



11 November 2019

Public Contracts Review Board  
Notre Dame Ditch  
Floriana FRN1601  
Malta

Dear sirs,

**Re: Letter of Objection in terms of Regulation 270 of the Public Procurement Regulations ('PPR')—Reference CT2403/2018—Tender for the Removal of Old Navigational Buoys, Supply, Installation and Commissioning of New Buoys (the 'Tender')**

1. We write on behalf of our clients **Boat Maintenance Limited (C82608)** (the '**Successful Bidder**') in connection with the above-captioned Tender. This is a reasoned letter of reply to the letter of objection filed by E.C. Municipals Limited (the '**Appellant**') on 1 November 2019.
2. The Successful Bidder submits that the Appellant is attempting a direct challenge against the electronic public procurement system ("ePPS") in order to save its bid.

It has been confirmed time and time again before this Honourable Board that it is simply not possible to tamper with ePPS and that its architecture was intentionally designed to create a system which is impenetrable to secure the market's trust and reliance in public procurement. Malta has departed from the archaic model of physical submission of tenders along with ceremonial public opening tender to attract economic operators to participate actively in public competitive tender procedures.

**As a matter of fact, and this has been confirmed by the Contracting Authority, is that the Appellant repeatedly failed to submit the ESPD—it was neither submitted with the bid on 18 June 2019 nor was it submitted in response to the request for rectification of 21 June 2019.**

It was the Appellant's responsibility to see that the ESPD—a document that is standard and submitted with EVERY tender—is uploaded successfully with its bid. The Appellant simply cannot point fingers at the Department of Contracts, Transport Malta or worse still, at the ePPS for its failure. The Appellant has to suffer the consequences of its negligent omission.

3. The Tender made it very clear that the submission of the ESPD must have been submitted with the bid "*in order to be considered eligible for the award of the contract*" (See Section 1 - 7. Selection and Award Requirements). This was evidently not done by the Appellant and that is precisely the reason why the award was rightfully withdrawn. For this reason, the Appellant's claim cannot be upheld for it is inviting this Honourable Board to depart from adherence to the terms and conditions of the Tender. This Honourable Board has already reiterated in past decisions that it is barred from doing so for it is its obligation to see that a "level playing field" is

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preserved for all the bidders who have participated in this Tender. If one would make a concession for the sake of saving the Appellant's bid from disqualification, the other bidders, including, the Successful Bidder would be treated unequally and discriminately – contrary to the general principles of public procurement law.

4. That, in any case, the Successful Bidder submits that the corollary principle in trials is that the burden of proving an allegation rests on the party making it. The Appellant, so far, has not submitted a single document which corroborates, at least in part, the allegations put forward in the Letter of Objection:
  - a. Document D attached to the Letter of Objection is simply a screenshot of Microsoft Windows's File Explorer – it does not in any way prove that any of the documents indicated there have been submitted as a matter of fact on ePPS.
  - b. Document E attached to the Letter of Objection is a mere e-mail confirmation that something was uploaded on ePPS – in fact the Contracting Authority confirmed in its reasoned letter of reply of 8 November 2019 that although a letter of response was submitted, it contained NO attachments.
  - c. Document F attached to the Letter of Objection is inadmissible as evidence at this stage and should not be taken into account as this should have been submitted either as part of the bid or as part of the request for rectification. It should also be noted that the ESPD is signed 25 June 2019, and that fact, does not corroborate the Appellant's contention that the ESPD was also submitted with the original bid (otherwise the date would have been earlier).
5. That, without prejudice the above, and if this Honourable Board considers that the ESPD was in fact submitted on 25 June 2019, the ESPD, which was allegedly submitted and attached to the letter of objection as Document F, should have made it clear that the Appellant intends to engage a sub-contractor for the purposes of this public contract. Under Part IV: Selection Criteria - C: Technical and Professional Ability, the Appellant indicated "Marine Architect Joe Bugeja Associates" under 4C.2 and 4C.2.1 as "technicians or technical bodies to carry out the work", but then failed to indicate the same as a "sub-contractor" as required by the ESPD and also failed to submit a separate ESPD for that sub-contractor. **On this basis alone, the Appellant ought to be considered as non-compliant with the selection and eligibility criteria.**

It also has to be pointed out that the Appellant would not have been allowed, even after submitting the ESPD on 25 June 2019 (if this is the case at all), to rectify any further oversights or mistakes in that ESPD due to the principle of self-limitation which this Honourable Board has upheld on numerous occasions.

6. That, without prejudice to the above, the Successful Bidder concurs with Transport Malta's submissions at paragraph 7, meaning, that the Appellant's demands simply

cannot be upheld for it is the evaluation committee that is vested with the authority to make a recommendation on the award or otherwise of this public contract.

THEREFORE, for the reasons above and other reasons which will be brought forward during these proceedings, the Successful Bidders humbly demands that this Honourable Board rejects the demands requested in the Appellant's letter of objection and to retain all of the deposit paid by the Appellant with the letter of objection.

Yours sincerely,  
Ganado Advocates

  
Dr. Antoine Cremona

  
Dr. Clement Mifsud Bonnici