

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1705 – IM 009 / 2021 – Tender for the Upgrading and Construction of an extension to Pinto quays 4 and 5, including reconstruction of Lascaris wharf at the Port of Valletta, Grand Harbour Malta**

**15<sup>th</sup> April 2022**

The Board,

Having noted the letter of objection filed by Dr Franco Galea on behalf of Saga Juris Advocates acting for and on behalf of Polidano Brothers Limited, (hereinafter referred to as the appellant) filed on the 21<sup>st</sup> March 2022;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici, Dr Antoine Cremona and Dr Calvin Calleja on behalf of Ganado Advocates acting for Infrastructure Malta (hereinafter referred to as the Contracting Authority) filed on the 30<sup>th</sup> March 2022;

Having also noted the letter of reply filed by Dr Norval Desira, Dr Charlon Gouder and Dr Shazoo Ghaznavi acting for G&P Borg Limited (hereinafter referred to as the Preferred Bidder) filed on the 1<sup>st</sup> April 2022;

Having heard and evaluated the testimony of the witnesses Mr Harry Fenech (Board Secretary of the Public Contract Review Board) as summoned by Dr Franco Galea acting for Polidano Brothers 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 13<sup>th</sup> April 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1705 – IMT009/2021 – Tender for the Upgrading and Construction of an Extension to Pinto Quays 4 and 5, including Reconstruction of Lascaris Wharf at the Port of Valletta, Grand Harbour Malta**

The tender was issued on the 28<sup>th</sup> August 2021 and the closing date was the 11<sup>th</sup> November 2021. The value of the tender, excluding VAT, was € 26,000,000

On the 21<sup>st</sup> March 2022 Polidano Brothers Ltd filed an appeal against Infrastructure Malta as the Contracting Authority objecting to the revocation of the award originally granted to them.

A deposit of € 50,000 was paid.

There were three (3) bidders.

On the 13<sup>th</sup> April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Polidano Brothers Ltd**

Dr Franco Galea	Legal Representative
Dr Michael Schiraha	Legal Representative
Mr Charles Polidano	Representative
Mr Frankie Zammit	Representative

**Contracting Authority – Infrastructure Malta**

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Perit Janice Borg	Chairperson Evaluation Committee
Ms Melanie Portelli	Secretary Evaluation Committee
Perit Robert Zerafa	Member Evaluation Committee
Perit Sarah Pace	Member Evaluation Committee
Perit Elaine Farrugia	Member Evaluation Committee
Dr Rachel Powell	Representative
Ms Christine Friggieri	Representative

**Interested Party – G & P Borg Ltd**

Dr Norval Desira	Legal Representative
Dr Shaheryar Ghaznavi	Legal Representative
Dr Charlon Gouder	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 noting that the Board will hear the two preliminary pleas followed by the merits of the Case.

Dr Franco Galea Legal Representative for Polidano Brothers Ltd (Polidano) stated that the reason for the appeal was the decision taken by the Contracting Authority after the award of the tender. Appellant had three grievances the first one of which is the question as to whether the Board as presently composed is competent to hear this appeal. This grievance regarding independence is specific to this Case. The matter of the Appeal is the payment of tax which falls within the sphere of the Ministry of Finance throughout - be it the appointment of members, their remuneration, domain etc. It is therefore not possible to be impartial or independent as proved by a Constitutional Court Case 20/2008/1 decision. Peace of mind is necessary regarding the independence of a tribunal. In this Case, if one followed Public

Procurement Regulation (PPR) 87, the PCRB does not have the competence to hear the Appeal. The Civil Court is the only competent body to hear this case. Without accepting the competence of the PCRB Appellant had no alternative but to come here with this appeal as directed by the Courts.

On the question of the merits of the case Appellant was also awarded another contract (IMT 012/2021) and the Contracting Authority in that instance accepted those documents as applying also to this tender.

Dr Clement Mifsud Bonnici Legal Representative for Infrastructure Malta said that the starting point is this Appeal is the question of whether the Appellant is adhering to the law, which the Authority did and where they had no alternative open to them due to the principle of self-determination and Polidano's actions. The contract has to be within the terms of the law. The Appellant by his own admission accepts that his appeal is very generic in nature whilst the Authority has laid out very chronologically the reason for their decision and if the Appellant had provided further grounds for appeal these would have been dealt with. The Appeal is based on scrutinising the decision of the Authority and once the Board has been approached Appellant cannot now claim that it is not competent. According to existing procedures it is the defendant that raises exceptions. Once Polidano has filed the appeal before this Board they cannot claim lack of independence or competence. The independence of the Board can only be decided by a higher court.

Dr Norval Desira Legal Representative for G & P Borg Ltd (Borg) stated that the appeal is not against the recommendation of the award by the Authority to his clients and no submissions or attempt should be allowed on this point. Appellant is asking solely for revocation yet claiming that the Board is not competent.

Dr Shaheryar Ghaznavi Legal Representative for G & P Borg Ltd said that the normal procedure for an Appellant is to list grievances not to make exceptions. Disputes on tenders are only heard by the PCRB and if Appellant was not happy with the mechanism for tender dispute resolutions he could have invoked a remedy under Regulation 262 before the close of the tender and claimed then that the composition of the Board was not acceptable.

Dr Galea replied that the important point is that the Appellant does not accept the jurisdiction of the Board, members of which have the discretion of recusing themselves which he is now requesting. If Appellant has doubts about getting a fair trial he is entitled to ask the Board members to recuse themselves. Appellant could not ask for pre-contractual remedy as they are not disputing the terms of the tender. They are not appealing the award but in the decision to revoke their previous decision of the 9<sup>th</sup> March.

Dr Antoine Cremona Legal Representative for Infrastructure Malta stated that there was no award in this tender but a recommendation that it be granted to a bidder. The proof required by the Board is if the action of the Authority was correct. What needs to be considered is has anything that should have happened and what happened. There is a fallacy in appearing

before a tribunal and straightaway stating that it has no competence – one cannot make submissions to that tribunal and claim that it is incompetent – it is a surreal situation. Recusal is something totally different as recusal is based on the replacement of an individual not on a board and once that is requested it means that the board is being automatically recognised.

Dr Ghaznavi interjected to point out that Regulation 262 is wider than that claimed by Dr Galea and also covers existing law – if not confident with the composition of the Board he should have objected beforehand.

Dr Galea requested the Secretary of the PCRB to testify.

Mr Lawrence Ancilleri, a member of the Board was requested to record the testimony of Mr Fenech.

Mr Harry Fenech (236237M) stated on oath that the Board members' remuneration is paid directly by the Ministry of Finance. The employees of the PCRB are likewise paid their salaries by the same Ministry.

This was the end of the testimony.

At this stage the Chairman stated that the Board will move on to hear the merits of the case in line with normal procedure.

Dr Galea said that he has submitted his proof on the merits in writing and relied on it.

Dr Mifsud Bonnici said that he would be relying on the submissions in the procurement file which cannot be made public. He would particularly be relying on an email dated 7<sup>th</sup> February 2022 from the Commissioner for Revenue (CfR).

Dr Ghaznavi pointed out that Appellants had not filed any submissions regarding the merits of the Case.

Dr Desira requested confirmation that the Appeal documents referred to are the only documents presented to the Board.

Dr Galea stated that from the evidence provided it is indicated that the members of the Board are paid by the Ministry for Finance – there is thus no independence and impartiality. The dispute is in regard to the payment of tax which is exactly the same Ministry's responsibility and hence the Board cannot be impartial. Recusal is necessary. The PPRs state that the remuneration is determined by the Prime Minister but Regulation 94 of the PPRs makes it clear that the Board is answerable to the Minister for Finance. Constitutional Court Cases 19/2008 and 20/2008 confirm that both local and European jurisprudence considers how members are appointed, their duration in office and outside influences which situation is replicated in the case of the PCRB. Where tax is concerned the PCRB cannot be impartial. The

Authority directed the form of this appeal after the prior referral to the Courts. This appeal is being made without prejudice to the Appellant's legal position. Polidano was the recommended bidder and that matter is decided because it was not appealed. What is in question is the signing of the contract and which is not covered under PPR 87.

As regard the merits, communications with Polidano indicate that documents were requested that Appellant was in compliance with the provisions of Regulation 194 of the PPRs. What was provided in tender IMT012/2021 was satisfactory. No request was made under PPRs 193 which is the one that allows exclusions on tax obligations. The CfR has no executive title on outstanding tax. The PPRs makes provision for entering into binding tax agreements and therefore the Authority cannot prove that Appellant is in breach of tax obligations. Documents and certificates provided show that tax payments from April 2021 are up to date yet the Authority still insists on certificates from the tax department when they should have simply relied on the documents provided. Instead, the Authority claims that according to the tax department the agreement is not being honoured. According to the records of the Malta Business Registry Polidano are up to date on all statutory declarations whilst Borg's latest audited accounts are those for the year 2019 which means they are not compliant. Finally the fact that Polidano's bid was € 5 million cheaper has to be considered. Documents dated after the date of the tender submitted by Polidano indicate that the Court proceedings against them on tax were withdrawn. There is no reason for exclusion under PPRs 194.

Dr Mifsud Bonnici said that Appellant has chosen his forum of appeal and the arguments put forward are not convincing. The peace of mind required regarding the independence of the Board is given by the Constitution. If a party asks for recusal then it is obvious that one is accepting the authority of the Board. The Court Cases referred to by Dr Galea dealt with the constitution of the tribunal on industrial disputes and the way it is appointed which is not the case with the PCRB, members of which cannot be removed. One could ask if the Courts are independent since they too are paid by the Ministry of Finance? PCRB have heard Cases affecting the Ministry of Finance - namely cases 1532/1539/1540 and 1541 and the point of their independence was never brought up.

Dr Cremona expressed the view that the real conflict in this Case is whether the Certificate was issued or not – this is not a matter of a conflict but one of a statement. The Certificate in the hands of the Authority states that the agreement is not being honoured and they acted both within the law and the spirit of the law. Appellant is expecting the Authority to act differently.

Dr Mifsud Bonnici continued by stating that Appellant is trying to reclassify the decision of the Authority by challenging the competence of the Board. The law and the General Rules make clear the three steps – process, evaluation and decision – which involved good faith in the self-declarations made. The Authority cannot award a contract if everything is not regular and the PCRB's role is to decide on this point. Appellant could have chosen another method instead of deciding to appeal to the PCRB. The Authority is the first guardian of the basic point

of a level playing field and they could not have acted otherwise faced with the presence of the certificate and the failure of the Appellant to provide the requested certificate of compliance. Borg had produced the compliance certificate and hence everyone was treated equally.

Dr Desira indicated that he agreed with the point that Appellant seemed to have an exception to the independence of the Board – he first doubted the constitution of the Board then went for recusal - two totally different matters which are covered by Article 733 of the COCP. The request for recusal was not raised in the appeal and even if asked for would have still not been in terms of Article 743 of the COCP. The constitution of the Board is a matter for the Constitutional Court. If one considers the Authority's decision one notices that it does not cover the revocation of the original award and the objections are only based on the recommended award (letter of 9<sup>th</sup> March) . Appellant did not appeal revocation and the PCRB was not asked to change or withdraw the 9<sup>th</sup> March decision. All grievances raised by Appellant do not challenge the decision to award the tender to Borg.

Presentation of the audited accounts is not proof that they were not compliant – on the other hand Borg presented a tax compliance certificate and all the allegations made against them have not been sustained. Logically it follows that the 9<sup>th</sup> March decision of the Authority is '*res judicata*' and overhauls and supersedes to first award to Polidano. Th only competent forum for Polidano's grievances are the Courts.

Dr Galea said that it is very clear that compliance certificates are issued to firms whose accounts are not up to date. The decision by the Authority to accept a tax declaration by the CfR as supreme is incorrect. The proof of compliance was in the tax agreements between the parties. The Board members should have recused themselves as there is a conflict of interest. The requested certificates were submitted and the only problem is that the CfR refused to issue further certificates. Infrastructure Malta are not the competent authority to decide tax matters.

Dr Mifsud Bonnici said the starting point is the decision of the Authority and that is for the Board to rule on. Polidano has practical experience of the tender process. The Authority requested from them compliance certificates which were all provided except the tax certificate and therefore they were obliged to follow the PPRs as their hands were tied. There was in this case a lot of background noise to hide the fact that the tax certificates were not provided.

Dr Cremona agreed by stating that the Authority could not have acted differently.

Dr Desira said that dangerous precedent would be created if one were to accept the argument put forward by the Appellant that if one is in arrears on tax the CfR will refuse to issue certificates.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 13<sup>th</sup> April 2022.

Having noted the objection filed by Polidano Brothers Limited (hereinafter referred to as the Appellant) on 21<sup>st</sup> March 2022, refers to the claims made by the same Appellant with regard to the tender of reference IM009/2021 listed as case No. 1705 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Franco Galea
Appearing for the Contracting Authority:	Dr Clement Mifsud Bonnici, Dr Antoine Cremona
Appearing for the Preferred Bidder:	Dr Norval Desira, Dr Charlon Gouder & Dr Shazoo Ghaznavi

Whereby, the Appellant contends that:

- a) **Preliminary Plea** - Unfortunately given that the subject matter of the dispute between the parties relates to tax and social security compliance which falls within the portfolio and remit of the Ministry of Finance, the Public Contracts Review Board does not offer the guarantees required in terms of Art 39 of the Constitution of Malta and Art 6 of the European Convention on Human Rights in order to decide on the matter at hand. As per Public Procurement Regulations, the members of this Honourable Board are appointed by the Ministry of Finance and their remuneration is forthcoming from the same Ministry. The method of appointment of the members does not afford security of tenure. Thus besides the clear conflict of interest in the matter, the Board does not offer the guarantees of an independent and impartial tribunal in this specific case.
- b) **Competence Rationae Materiae of the this Board** - The Remit of this Board is circumscribed by the provision of Regulation 87 of the Public Procurement Regulations. From a reading of the said legal provision, the appellant is of the view that the case in hand does not fall within any one of the cases listed in such Regulation and therefore does not fall within its remit and competence. It is appellant's view that the matter in hand falls within the competence of the ordinary courts.

- c) **On the merits** - As will be proven during the course of these proceedings, appellant was in full conformity of its obligations in terms of the tender conditions as well as the applicable Public Procurement Regulations. For avoidance of repetition, reference is made to the submissions made in appellants communications with Infrastructure Malta which goes to prove that the decision taken by Infrastructure Malta is erroneous at fact and at law.
- d) **Financial Considerations** - On a final point, it cannot but be pointed out the massive difference between the awarded price of appellants and the price of the new recommended contractor - Polidano Brothers Limited Eur19,754,719.60; new recommended tenderer Eur24,831,171.40. A massive difference amounting to Eur5,076,451.81. We are here dealing with public money. Differences of millions of Euros are a clear sign of maladministration and are indicative of the unreasonableness of Infrastructure Malta's actions.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 30<sup>th</sup> March 2022 and its verbal submission during the virtual hearing held on 13<sup>th</sup> April 2022, in that:

- a) **Contracting Authority's Preliminary Plea** - By way of a preliminary plea, the Contracting Authority submits that the appeal lodged by the Appellant is procedurally irregular, and should be thrown out by this Honourable Board on the basis that it does not contain "in a very clear manner the reasons for (its) complaints" as required by Regulation 270 of the PPR. The "appeal" lodged by the Appellant does not raise any ground of objection at all. This Honourable Board has held on various occasions that the requirement to set out the reasons for the complaints is not a mere formality, but it is a substantive requirement for the appeal to be valid.' This substantive requirement is necessary so that the Contracting Authority and any interested party are able to respond to the appeal adequately and further for this Honourable Board to be able to manage the case rapidly and effectively.
- b) **Appellant's Preliminary Plea and Plea on Competence** -
- i. The Contracting Authority submits that the Appellant has voluntarily elected to exercise its right to appeal against the Contracting Authority's decision under Regulation 270 of the PPR. No one forced it to do so. Therefore, if the Appellant has voluntarily exercised this right of remedy, and has resorted to this Honourable Board, then it is a given that the very lodging of an appeal is an express submission to this Honourable Board's competence to decide the Appellant's "appeal"-whatever that is--and further, a waiver of any objection it might have on its independence and impartiality. It is blatantly transparent that these pleas are vexatious, if not abusive, and only intended to engineer a dispute to stall the award of this Tender to the Recommended Bidder.
  - ii. On the Appellant's preliminary plea that this Honourable Board is not independent and impartial is not only unfounded in law and in fact, but it is an insult to the workings of this



Honourable Board. The Appellant wrongly states that this Honourable Board is appointed by the Ministry of Finance. Regulation 81 is very clear that the members shall be appointed by the Prime Minister, albeit on the advice of the Minister for Finance. The members' guarantee of independence and impartiality is achieved through: i) A fixed term of their appointment of 3 years in Regulation 81(1) of the PPR; ii) Limited grounds for their removal in Regulation 82 of the PPR; iii) Clear rules on disqualification in Regulation 85 of the PPR. On a concluding note on this matter, it has to be said that Appellant has, in the past, resorted before this Honourable Board on multiple occasions, and never, was this point ever raised.

- iii. On the Appellant's plea that this Honourable Board is not competent *ratione materiae*, it has to be said that the Appellant's plea is poorly motivated and it is difficult to follow. The Appellant has not explained in any way how "*the case in [sic] hand*" does not fall within this Honourable Board's competence. This "appeal" has been lodged against the Contracting Authority's decision of 9 March 2022, and this is very clearly (perhaps the only point which is clear in this "appeal") laid out in its opening paragraph, and therefore, this Honourable Board is competent to hear any such "appeal" in terms of Regulations 87(b), 198 and 270 of the PPR. The law is amply clear on this point and there is really nothing much more to say on this point.
- c) **Merits** - The Contracting Authority submits that the Appellant's statements under the Sections "On the merits" and "Financial Considerations" are mere (unfounded) observations and do not constitute, as submitted above, clear reasons for the Appellant's objection (which remains elusive) against the Contracting Authority's decision.
  - i. On the matter relating to the "merits", the Appellant has not explained, or otherwise corroborated, how it is in "full conformity of its obligations in terms of the tender conditions as well (sic) as the applicable Public Procurement Regulations". What the Contracting Authority has ascertained is exactly the opposite.
  - ii. On the matter relating to price, the Contracting Authority cannot but say that the argument on the price difference is, quite frankly, irrelevant and the Appellant is aware, in particular in view of its experience in public procurement, that cheapest offers are not supreme and that bids must comply with tender specifications and the law. Comparative exercises between the prices of bidders in any case is an award exercise which is only relevant amongst 'qualifying bidders'. If a bid is launched by an economic operator who is in breach of the very core basic principles of public procurement - compliance with VAT and tax certificates - and frankly the very core principles of the social contract in a democratic society, then there is no comparative exercise at all to be had. The comparison in total cost proposed by the Appellant is one between a bid and a 'ghost' bid.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 1<sup>st</sup> April 2022 and its verbal submission during the virtual hearing held on 13<sup>th</sup> April 2022, in that:

- a) **Reply on Preliminary Plea & Competence Rationae Materiae of this Board** - If one were to analyze the method of appointment of the members of the PCRB, as outlined in Article 81(1) of S.L. 601.03, one notices that such members are appointed by the Prime Minister of the Republic of Malta, and not by the Ministry of Finance. Furthermore, although the PCRB falls within the portfolio and remit of the Ministry of Finance, the statement that their remuneration is forthcoming from the same Ministry, does not result from the law.

*“The Review Board shall be composed of a chairman and two permanent members, one of whom shall act as a Vice- chairman, all appointed by the Prime Minister on the advice of the Minister for a period of three years with the possibility of re- appointment.”*

Conversely, the law clearly sets out the term that they are appointed for i.e., three years. Exceptionally, a member can be asked to refrain from hearing a case and Article 85(1) of S.L. 601.03 sets out that the instances where a member can abstain are those instances where ordinarily a judge in a civil suit can be asked to abstain.

*“The chairman or other members of the Review Board shall be disqualified from hearing a case in such circumstances as would disqualify a judge in a civil suit, and in any such case the chairman or member shall be substituted by another member on the panel.”*

Furthermore, Article 87(b) clearly sets out that the PCRB has the competence to address complaints raised by tenderers or candidates relating to exclusions, non-compliant offers, contract award decisions or cancellations of a procurement procedure after the closing date and the time set for the submission of the said call. Therefore, the Board has the competence the Appellant is claiming it does not have, to hear this appeal.

- b) **Merits** - The Appellant raises the argument that he was “in full conformity of its obligations in terms of the tender conditions as well as the applicable Public Procurement Regulations” and that the “decision taken by Infrastructure Malta is erroneous at fact and at law.” In correspondence via electronic mail on 7<sup>th</sup> March 2022, the Appellant also stated that “Polidano Brothers Limited is under no obligation under the Public Procurement Regulations and /or Tender Conditions to provide you with a compliance certificate issued by CFR”

Article 193 of S.L. 601.03 reads as follows:

*“(1) An economic operator shall likewise be excluded from participation in a procurement procedure where the authority responsible for the tendering process is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a local or foreign judicial or administrative decision having final and binding effect.*

*(2) The authorities responsible for the tendering process are also entitled to exclude an economic operator from participation in a procurement procedure if they can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions, even in the absence of a local or foreign judicial or administrative decision,*

*(3) The term 'appropriate means under this regulation includes any certificate, declaration or documentation issued by a competent entity which demonstrate that the economic operator is in breach of its obligations relating to the payment of taxes and, or social security contributions.*

*(4) The exclusion mentioned under this regulation shall no longer apply if the economic operator fulfils his obligations by paying or by entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.”*

Although not explicitly mentioned, from the above it is clearly evident that the appellant had the obligation to ensure that if the tender document required submissions to ensure tax and social security compliance, such submissions had to be provided in a correct manner. Merely stating that the Contracting Authority does not have a reason to believe that Polidano Brothers Limited is in breach of its tax obligations due to the Authority being in possession of past declarations and legal documents issued by CFR stipulating settled amounts and payments, does not suffice.

It is to be pointed out that even if this requirement was not outlined in S.L. 601.03, Article 13 of the Economic Operators User Manual stipulates that if the Appellant had been awarded the contract, upon accepting the award, the EPPS system itself *“asks the user to provide details regarding the following:”*

*“The Compliance certificates from the CjR department; for economic operators from Malta.”*

Consequently the Contracting Authority had every legitimate reason to request the Compliance certificates from the Cf department, pertaining to the Appellant, so as to confirm that the Appellant is indeed in conformity with all its obligations relating to the payment of taxes or social security contributions. In default of such confirmation, the Contracting Authority is in fact obliged at law to exclude the Appellant not only from participating in the tender procedure but also from being awarded the contract.

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 witness duly summoned, will consider Appellant's grievances as follows:

a) **Appellant's Preliminary Plea –**

- i. From the beginning, this Board outlines that 'normal' procedure dictates that Appellants are to list grievances and not to make exceptions.
- ii. Moreover, reference is made to regulation 81(1) of the Public Procurement Regulations ("PPR"), whereby *"The Review Board shall be composed of a chairman and two permanent members, one of whom shall act as a Vice chairman, **all appointed by the Prime Minister** on the advice of the Minister for a period of three years with the possibility of reappointment."* (bold & underline emphasis added). Even though advice is provided by the Minister for Finance, it is evident that the appointment of this Board's members is done by the Prime Minister of the Republic of Malta.
- iii. Reference is made to regulation 82 of the PPR whereby the possibilities for removal are listed. They relate to the *'inability to perform the functions of that office'* or *'because of proven misbehaviour'*. It is this Board's opinion that none are deemed applicable in this case.
- iv. Reference is made to regulation 83 of the PPR whereby it is crystal clear that the remuneration received by Board members is determined by the Prime Minister.
- v. Reference is made to regulation 85 which lists the grounds for disqualification, if applicable, again in the Board's opinion these are not applicable to this case.
- vi. It is also evident to this Board, that the Appellant is not accepting the jurisdiction of this Board, on this specific case, and not the presence of specific Board members. Hence, the recusal being requested by the Appellant cannot be considered by this same Board.
- vii. The Board opines that since the Appellant appealed to the PCRB out of his own free will, it is somewhat baffling for this Board to be requested to decide on such a matter! If the Appellant is not accepting this Board's jurisdiction, why was this Appeal filed in the first place before the PCRB?
- viii. This Board opines that such a request can only be decided upon by a higher court.

b) **Competence Rationae Materiae of the this Board –** Reference is made to:

- i. Regulation 87 (b) of the PPR, which states; *"It shall be the function of the Review Board to address in particular complaints raised by tenderers or candidates relating to exclusions, non-compliant offers, contract award decisions or cancellations of a procurement procedure after the closing date and time set for the submission of the said call"*
- ii. Regulation 198 of the PPR, which states; *"Any economic operator who feels aggrieved by a decision to exclude him from participating in a procurement procedure may file an objection before the Public Contracts Review Board in the same manner as provided for in regulation 270"*

- iii. Regulation 270 of the PPR, which states; *“Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period, may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.”*
- iv. Paragraph 20.6 of the General Rules Governing Tender which states; *“Only the signed contract will constitute an official commitment on the part of the Central Government Authority/Ministerial Procurement Unit/Contracting Authority.”*
- v. When one considers all of the above, and takes into account that there is in actual fact no signed contract in relation to this specific tender, i.e. no official commitment on the part of the Contracting Authority and therefore the tender procedure can still be cancelled (considering there are sufficient legal grounds for doing so), any appeals are the competence of the Public Contracts Review Board.

Therefore, this Board does not uphold this grievance of the Appellant.

- c) **Contracting Authority's Preliminary Plea** – This Board does not uphold this Preliminary Plea of the Contracting Authority. This on the grounds that the Appellant does in fact make references to communications with the Contracting Authority referring to point of law, more specifically to regulation 194 of the Public Procurement Regulations. Whether this Board agrees with such argumentation or not will be further delved into the section headed ‘Merits’.
- d) **Merits** – This Board will initially list out what it considers to be relevant points in order to properly analyse the specific grievance listed as “On the merits” in the Appellant’s objection letter. Finally, it will conclude and provide its opinion on such matters.
  - i. Regulation 196 of the PPR: *“The authority responsible for the tendering process shall exclude economic operators **at any time** during the procedure leading to the award of the contract when it transpires out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in regulations 192, **193** and 194.”* (bold & underline emphasis added)
  - ii. Regulation 193(1) of the PPR: *“An economic operator **shall** likewise be excluded from participation in a procurement procedure where the authority responsible for the tendering process is aware that the economic operator **is in breach of its obligations relating to the payment of taxes or social security contributions** and where this has been established by a local or foreign judicial or administrative decision having final and binding effect.”* (bold & underline emphasis added)
  - iii. Regulation 193(4) of the PPR: *“The exclusion mentioned under this regulation shall no longer apply if the economic operator fulfils his obligations by paying or by entering into a binding arrangement with a*

*view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.”*

- iv. Regulation 230 (1) of the PPR: “*Contracting authorities may require the **certificates**, statements and other means of proof referred to in this regulation as well as regulations 231 and 232 as evidence for the absence of grounds for exclusion as referred to in Part VI and for the fulfilment of the selection criteria in accordance with regulation 217.” (bold & underline emphasis added)*
- v. Regulation 230 (3) of the PPR: “*Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in regulations 192, 193, 194 and 199 apply to the economic operator: as regards regulations 193 and 194(a), **a certificate issued by the competent authority** in the Member State or country concerned” (bold & underline emphasis added)*
- vi. Finally, reference is also made to section 20 of the General Rules Governing Tenders which apply and are much relevant to this tender procedure. Most relevant are paragraphs 20.3 and 20.5.
- vii. With regards to the analysis of all matters referred to in (i) to (vi) above, it is this Board’s initial opinion that the Contracting Authority had full, complete and total legitimacy in requesting the relevant tax compliance certificate from the appellant company and any possible recommended bidder.
- viii. Henceforth, the crux of the matter rests on whether the Appellant company did in fact supply such a requested certificate or otherwise. From the documentation reviewed by this Board, such a certificate issued to the Appellant company and in the hands of the Contracting Authority reads “..... *which amount is covered by agreements that are not being honoured.*” Therefore, regulation 193(4) is deemed irrelevant.

When considering all of the above, this Board does not uphold the grievance of the appellant, referred to as “On the merits”.

- e) **Financial Considerations** – Reference is made to Section 1 Paragraph 7 of the Tender Dossier, whereby the following is stated with regards to the Criteria for Award; “*The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.*” Even though, the Board notes that there is in fact a difference in the bids, of circa Eur5 million, between the Appellant and Interested Party / Recommended Tenderer, this argumentation is at this stage irrelevant. The financial comparison can only be done on fully compliant bids in regard to ‘Administrative’ and ‘Technical’ compliance.

The Board does not uphold this grievance of the Appellant.

**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 to G&P Borg Limited,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member