

PUBLIC CONTRACTS REVIEW BOARD

Case 1673 – CT2007/2021 – Tender for the Provision of a Service for the Non-Emergency Transport for the Ministry for Health including the use of Low Emission Vehicles

31st January 2022

The Board,

Having noted the letter of objection filed by Dr Matthew Paris acting for and on behalf of South Lease Limited, (hereinafter referred to as the appellant) filed on the 15th November 2021;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 25th November 2021;

Having also noted the letter of reply filed by Dr Massimo Vella for and on behalf of Vella Zammit McKeon Advocates acting for the Health JV (hereinafter referred to as the Preferred Bidder) filed on the 24th November 2021;

Having heard and evaluated the testimony of the witness Mr Shaun Camilleri (Chairperson of the Evaluation Committee) as summoned by Dr Adrian Delia acting for South Lease Limited;

Having heard and evaluated the testimony of the witness Mr Etienne Bartolo (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for South Lease Limited;

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 sitting of the 13th January 2022 hereunder-reproduced;

Minutes

Case 1673 – CT 2007/2021– Tender for the Provision of a Service for the Non-Emergency Transport for the Ministry of Health including use of Low Emission Vehicles

The tender was issued on the 20th January 2021 and the closing date was the 23rd February 2021. The value of the tender, excluding VAT, was € 12,807,537.

On the 15th November 2021 South Lease Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered to be technically not compliant.

A deposit of € 50,000 was paid.

There were five (5) bidders and six (6) bids

On the 13th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – South Lease Ltd

Dr Adrian Delia	Legal Representative
Dr Ronald Aquilina	Legal Representative
Dr Matthew Paris	Legal Representative
Mr Joseph Scicluna	Representative
Mr Gordon Zammit	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Shaun Camilleri	Chairperson Evaluation Committee
Ms Miriam Cassar	Secretary Evaluation Committee
Ms Naomi Cachia	Member Evaluation Committee
Mr Etienne Bartolo	Member Evaluation Committee
Mr Keith Magro	Member Evaluation Committee

Preferred Bidder – Health JV

Dr Massimo Vella	Legal Representative
------------------	----------------------

Department of Contracts

Dr Kristina Busuttil	Legal 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 Adrian Delia Legal Representative for South Lease Ltd stated that the appeal was based on two points – firstly the request of the Contracting Authority on 27th July 2021 to the Appellant to resubmit the literature list without indicating any shortcomings but with a request to rectify. The first point to stress is that at that stage there were no shortcomings pointed out and Appellant was compliant as they had self-declared that they met the terms of the tender. South Lease did not rectify any submissions but simply clarified the literature list. If the CPSU requested rectification then that request was irregular and is an attempt at

entrapment of the bidder. The document submitted clearly indicated an emission average of 175g/km.

In dealing with the second point of the appeal Dr Delia directed the Board's attention to the letter of the 16th August 2021 from the Department of Contracts (Doc 5 in the letter of objection) indicating the composition of the Health Joint Venture (JV) made up of three companies and one individual. According to Appellant each member of the JV had to confirm financial standing. The reply by the CPSU on the 25th November confirms that there were some doubts about the compliance of the JV and advice thereon was sought. Dr Massimo Vella's letter on behalf of the preferred bidder, on page 4, refers to four companies whereas in fact there was one individual in the JV and therefore it certainly does not meet the parameters required regarding financial standing. It is clear that there are doubts on whether the financial requirements were met.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit referred to the letter from the Authority of the 27th July 2021 giving the Appellant the opportunity to present a legible copy of a submitted document which was unreadable. Instead the Appellant altered the technical offer form and submitted fresh documents as the original offer was incorrect. Since the technical offer falls within Note 3 restrictions no rectification was allowed. The Authority did not request Appellant to rectify but merely to re-submit a document which could not be read as the print was unclear and too small. Instead Appellant submitted a copy of the original technical offer with a handwritten alteration changing a figure of 196 to 176g/km when the tender asked for an emission of 175g/km and just signed by a single individual not as a company representative. At submission stage South Lease was already not compliant.

After seeking advice on the make up of the JV it was confirmed that they were compliant and met the terms of the tender.

Dr Massimo Vella Legal Representative for Health JV said that on the first claim by Appellant it was clear that the original submission was changed from 196 to 176 g/km when even that was insufficient as the tender required a figure of 175g/km.

As regard the claim of non-compliance by the preferred bidder this is just a case of pure allegations. If one referred to the letter from BOV dated 16th February 2021 it is clear that the financial standing of the JV is confirmed. Reference was made to PCRB Case No 1051-Environment Management Planning Design vs Foundation for Medical Services wherein on similar grounds to this case the Board held that the mode and source of the same facility is not an issue. Appellant did not have access to documents on this matter and therefore the arguments put forward are naive.

Mr Shaun Camilleri (44978M) called as a witness by Appellant testified on oath that he was the Chairperson of the Technical Evaluation Committee (TEC). He stated that there were five bidders and six bids on this tender, detailed by name and how the evaluation process evolved.

After a round of clarifications only two bidders were left in the contest. The technical evaluation followed and a clarification was sent to Appellant as one document was not readable due to a low scan process.

Witness agreed that in the self-declaration South Lease had indicated an emission standard figure of 175g/km but the technical offer indicated that figure as being 196 and on clarification a third figure of 176 appeared. Because of the anomaly between the self-declaration figure and the technical offer figure a clarification was sought and at this stage the figure of 196 was altered to 176. There was divergence between the documents and since the technical details are mandatory failure to comply meant disqualification. The self-declaration taken in isolation was compliant but the Appellant submitted fresh documents in reply to a clarification, instead of what was requested, and thus violated Note 3. The request to clarify and the wording thereof was approved by the DoC but the salient point remains that the technical offer was amended.

At this stage Dr Delia asked a question which the Authority considered that a possible answer thereto could be of a commercially sensitive nature and to which both the Authority and the Preferred Bidder objected.

The Chairman directed that there would be a short recess to enable the Board to consider these objections.

On resumption the Chairman stated that the Board had decided that witness is not obliged to reply to the last question from Dr Delia or indeed any other question of a commercially sensitive nature. He also stated that the Board requests copies of the entire documents submitted by South Lease in reply to the clarification note of the 27th July 2021.

Dr Delia requested that it be recorded that whilst South Lease understands the Board's reasoning on this point nonetheless he still maintains that the information he was seeking is not commercially sensitive as the vehicles in question are to be used by the public and the information sought was solely to offer the Board the opportunity of comparing the two bids to enable them to gauge the inconsistency of the evaluation.

Dr Vella said that Health JV are compliant with the tender requirements on all counts and not as suggested by Appellant. However the questions by Dr Delia were moving away from the parameters of the appeal and the Board is correct in not allowing questions of this nature.

Dr Delia at this stage reminded the witness that the Board had requested copy of the documents of the 29th January 2021.

Witness replied that the Chairman had only requested documents dated the 27th July 2021.

Dr Delia replied that he was referring to the document dated 29th January 2021 from Engineer Aloisio confirming that the vehicles as modified meet the tender requirements. Witness

confirmed receipt of this document but pointed out that it was excluded as it came under the provision of Note 3 and was thus not acceptable.

Questioned by Dr Camilleri witness confirmed that the tender requested that tail lift vehicles average emission must not exceed 175g/km and the offer in Appellant's technical offer stated this as 196 and was subsequently changed to 176 on the same form. He also confirmed that the South Lease document dated 20th February 2021 signed by Mr Joseph Scicluna was not corroborated by any competent authority.

In reply to questions from Dr Vella, witness confirmed that the technical offer comes under Note 3, and that in the revised offer Appellant had crossed out the figure 196 and substituted it by 176 in handwritten form.

Mr Etienne Bartolo (383977M) called as a witness by Appellant testified on oath that he was a member of the TEC which consisted of three evaluators, a Chairman and a Secretary. He had previous evaluation experience. He confirmed that all the component members of the JV (which he listed) met the financial suitability requested in the tender. Witness confirmed that he had sought confirmation from the Bank on the financial standing of the JV and had also requested confirmation that the letter was acceptable in terms of the tender.

Dr Vella intervened at this stage to state that to avoid any misunderstanding he would read the salient point from the letter of the bank, which *inter-alia* states "to cover the credit facilities of all members/companies forming the Joint Venture". A copy of the letter was tabled with the records of the Board.

Proceeding with his testimony Mr Bartolo said that the letter indicates that individual members were covered and this was confirmed in the advice he received. He stated that there was no direct proof that a certain Leone Grech had individual credit facilities but his name was included in the BOV letter.

Regarding the requirement of cumulative experience mentioned in page 6 of the tender, witness stated that no documentary evidence was requested as the Authority relied on the declarations of each bidder in this respect.

According to the witness, Clause 3.2.3 of the technical offer requested an emission standard of 175g/km. The Appellant's submission showed different values in this regard – verification was therefore required. Witness agreed that the vehicles were declared as Euro VI but verification was required due to the different emission standards declared by Appellant and no clear indication that he was complying with the stated emission standard of 175.

Dr Camilleri objected to the fact that Dr Delia was asking questions of a direct nature to the witness summoned by him and was also making statements rather than asking questions.

In reply to questions posed by Dr Camilleri witness re-iterated that in regards to the credit facilities the letter from the Bank confirms that all members of the JV were covered.

Witness agreed, in reply to Dr Vella's questions, that the original technical offer stated the emissions at 196g/km, the self-declaration stated them at 175, and the later amendment to the technical offer showed them at 176, which even then is still incorrect and not what the tender requested. The self-declaration was not backed by any technical literature.

This was the end of the testimonies.

Dr Delia in his final submissions said that Health JV did not meet the financial and experience criteria laid down in the tender, and this had been confirmed by witnesses and by the letter from BOV quoted by Dr Vella. The ability of one member to meet the financial requirements does not cover the rest. Appellant met the financial standing requirements whilst JV does not. The Authority simply relied on the self-declaration that the necessary experience existed.

In a PCRB case also regarding an ambulance tender it was held that self-declaration that the vehicles were Euro VI without certification was found to be sufficient – unlike the exclusion of Appellant in this case. A so called 'anomaly' was used as a lever to eliminate Appellant when proportionality principles require transparency and not looking for a needle in a haystack to eliminate one of the parties. There was no deficiency in South Lease submissions either in financial or technical terms. Reference was made to past cases decided by the PCRB namely Computer Domain and CT Training regarding the importance of self-declarations and which indicate that an anomaly does not cancel or override it. If Appellant provided too much information then surely the right course would have been to discard the excessive part but not to disqualify. By creating an anomaly the Authority used different measures in their assessments.

Dr Vella stated that as a fact the tender emissions standards could not exceed an average of 175g/km. Appellant's technical offer indicated a figure of 196 and a self-declaration of 175 leading to a clarification on an unreadable document which in turn lead to a figure of 176 in amended documents and a figure of 165 in additional documents. The reason for this anomaly or discrepancy was not explained but it does not conform with the tender or the requirements of Note 3 which is clear enough. Proportionality only applies in '*de minimis*' cases with a caveat that it does not change on offer. Appellant was here changing the goal posts not clarifying a point.

As regard the financial offer, continued Dr Vella, the tender requested a statement from a bank that the credit facilities must cover all members forming the consortium/joint venture. It does not state that each member must have the facility. The letter from the bank states that three members of the JV have the facility thus covering all JV members – this is in line with the tender requirements and it would not make sense to expect each member of the JV to have the credit facility individually. The interpretation of the tender on the statement 'must cover all members' requires that the facility covers all members. In the decision in the Case

1051 - Environmental Management previously referred to, the wording was similar to the present tender and the PCRB on similar arguments declared that the mode and source is not an issue so long as the consortium as a whole is covered. It is clear that the € 700,000 guarantee is required only once and so long as it is offered it is sufficient to meet the tender requirements.

Dr Camilleri referred the Board to the submissions made in the Authority's letter of reply and stressed the points made therein. The Appellant seems to be implying that the decision to disqualify is directed against it. The evaluation was carried out impartially and allegations are totally out of place. Appellant is claiming that the self-declaration should be considered in isolation which does not make sense as a tender is not considered on a sole document. Figures of emissions of 196, 176,175 and finally 165 feature in Appellant's submission and when they finally realised that certification was required they produced a certificate from Engineer Aloisio. Technical information falls under Note 3 and new information is not allowed. One wonders why the Appellant presented certification but when they realised that they submitted it late, claimed that it was not required? The TEC faced with all these changes could not be expected not to disqualify the bid.

Proportionality does not change the terms of a tender requirements but on the other hand self- limitation binds the TEC. On the claim that there was no compliance by the preferred bidder on the financial aspect, no proof was provided that the Bank guarantee does not meet the terms of the tender. It was clearly specified by Dr Vella that the Bank's letter confirms that all members of the JV are covered and the Board should accept the arguments of the preferred bidder.

Dr Delia commented that the PCRB Case quoted earlier regarding the Bank guarantee was not applicable in this Case as the parameters there were different.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 13th January 2022.

Having noted the objection filed by South Lease Limited (hereinafter referred to as the Appellant) on 15th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2007/2021 listed as case No. 1673 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Delia, Dr Ronald Aquilina &
Dr Matthew Paris

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Massimo Vella

Whereby, the Appellant contends that:

- a) **Offer is cheapest technically compliant** - The rejection letter, inter alia states that,
“Therefore, the emission standards for the tail lift vans remains in excess of what is required as per tender requirements (175g/km), and due to this, the offer is not technically compliant”

The appellant contends that this is factually incorrect as the written submissions clearly stated and confirmed that emission standards are within the requested range, both in the original submission and reconfirmed through supplementary documentation about request. The contracting authority has been made fully aware *ab initio* that the vehicles on offer, upon modification, will satisfy in its entirety the tender specification;

- b) **Appellant company asked to resubmit and rectify** - By virtue of letter dated 27th July 2021, the Evaluation Committee stated the following:

“In line with Clause 5 - Selection and Award Requirements, you are being requested to resubmit the attachments requested in Section [C] Specifications, point [iv]: Literature as per Form marked 'Literature List' Kindly resubmit in a clear and readable manner. You are hereby being given the opportunity to rectify these shortcomings by noon of Tuesday 3rd August, 2021.”

It is thus absurd, to say the least, to suggest that the appellant company *sua sponte* rectified or sought in any manner to do so. It has been asked to do so by CPSU, and has been given a deadline to adhere, presumably failing to do so would have excluded the appellant company.

- c) **Principle of proportionality** - Without prejudice to the foregoing, the contracting authority should have applied the principle of proportionality in evaluating this tender, a principle which was not considered in the current context. Proportionality should have reigned supreme in that whilst barring any changes to the original submission, no further action should have been undertaken.
- d) **Recommended tenderer – non-compliant** - The appellant company contends that the recommended tenderer Messrs. “Health JV” is not compliant with the tender requirement - Selection and Award Requirements [Economic and Financial Standing], and thus should be rejected; The tenderer is a newly formed joint venture and does not have the capacity or ability to achieve the required standards –

"The minimum credit facility/ credit balance required for the duration of this project is Seven hundred Thousand Euro (€700,000). The tenderer must submit a statement by a bank or a financial institution recognized by the MFSA (Malta Financial Services Authority) (or an equivalent authority in the country of origin of the bank) certifying such credit facilities during tendering stage. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture,".

Additionally, the tender document (page 6 - under Technical and Professional Ability) required prospective tenderer to indicate the number of contracts / services of similar nature, being transportation of clients during the last three (3) years, namely from 2018 up to 2020. Indicated contracts had to satisfy all of the following conditions namely;

- a. the minimum number of contracts / services must not be less than two (2);
- b. the cumulative value of all the contracts/services listed in (a) above must not be less than €1.5 million (excl. VAT) for the quoted period;
- c. One (1) of the contract/service listed in (a) above must not be less than Euro 1 million (excl. VAT).

On the 16th August, 2021, the DOC disclosed to all bidders the identity of the persons making up the various joint ventures participating in this tender. From this document, it transpires that the recommended tenderer "Health JV" is composed of VZ Lines Limited, Smart Transport Limited, Leone Grech and Zarb Coaches Limited. As an active player in the transport industry, appellant is aware that none of the 4 persons forming 'Health JV' satisfy the aforementioned tender requirements to which they or any of them could have been party in their own name. This should have lead to the disqualification of the bid submitted by Health JV in the first instance and in and of itself and without prejudice to the other grounds above mentioned, is good and sufficient cause for this Board to overturn the decision. The same would apply *a fortiori* in the event that 'Health JV' referred to contracts entered into by third parties, even if such third parties are somehow related to the participants in Health JV as the only experience which is relevant and which should have been considered is that of actual tenderer and/or any nominated sub-contractors.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th November 2021 and its verbal submission during the virtual hearing held on 13th January 2022, in that:

- a) **Offer is cheapest technically compliant & Appellant company asked to resubmit and rectify** - In section 3.4.2.10 of the technical specifications relating to tail lift vans, the tender document clearly states that *"The fleet average for vans should not exceed 175g CO2/km"* and goes on to say that *"Bidder must list the technical specifications for Tail Lift vans demonstrating that he complies with the criteria established under this heading"*,

Section 3.8.1, page 36 of the tender document, provides that *“The bidders shall submit a list of the vehicles which will be used for the whole duration of the contract. All vehicles must have at least a Euro VI engine and shall be in line with EU emission standards. The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO VI standard the measures must be documented and included in the tender application, and this must be approved by an authorised entity. If vehicles being provided are not certified as Euro VI, but technical after-treatment has achieved the same standard, a certificate approved by an authorised entity must be submitted to the Contracting Authority.”*

The same approach is taken throughout the tender document, namely that where a particular standard is required, the necessary certification is to be presented, but where modifications were made on the vehicles, a certificate by an authorised entity must be presented. The objectors did not provide such documentation upon initial submission, where they have only presented a self declaration, signed by Mr Joseph Scicluna, the director of South Lease Limited declaring that "The fleet average for the tail-lift vans is 175g CO₂ /km and is EURO 6". With all due respect to the appellants, a self declaration is not the proper way of proving the emission levels of a vehicle and the objectors are well aware of this, so much so that when an opportunity to resubmit the documents emerged, they took the opportunity, although well aware that the technical specifications are note 3 documents and can never be rectified, to submit different documents signed by a certified person

- b) **Principle of proportionality** - On the third grievance of the Objector, CPSU and DOC submit that the evaluation committee adheres to a number of principles, such as the principle of equal treatment, the principle of self-limitation and the principle of proportionality. The evaluation committee adheres to the principle of equal treatment, and if other non-compliant tenderers were (sic) disqualified, there was no reason for the objector not to be disqualified if it was clearly not technically compliant. Another principle the evaluation committee adheres to is the principle of self limitation, and therefore is bound by the conditions imposed in the tender and by the documents presented. Moreover CPSU and DOC, although they recognise the relevance of the principle of proportionality as a principle at law, submit that there is a fine line where this principle shall be applied
- c) **Recommended tenderer – non compliant** - In this grievance the objector is stating that the recommended tenderer is not compliant with the tender requirement because according to the objectors, as a newly formed consortium, the recommended tenderers do not have the capacity or ability to achieve such a standard. With all due respect to the objectors, but (sic) this argument is frivolous, since the objectors were never given a copy of the documents and proof presented by the recommended tenderers and therefore their claim is unfounded. The evaluation committee evaluated the documents presented before them and took the necessary advice and confirmed that the recommended tenderer does have the necessary credit facility and was therefore compliant from that end. The objectors are also submitting that 'Health JV' which are the recommended

tenderers, do not satisfy the requirements set under section 5 (B)(c) (ii) of the instructions to tenderers. With all due respect to the objector, CPSU and DOC submit again that this argument is totally unfounded and frivolous for the simple reason that the objectors are not in possession of the ESPD submitted by the recommended tenderer and the companies forming part of the consortium Health JV, certainly do not disclose or inform the objectors with all contracts they enter into. The tender document only requested a list of contracts, consisting of a description, amount, period and recipient. All tenderer were assessed on what they self-declared on the ESPD, including the objector. If the objector feels that this system might give rise to declarations which are untrue as it seem to suggest in the objection letter, the objector should have filed for a remedy before closing time in terms of regulation 262 of the Public Procurement Regulations.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 24th November 2021 and its verbal submission during the virtual hearing held on 13th January 2022, in that:

- a) **Offer is cheapest technically compliant** - From a reading of the Objection filed by the Appellant, it transpires that the Appellant's bid was determined not to be technically compliant since the emissions of the tail lift vans submitted by the Appellant are in excess of the emission standards specified in the tender. It would appear that the Appellant specified a higher emission level than that allowed by the tender. This, in itself, leads to an automatic disqualification which cannot be rectified. The Appellant's argument is aimed at allowing him to rectify the Technical Offer when such rectification is specifically disallowed by the tender.
- b) **Appellant company asked to resubmit and rectify** - From a reading of the Appellant's Objection, it transpires that by virtue of a letter dated 27th July 2021, the Evaluation Committee requested the Appellant to "resubmit in a clear and readable manner" the attachments listed in Section (c) Specifications Point (iv). The Appellant was only given the opportunity to resubmit a clearer and more readable copy of the same documents that were included in its offer. The Appellant was certainly not afforded the opportunity to submit different or supplementary documentation or otherwise rectify its offer. From the Objection, it transpires that, following the Evaluation Committee's request, the Appellant submitted supplementary documentation. The Tender is crystal clear in this respect since it classifies Paragraph (iv) of the Specifications as falling under Note 3, which stipulates that, "No rectification shall be allowed. Only clarifications on the submitted information may be requested."

The Appellant tries to hinge onto the wording employed in the aforementioned letter of the 22nd July 2021, wherein it is stated that "You are hereby being given the opportunity to rectify these shortcomings by noon of Tuesday 3rd August, 2021." From the excerpts reproduced in the Appellant's Objection, it is more than clear that the Evaluation Committee's request was merely limited to the resubmission of a clearer and more readable copy of the same documentation that

had already been submitted. The use of the word "rectify" certainly did not give a carte blanche to the Appellant to change or supplement the submitted documentation thus rectifying its bid. The submission of supplementary documentation, as indicated in the Appellant's Objection, was in clear violation of the tender conditions,

- c) **Principle of proportionality** - The Appellant contends that the Evaluation Committee ought to have applied the principle of proportionality, presumably to allow the submission of the supplementary documentation by the Appellant.

The Court of Appeal has repeatedly stated that the principle of proportionality cannot serve as a passepartout to allow the indiscriminate rectification of non-compliant bids in breach of the tender conditions.

- d) **Recommended tenderer – non compliant** - Given that the Appellant did not, and could not, have had access to Health JV's bid, one can only conclude that the Appellant's allegations that Health JV's bid is not compliant can only be based on mere conjecture. Health JV will be addressing the Appellant's allegations nonetheless to demonstrate their unfoundedness. Firstly, The Appellant alleges that Health JV is a “newly formed joint venture and does not have the capacity or ability to achieve the required standards”. This assertion by the Appellant is evidently ignoring the fact that a joint venture does not have a separate legal personality from that of its partners. Hence, the requirement to provide evidence of a minimum credit facility / credit balance can never refer to the Joint Venture itself, simply because the joint venture is not a separate legal person. The members of the Health JV are four companies that have operated in the Maltese transport sector for decades and satisfy the requirement in question. Health JV submitted, together with its offer, a statement by a leading Maltese bank which confirms that facilities exceeding €700,000 are available, *“to cover the credit facility of all members/ companies forming the Joint Venture.”*

Secondly, the Appellant alleges that Health JV has not satisfied the requirement pertaining to the minimum number of contracts / services of a similar nature required by the tender. The Appellant states that "none of the 4 persons forming 'Health JV' satisfy the aforementioned tender requirements to which they or any of them could have been a party in their own name." From the emphasis made by the Appellant in his Objection, it would appear that it is alleging that the contracts submitted in evidence of the fulfilment of this requirement were not in the name of the members of Health JV and therefore do not qualify for the purposes of the tender

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 now consider Appellant's grievances. In the Board's opinion there are 2 main issues / grievances to this appeal. Firstly, this Board will delve into and consider Appellant's grievances with regards to its own (Appellant's) technical

compliance. Secondly, consideration will be given to the Appellant's grievance which concerns the preferred bidder's compliance.

Appellant's Technical compliance grievances

The Board opines that for this 'category' of grievances there are two main aspects that should and will be tackled. The first relating to the Euro VI engine criteria and the relevant documentation to be submitted by prospective bidders. Secondly and more importantly is the technical compliance in relation to the specific emissions of 'g/km'.

1. Euro VI Engine / Authorised Entity

- a. The Board refers to section 3.8.1, page 36 of the tender dossier, which states *"The bidders shall submit a list of the vehicles which will be used for the whole duration of the contract. All vehicles must have at least a Euro VI engine and shall be in line with EU emission standards. The bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO VI standard the measures must be documented and included in the tender application, and this must be approved by an authorised entity. If vehicles being provided are not certified as Euro VI, but technical after-treatment has achieved the same standard, a certificate approved by an authorised entity must be submitted to the Contracting Authority."*
- b. Reference is now made to the Self Declaration of South Lease Ltd. of 20th February 2021 whereby it is expressly stated that *"The fleet average for the tail-lift vans is 175g CO₂/km and is Euro 6"*
- c. Reference is also made to the Technical Literature as submitted by the Appellant in his reply to the Clarification note made by the Evaluation Committee. The Euro VI engine requirement is clearly mentioned in such literature. (N.B. Emissions will be dealt with in the next section)
- d. In the Board's opinion, the Tender dossier is very clear and unambiguous in section 3.8.1 in that the *'technical sheets of the vehicles where emission standards are defined'* need to be submitted. It is ONLY for those vehicles where a technical upgrade has achieved Euro VI standard which have to be approved by an authorised entity. This is not the case in hand, therefore the 'approval' of an authorised entity is not required in this case.

Therefore, for the Euro VI engine requirement, the Appellant's bid is in line with tender requirements.

2. Emissions of 'g/km'

- a. The Board refer to section 3.4.2.10 of the tender dossier 'Technical Specifications for Tail-Lift Vans' whereby *"The fleet average for vans should not exceed 175g CO₂/km"* and goes on to say that *"Bidder must list the technical specifications for Tail Lift vans demonstrating that he complies with the criteria established under this heading"*

- b. The Tenderer's Technical Offer apart from a number of exclusions falls under 'Note 3'. The Technical Offer Form relating to emissions criteria does not form part of the exclusions, therefore is subject to Note 3.
- c. The initial submission of the Appellant company in the section entitled 'Emission standards: Tail lift vans' listed 196g/km. In the reply for clarification, a handwritten note stated "*typing error should read 176g/km as stated below*".
- d. Therefore, the facts of the case are very clear in the Board's opinion:
 - i. Self-Declaration by South Lease Ltd of 20th February 2021 stating "*the fleet average for the tail-lift vans is 175 g/km*" (i.e. in line with tender requirements)
 - ii. An initial Technical offer form stating 196 g/km (i.e. not in line with tender requirements)
 - iii. An amended technical offer form, post clarification, stating 176 g/km (i.e. not in line with tender requirements)
 - iv. Technical Literature submitted by same South Lease Ltd stating 176 g/km (i.e. not in line with tender requirements)
- e. At this point, this Board opines that the Evaluation Committee made use of all the possible tools at its disposal in querying / clarifying with the prospective bidder, now Appellant, on the emissions criteria.
- f. Ambiguity still remains even after the re-submission of the Technical Offer form, which falls under note 3. Even though the Self Declaration states 175 g/km (which is in line with tender requirements), the technical literature and technical offer form contradict this statement, in that they list 176 g/km (which is outside the limits permitted as per tender requirements).

Therefore, this Board, will not uphold Appellant's grievance.

Preferred Bidder's compliance grievances

In this specific section, the Appellant raises two (2) main issues. The first regarding the financial compliance of the preferred bidder with specific reference to the credit facilities as required by the tender dossier. The second issue revolves around technical compliance with specific reference to the number of contracts / services of similar nature, being transportation of clients during the last three (3) years, namely from 2018 up to 2020.

3. Credit Facilities

- a. Section 1 Paragraph 5(B)(b)(i) of the Tender Dossier – Selection and Award Requirements states "*Economic Operators must provide a Credit Facility which is to remain effective for the whole duration of the contract: The minimum credit facility/ credit balance required for the duration of this project is Seven hundred Thousand Euro (€700,000). The tenderer must submit a statement by a bank or a financial institution recognized by the MFS.A (Malta Financial Services Authority) (or an equivalent authority in the country of*

origin of the bank) certifying such credit facilities during tendering stage. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture,”

- b. Health JV did submit a statement in this regard from Bank of Valletta which reads “.....to cover the credit facility requirements of **all** members/companies forming the Joint Venture”. (bold emphasis added)
- c. The Board opines that what the Contracting Authority is after is a Credit Facility, which is to remain effective for the whole duration of the contract which as a minimum amounts to €700,000. In the case of consortia / joint ventures it surely isn't expecting that each and every member of the consortium / joint venture is able to provide such a facility on his own accord. Therefore, the submission by Health JV in favour to the Department of Contracts covering “*all members / companies forming the Joint Venture*” should be deemed enough for financial compliance in this specific requirement.
- d. Moreover, this Board refers to the Public Procurement Regulations (“PPR”) regulation 235(1) whereby “*With regard to criteria relating to economic and **financial standing** as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, **an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.....***” (bold emphasis added)

4. Number of contracts / services of similar nature

- a. Section 1 Paragraph 5(B)(c)(ii) of the Tender Dossier – Selection and Award Requirements states “*State the number of contracts / services of similar nature, being transportation of clients during the last three (3) years, namely from 2018 up to 2020 that satisfy the following criteria: a. the minimum number of contracts / services must not be less than two (2); b. the cumulative value of all the contracts/services listed in (a) above must not be less than €1.5 million (excl. VAT) for the quoted period; c. One (1) of the contract/ service listed in (a) above must not be less than Euro 1 million (excl. VAT).*”
- b. The Board notes that for this specific requirement, the Tender Dossier is expecting a ‘statement’ / self-declaration from prospective bidders in their respective ESPD. This statement was duly reviewed by the Evaluation Committee and found to be compliant. The Board opines that no substantial proof was brought forward to shed doubt on the submission as provided by the Preferred Bidder.

On the basis of the above, this Board does not uphold the grievances of the Appellant in relation to the financial and technical non-compliance of the Preferred Bidder.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member