

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1655 – QLC-CPP 49/21 – Tender for the Provision of Health Attendants to Carry Out Cleaning and Maintenance of Public Conveniences in an Environmentally Friendly Manner in the Locality of Qrendi**

22<sup>nd</sup> March 2022

The Board,

Having noted the letter of objection filed by Dr Jonathan Mintoff and Dr Larry Formosa acting for and on behalf of Mr Alistair Bezzina, (hereinafter referred to as the appellant) filed on the 1<sup>st</sup> September 2021;

Having also noted the letter of reply filed by Ms Stephania Grixti acting for the Qrendi Local Council (hereinafter referred to as the Contracting Authority) filed on the 10<sup>th</sup> September 2021;

Having heard and evaluated the testimony of the witness Mr Kenneth Brincat (Member of the Evaluation Committee) as summoned by Dr Jonathan Mintoff acting for Mr Alistair Bezzina;

Having heard and evaluated the testimony of the witness Mr Christian Gravina (Member of the Evaluation Committee) as summoned by Dr Tiffany Attard acting for the Qrendi Local Council;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 16<sup>th</sup> November 2021 and 15<sup>th</sup> March 2022 hereunder-reproduced;

#### **Minutes**

#### **Case 1655—QLC-CPP 49/21. Tender for the Provision of Health Attendants to carry out Cleaning and Maintenance of Public Conveniences in an Environmentally Friendly Manner in the Locality of Qrendi**

The tender was published on the May 2021 and the closing date was the 1 June 2021. The value of the tender excluding VAT was € 21 ,000.

On the 1<sup>st</sup> September 2021 Mr Alistair Bezzina filed an appeal against the Qrendi Local Council as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be technically not compliant. A deposit of € 400 was paid.

There were six (6) bidders.

On 16th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant — Mr Alistair Bezzina**

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative

**Contracting Authority — Qrendi Local Council**

Dr Tiffany Attard	Legal Representative
Mr Chris Falzon	Representative
Mr David Schembri	Representative
Ms Stephania Grixti	Representative
Mr Christian Gravina	Representative
Mr Adrian Mifsud	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Alistair Bezzina claimed that confidential information had been released by the Contracting Authority. Under Public Procurement Regulations there was a relationship based on trust and the maintaining of confidential

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information came under that. Reference was made to the Court of Appeal Case Allclean Services Ltd vs Director of Contracts which dealt precisely with bidders being treated differently and the Authority's actions defy logic in the way they treated confidential information both regarding employees and the type and brand of products used by the Appellant.

Dr Tiffany Attard Legal Representative for the Qrendi Local Council said that bidder's appeal was on the merits of the case. If the Authority had erred in publishing documents it does not make sense to then request divulging of further documents. The document referred to, which is a screen shot of an employees' payslip does not seem to be credible as the bank details are incorrect and in any case that is not a trade secret. There are omissions in Appellant's bid and that is what the appeal should be about.

Dr Mintoff replied by stating that the Authorities submit to the PCRB all documents relating to a case once an appeal is filed and therefore it was totally unnecessary in this Case for the Authority to supply further information to other parties.

Dr Attard said it was unfortunate that the Authority decided to publish which she would not have recommended.

The Chairman asked for a short recess to enable the Board to consider the points made.

On resumption the Chairman stated that the Board feels that since the tender was on BPQR basis the Appellant is entitled to information regarding the points awarded on the technical part and on the financial award and therefore they should be given the evaluation grid. The Board therefore concedes a deferment of ten days for the Authority to submit this information to the Appellant and ten days

after that for the latter to submit further submissions should he so wish. He then thanked the parties for their submissions and deferred the case to a future date.

End of Minutes

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## **SECOND HEARING**

On the 15<sup>th</sup> March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider further submissions on this appeal.

The attendance for this public hearing was as follows:

### **Appellant – Mr Alistair Bezzina**

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative

### **Contracting Authority – Qrendi Local Council**

Dr Tiffany Attard	Legal Representative
Mr Christian Gravina	Member Evaluation Committee
Mr Kenneth Brincat	Member Evaluation Committee
Mr David M Schembri	Representative
Ms Stephania Grixti	Representative
Mr Chris Falzon	Representative

### **Preferred Bidder – Mr Christopher Bonello**

Dr Alexander Schembri	Legal Representative
Mr Christopher Bonello	Representative.

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He reminded the parties that the second hearing followed up on the earlier Board directive to have the evaluation grid provided to Appellant. He then invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Alistair Bezzina started by requesting copies of the preferred bidder's submissions. He stated that this was in line with the decision of the Court of Appeal, Case 269/2021/1 (para 19) which stated that the appellant was entitled to see the preferred bidder's submissions and the argument opposing this was not very convincing as the documents were disclosed in open court. The objector in this Case is entitled to the information which should be given to all parties to maintain a level playing field.

Dr Tiffany Attard Legal Representative for the Qrendi Local Council said that the only documents disclosed in this case was a necessity done to prove that the Appellant's offer was not preferred as documents were missing.

Dr Alexander Schembri Legal Representative for Mr Christopher Bonello said that the cause of this appeal is the fact that Appellant was not technically compliant. This was contested in a mere one paragraph in the letter of objection but the whole contest revolves on this point. Appellant must decide on what basis he is appealing, namely the missing documents.

Dr Attard agreed that the appeal must be on the merits of the Case not on peripheral arguments or issues.

Dr Mintoff said that the appeal included access to the preferred bidder's documents. Once the Authority decided to disclose certain documents it lost the right to withhold others – the Authority itself accepts that the lack of documents disadvantaged Appellant.

The Chairman at this stage said that there will be a short recess to enable the Board to consider the submissions made in the light of the arguments put forward.

On resumption the Chairman stated that the Board had considered the submissions made. The reference by Dr Mintoff to the Court of Appeal Case states that the operative words in the Court sentence is that the information should only be given in an 'admissible offer'. The Board does not feel that it has enough information yet that Appellant's offer is admissible so it cannot decide thereon. Regulation 272 of the Public Procurement Regulations was referred to, and the Chairman stated this had been fulfilled when Appellant was given the copy of the Evaluation Grid – also the General Rules Governing Tenders, paragraphs 22.1 and 22.1 make clear what the Appellant are allowed to be provided with. Based on the above the appeal will therefore be heard on its merits.

Dr Mintoff requested that it be recorded verbatim that 'Dr Mintoff on behalf of the objector whilst referring to the interim decision at this hearing hereby reserves the right to appeal this decision at a later stage'.

He then requested the testimony of a witness from the Tender Evaluation Committee (TEC).

Mr Kenneth Brincat (195676M) called as a witness by Appellant testified on oath that he was employed as a Chief Executive Officer. The reason why Appellant's bid was not compliant was that information on certain cleaning materials was missing by failure to provide technical literature and by the lack of some form of agreement from the bank indicating that employees would be paid by direct credit. Both points were mandatory and hence points were deducted. Referred to page 12 of the tender document witness agreed that the Appellant's bid indicated that the materials carried Eco labels which eliminated the need for technical literature and that this satisfied the tender requirements.

Regarding the bank agreement, according to the witness, Appellant submitted a screen shot of a bank transfer and stated that this was not what the tender requested. Referred to the relevant part in page 14 of the tender witness stated that what the TEC expected was some form of agreement from the Bank conforming with the tender and not a copy of a credit transfer. On the basis of the document provided the TEC did not feel the need to clarify as it was obvious it was not what required.

In reply to a question from Dr Attard witness said that the IBAN number on the screen shot provided was not a valid one and it did not resemble the usual format of a wages credit transfer.

Questioned by Dr Schembri witness stated that there was no bank input in the screen shot provided, with no reference to an existing agreement with the bank, no indication of any charges and the type of document that could be mocked up easily by anyone.

Witness finally told Dr Mintoff that he was unable to answer if the IBAN was required in all cases.

Mr Christian Gravina ((584389M) called as a witness by the Contracting Authority testified on oath that he was an Accountant and Auditor by profession and was a member of the Evaluation Committee. He said that the screen shot showed a normal bank transfer not an automated transfer on which banks normally levy a charge. The transaction does not indicate that this was a direct credit transfer which is normally indicated as a Bulk File Consolidated entry. He has commercial experience of this through his profession.

In reply to questions from Dr Mintoff witness said that the evidence of a form of bank agreement was mandatory in the tender, and what the TEC expected was evidence of the existence of regular credit transfers. What was offered was just a single isolated bank transfer. He could not say if the document provided by bidder could have been an old document as his testimony was based on first-hand experience which does not vary from client to client. The requirement which was mandatory was not compliant.

Questioned by Dr Attard witness was referred to page 14 of the tender dossier to which witness stated that the document provided gave no indication that the employee would not bear any charges on the transaction as required in that part of the tender.

Questioned by Dr Schembri witness stated that the aim of the tender was to ensure that no charges fall on the employee and that wages were paid on time this was all combined to ensure that the process of individual payments is by the bank not by the employer. The sample screen shot submitted could be produced by anyone.

In reply to a question by Dr Mintoff witness said that nowhere is there any indication of who is bearing the cost of the transfer.

This concluded the testimonies.

Dr Mintoff said that the offer was rejected on two points, the first of which had been easily clarified through the agreement that Appellant's products were Eco labelled. As regard the credit transfer one must consider the principle of self-limitation imposed on the Authority and one cannot widen the basis of that by relating one's personal experience to what was requested in the tender. The credit transfer was required merely to ensure that no precarious wages were being paid – there was no need for proof of who bore the charges or whether they were being paid by the employee. The TEC must limit themselves to the tender document and in past submissions the same document as produced here has been accepted as compliant – tender only asked for examples. If the TEC were not satisfied with the sample provided they had the possibility of clarification under Note 3 bearing in mind the *dictum* in CJEU Case 599/10 that a tender should not be rejected because of lack of clarity. Nowhere does the sample provided indicate that the charges are being suffered by the beneficiary and there is

no need for an IBAN on a local transfer and this does not necessarily mean that the offer was not conforming. If Appellant conforms then he is entitled to the preferred bidder's submissions. Appellant cannot be penalised as he submitted all documents.

Dr Schembri said that he leaves the decision regarding the Eco labelling to the Board. As regard the bank transfer the tender makes it clear that the agreement is required to ensure that no precarious wages are being paid and there are no charges borne by the employees. The intention behind such an agreement is to ensure that it is the bank that processes the wages and it is not up to the employer to manipulate. The tender specifies that it requests proof that payment is by credit transfer with no charges and it is up to the Appellant to prove it – not the other way around. All Appellant did was to exhibit a manual transfer which can be produced by anyone with no control on the amount, date of payment, charges etc. The document offered is merely a manual payment.

Dr Attard concluded by saying that the tender is clear on what was required – the document provided was not sufficient or valid and since it was mandatory the offer fails. The Appellant's offer was not the cheapest and the same approach was adopted with the other defaulting submission.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 16<sup>th</sup> November 2021 and 15<sup>th</sup> March 2022.

Having noted the objection filed by Mr Alistair Bezzina (hereinafter referred to as the Appellant) on 1<sup>st</sup> September 2021, refers to the claims made by the same Appellant with regards to the tender of reference QLC-CPP 49/21 listed as case No. 1655 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Tiffany Attard

Appearing for the Preferred Bidder: Dr Alexander Schembri

Whereby, the Appellant contends that:

a) ***The Mandatory Criteria:***

That the Objector's bid was deemed non-compliant on two basis:

- i. B5 - 4 criteria - technical literature of the window cleaner (sic) to show compliance with GPP criteria; and
- ii. C2 - 2 criteria - written communication with Bank giving enough proof that the direct credit system is in place;

That this conclusion is completely unfounded and this for the following reasons:

- i. The Objector has in fact submitted the information requested concerning the window cleaner (sic). From the visual submitted by the Objector the EU Ecolabel is clearly visible. According to the tender dossier this is sufficient proof of compliance with the GPP criteria and thus satisfies the information demanded.
- ii. Sufficient proof has been also submitted to show that a direct credit system is in place.

The objector humbly submits to this Honourable Board, that he indeed provided the said documentation and/ or visuals with his submission.

Without prejudice to the above, it must be stressed that, at law, the technical criteria for eliminating a bid must be objective and cannot be rooted in any form of subjectivity. A distinction thus had to be made between a failure to submit a document and an unsatisfactory reply: a failure to submit a document is an objective fact that could (in the right circumstances) lead to the elimination of a tender for lack of administrative compliance; whether the contents of the document are satisfactory or not and to what extent they are satisfactory is a subjective value judgement that cannot lead to the elimination of a tender but must, if anything, be reflected in the marks given to that bid when determining the most advantageous technical offers.

Thus, the evaluation board should have sought the relevant clarification on the submitted information from the Objector, this within the parameters of Clause 5 (note 3) of the Tender Document.

In this case, Clause 5 - Note 3 it establishes how for certain lack of clarity, the contracting authority shall retain (i.e. 'save') a seemingly unclear submittal by requesting a clarification of the content of the tender.

In this case, the Contracting Authority and/ or Evaluation Committee did not even seek an Evaluation Clarification from the Objector regarding such matter and proceeded with a rejection of the objector's offer.

b) **Irregular post-evaluation procedure**

The objector refers to Procurement Policy Notes (PPN) by the Department of Contracts [<https://contracts.gov.mt/en/ProcurementPolicyNotes/Pages/ProcurementPolicyNotes.aspx>]

which every bidder and a Contracting Authority is bound to observe and adhere to, more specifically PPN #37 addressed to Contracting Authorities -

The said policy note states the following:-

*“The purpose of this Procurement Policy Note is to remind Contracting Authorities that this procedure must be adhered to whenever a procurement call takes place, In addition, this policy aims to standardise and facilitate the formulation of the letters to be sent to the un/successful Economic Operators who submitted a bid in respect of a procurement process.”*

Furthermore, the said PPN also provides the template letters that should be utilised to unsuccessful bidders (including those with a non-technically compliant offer). The said letter, necessitates that such unsuccessful bidders (having a non-technically compliant offer) should be informed of the ranking, a breakdown of the Technical Score, Financial Score, and overall score.

None of these were provided to the objector. This information should always be further complemented with the evaluation grid, and the extracts from the evaluation report.

Therefore, in this case, the Contracting Authority, did not abide by the above, and was very economical with the information provided. This has caused great prejudice to the objector, as will be further explained during the hearing of the case.

c) **Access to relevant documentation**

With every objection lodged it is standard practice for this Honourable Board to request the Contracting Authority to provide the Board with all relevant information and documentation, including the evaluation report and the evaluation grid in connection with a filed objection.

It is pertinent to mention that an evaluation grid and an evaluation report should have been drawn up during the evaluation of this procurement process. Thus, as a minimum these should be provided to each and every bidder, to be in a better position to determine and assess the quality of their offer and determine whether to file an objection.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 10<sup>th</sup> September 2021 and its verbal submission during the virtual hearings held on 16<sup>th</sup> November 2021 and 15<sup>th</sup> March 2022, in that:

a) **The Mandatory Criteria:**

During the evaluation process, the Evaluation Committee noted the following shortcomings in Mr Bezzina's bid:



1. In point B5.4 the bidder did not submit technical literature of the window cleaner to show compliance with GPP criteria;
2. In point C2.2 the bidder did not submit written communication with Bank to give proof enough that direct credit system is in place.

As can be attested, Mr Bezzina did not provide any information regarding technical literature of the window cleaning product. In the ePPS system, bidders were requested to:

*“B5 - 4: Cleaning Products - Availability and Compliance of cleaning products to be used by the Public Convenience operator/s. Economic operators are to provide a List of Products to be used (including name of product), accompanied by proof of compliance in relation to GPP requirements, in line with Article 4.2.4.12 of the Terms of Reference.”*

Since Section B5 - Attire, Equipment and Cleaning Products (Mandatory Criteria) was mandatory, the Evaluation Committee could not ask for a rectification since the window cleaning product was missing.

With reference to Section C2 - Employment Conditions, bidders were asked to provide the following for C2.2:

The Economic Operator is to submit proof indicating the following:

*“Wages are paid through credit transfer - costs of which are borne by the economic operator (mandatory). Proof is to be provided e.g. Agreement with a Bank or Written communication between bidder and Bank confirming direct credit settlement of wages.”*

Mr Bezzina did not submit an agreement with a Bank or written communication between himself and a Bank to confirm direct credit settlement of wages. Mr Bezzina submitted a screenshot of what is supposed to be a bank transfer from an "a/c BRC (EUR)" account to another which is supposed to be of one of his employees. One can also lament about the veracity of the amount transferred for the following reason:

*“Beneficiary account type: Not a valid IBAN. If you are paying a non-BOV bank you may incur additional charges.”*

Since point C2.2 was mandatory, the Evaluation Committee could not ask for a rectification or otherwise, since the requested documentation was not provided.

In both cases, mandatory criteria in the Tenderer's Technical Offer is a Note 3 criteria.

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, will consider Appellant's grievances.

Initially this Board will refer and analyse the requests made by the Appellant for it to be provided with copies of their 'Evaluation Grid' and the 'Preferred Bidder's' submissions.

- a) **Evaluation Grid** – This Board will immediately refer to the interim decision provided by it in the 1<sup>st</sup> hearing of 16<sup>th</sup> November 2021, whereby it was stated *“On resumption the Chairman stated that the Board feels that since the tender was on BPQR basis the Appellant is entitled to information regarding the points awarded on the technical part and on the financial award and therefore they should be given the evaluation grid. The Board therefore concedes a deferment of ten days for the Authority to submit this information to the Appellant and ten days after that for the latter to submit further submissions should be so wish. He then thanked the parties for their submissions and deferred the case to a future date.”* This interim decision was duly accepted by the Contracting Authority and the necessary documentation passed on to the Appellant.
- b) **Preferred Bidder's submissions** – The Appellant refers to Court of Appeal Case 269/2021/1 whereby in paragraph 19 it was stated; *“L-awtorita kontraenti tgħid illi dak it-tagħrif hu 'kunfidenzjali' u jekk jinkixef ikun 'detrimentali għall-kompetizzjoni'. Fil-fatt iżda l-kundizzjonijiet tal-proposti magħzula llum jinsabu fl-atti tal-kawża u għalhekk ma jidbix wisq konvincenti l-argument li huma kunfidenzjali. F'kull każ, il-ligi trid illi min jagħmel offerta ammissibli, bhal ma għamlet l-appellanti, għandu jingħata taqħrif dvar 'il-vantaggi relattivi tal-offerta magħzula' meta mqabbla ma tiegħu, jekk jitlob dak it-tagħrif, kif talbitu fi żmien utli l-appellanti”.* This Board notes that the Court of Appeal made reference to an “admissible offer” (“offerta ammissibli”) and limited the information that is to be provided. The rejection letter issued by the Contracting Authority in this specific case mentioned two instances where the bid of the Appellant was technically non-compliant. Therefore, this Board, deems fit to continue analysing this case on its merits. Moreover, this Board refers to the interim decision provided by it in the 2<sup>nd</sup> hearing of the 17<sup>th</sup> March 2022, whereby it was stated *“On resumption the Chairman stated that the Board had considered the submissions made. The reference by Dr Mintoff to the Court of Appeal Case states that the operative words in the Court sentence is that the information should only be given in an 'admissible offer'. The Board does not feel that it has enough information yet that Appellant's offer is admissible so it cannot decide thereon. Regulation 272 of the Public Procurement Regulations was referred to , and the Chairman stated this had been fulfilled when Appellant was given the copy of the Evaluation Grid – also the General Rules Governing Tenders, paragraphs 22.1 and 22.1 make clear what the Appellant are allowed to be provided with. Based on the above the appeal will therefore be heard on its merits”*

Basing on the two interim decisions above, this Board will now delve into the merits of the case, i.e. the Mandatory Criteria.

- a) **Criteria B5 – 4** – Reference is made to the testimony under oath of Mr Kenneth Brincat whereby he confirmed and agreed that the Appellant’s bid indicated that the materials carried Eco labels which eliminated the need for technical literature and that this satisfied the tender requirements.

This Board hence upholds Appellant’s grievances in relation to B5 – 4 criteria.

**b) Criteria C2 – 2 –**

- i. The Tender Dossier for this particular criteria stated *“Wages are paid through credit transfer – cost of which are borne by the economic operator (mandatory). Proof is to be provided e.g. Agreement with a Bank or Written communication between bidder and Bank confirm direct credit settlement of wages.”*
- ii. This criteria, the Board opines, can be segregated into 3 separate requirements, i.e. 1) paid through credit transfer, 2) cost of which are borne by the economic operator (mandatory) and 3) Proof is to be provided. The examples are what they are, examples, i.e. not an exhaustive list.
- iii. The Board opines that the submission of the Appellant, in this regard, is a ‘normal bank transfer and not an automated transfer. This also as confirmed from the testimony under oath of Accountant and Auditor, Mr Christian Gravina, Member of the Evaluation Committee.
- iv. This Board further opines that such a submission would satisfy the first ‘separate requirement above’, i.e. paid through credit transfer, but does not satisfy the other 2 separate requirements. By producing / submitting a ‘normal’ bank transfer, there is no guarantee that all the costs would be borne by the economic operator. This Board also refers to the fact that “proof is to be provided”, hence it was the responsibility of the economic operator to provide proof that all the charges are to be borne by the economic operator, i.e. no bank charges to be borne by the employees. The Appellant’s submission in this regard was ‘silent’, it provided no information.
- v. In conclusion, being that not all of the requirements were satisfied by the Appellant, and bearing in mind that this criteria was of a ‘mandatory’ nature, this Board agrees with the assessment provided by the Evaluation Committee and does not uphold the Appellant’s grievance for this particular criteria.

Finally, this Board will again refer to the request by the Appellant to be provided with the Preferred Bidder’s submissions (as per point above). Since, in conclusion, the Appellant’s bid is still to be deemed technically non-compliant, this Board is against providing the Appellant with such documentation apart from that documentation which is allowed in accordance with regulation 272 of the Public Procurement Regulations.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds Appellant's grievances in relation to the 'Evaluation Grid' and 'Criteria B5 – 4',
- b) Does not uphold Appellant's grievances in relation to the 'Preferred Bidder's submission' and 'Criteria C2 – 2', therefore Appellant's bid is still to be deemed technically non-compliant,
- c) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- d) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Dr Charles Cassar**  
**Member**

**Dr Vincent Micallef**  
**Member**