

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1746 – IND/KIP/T003/22 – Tender for the Professional Services of Project Designers, Construction Project Management and Other Supporting Services for the Refurbishment of Office & Canteen Building**

24<sup>th</sup> June 2022

The Board,

Having noted the call for remedies filed by Dr Massimo Vella on behalf of Vella Zammit McKeon Advocates acting for and on behalf of Architecture 360 Limited, (hereinafter referred to as the appellant) filed on the 1<sup>st</sup> June 2022;

Having also noted the letter of reply filed by Dr John Bonello and Dr Elian Scicluna on behalf of 8 Point Law acting for and on behalf of INDIS Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 10<sup>th</sup> June 2022;

Having also noted the letter of reply filed by Perit Mariello Spiteri acting for and on behalf of EMDP Ltd (hereinafter referred to as the Preferred Bidder) filed on the 14<sup>th</sup> June 2022;

Having heard and evaluated the testimony of the witness Perit Mark Anthony Muscat (Representative of the Appellant) as summoned by Dr Massimo Vella acting for Architecture 360 Limited;

Having heard and evaluated the testimony of the witness Mr Keith Buttigieg (Chairperson of the Evaluation Committee) as summoned by Dr John Bonello acting for INDIS Malta Ltd;

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 16<sup>th</sup> June 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1746 – IND/KIP/T003/22 – Tender for the Professional Services of Projects Designers, Construction Project Management and other Supporting Services for the Refurbishment of Office and Canteen Building.**

The tender was issued on the 18<sup>th</sup> February 2022 and the closing date was the 8<sup>th</sup> April 2022. The value of the tender, excluding VAT, was € 770,000.

On the 1<sup>st</sup> June 2022 Architecture 360 Ltd filed an appeal against INDIS Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that their offer was not administratively compliant.

A deposit of € 3,850 was paid.

There were nine (9) bids.

On the 16<sup>th</sup> June 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 – Architecture 360 Ltd**

Dr Massimo Vella	Legal Representative
Perit Mark Anthony Muscat	Representative

**Contracting Authority – INDIS Malta Ltd**

Dr John Bonello	Legal Representative
Dr Elian Scicluna	Legal Representative
Mr Keith Buttigieg	Chairperson Evaluation Committee
Ms Janella Camilleri	Secretary Evaluation Committee
Mr Ray Vella	Member Evaluation Committee
Mr Stephen Borg	Member Evaluation Committee

**Preferred Bidder – EMDP Architects**

Dr Charlon Gouder	Legal Representative
Perit Mariello Spiteri	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Massimo Vella Legal Representative for Architecture 360 Ltd said that the Appellant had been disqualified on a premise that there was a conflict of interest in the procurement process as the Appellant had been party to the preparation of a conceptual design prior to the issue of the tender. The Court of Appeal decision in Case 236/2018 (Bonnici Bros vs Minister of Health) stated that not every involvement leads to a conflict – it only arises when that involvement gives a competitive advantage. This is not the case in the tender under consideration.

There are several facets to this tender like project design, project management, interior design, quality control and Health and Safety none of which give the Appellant an advantage as they did not form part of the preliminary work. In the case of the design the tender is a complete re-design and it was not the Appellant which produced the design concept. The Appellant was only involved in identifying policy restraints and overseeing that the concept was faithful to the brief. The conceptual design was published as part of the tender and available to all bidders. Further, the tender deals only with a third part of the site (identified on the proffered sketch as KK0) and Appellant was not aware of what would be required until the tender was published – there was thus a level playing field for all bidders. The legal

principle of the Bonnici Bros case is whether there was competitive advantage; this has not been proven by the Contracting Authority.

Dr John Bonello Legal Representative for INDIS Malta Ltd said that there was involvement by the Appellant in the ground work to prepare the tender. There are two points to be made regarding the quoted Appeal Court Case – first it dealt with a particular case, and secondly it mentioned the risk of conflict and of the smallest doubt. This tender is separate to that case. One question in the tender is whether there was direct or indirect involvement in the preparation of the procurement procedure. In fact there was involvement when the Appellant in the tender stated that there was not.

Subjectively Appellant claims that it was only involved in the concept design – the tender requests design of the project which leads one to conclude that this was based on the concept design prepared earlier.

Dr Vella pointed out that in the Court of Appeal case the Court did not state that the risk of conflict disqualifies – this point was raised by one of the parties.

Perit Mark Anthony Muscat (150386M) called as a witness by Appellant testified on oath that he was not involved in the formulation of the tender. In the previous tender alluded to, the designers were an Italian company which needed assistance with planning provisions and local regulations. The first task was to survey the site then show the site to the Italians and subsequently involvement in progress meetings to assist and answer questions. Witness was involved in the total concept but although aware of the concept had no idea of the final design and became aware that only KKO was included in the tender when this was issued.

Mr Keith Buttigieg (8879M) called as a witness by the Contracting Authority stated on oath that he is the Principal Tendering Procurement Officer at INDIS Malta and his role is to oversee the whole procurement process. ST Microelectronics requested INDIS to engage companies to produce a concept design to redevelop the whole site, consisting of three units and included Architecture 360 Ltd to assist. The concept design was completed in October/November 2021, with the tender issued in February 2022.

Architect Muscat had to ascertain that the design conformed with local legislation and was awarded a direct order of around € 14,000 for this work. The concept design was forwarded only to the Italian architects. The contested tender covered part of the design dealing with KKO and without the concept design it would have been difficult to submit tenders.

Questioned by Dr Vella witness stated that the design of KKO was given to all bidders through a clarification note. The new design was based on the conceptual design. Appellant had the advantage as it knew the concept of the whole project and had made a reconnaissance of the whole site. Site visits were offered to all bidders. Witness agreed that KK1 and KK2 are independent of KKO and might not be redeveloped. The Evaluation Committee did not feel that there was a level playing field beside the fact that there was technical sensitive

information on all three sites which could not be published. Witness agreed that the building is to be demolished and that all parties had been provided with the conceptual drawings.

In reply to questions from Perit Mariello Spiteri, Representative for EMDP Architects, witness stated that ST Microelectronics would continue with their operations whilst the work was carried out and that there was interdependence of buildings.

Dr Bonello further questioned Perit Muscat, who stated that he was not involved in the tender and was not aware how it was being issued, nor how the works would be conducted. He confirmed that the only survey he made was of the building and not of any M&E works. He was not involved in the design as the Italian firm carried out design of all the necessary services. . Apart from the structural survey witness was involved in around 15 to 20 progress meetings with part or full attendance over a period of four months . He agreed that the project was discussed holistically at these meetings and that he was involved from the inception of the project. INDIS paid witness's fees for this project and he was still carrying on ongoing work for ST Microelectronics.

Questioned by Dr Charlon Gouder, Legal Representative for EMDP Architects witness confirmed that he charged INDIS for the structural survey and for assisting the Italian firm of architects and regularly discussed the progress of the scheme. According to the witness Minutes of the meetings held were recorded and copies given to him – these were not given to the other bidders as it was no thought that they were relevant.

When questioned by Dr Vella, witness said that the Minutes did not give any advantage as they only led to the final concept of the design and only carried information on the operations of ST Microelectronics regarding use of premises.

This concluded the testimonies.

Dr Vella said that the crucial factor is that the Court of Appeal and the European Court of Justice sentences are clear on the point that only distortion of competition gives rise to a conflict of interest. Units KK1 and KK2 are not part of the tender and independent of it. The concept was given to all bidders and the subdivision of the project does not give an advantage to any party. Existing building is to be demolished and any prior knowledge of it becomes irrelevant. The new build is based on plans available to all bidders and since the tender is based on price it cannot give a competitive advantage to any side. Keith Buttigieg in his testimony could not show how Appellant had an advantage, and unless there is a certainty of advantage the appeal must fail.

Dr Gouder stated that the tender is not based on price but on BPQR basis and the information which Appellant may have obtained has to be gauged as to its helpfulness on other facts. The complete advantage is on the overall scheme which includes time, price and all previous information gathered on site. The record of the Minutes, not accessible to other parties, gives

advantages and it is inconceivable that they were totally ignored and on the strength of this privileged information Appellant had a competitive advantage which was not declared.

Dr Bonello said certain facts only became known through this appeal. This was a direct involvement with lack both of transparency and non-discrimination. No bidder was placed at the same level as Perit Muscat or had three or four months worth of meetings and involvement with ST architects. The reply that there was no involvement, if correct, has to be justified and the PPRs have to be applied in a positive way – Perit Muscat has to indicate his involvement.

Dr Vella made reference to the Fabricon case and the question as to whether the involvement was illegal. The Board has the opportunity to examine the facts.

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 sitting of the 16<sup>th</sup> June 2022.

Having noted the letter of objection filed by Architecture 360 Limited (hereinafter referred to as the Appellant) on 1st June 2022, refers to the claims made by the same Appellant with regard to the tender of reference IND/KIP/T003/22 listed as case No. 1746 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Massimo Vella

Appearing for the Contracting Authority: Dr John Bonello & Dr Elian Scicluna

Whereby, the Appellant contends that:

- a) *“The evaluation committee determined that the bidder's involvement in the preparation of the concept design as defined in the Terms of Reference in Contract IND-KIP-S045-21 constitutes a direct/indirect involvement in this procurement procedure. Hence the EC deemed that the bidder should not be considered further.”*
- b) The Legal Principle - It has been authoritatively held by the Court of Appeal that not every type of involvement should result in a disqualification. The Court of Appeal held that a disqualification was only warranted when this resulted in a competitive advantage for the benefit of the bidder so involved. In *Bonnici Bros Projects Limited et v. Onorevoli Ministru ghas-Sahha noe et* (Appeal No. 236/2018, decided on the 30th July 2018), the Court of Appeal

held that. *‘Jekk minhabba konflitt ta’ interess oblatur ghandux jigi skwalifikat jew jingbatax zymien biex inehbi dak il-konflitt jiddependi fuq jekk il-konflitt ikunx ga labaq ta vantagg kompetittiv lil dak l- oblatur.’*  
A disqualification is thus unwarranted in the absence of a competitive advantage.

- c) The Onus of Proof - It is respectfully submitted that the onus to prove the competitive advantage rests entirely with the Procurement Unit. It is a fundamental principle in the law of civil procedure that he who alleges ought to prove such allegation. A second fundamental rule is that no one is required to prove a negative fact. In other words, the appellant in this case is not required to prove that there is no competitive advantage, but rather it is the Procurement Unit which must prove the existence of such a competitive advantage.
- d) No competitive advantage - The appellant submits that its (sic) participated in Tender IND-KIP-S045-21, the separate procurement exercise relative to the conceptual design stage, did not give it any competitive advantage over the other bidders in this Tender. Therefore, the appellant's disqualification is altogether unfounded in fact and at law:
- i. The conceptual design was made available to all bidders participating in this Tender, thus creating a level playing field.
  - ii. Tender IND-KIP-S045-21 was totally separate and distinct from this procurement procedure.
  - iii. The appellant's involvement in Tender IND-KIP-S045-21 was marginal in that it related solely to: (a) the giving of advice to Lean S.r.l.s. on local planning requirements; (b) reporting to INDIS Malta Limited on the progress in the design development by Lean S.r.l.s.; (c) surveying and draughting of existing premises.
  - iv. The conceptual design was prepared by Lean S.r.l.s., a foreign firm that is unrelated to the appellant.
  - v. As specified in the Tender documentation, the conceptual design is to serve as a basis for a detailed redesign envisaged by the Tender. This procurement procedure requires a detailed re-design which shall supersede the conceptual design. To this extent, the appellant did not benefit from any kind of competitive advantage over the other bidders in respect of the project design aspect of the Tender, especially since the conceptual design was made available to all bidders as part of the Tender documentation.
  - vi. The same principle applies to all the other services forming the subject matter of the Tender: a) Project Management - this service relates to the process of leading the work of a team to achieve all project goals within the given constraints. Project Management relates to the works-execution phase and is completely unrelated to the conceptual design. B) Interior design - the conceptual design is, by definition, a preliminary design relating to the general appearance and layout of the entire facility, whereas the interior design is a detailed design of the interior spaces of the development. It is clear that

the appellant did not have had (sic) any competitive advantage in respect of this aspect of the Tender, especially since the conceptual design was made available to all the other bidders as part of the Tender documentation. c) Site Supervision - this service is rendered during the execution of the works to ensure their conformity with the contract. Here too, the appellant did not have had (sic) any competitive advantage since site supervision is completely unrelated to the conceptual design. d) Quantity Surveying - the same considerations also apply to quantity surveying services. Quantity surveying relates to the management of the contractual and financial aspects of the contract of works between the client and the contractor. Here too, the appellant did not have had (sic) any competitive advantage since quantity surveying is completely unrelated to the conceptual design. e) Quality Assurance and Quality Control - these two services can be treated together since they relate to quality aspects of the works to be executed by the contractor eventually engaged by the client. Once more, this service relates to the works-execution phase. The appellant did not have had (sic) any competitive advantage in this respect is (sic) QA/QC are completely unrelated to the conceptual design. f) Health and Safety Supervision - this service relates to the supervision of health and safety measures during the works-execution phase. The appellant could not have had any competitive advantage in this respect since health and safety supervision is completely unrelated to the conceptual design.

- e) The final consideration that needs to be made is that this Tender relates solely to zone KKO of the site. The conceptual design relates to a much larger area comprising zones KK0, KK1, and KK2. The appellant had no visibility or knowledge of such sub-division prior to the publication of the Tender. The appellant had no involvement in the Tender preparation. It was therefore not possible for the appellant to anticipate any Tender quantities prior to the publication of the Tender. This guaranteed a level playing field between all bidders, thereby excluding any possible competitive advantage in the formulation for the lump sum price.
- f) Finally, it must be pointed out that the disqualification letter issued by the Project Supervisor does not refer to any kind of competitive advantage which the appellant may have benefitted from through its participation in Tender IND-KIP-S045-21. The disqualification letter merely states that the appellant's involvement in the preparation of the concept design as defined in the Terms of Reference in Contract IND-KIP-S045-21 constitutes a direct/indirect involvement in this procurement procedure.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10<sup>th</sup> June 2022 and its verbal submission during the virtual hearing held on 16<sup>th</sup> June 2022, in that:

- a) The Objector's appeal is essentially based on its disqualification from the procedure which, according to Objector, in the absence of a competitive disadvantage was unwarranted. The Objector's involvement in contract IND-KIP-S045-21 is pivotal in this context. By way of background, the Objector was a recommended specialist by ST Microelectronics (Malta) Ltd. (hereinafter referred to as "ST") to advise Lean SrL for the works pertinent to the upgrading of the current premises leased by the Contracting Authority to ST (KK0, KK1 and KK2 at Kirkop). The Objector's services were required to support Lean SrL in their concept design work for the said properties. For the period between 24<sup>th</sup> May 2021 until the 21<sup>st</sup> June 2021, the Objector performed several works connected to the Kirkop site, namely surveying of properties KK0 to KK2 (i.e. including site in question KK0), all of which were certified by ST. The services rendered by the Objector required several on-site visits, draughting of existing premises and issuing milestone reports on the progress being made with respect to the design of the site.
- b) It is pertinent to note that while the conceptual design was indeed made available to all interested bidders prior to submitting their offer, as recommended specialist and advisor to Lean Sr, Objector was privy to the works that led to the publication of this call for tenders. Needless to say that public procurement is intended to create a "level playing field" amongst economic operators. To this extent, ePPS portal requires bidders to declare their direct or indirect involvement in the preparation of the procurement procedure. It is pertinent to note that Objector replied in the negative to the declaration *"Direct or indirect involvement in the preparation of this procurement procedure Has the economic operator or an undertaking related to it advised the contracting authority or contracting entity or otherwise been involved in the preparation of the procurement procedure?"*
- c) It was therefore clear to the Contracting Authority's evaluation board that due to the Objector's direct involvement in IND-KIP-S045-21 which contract included site KK0 forming part of this tender (which involvement is not being contested in any way in Objector's appeal), that Objector had been involved n (sic) the preparation of this procurement procedure -a clear case of a palpable conflict of interest which Objector has tried to downplay in their reply as per above. It would have been unreasonable and irrational for the Contracting Authority to take another course but disqualify Objector's offer.
- d) It is pertinent to note that in its appeal, Objector attempts to justify its position by citing a judgment of the Court of Appeal (Appeal no. 236/2018, Bonnici Bros Projects Limited et v. L- Onorevoli Ministru ghas-Sahha noe et, decided 30<sup>th</sup> July 2018). In the present context, it would not be amiss to refer to what the Court has held in said judgment with specific reference to conflicts of interests:

*"Fid-dawl ta' dan, il-konsorzju esponenti ma jistax jifhem kif, ladarba dan il-kunflitt l'interess gje rikonoxxut mill-bord, l-istess bord seta' jordna li l-offerta tal-konsorzju Ergon tigi ri-integrata fl-evalwazzjoni. Il-konsorzju jirrileva illi f'dan ir-rigward is-sentenza hija manifestament zbaljata ghalieq kontradittorja ghal kollox. Huma*



*obbligu ta' kull oblatur illi jassigura illi kwalunkwe offerta tiegħu tkun bielsa mbux biss minn kull kunflitt t'interess, iżda addirittura minn kwalunkwe riskju ta' tali kunflitt. F'dan il-każ, ir-riskju mbux biss jeżisti, iżda gie konfermat u rikonoxxut mill-istess bord. Huwa għalhekk sottomess illi l-bord kellu għalhekk ikompli biex jeskludi l-offerta ta' Ergon Technoline JV u mbux "isalvaha"!*

....

*Fl-ordinament tagħna, il-bażi legali sabiex tigi skartata offerta milquta min kunflitt t'interess hija r-reg. 194 tal-SL 197.04: »"194. Kuntratt ukoll m'għandux jingħata lil operatur ekonomiku li, waqt il-procedura ta' akkwist għal dak il-kuntratt: "(b) ikollu konflitt ta' interess, keif imfisser fit-tifsira fir-regolament 2, li ma jistax jigi rimedjat effettivament b'mezzi inqas intruzivi;"*

....

*Minn dan għandu jirriżulta ampjament li l-eskluzjoni tal-oblatur ma hijiex awtomatika iżda għandha ssir biss fejn ma hemmx rimedju ieħor. Dan kien jimponi obbligu fuq l-awtorità kontraenti sabiex tinvestiga jekk jeżistix rimedju ieħor;"*

e) It therefore follows that:

- (i) the Objector's direct involvement in the Contract IND-KIP-S045-21 had an impact on the Objector's conduct in the context of this tender procedure and constituted a direct or indirect involvement which disqualifies the bid;
- (ii) in practical terms, this involvement cannot be overseen and could have distorted competition between tenderers;
- (iii) there was no other appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency;
- (iv) the Contracting Authority acted correctly when it proceeded to disqualify Objector's offer.

The Contracting Authority submits that its decision to disqualify the Objector was based on the caution it is bound to exercise particularly in accordance with article 16 (1) (g) of the Public Procurement Regulations (S.L 601.03) which specifically lays down that the Contracting authority shall “*take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators*”

This Board also noted the Preferred Bidder’s Reasoned Letter of Reply filed on 14<sup>th</sup> June 2022 and its verbal submission during the virtual hearing held on 16<sup>th</sup> June 2022, in that:

- a) It is to be noted that Architecture 360 Limited in its objection is referring to Bonnici Bros Projects Limited et v. Onorevoli Ministru għas- Sahha noe et (Appeal No.236/2018, decided on the 30 July 2018), the Court of Appcal held that: “*jekk minhabba konflitt ta’ interess oblatur għandux jigi skwalifikat*

*jew jinghatax z'mien biex inebbi dak il-konflitt jiddependi fuq jekk il-konflitt ikunx ga labaq ta vantagg kompetitiv lil dak l-oblatur.*" This reference [which refers to CT3030/2016 entitled Design & Build of the Primary Health Care Vincent Moran Regional Hub Using Environmentally Friendly Construction Materials and Products ] is completely out of context and the situation is not identical or at least even comparable to the case decided on by the Contracting Authority in tender reference IND/KIP/T003/22. It is to be noted that the case referred to by Architecture 360 Limited concerns amongst others an issue related to potential conflict of interest by one key expert namely Ing Sammut who at the time when the tender in question was being prepared was employed by the same entity that prepared the tender. In the case of Appell numru 236/2018 it could not be established without any doubt that Ing Sammut had an input in the preparation of tender CT3030/2016 entitled Design & Build of the Primary Health Care Vincent Moran Regional Hub Using Environmentally Friendly Construction Materials and Products by Ergon.

- b) On the Contrary in tender IND/KIP/T003/22 it is the same Architecture 360 Limited who by their own admission prepared in part or in full the tender document and also participated as a tenderer in its own name Architecture 360 Limited giving the same Architecture 360 Limited a decisive unwarranted proven advantage over all other tenderers given that it was not only consulting the Contracting Authority on planning legislation, applications, review and participation in the concept design process and the general conceptual development of the project pertaining to tender IND/KIP/T003/22, but the same Architecture 360 Limited was privy to and created itself the information on which other tenderers participating in IND/KIP/T003/22 were to compete - therefore distorting the level playing field and giving Architecture 360 Limited an unfair proven inevitable advantage. It is to be stressed that Architecture 360 Limited not only had a proven advantage when tendering for tender IND/KIP/T003/22 but Architecture 360 Limited failed to declare that it was involved in the preparation of tender IND/KIP/T003/22. Reference is made to correspondence already submitted to the Public Contracts Review Board in the response given by the Contracting Authority in its correspondence of the 10th June 2022. It is clear that Architecture 360 Limited failed to declare its involvement in IND/KIP/T003/22 during tendering stage and tried to deflect attention to the fact that it enjoyed a decisive unwarranted proven advantage over all other tenderers.

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.

The Board will initially list and summarise the points that it deems most relevant to this appeal:

- a) Bonnici Bros Projects Limited et v. Onorevoli Ministru ghas-Sahha noe et (Appeal No. 236/2018, decided on the 30th July 2018), whereby the Court of Appeal held that: *'Jekk minhabba konflitt ta'*

*interest oblatur gbandux jigi skwalifikat jew jinghatax zymien biex inehbi dak il-konflitt jiddependi fuq jekk il-konflitt ikunx ga lahaq ta vantagg kompetittiv lil dak l-oblatur.*” (bold emphasis added)

- b) During verbal submissions, the Appellant stressed the point that in relation to IND-KIP-S045-21, their involvement was limited to identifying policy restraints and overseeing that the concept was faithful to the brief. Moreover, it was ascertained that they were directly engaged by INDIS Malta Ltd.
- c) As per point (b) above, Appellant claims that it was only involved in the concept design, but the project design is in fact one of the requirements of the tender dossier. Hence can one conclude that this was based on the concept design prepared earlier (IND-KIP-S045-21)?
- d) Perit Mark Anthony Muscat’s testified under oath whereby:
  - i. He confirmed he was not involved in the formulation and drafting of the tender dossier.
  - ii. Even though he was not involved in the final design, as his work was involved with surveying site KK0, he was still privy to the full unrestricted minutes of progress meetings.
- e) Mr Keith Buttigieg’s testified under oath whereby:
  - i. Architecture 360 Ltd’s direct order value for IND-KIP-S045-21 amounted to approximately €14,000.
  - ii. Initially the concept design was forwarded only to the Italian architects. However, the design in reference to KK0 (subject matter of this tender procedure) was provided to **all** bidders through a clarification note. (bold emphasis added)
  - iii. Site visits were offered to all bidders.
  - iv. Sites KK1 and KK2 are independent of KK0 and they might not necessarily be re-developed.
  - v. KK0 is to be demolished and that all economic operators had been provided with the conceptual drawings / designs.
  - vi. When directly asked to state advantage obtained by appellant company due to work carried out in IND-KIP-S045-21, he stated that the evaluation committee did not feel that there was a level playing field.

The Board will now continue to analyse all matters above and proceed to provide its conclusions.

- a) From the outset, this Board notes that there are inter-dependencies between the current tender procedure and IND-KIP-S045-21. However as can be understood from *Bonnici Bros Projects Limited et v. Onorevoli Ministru ghas-Sahha noe et* (Appeal No. 236/2018, decided on the 30th July 2018), a disqualification is unwarranted in the absence of a competitive advantage. Therefore, it is important to ascertain if competitive advantage was obtained by the Appellant with its involvement in procedure IND-KIP-S045-21.

- b) To ascertain this, reference is made to PCRB Case 1206 whereby it was stated *“From the above testimony, it is evident that Architect Lewis was knowledgeable of the policy and strategy for the provision of cycle lanes and, in fact, it has been established that the said architect was also assisting Mr Barbara in the preparation of this policy. In this regard, this Board was made aware that such **a policy report has not yet been published so that Architect Lewis was knowledgeable about such a particular policy on cycle lanes which other bidders could not be aware of, as this report was not published and not referred to in the tender document**”* (bold emphasis added). Therefore, one way of ascertaining this is to identify if the Appellant was on a different level playing field as compared to the other economic operators. In PCRB Case 1206, this was achieved by establishing whether the Appellant was privy to ‘more’ information than the other economic operators.
- c) In this tender procedure it was proven, during Mr Keith Buttigieg’s testimony, that all the relevant information was in fact provided to **all** economic operators interested in participating in this tender procedure.
- d) This Board opines that the progress meeting minutes referred to above were in possession of the Appellant company before the report / information provided to all economic operators was drafted. Therefore, any information within, which is relevant to this tender procedure, would have been included in such report provided to all economic operators.[ Chairman – this was not stated by anyone]Therefore, it is the opinion of this Board that the Appellant company would not have had privilege to any specific information, not provided to other economic operators, which would have provided it with a competitive advantage over its ‘rivals’.
- e) Moreover, the Chairperson of the Evaluation Committee did not provide specific examples of what advantage the Appellant was privy to in order for it to be on a different level playing field as compared to other economic operators.
- f) In the Board’s opinion, no tangible proof was provided to ascertain distortion of competition.

Hence, this Board upholds the Appellant’s grievances.

**The Board,**

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 23<sup>rd</sup> May 2022;
- c) To cancel the Letter of Rejection dated 23<sup>rd</sup> May 2022 sent to Architecture 360 Ltd;
- d) To order the contracting authority to re-evaluate the bid of Architecture 360 Ltd received in the tender, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member