

## INFORMATION MEMORANDUM – PML 05/2015

### **Public service concession for the design, manufacture, delivery, installation, operation, training, maintenance and periodic upgrading of an automated single dose-system and smart cabinets for Pharmaceutical, Medical Materials and Surgical Devices for E-Prescribing and Medicines Administration (ePMA) to the Department of Health (Malta)**

#### 1. Introduction

- 1.1 Projects Malta Limited, in its capacity as administrator (hereinafter the “**Administrator**”), has taken note of the *obiter dictum* of the Concessions Review Board (hereinafter the “**Board**”) as set out in its decision dated 19 October, 2016 in respect of the complaint filed by SLPA Swisslog Italia Consortium (hereinafter the “**Complainant**”) against the Administrator (hereinafter the “**Decision**”).
- 1.2 The Administrator, notwithstanding that the complaint filed by the Complainant was rejected by the Board for various reasons as set out in the Decision, sought legal advice as to what further measures (if any) may be adopted in order to continue to ensure compliance with the principles of equal treatment, non-discrimination and transparency.
- 1.3 In view of the above, the Administrator hereby informs all bidders for the captioned public service concession of certain steps taken following the Decision and the procedure to be followed as from the date of this information memorandum.

#### 2. Relationship with Sumetzberger

- 2.1 The Administrator, following the allegations made by the Complainant in relation to the relationship between Ing. Sumetzberger GMBH (hereinafter “**Sumetzberger**”) and a member of Innovative Automated Solutions JV (hereinafter “**IAS JV**”), and following the Decision of the Board, sought to determine the existence of the said connection and any other connection, and the extent thereof.
- 2.2 Each of the two bidders was therefore requested to disclose any past and present relationships, direct or indirect, between:
  - (a) the relevant bidder, including any of its members, and the other bidder, including any of its members;
  - (b) the relevant bidder, including any of its members, and Sumetzberger.
- 2.3 Following receipt of responses from each bidder, it became apparent that each bidder (or a member thereof) had collaborated, in some shape or form, with the other bidder (or a member thereof) and with Sumetzberger in the past. It was also confirmed that there is no existing formal relationship between any of the bidders and Sumetzberger in relation to the captioned tender procedure.
- 2.4 The Administrator subsequently sought legal advice as to whether the connections disclosed are capable of distorting competition between the bidders and, if so, as to the measures to be adopted by the Administrator to respect the principles of equal treatment, non-discrimination and transparency, as such principles have been interpreted in the case-law of the Court of Justice of the European Union (the “**CJEU**”).

### 3. CJEU Case-Law and Relevant Legislation

- 3.1 The responses referred to in paragraph 2 above were subsequently forwarded to the Administrator's legal counsel who were requested to advise what measures, if any, must be adopted by the Administrator following the receipt of such responses with a view to remaining fully compliant with the principles of equal treatment, non-discrimination and transparency.
- 3.2 A review of the relevant CJEU case-law and legislation, including Directive 2014/23/EU<sup>1</sup> and the Concession Contract Regulations (S.L. 174.10)<sup>2</sup>, was therefore undertaken by the Administrator.
- 3.3 The Administrator notes that in terms of the Decision, the Board (in its obiter) referred the Administrator to the relevant provisions of Directives 2014/23EU as well as 2014/24EU<sup>3</sup>, particularly article 41 of the latter. In view of the fact that the captioned procurement process relates to the award of a public service concession, the provisions of Directive 2014/24EU were deemed not directly applicable.
- 3.4 In any event, Article 41 of Directive 2014/24EU regulates a scenario where a candidate or tenderer or an undertaking related thereto has advised the contracting authority or has otherwise been involved in the preparation of the procurement procedure.
- 3.5 In this case, the Administrator confirms that neither candidate / tenderer or undertaking relating thereto has advised or otherwise been involved in the preparation of the captioned procurement procedure. In fact, even if Directive 2014/24EU were applicable, and even if Sumetzberger were to be considered to be an undertaking related to one of the candidates (which is not the case here), Article 41 would still not be relevant in this case since Sumetzberger was not involved in the preparation of the captioned procurement procedure.
- 3.6 In view of the above, Article 41 of Directive 2014/24EU was deemed not applicable, both from a legal perspective (since it is Directive 2014/23EU which regulates the award of concessions) and from a factual perspective (since no candidate or party related thereto was involved / assisted the Administrator with the preparation of the captioned procurement procedure).
- 3.7 It was also noted that the captioned procurement procedure was for the award of a public service concession in relation to a new system and there is therefore no incumbent service provider / concessionaire for the service sought to be procured. Consequently, no candidate is the incumbent or has a relationship with the incumbent. CJEU case-law relating to incumbents is therefore considered not to be directly applicable.
- 3.8 As set out in the documentation governing the captioned procurement procedure, bidders may propose a solution which would require interfacing with the PTS however there was no obligation to interface with said PTS.

### 4. PTS

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<sup>1</sup> It is noted that this directive was transposed into Maltese law after the date on which the captioned tender procedure was initiated.

<sup>2</sup> It is noted that the Concession Contract Regulations were issued on 28<sup>th</sup> October 2016 and are not applicable to procedures issued prior to the publication of the said regulations, which procedures continue to be regulated by the laws which were previously in force.

<sup>3</sup> The Administrator notes that neither of the two Directives had been transposed at the time of issuing of the tender procedure forming the subject matter of this Information Memorandum.

- 4.1 The captioned procurement procedure is for the award of a service concession for, *inter alia*, the supply, installation and operation of an automated single dose-system and smart cabinets (hereinafter the “**System**”). The System is an innovative system which is intended to replace the current system used within Mater Dei, which system is decentralised, not automated and involves a manually operated inventory system and delivery system which is heavily dependent on human resources.
- 4.2 Sumetzberger is the supplier and maintenance provider of the pneumatic-tube system (hereinafter the “**PTS**”) at Mater Dei. The PTS is an infrastructure which is separate from the System and which is used to transport certain items within the said hospital.
- 4.3 The Administrator has, throughout the captioned procurement procedure, granted equal access to both candidates to personnel from Sumetzberger in order to respond to any queries which they may have in relation to the PTS, including through written questions and answers and liaison with Sumetzberger to broker meetings with candidates upon a request from the latter.
- 4.4 The Administrator has at all times ensured, through technical personnel of Mater Dei responsible for operating the PTS, that all information provided by Sumetzberger was to the best of their knowledge correct and accurate. This process was undertaken to ensure (to the extent possible) the veracity and accuracy of all information disclosed to bidders and to ensure that both bidders had access to the same information made available by the Administrator.
- 4.5 In view of the above, the Administrator shall be liaising with the bidders and Sumetzberger to co-ordinate a meeting / conference call wherein each bidder will be given an opportunity to request information from Sumetzberger. The Administrator shall also continue to request technical personnel of Mater Dei responsible for operating the PTS to vet and, to the extent possible and to the best of their knowledge, confirm that information disclosed by Sumetzberger is correct and accurate.

5. Extension

- 5.1 The Administrator hereby informs the bidders that an extension of the timetable relating to Stage 2B of the Competitive Dialogue is hereby being granted in order to afford the bidders the necessary time to request clarifications in relation to the PTS. A revised timetable is set out hereunder:

Competitive Dialogue (timetable) – Stage 2B (Detailed Solutions)	Date	Time
Deadline for request for any clarifications from the Administrator	Monday 6th February 2017	5.00 pm (CET)
Last date on which clarifications are issued by the Administrator	Monday 20th February 2017	
Deadline for submission of detailed solutions	Friday 3rd March 2017	10.00 am (CET)
Site Visit at the Shortlisted Candidates’ sites	Tuesday 14th – Friday 17th March 2017	

Dialogue meetings	Monday 20th – Friday 24th March 2017	
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Best and Final Offer (timetable) – Stage 3	Date	Time
Publication of document inviting the submission of the Best and Final Offer	Tuesday 2nd May 2017	
Deadline for submission of Best and Final Offer	Monday 3rd July 2017	10.00 am (CET)
Notification of award	Monday 31st July 2017	

John Valenzia  
Projects Malta Ltd (Administrator)

Date: 27<sup>th</sup> January 2017