

PUBLIC CONTRACTS REVIEW BOARD

Case 1768 – CT 2281/2019 – Tender for the Finishing, Furnishing, Equipping, Operating, Managing, Maintaining and Transferring Back Dar San Guzepp, Ghajnsielem, Gozo as a Facility for the Long Term Care of the Elderly including the Provision of Environmentally Friendly Cleaning Products, IT Equipment, Furnishings and Landscaping

10th August 2022

The Board,

Having noted the letter of objection filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Golden Care Homes Malta, (hereinafter referred to as the appellant) filed on the 9th May 2022;

Having also noted the letter of reply filed by Dr Daniel Inguanez and Dr Anthony Borg on behalf of State Advocate acting for and on behalf of Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 19th May 2022;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of CareMalta Limited (hereinafter referred to as the Preferred Bidder) filed on the 19th May 2022;

Having heard and evaluated the testimony of the witness Ms Sharon Debono (Member of the Evaluation Committee) as summoned by Dr Daniel Inguanez acting for the Ministry for Gozo;

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 14th July 2022 hereunder-reproduced.

Minutes

Case 1768 – CT 2281/2019 – Tender for the Finishing, Furnishing, Equipping, Operating, Managing, Maintaining and Transferring back Dar San Guzepp, Ghajnsielem, Gozo as a Facility for the Long Term Care of the Elderly including the Provision of Environment Friendly Cleaning Products, IT Equipment, Furnishings and Landscaping.

The tender was issued on the 3rd July 2020 and the closing date was the 22nd September 2020. The estimated value of the tender, excluding VAT, was € 38,526,845.

On the 9th May 2022 Gold Care Homes Malta filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be administratively compliant.

A deposit of € 50,000 was paid.

There were four (4) bids.

On the 14th July 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Gold Care Homes Malta

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Bikram Arora	Representative

Contracting Authority – Ministry for Gozo

Dr Daniel Inguanez	Legal Representative
Ms Christabelle Farrugia Grech	Secretary Evaluation Committee
Eng Jeffrey Muscat	Member Evaluation Committee
Perit Shawn Spencer Micallef	Member Evaluation Committee
Ms Sharon Debono	Member Evaluation Committee
Mr Joseph Borg	Member Evaluation Committee
Ms Nadia Cachia	Member Evaluation Committee
Mr Joseph Xiberras	Member Evaluation Committee

Preferred Bidder – Care Malta Ltd

Dr Matthew Paris	Legal Representative
Mr James Sciriha	Representative
Mr Pio Vassallo	Representative
Ms Nathalie Briffa	Representative
Mr Raphael Aloisio	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Gold Care Homes Malta (GCHM) stated that the appeal was a matter of the interpretation and application of the selection criteria and the point of the appeal is about promoting genuine competition. There are two principal grounds of the appeal – how the financial ratios were interpreted and secondly on a point of law. On the question of the debt ratios it appears that there is agreement and if this agreed the case can move forward.

Dr Matthew Paris Legal Representative for Care Malta Ltd (CM) said that as yet the full information had not been disclosed so whilst accepting the point in principle he reserved his rights.

Dr Daniel Inguanez Legal Representative for the Ministry for Gozo agreed with Dr Mifsud Bonnici on the first point which was purely technical.

Dr Mifsud Bonnici said that with regard to the disclosure of information Appellant has disclosed extracts of the ESPD and there have been further disclosures by the Ministry so matters have now moved on from the preliminary point. The ESPD makes very clear that Appellant's bid is a joint venture with the main party financing the project. The details of the joint venture are a sensitive matter and have not been disclosed, as also details of documents submitted on line and requested by the Tender Evaluation Committee (TEC) after the closing date of the tender. Explanation was also given why there were different sets of accounts submitted due to the Covid pandemic – however both sets of accounts meet the debt ratio requirements.

Dr Paris said that these last mentioned documents were irrelevant and should not be considered. The Board is also asked to ignore the accounts submitted for Vassallo Builders and Care Malta Group.

The Chairman pointed out that these documents were filed late anyway and the Board agrees not to take cognisance of the accounts referred to by Dr Paris.

Dr Mifsud Bonnici regretted that the Ministry decided, before hearing submissions, to disclose documents for the recommended bidder's benefit to which comments Dr Inguanez replied that the workings of the debt ratio calculations were disclosed for the sake of transparency.

Ms Sharon Debono (1177G) called as a witness by the Contracting Authority testified on oath that she was employed as an Accountant at the Ministry and was one of the evaluators. She was referred to FM Core Ltd (FM) accounts for the years 2017 to 2019 and the clarification of workings of figures therefrom. Originally the accounts were not submitted in full and there were discrepancies when compared to the final calculations made from figures obtained from the accounts filed with the Malta Business Registry. Witness explained how the ratios were worked out and said that the combined figures of FM and Operations Holdings Ltd (OH) indicated negative ratio figures. The evaluation committee had to combine the figures of FM and OH as there were jointly and severally liable. Witness said that the calculation of EBITDA (Debt to Earnings before Interest, Tax, Depreciation and Amortization) does not properly reflect the financial situation of the companies as the calculations are on adjusted figures. Even when the overdraft balances were not included in the debt figures the overall figure was still a negative one.

Questioned by Dr Mifsud Bonnici witness said that the figures were negative only when the figures of both companies (FM and OH) were combined. She took the decision to combine them on her own and did not consult any expert consultants on the calculation of the figures. The full audited accounts had been requested by the previous TEC whilst the second TEC only asked for the financial figures. Witness stated that she does not know or cannot remember why there were two TECs and that she did not request clarification, as she had a report 'from somewhere else' that that option had already been used. Asked more than once why she had not requested a clarification or rectification but instead requested a new document which was not required in the tender terms witness did not reply. Witness agreed that in the notes in Clause 7 of the tender terms there is no prohibition to the Authority seeking further clarification and also that there is no requirement for full audited accounts.

Dr Paris interjected to point out that that point was irrelevant as it has already been agreed but Dr Mifsud Bonnici said that the point he was establishing is that audited accounts had been requested when there was no requirement for them in the tender.

Further questioned by Dr Paris, witness stated that the second evaluation started the process afresh. Their ratio calculations were based on accounts submitted to the MBR but the first evaluation had based their calculations on financial figures submitted by the bidder.

This concluded the testimony.

Dr Paris said that on behalf of his client he had requested various documents. Appellant states that all documents are sensitive. All that the preferred bidder asked for from the Department of Contracts was for basic information which was refused. Late yesterday part of the ESPD was received but the part which was vital to the preferred bidder was not provided. The ESPD document page 10 item 2.c.1 merely states 'yes'. Further on the ESPD request if the inclusion of economic and financial standing requirements are being met but there is no mention on which ratio the third party is relying (Reference page 25 item 4B.4). In regard to the ratios Appellant had to indicate how it was satisfying the requirements and not merely state 'yes' but provide the information.

The preferred bidder, said Dr Paris, also requested access to documents submitted originally in the bid and is now requesting copy of that part of the ESPD where the required information is indicated or state that the requirement was not met.

Dr Mifsud Bonnici said that the extract of the ESPD is very clear on how the joint venture is structured. The ESPD is there to help the evaluation and it is clear that bidder is relying on FM only. On behalf of his client Dr Mifsud Bonnici objected to further disclosure of further parts of the ESPD. There was no request for rectification of the ESPD so this is a moot point.

Dr Paris asked for the following Minute to be recorded:

'Dr Matthew Paris on behalf of Care Malta Ltd is formally requesting this Board for a full copy of the most relevant parts of the statement of reliance on the capacity of third parties being made by Operations Holdings Ltd through its ESPD document which document has been only handed over less than 24 hours earlier and completely redacted.

This information is crucial and fundamental firstly because any changes that might occur would amount to a change in the original bid. Secondly, because in the redacted version presented by objector the claim of reliance in relation to economic and financial standing but more importantly the financial ratios indicated in page 7 of the tender document is not in any way indicated.

The basis of this request relates amongst other things to Article 40 of the Public Procurement Regulations but more importantly as recently interpreted by the Court of Appeal, Superior Jurisdiction on 22nd June 2022 in South Lease Ltd vs CPSU et pages 6 and 7;

'Il-Bord irrifjuta din it-talba peress li l-informazzjoni kienet, skond hu,"of a commercially sensitive nature". Din il-Qorti ma taqbilx ma dan l-argument peress illi kull parti fi kwistjoni quddiem Tribunal kwazi gudizzjarju (kif inhu i-Bord in kwistjoni) ghandu dritt ghal kull informazzjoni rilevanti ghall-kaz tieghu, u l-parti l-ohra, speċjalment fejn ikun hemm dettalji teknici, trid tipprovdi dik l-informazzjoni u mhux tinheba wara n-natura kummercjali kunfidenzjali tal-informazzjoni. Speċjalment f'kazijiet ta din ix-xorta fejn, hafna drabi, l-ghazla ddur fuq l-istruttura teknika tal-offerta, kull parti ghandha obbligu li tikkexf dak kollu li hu rilevanti u relatat ma l-offerta taghha. Jekk l-informazzjoni li tkun se tinghata tkun sensitiva, il-Bord jista jordna li l-informazzjoni tkun accessibbli biss ghaliha u ghall partijiet fil-kwistjoni, u li ma jinhargux kopji tad-dokumenti relattivi, izda jibqghu issigillati f'envelop ghall-uzu biss kif inghad. L-aversarju, pero, ghandu dritt jitlob mill-parti l-ohra kull informazzjoni marbuta mal-kaz u rilevanti ghall-materja quddiem il-Bord".

Based on this statement of the Court of Appeal the preferred bidder is requesting full disclosure of the ESPD document and any other documentation which is relevant and important to enable us to make our submissions.'

Dr Mifsud Bonnici asked for the following Minute to be recorded:

'The Appellant formally objects to the recommended bidder's request on the basis that this request is too wide, disproportionate and tantamount to a fishing expedition.

The Appellant notes that the Court of Appeal took a different position in the following two cases

Salvatore Mifsud vs Kunsill Lokali Sliema (362/2016/1)

Mediterranean Insurance Brokers vs Direttur tal-Kuntratti (11/2016)

where a wide request for a bidders documentation was turned down. The Appellant also refers to Case C/450/06 Varec SA and specifically paragraph 51.

The Appellant submits that the South Lease case related to a request for a specific piece of information while the recorded request just made is much wider.

In any case the Appellant's request has no utility for the determination of this case for two reasons- information requested by the tender on financial ratios has been submitted by the Appellant and secondly in any case any shortcoming in the ESPD could have been rectified because there was no request for rectification issued by the Evaluation Committee on the ESPD.'

The Chairman proposed a short recess to enable the Board to consider the submissions made.

On resumption the Chairman said that the Board noted the Minutes of both Appellant and the preferred bidder. It deems most relevant the cases as quoted being South Lease vs CPSU et and Varec SA vs Belgian State.

The Board notes that basically, in both instances, the courts highlighted the right of participants in a procurement procedure to be supplied with information which is relevant (emphasised) to their respective case.

This was more widely interpreted in the case Varec SA vs Belgian State where it was held the issue of relevance must be examined with circumspection and within the context of balance – that is to say, that such right of access "must be balanced" against the right of other economic operators to the protection of their confidential information and their business secrets.

Henceforth, this Board whilst upholding the Appellant's request "in parte" whereby it accedes to the request limitedly to page 25 section 4B.4 of the ESPD. In this way the Board will be striking a fair and just balance between the provision of access of information and the right to the protection of confidential business secrets.

Dr Mifsud Bonnici requested the Board to allow him a short break to enable him to confer with his client. After the break Dr Mifsud Bonnici said that he can reveal that section 4B.4 in page 25 of both ESPDs was left blank.

Dr Paris said that notwithstanding this information his client still requested a copy and a further copy to be filed in the records of the case. The preferred bidder claims that the decision of the Authority is correct – firstly because its bid was the cheapest compliant offer and secondly one believes that the joint venture failed the financial ratio tests irrespective of any reliance factor. It failed for the

fundamental reason that it is crucial that the parties in a joint venture continue in force until the contract is concluded. If any economic operator did not like the conditions in a tender there was the availability of remedies but once the bid was submitted there was full acceptance of the terms. No mention has been made of OH since if one had to look at their finances they clearly fail the ratio test. Not only is this shown in the documents submitted but it is also confirmed by the Authority. No evidence has been produced that OH meet the test. This is not merely about financing since the financial position of FM is irrelevant to the project.

Dr Mifsud Bonnici said that it is agreed that there is nothing wrong with GCHM figures as the Authority has agreed that the ratios were calculated incorrectly and this argument has lapsed. The Authority was wrong to expect the Appellant to prove this point and they are duty bound to give reasons not just brief replies.

On the point of law, said Dr Mifsud Bonnici, this case is surreal as it challenges how the basic principles of a joint venture work in public procurement. The objectives of the EU Directives are to promote competition. The key objective of the 2014 Directive is the participation of SMEs in tenders – the law and CJEU judgements are all in favour of this. There are, of course, limits to this and the principle is that one can rely on the capacity of someone else. If the Appellant satisfies these criteria it is at liberty to compete. It is clear in this case that both parties are bound by the joint venture with joint and several liability – this is evident from the ESPD which makes it clear who is taking the financial burden.

Rectification, continued Dr Mifsud Bonnici, is not a matter of changing the bid. Item 4B.4 was left blank but that is a point that could have been easily rectified with no changes to the bid. The principle of proportionality applies and substance over form warranted. FM has identified itself as the lead partner financially with OH supplying the technical side of the subject matter. Appellant supplied the financial ratios for FM precisely with a purpose as they were taking on full financial capacity. In Clarification Note 7 question 12 the Authority confirmed that one party could take financial responsibility and their subsequent action shows a flaw in their reasoning. PPRs 58 and 235 make it very evident that reliance is possible – both the law and the General Rules Governing Tenders are very clear that a bid can be structured as one wishes, a substance over form approach. It did not help that the Authority failed to seek legal advice on this matter.

Dr Mifsud Bonnici mentioned the South Lease case and said that in their decision the PCRB referred to Regulation 235 and recognised that not every party in a joint venture has to meet the requirements. As to the UK document exhibited by the preferred bidder, this was not relevant as it was issued post-Brexit but even so the document mentions the need for joint and several liability which is exactly what happened in this case. He then referred to CJEU Case C642/20 (Caruter Srl) where the European Court took a very expansive definition of joint venture and flexibility is to be defined in each and every tender. Reference was also made to European Code of Best Practice which in pages 9 and 16 gives clear direction how to interpret and organise joint ventures. If the TEC having done their calculations had requested a clarification or rectification then at least Appellant would have been given the opportunity to appoint a sub-contractor to correct the balance in his favour. According to Regulation 235 (3) when an economic operator relies on the capacity of other parties the Contracting Authority may require those entities to be jointly liable. This provision was not provided in the tender which meant a sub-contractor could have been appointed without joint and several liability which holds the law to ridicule. The law is drafted to provide genuine competition and Appellant's exclusion is at odds with public procurement regulations.

Dr Inguanez stated that there is no contestation by the Appellant that the aggregate of the joint venture gives negative ratios. Whilst Appellant claims that FM takes on all financial capabilities the

Authority contends otherwise and it is the combined venture liabilities that have to be considered. The General Rules regulating tenders refer to 'as a whole'. The financial accounts submitted clearly indicate that one of the parties has financial problems. Case C642/20 earlier referred to, states in section 38, that the Contracting Authority is entitled to decide the terms of the joint venture.

Dr Paris started by asking a question – what is the Government trying to buy? The reply is a ninety (90) month procurement with six (6) months construction and most importantly seventy six (76) months on phase 2. The ESPD makes it clear that FM will be involved in the first phase but OH in the second phase covering the care of the elderly. The decision on how to structure the bid was exclusively that of the bidder. In the clarification note the emphasis is on experience. The General Rules state that a joint venture as a whole must satisfy the criteria of the tender and this is confirmed in section 1 (Instruction to Tenderers) in the tender document. Appellant is wrong in claiming that the document has to be considered as a whole.

Dr Paris quoted from 'The Law of Public Utilities' the work of Prof Arrowsmith wherein it is stated that government does not enter in a tender with a party which might fail. The ratios are there to give assurance that the entity will not fail especially when 85% of the duration of the tender relates to elderly care. Documents clearly show that considered as a whole and looking at the broader picture one must ensure that the contract will be fulfilled.

Mr Raphael Aloisio Representative for Care Malta Ltd said that financial ratios gave an indication of a company's standing over a the long term view and the prospect of the bidder being there for the duration. One has to ask if one of the partners fails who is going to run the Home? What happens then? In this case one of the operators has a negative EBITDA and a deficient balance sheet.

Turning to the point of reliance Dr Paris referred to Article 19 of the 2014 Directive which states that if one wants to depart from a joint venture one must justify it. The tender covers the point re joint ventures or consortia and if the tender wanted to move away from the normal it has to declare it – when it did not declare it, Article 2.4 has to be followed. The South Lease case is completely relevant – reliance is not absolute it is only where it is appropriate which it is not in this particular case or in the tender documents. If the objector was not happy with the terms or the clarifications there was a remedy easily available. There has been an admission that bidder failed to indicate in the ESPD to what criteria it was referring and any substantial changes in it will lead to changes in the original submissions. CJEU Case C 387/14 deals with reliance on third parties' capacities and states that once it has been established that another party has been brought in that amounts to a change in the original bid. OH should have declared that they were relying on the financial capacity of FM – nowhere is this stated.

Dr Paris next referred to a UK Government publication "Assessing and Monitoring the Economic and Financial Standing of Bidders and Suppliers" and particularly section 2.7.1 which deals with the need to assess figures of both parties in a joint venture and section 2.7.3 stating that the tender terms must follow on the same lines. On the matter of self-limitation Dr Paris referred to PCRB Case 1665 wherein it was held that the rules are applicable to all including the Contracting Authority and confirmed in CJEU Case C451/10 stating that it cannot depart from conditions it has itself imposed. Dealing with financial ratios, Dr Paris said, that the viability of bidders is crucial to the Authority and the winning bidder has to submit to it annual financial situations to enable it to ascertain that it does not fall foul of its obligations. The Board must consider if the joint venture clearly stated whether it was relying on OH financial ratios and if it definitely did not where has it been stated that OH is relying on the other party's financial capabilities. Was the TEC authorised to examine the financial figures of both

parties and was it correct in reaching its decision. Reliance was clearly not stated and the bid failed all requirements.

Dr Mifsud Bonnici, replying to the points made, said that no one is claiming that the financial ratios are not important – the tender should have been clear on this if the TEC wanted to apply the interpretation they did. Clarification Note 7 refers to technical and financial resources whilst the last paragraph of Article 2.4 of the General Rules stated a group of participants may rely on the capability of other members in the group. An economic operator is at liberty to organise itself as it wishes. Mr Aloisio’s comment about the necessity to ensure joint and several liability is also correct. The law is clear on the point that one can organise oneself as it wishes but it is not the case, as claimed by the preferred bidder that the contract is going to be ruined, and it certainly not the case that the Appellant is heading into financial difficulties.

There was no request for rectification on the ESPD, continued Dr Mifsud Bonnici, as this tender is an old one and did not include the clause that rectifications cannot be asked for again. He cited the case of the Paola Primary Care Hub where in a high value tender more than one clarification was allowed. The request by the Authority for audited accounts did not amount to a rectification as the tender did not request the documents for a start. The Note to Clause 7 is not an issue as it just regulates what the Authority can do. The ESPD, which is the principal issue, does not allow changes that are material to the bid. Regulation 235 allows the possibility of changing sub-contractors and the preferred bidder appears to be turning this point of law upside down in its arguments.

According to Dr Mifsud Bonnici, Dr Inguanez said that the Caruter case does not apply in this case; however the principle is what the Authority needs to do in each case. The Appellant’s intention is very clear from the ESPD with reference to the financier. Appellant was consistent and submitted only the FM financial ratios as they were the only ones that were relevant. A rectification would not have changed the bid. The principle in Regulation 58(2) is clear. The Contracting Authority did not submit that each party has to satisfy the requirements. The principle is clear – if the Authority wanted each party to satisfy the financial ratios it should have stated that.

The Chairman thanked the parties for their forbearance in a long and complex case and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 14th July 2022.

Having noted the objection filed by Golden Care Homes Malta (hereinafter referred to as the Appellant) on 9th May 2022, refers to the claims made by the same Appellant regarding the tender of reference CT2281/2019 listed as case No. 1768 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Daniel Inguanez & Dr Anthony Borg
Appearing for the Preferred Bidder: Dr Matthew Paris & Mr Raphael Aloisio

Whereby, the Appellant contends that:

- a) ***First Ground of Appeal:*** Contracting Authority erred in its interpretation and application of the EBITDA to Debt repayments (including interest payments) selection criterion.

The Appellant is aggrieved by the fact that the Contracting Authority has decided that “*FM Core Ltd reported positive balance but is below the threshold as established in the criteria with 0.87 and 0.43 for 2018 and 2019 respectively*”, and therefore, it has concluded that FM Core Limited has not satisfied this criterion. The Tender provided that: “*Tenderers are to submit evidence [including related workings] from their audited financial Statements for 2018 and 2019 that their: [...] iii. EBITDA to Debt repayments (including interest payments) is not below 1.0 times*” The Appellant respectfully submits that the Contracting Authority has erred in its interpretation and application of this selection criterion by working out the ratio using the TOTAL DEBT rather than the DEBT REPAYMENT. This is evident from the workings carried out by the Appellant after receiving the letter of rejection. As this Honourable Board will surely appreciate, these are two different things. As the Appellant shall prove, in due course during these proceedings, FM Core Limited satisfied this criterion since its EBITDA to Debt repayments (including interest payments) for 2018 and 2019 is not below 1.0 times.

- b) ***Second Ground of Appeal:*** Reliance on Third Parties' Economic and Financial Standing
- i. The Appellant is aggrieved by the fact that the Contracting Authority has rejected the Appellant's bid since Operations Holdings Limited, the partner responsible for operations and management of the project, does not satisfy any of the above-mentioned selection criteria on Financial Ratio. The Appellant respectfully submits that the Contracting Authority's decision on this point is in breach of law and the general principles of public procurement law.

As shall be explained below, the Appellant had every right at law, and according to the Tender and the General Rules Governing Tenders, to organise its consortium as it deemed fit to satisfy the selection criteria relating to Economic and Financial Standing and for the Appellant to rely on the capabilities of participants in the group or of other entities.

The Appellant expressly organised the "Gold Care Homes Malta" consortium by relying on FM Core Limited's capabilities for the satisfaction of the selection criteria on Economic and Financial Standing and by relying on Operations Holdings Limited's capabilities for the satisfaction of the selection criteria on Technical and Professional Ability.

The Contracting Authority, however, and for some odd reason, has decided to take into account the Financial Ratios of Operations Holdings Limited, even though the Appellant did not rely on its Economic and Financial Standing, to lower those of FM Core Limited which satisfied (subject to the above-mentioned ground of objection) the selection criteria on Financial Ratios.

ii. The Courts of Justice of the European Union has, in past judgments on this matter, held that:

a. that the combination of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, including selection criteria on economic and financial standing, is permitted, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract;

b. such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities and further facilitates the involvement of SMEs.

These principles are codified in Directive 2014/24 (and Directive 2004/18 before it), and therefore, transposed in the PPR.

Based on Regulations 2, 235 and 58 of the Public Procurement Regulations and Rule 2.4 of the General Rules Governing Tenders, it is evident that the Appellant could have decided to rely on the Economic and Financial Standing of FM Core Limited, one of the participants in the group, only, but so long as the Appellant did *“prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect”*.

This commitment is patently evident by the very fact that FM Core Limited is part of the consortium, but in any case, it is evident from the signed ESPD submitted by FM Core Limited and the joint venture agreement.

iii. The Appellant made it very clear, in the respective ESPDs submitted for FM Core Limited and Operations Holdings Limited, that the financier will be FM Core Limited. In fact, the Appellant only provided data on the Financial Ratio for FM Core Limited and it did not provide any data on the Financial Ratio for Operations Holdings Limited. However, the evaluation committee, unilaterally and in breach of the principle of self-limitation, requested, by way of rectification, the audited financial statement for Operations Holdings

Limited and then did their own calculations on the Financial Ratio of the same. It must be said that the Tender did not say that each member of the joint venture was to satisfy the selection criteria on Financial Ratio (Economic and Financial Standing) and rather the law and the General Rules Governing Tenders say that a group of economic operators may rely on the capabilities of participants in the group or of other entities. The Appellant submits that this is the position taken by the Contracting Authority itself (correctly so, the Appellant adds) in its response to Question No 12 in Clarification Note 7 referred to above in paragraph 4 when it permitted a "wholly owned new subsidiary" to rely on the "technical and financial resources" of its "mother company" to satisfy the eligibility criteria of this Tender. This corroborates the Appellant's submissions and is perfectly consistent with the law.

- iv. Further, and on a concluding note, the Contracting Authority's conduct and decision on this point is in breach of the general principles of public procurement:
 - a. Self-Limitation & Transparency. The interpretation that the Contracting Authority has adopted to the Tender selection criteria is wrong and it is evident that it exceeds the prescribed procedure and the tender specifications and conditions.
 - b. Promotion of genuine competition. The interpretation that the Contracting Authority has adopted is contrary to the above-quoted jurisprudence of the CJEU, and other cases and literature that might be cited in due course, since it restricts the actual competition on the Tender and denies economic operators of the flexibility afforded by the law and the General Rules Governing Tenders.
 - c. Proportionality. The interpretation that the Contracting Authority has adopted, in any case, exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the Tender. Further, the evaluation committee did not, on this point, avail itself of rectification requests or clarification requests at its disposal and opted for the most onerous route of excluding the Appellant's bid.
- c) ***Third Ground of Appeal:*** Recommended Bidder does not satisfy the Financial Ratio: EBITDA to Debt Repayments methodology used by the Contracting Authority

Without prejudice to the First Ground of Objection, the Appellant submits that if the methodology of calculation the Financial Ratio applied to it were to be applied to Recommended Bidder, it appears the Recommended Bidder would not have satisfied these selection criteria and this shall be proven, in due course during these proceedings.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the virtual hearing held on 14th July 2022, in that:

- a) First ground of appeal;- The first ground of appeal relates to the selection criterion regarding the Financial Ratio contained in Section 7(B)(b)(iii) of the tender documents *“Tenderers are to submit evidence [including related workings] from their audited financial statements for 2018 and 2019 that their: iii. EBITDA to Debt repayments (including interest payments) is not below 1.0 times. The Evaluation Committee reserves the right to request Audited Accounts for the past 2 years (being 2018-2019), if not appearing on the website of the Malta Financial Services Authority (MFSA).”*

In its evaluation of the Appellant's bid the Contracting Authority concluded that FM Core Limited had a EBITDA to Debt Repayment ratio of 0.87 in 2018 and of 0.43 in 2019. The overdraft balance of the company was considered as "debt repayment". being taken into account). The Appellant's accounts, as submitted by the Appellant itself, were not comprehensive so much so that the contracting authority had to check the audited accounts of FM Core filed with the Malta Business Registry. For financial year 2019, there is a discrepancy between the submitted accounts and the audited accounts filed in the Malta Business Registry. The Contracting Authority submits to the Board that it is for the Appellant to prove that the EBITDA to Debt Repayments ratios were incorrectly calculated in the case of FM Core Limited.

- b) Second ground of appeal;- The second ground of appeal is that the Appellant's bid could not have been rejected for the reason the Operations Holdings Limited, one of its consortium members, did not satisfy the selection criteria relating to the Financial Ratio. The Appellant further explains that it is relying on FM Core Limited's capabilities to meet the selection criteria on Economic and Financial Standing and on Operations Holdings Limited's capabilities to meet the selection criteria on Technical and Professional Ability. Rather than relying on "third parties" the Appellant is relying on its own member entities in terms of Regulation 58 of the Public Procurement Regulations which allows the sharing of capabilities in consortia.

The Appellant is incorrect in asserting that its bid was disqualified based on the financial capability of FM Core Ltd only. To the contrary the Appellant's bid was rejected since the two consortium members taken together did not satisfy the selection criteria relating to Economic and Financial Standing. FM Core Ltd does not have the financial capability to finance the capital and the losses sustained by Operations Holdings Limited. In fact, the Contracting Authority evaluated the Economic and Financial Standing criteria in relation to both FM Core Limited and Operations Holdings Limited, together, to verify whether the Appellant could rely on the two members' capabilities!

- c) Third ground of appeal:- First, it is for the Appellant to prove its allegation that a different method of calculation of the financial ratio was applied to the Recommended Bidder. In any case and without prejudice to the above, the Respondent Contracting Authority rejects the Appellant's allegation.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the virtual hearing held on 14th July 2022, in that:

- a) **No changes to the original bid** - Without prejudice to all other legal arguments included hereunder, the only recognised method through which an entity may rely on the capacities of third parties is through the proper submission of the appropriate ESPD document. As a matter of fact, Directive 2014/24/EU imposes that: *"It should be set out explicitly that the ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in respect of the main economic operator."* This is followed up through Section C of the ESPD, wherein an economic operator that so wishes to rely on the capacities of third parties shall confirm and reply in the affirmative to the following question: *"Does the economic operator rely on the capacities of other entities in order to meet the selection criteria set out under Part IV and the criteria and rules (if any) set out under Part V below?"*

In this particular context, the claim being made by the appellant is that Operations Holdings Limited was relying on the capacities of FM Core Limited to satisfy Part IV of the criteria - Thus and thereby, the only method through which Operations Holdings Limited could have so availed of the exemption envisaged in article 235 of the Public Procurement Regulations [hereinafter 'PPR'] [an exemption which CM contests in the situation de quo], was through the submission of the ESPD document by Operations Holdings Limited asserting that it was relying on the capacities of FM Core Limited. *Ex admissis* in point 21 of the objection, the appellant consortium claims that any such declaration [if at all] has been organised through the ESPD of FM Core Limited and not through the ESPD of Operations Holdings Limited.

Thus and thereby, if at all, the reliance declaration has been erroneously made and cannot at such stage be amended or changed, as any such modification and change amount to a change the original bid, which is an approach which is not permissible under the public procurement regulations.

- b) Failure to satisfy the financial measures creates a serious existential threat to the consortium - Article 235 of the PPR has been included following a number of ECJ judgments and the inclusion of same within the European Union *acquis communautaire* with a specific objective of widening competition. Whilst widening of competition is indeed permissible, reliance on the capacities of third parties is not permitted in all circumstances, and this as indicated by article 235 of the PPR itself. The article of the law allows it only "where appropriate" and it does so to limit any abuse which might be directed at circumventing rules and/or mandatory requirements.

In this particular context the following financial workings:

- Debt-to-Earnings before Interest Tax, Depreciation and Amortisation ratio does not exceed 8 times

- Interest bearing liabilities on equity and interest bearing liabilities does not exceed 80%
- EBITDA to debt repayments is not below 1.0 times

Are all measures of financial performance of the companies/entities involved, which are crucial to determine the going concern of the same entities and thereby confirm that for the foreseeable future the entities will remain in operation. Any failure of such measures shall a *contrario sensu* constitute a serious existential threat to the same entity, and as a consequence the consortium with which it is associated. It is for this reason that it is crucial that the financial measure is triggered and applied identically to all economic operators forming part of a consortium, in this particular context both FM Core Limited and Operations Holdings Limited, as any fallacy or failure by one entity will automatically and profoundly impact the consortium organised as GCHM.

This interpretation is consistent with the provisions of the General Rules Governing Tenders, which claims that: *“In the case of a joint venture/consortium/group of Economic Operators, the joint venture/consortium/group of Economic Operators as a whole must satisfy the criteria established in the instructions to Tenderers”* As well as; *“All partners in the joint venture/consortium/group of Economic Operators are bound to remain in the joint venture/consortium/group of Economic Operators until the conclusion of the contracting procedure. The consortium/joint venture/group of Economic Operators winning this contract must include the same partners for the whole performance period of the contract other than as may be permitted or required by law.”*

Thus and thereby, whilst it is clear through the general rules governing tenders that it is the joint venture as a whole that ought to satisfy the requirement and not an individual member, the financial measure must scrutinise both companies to ascertain that no member of the consortium perishes due to financial troubles throughout the pendency of the contract.

- c) ***Ubi lex voluit dixit*** - In an analogous situation, specifically in the requirement of 'Other economic or financial requirements' [page 8 of the tender document], the tender document itself created a special provision for joint venture/consortium and didn't require evidence for each and every member of the joint venture/consortium. The tender document held that: *“Evidence that the Tenderer has adequate financial resources together with the necessary credit facilities to finance the project throughout the duration of the contract. The Tenderer must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities. Each Tenderer's financial proposal must be accompanied by a support letter from the Tenderer's bank that confirms the latter's favourable consideration to provide the debt financing portion of the total funding requirements contemplated in the respective Proposal. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture”*

Would the tender document require a different approach in terms of the 'financial ratio' [tender document page 7] it would held so declared - *Ubi Lex Voluit Dixit*. The fact that the tender document is silent on this matter, make it mandatory on the evaluation committee to review the economic operators individually and separately vis-à-vis the financial ratio; The above is consistent

with Article 19 of DIRECTIVE 2014/24/EU, whereby it is held that: *“Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 58 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements. Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.”*

In the situation de quo, the contracting authority/DOC clarified the manner in which economic operators in the form of joint ventures/consortium are to satisfy the Other economic or financial requirements, but did not deem it necessary to clarify vis-à-vis other criteria. At this point, would the evaluation committee had decided otherwise, it would have itself be infringing the doctrine of self-limitation, which is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderer are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.

- d) ***CM fully satisfies requirements*** - Finally, in a tame attempt, the appellant claims that the recommended bidder qua CM does not satisfy the financial ratio criteria. Whilst forcefully rebutting this claim as totally unfounded, the appellant consortium failed to explain how CM does not satisfy the criteria, and thus by virtue of this provision CM is reserving its rights to present further submissions [oral and written] during the public hearing in relation to this unfounded grievance put forward by the appellant consortium.

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) With regards to the first and third grievance, it was ascertained, in the beginning of the hearing, that the Contracting Authority erred in its interpretation by working out the ratio using the total debt rather than the debt repayment. Therefore, the first grievance is being upheld whilst the third grievance is being declared not applicable any further.
- b) ***Second grievance - Reliance on Third Parties’ Economic and Financial Standing***
Initially this Board will list down what it deems to be of most relevance to this specific grievance.
- i. General Rules Governing Tenders V4.4 – sections 2.4 & 2.5 which state:
*“2.4 In the case of a joint venture/consortium/group of Economic Operators, the joint venture/consortium/group of Economic Operators **as a whole must satisfy the criteria established** in the Instructions to Tenderers.*

2.5 An economic operator **may, where appropriate** and for a particular contract, **with regard to criteria relating to economic and financial standing** and to criteria relating to technical and professional ability, **rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.** With regard to criteria regarding educational and professional qualifications, Where an economic operator wants to rely on the capacities of other entities, **it must in that case prove to the contracting authority** that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.” (bold & underline emphasis added)

Therefore, this Board opines, that although initially it is clear and evident that joint ventures need to satisfy criteria “as a whole”, it is also very much accepted and legally permissible to rely on the capacities of certain members making up the joint venture, always within certain requisites that must be reached and honoured.

- ii. Tender Dossier Section 1 – Instructions to Tenderers – paragraph 7(B)(b)(1) whereby it is clearly stated that “*the Evaluation Committee reserves the right to request Audited Accounts for the past 2 years (being 2018-2019), if not appearing on the website of the Malta Financial Services Authority (MFSA)*”. It is therefore evident that when these audited accounts were requested by the Evaluation Committee to the Appellant, this would not, in the view of this Board, constitute a request for rectification. This, on the basis of the fact that such audited accounts were not initially required to be presented (in the first place).
- iii. ESPD of members constituting Gold Care Homes Malta - Section 2C.1 – “*Does the economic operator rely on the capacities of other entities in order to meet the selection criteria set out under Part IV and the criteria and rules (if any) set out under Part V below?*” – the answer to such question reference is marked as “Yes”.
- iv. ESPD of members constituting Gold Care Homes Malta - Section 4B.4 (page 25) – was left blank. However, this Board opines, that a simple rectification request would have, for fairness’s sake, solved such an issue. This Board does not agree with argumentation brought forward by the Preferred Bidder that such a ‘rectification’ would have amounted to a change in the original bid. Notes to Clause 7 (2A) clearly states “*Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation and/or submit any missing documents within five (5) working days from notification.*” Note 2B continues on the same similar lines.
- v. Reference is made to document presented by the Preferred Bidder entitled “*Assessing and Monitoring the Economic and Financial Standing of Bidders and Suppliers*” submitted in relation to the issues of ‘reliance’ and ‘guarantees’. Paragraph 2.7.1, in the Board’s opinion, speaks about the safeguards a contracting authority needs to adopt when a major shareholder/stakeholder of a JV is relying on other members of such JV. Therefore, it is as clear as day that reliance on financial aspects can be adopted, always keeping in mind

any requisites that would need to be satisfied in terms of law. One such safeguard, it continues, is to adopt a ‘joint and several guarantee’. In fact, it states “*a written commitment to provide such guarantees would normally be sufficient at selection stage*”. This has been duly done – adhered to – by Appellant.

This Board will now continue with its interpretations.

- i. *Substance over form argument as brought forward by Appellant* – this Board refers to the fact mentioned above, more specifically the ESPD Section 2C.1 where the question on reliance was marked as ‘yes’. Reference is also made to the fact that for the financial ratios (tests on the economic and financial standing), the Appellant used only the data / figures of one member of the JV, FM Core Ltd. Even though ESPD Section 4B.4 was left blank, it is this Board’s opinion that it was clear from the start that for economic and financial standing requisites reliance was going to be placed on the financial ‘robustness’ of FM Core Ltd. Such suppositions are certainly not enough, but that is why there are ‘safeguards’ / ‘tools’ within the tender dossier and within the public procurement process to ‘save’ a tender offer whenever possible. This, through the rectification request, which should have been made available to the Appellant when the Evaluation Committee saw that such a section was left blank by the Appellant. That, in the Board’s opinion, would have been a proportionate manner of how the Evaluation Committee should have acted. It would also certainly have fit within the principle of self-limitation that evaluation committees are required to observe. It is after all what the Public Procurement Regulations are all about - to promote genuine competition. Such ‘promotion’ obviously has always to be within the very high regard to the rules and principles legislating it.

When considering all the above, this Board upholds this second grievance of the Appellant.

The Board,

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

- a) To uphold the Appellant’s first and second grievances;
- b) To cancel the ‘Notice of Award’ letter dated 29th April 2022;
- c) To cancel the Letter of Rejection dated 29th April 2022 sent to Gold Care Homes Malta;
- d) To order the contracting authority to re-evaluate the bid of Gold Care Homes Malta 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

Dr Charles Cassar
Member

Dr Vincent Micallef
Member