

1 December 2017

The Secretary
Public Contracts Review Board
Notre Dame Ditch
Floriana



Reasoned Letter of Objection

Re: eCT2039/2017

Refurbishment & Upgrading Works (Phase 2) at Deep Water Quay Marsa, Malta (the "Tender Procedure")

Dear Sir, Madam,

1. Introduction

- 1.1 We are instructed by Bezzina Maritime Services Ltd (hereinafter referred to as the "**Appellant**") in connection with the Tender Procedure.
- 1.2 Reference is made to letter dated 21st November 2017 (the "**First DOC Letter**") sent by the Department of Contracts (the "**DOC**") to the Appellant *inter alia* informing it that:
 - (a) the Tender Procedure was being cancelled in line with article 18.3(b) of the General Rules Governing Tendering which provides as follows: "*Cancellation may occur where: (b) the economic or technical parameters of the project have fundamentally altered*"; and
 - (b) the tender submitted by the Appellant was found to be technically non-compliant for the reason set out in the extract attached thereto, which extract provided that the Evaluation Committee (the "**EC**") contacted 3 clients of the Appellant and only 2 replied.
- 1.3 Reference is also made to letter dated 22nd November 2017 (the "**Second DOC Letter**") sent by the DOC to the Appellant *inter alia* informing it that the reason for cancellation in the First DOC Letter should read as follows:

"Cancellation may occur where: (a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all".
- 1.4 Our client respectfully considers the decision to be wrong, both in fact and at law. In accordance with the Public Procurement Regulations, 2016 (S.L.174.04) (the "**PPR**"), our client hereby submits its appeal by means of this objection which shall set out hereunder the reasons therefor (this "**Objection**"). Enclosed please find a deposit of €50,000.

2. Facts

- 2.1 In terms of Section 7(C) – Technical and Professional Ability – of the Instructions to Tenderers (the "**ITT**") bidders were required to provide a list of principal works of a similar nature as specified in sub-article (2) thereof, including the value of these works in Euro excluding VAT;

- 2.2 Section 7(C) (3) stated that, as per ESPD Question reference 4C.1.1, bidder is to provide relevant documentation concerning the satisfactory execution and outcome for the works listed. Note C: In so listing the end clients, the tenderer is giving his consent to the EC, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them an opinion on the works provided to them by the tenderer. The EC reserves the right to request additional documentation in respect of the project experience provided by tenderers.
- 2.3 The table which bidders were requested to complete in their response to 4C.1.1 of the ESPD is produced hereunder *[emphasis add]*:

| | | | |
|--------|--|---|--|
| 4C.1.1 | <i>If the relevant documentation concerning satisfactory execution and outcome for the most important works <u>is available electronically, please indicate:</u></i> | <i>Web address: [text]</i> | |
| | | <i>Issuing authority or body: [text]</i> | |
| | | <i>Precise reference of the documentation: [text]</i> | |

- 2.4 Since the relevant documentation was not available electronically, the Appellant included the letters "NA" in its ESPD.
- 2.5 In accordance with Note C to Section 7(C) (3), the EC claims that:
- it wrote to the three (3) clients listed by the Appellant; and
 - only two (2) clients replied, ElectroGas Malta Limited and Manoel Island Yacht Yard Limited.
- 2.6 In view of the fact that one (1) of the clients listed by the Appellant allegedly failed to reply to a request made by the EC, the Appellant's tender was deemed to be technically non-compliant.

3. Disqualification

- 3.1 The disqualification of a tender on the basis of an alleged failure to reply of one of the clients referred to by a tenderer in its tender breaches the PPR and the Directive (including the principle of proportionality), as well as the tender document governing this Tender Procedure.
- 3.2 The Appellant, in submitting its tender, declared that it carried out the works specified in its ESPD. The right reserved by the EC is intended to grant the EC the faculty to ascertain that the statement made by the Appellant is correct and truthful.
- 3.3 No section of the tender document, or provision of law, grants the DOC the right to disqualify a tenderer if a client (and therefore an entity extraneous to the tenderer and over which the tenderer has no control) fails to reply to a request made by the EC. The position would be even worse if, as happened in this case, the client did not receive the request from the EC.

- 3.4 It is important to note that in this case the client referred to by the Appellant, JP Avax S.A., is a Greek international building, civil and engineering contractor with an involvement in the energy (oil and gas) and industrial sectors operating globally, including in the Middle East, North Africa, Europe and Asia. Accordingly, the request would need to be made to the right person / department.
- 3.5 The EC could have requested the Appellant to obtain a letter from the 'non-responsive' client confirming that the works had been carried out, in a successful manner. Alternatively, the Appellant could have been requested to provide the necessary contact details of the person(s) within the 'non-responsive' client's organisation who would be able to provide the confirmations deemed necessary by the EC (if the EC wanted to confirm such facts directly itself).
- 3.6 In fact, JP Avax S.A. have confirmed in writing that they did not receive any request from the EC. Furthermore, they have expressly confirmed that the works forming the subject-matter of the alleged request have been carried out, successfully and without delay. This corroborates the statements made by the Appellant in the ESPD and invalidates the reason for disqualification indicated by the EC. Attached as "Annex 1" please find a letter from JP Avax S.A. confirming the above.

4. Applicable Legislation and Case-Law

- 4.1 It is submitted that even if the DOC was authorised to disqualify the tenderer due to the failure to receive a reply from JP Avax S.A., the DOC must act in a proportionate manner.
- 4.2 The Tender Procedure is governed by the PPR. The PPR is the national law which transposes Directive 2014/24/EU (the "**Directive**").
- 4.3 Contracting authorities must act fairly in the course of public procurement; all tenderers must have an equal opportunity to compete for the contract. Article 18 (Principles of procurement) of the Directive and Regulation 39(1) of the PPR in fact provide that

"contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner." [emphasis added]

- 4.4 The principle of proportionality requires that a contracting authority adopts measures which are not excessive and unnecessary.
- 4.5 In *Tideland Signal V Commission*¹, the Court held:

"... the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous..." [emphasis added]

¹ T-211/02, paragrafu 39.

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ADVOCATES

4.6 In this case, the disqualification on the basis that one of the clients quoted by a tenderer did not reply to a request from the contracting authority is unjustified, disproportionate and unnecessary.

5. Conclusion

5.1 In view of the above, the Appellant respectfully requests the PCRB to:

- (i) cancel and revoke the proposed cancellation of the Tender Procedure;
- (ii) cancel and revoke the disqualification of the tender submitted by the Appellant, on the basis that it is technically compliant;
- (iii) order that the Appellant is re-integrated in the Tender Procedure.

5.2 Without prejudice to any further submissions that the Appellant may be allowed to make during the proceedings relating to the appeal forming the subject-matter of this Objection.

Yours faithfully,



Steve Decesare



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To: Whoever it may concern

Our Ref.: 2779-JP-BEZ-003
Pls. Contact: Mr. G. Rousopoulos
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E-Mail: grousopoulos@jp-avax.gr

Athens, 28 November 2017

Project: LNG Importation and Regasification Facility at the Delimara Power Plant Malta

Subject: Deep Water Quay tender for Transport Malta

Dear Mr Bezzina,

With reference to your email message received today on the a.m. subject, please note J&P AVAX S.A. response below:

1. JPA hereby confirms that to the best of our knowledge, JPA has not received any form of communication from Transport Malta and/or any other Maltese Authority in respect of the Deep-Water Quay tender.
2. I hereby confirm that your company BEZZINA has carried out works as J&P AVAX S.A. subcontractor at the **LNG Importation and Regasification Facility at the Delimara Power Plant in Malta**, with respect to structural/concrete and other works on the Project's marine infrastructure, for a value of exceeding Euro 1,500,000 (one million five hundred thousand) for the years 2015 and 2016. All works have been executed to J&P AVAX S.A. satisfaction and in a timely manner.

Best regards,

A handwritten signature in blue ink, appearing to be 'G. Rousopoulos', written over a horizontal line.

G. Rousopoulos
Project Manager

BOV

Bank of Valletta 4 GUZE D'AMATO STREET PAOLA PLA1240

22-736

Date: 01/12/17

Bank of Valletta p.l.c., Malta

Pay Public Contracts Review Board or order

Fifty thousand Euro Only

€ 50,000

BEZZINA MARITIME SERVICES LTD
FBC

Please do not write or mark below this line.

⑈002067⑈ 22⑈736⑈ 40018490361⑈

Public Contracts Review Board

Temporary Receipt

Date: 1/12/17

Received from BEZZINA MARITIME SERVICES the sum of € 50,000

in respect of Tender CT 2039/17

Cheque No: BOV 2067

Validity of receipt is subject to bank clearance, when payment is made by cheque

Antonella Alib

Signature