step – it was easy to resolve without transgressing the proportionality and self-limitation principles. Sport Malta now appears satisfied that all references are to the same person.

Referring to the certificate relating to the Masters in Project Management, Dr Grech said, that the tender did not specify that it had to be an architect – once Appellants offered an architect with a warrant number it should have been easy to identify that it was the same person. All submissions relating to late presentation of evidence are not germane as the main point of the appeal did not deal with that aspect.

Dr Farrugia Scerri stated that since there are other architects with the same names it was not easy for the Authority to verify if they were dealing with the same person. It was the responsibility of the bidder to provide full and correct information and which they failed to do – even the sought clarification was not answered fully.

Dr Gouder concluded by saying that the Authority would have been acting against the principle of proportionality if they had gone back to Appellants. An ECJ case states clearly that there is a limit to the clarifications which a Contracting Authority should seek.

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

End of Minutes

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Reconvening of the public hearing on case 1536 on **26<sup>th</sup> February 2021** by the Public Contracts Review Board composed of Dr Ian Spiteri Bailey as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members.

The Appellants were represented by Dr Carl Grech and the Contracting Authority by Dr Farrugia Scerri.

The Chairman of the Public Contracts Review Board welcomed the parties and requested confirmation that they accept this virtual meeting as a normal hearing of the Board. He then explained that due to the fact that the Board had been reconstituted since the original appeal was heard there was need to confirm the previous submissions made to enable a decision to be published.

The parties agreed that the Board may proceed to a decision.

The Chairman thanked the parties for their co-operation and declared the hearing closed.

End of Minutes

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### **Hereby resolves:**

The Board considers that the main contention in this procedure relates to the fact that whereas the appellant was informed by correspondence dated 4<sup>th</sup> December 2020 by the Department of Contracts that its bid was found to be technically NOT compliant due to the fact that “*no certification of Masters in project management was provided as stipulated in article 6.1.1 no.4 under section 3 – Terms of Reference*”, appellant claims that the certification in question was submitted together with the reply given to the clarification request they received on the 23<sup>rd</sup> October 2020.

The Board notes that article 6.1.1 (4) of the Tender Document CT 2150/2020 specifically requested bidders to submit a list of experts, including one who holds a Masters Degree (MQF Level 7) in Project Management.

The Board also notes that in the tender submitted by the appellants, Pierre Zammit was listed as Project Manager with an MSc in Project Management. Attached to the tender document were cv’s of all key experts, including that of Pierre Zammit, indicating also reference to his reading for and obtaining his MSc in Project Management between 2014 – 2018. The same cv indicates this key experts’ warrant number as 268.

The Board took note of the Evaluation Report from which there results that only three bidders were deemed technically compliant, with the tender awarded to EMDP, whilst the appellants being deemed technically not compliant on the basis that they failed to provide ‘Masters in Project Management’.

In its reply to the Appeal, the Contracting Authority submits that the appellants complied with the request for clarifications on time, but the bidder was found to be technically non-compliant since the appellants submitted the name of Pierre Zammit

as Project Manager whilst the documentation relative to the same person carried the name of Peter Zammit. The contracting authority submits that there was never any reference to the effect that Peter Zammit and Pierre Zammit was one and the same person, and hence the evaluation board was correct in its decision. The contracting authority claims that the clarification arose solely when the documentation of this appeal was received by the contracting authority.

The Board,

Having evaluated all the above cannot but resolve that there is no doubt that the appellants' key expert by the name Pierre Zammit is in actual fact the same person elsewhere identified as Peter Zammit. In fact, there is agreement to this between the parties.

This definitely means that the appellant never changed persons acting as key experts, and submitted its bid with only one key expert as Project Manager.

In view of the above, the Board concludes and decides:

- a) To uphold the Appeal and declare that the appellants should be deemed to be technically compliant, and hence to be considered further together with EMDP, JLZ+MBF Architects Ltd and Meinhardt Malta Pvt. Ltd,
- b) To annul the Notice of Award issued on the 4<sup>th</sup> December 2020 to EMDP,
- c) To order the Evaluation Committee to re-assess the submissions made in the tender process CT2150/2020 in the light of this decision and award the same tender accordingly.

In view of the above considerations, the Board furthermore orders that the deposit paid by the appellant upon filing of this appeal should be refunded back to the same appellant.

**Ian Spiteri Bailey**  
Chair

**Lawrence Ancilleri**  
Member

**Carmel Esposito**  
Member