

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1808 – CT2050/2022 – Supplies – Lease of 48 Plug-in Hybrid Vehicles for the Members of Judiciary**

**8<sup>th</sup> November 2022**

The Board,

Having noted the letter of objection filed by Dr Albert Libreri acting for and on behalf of Princess Operations Limited, (hereinafter referred to as the appellant) filed on the 30<sup>th</sup> September 2022;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for Court Services Agency (hereinafter referred to as the Contracting Authority) filed on the 10<sup>th</sup> October 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 5<sup>th</sup> October 2022;

Having heard and evaluated the testimony of the witness Ms Laura Desira (Chairperson of the Evaluation Committee) as summoned by Dr Chris Mizzi acting for Court Services Agency;

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 3<sup>rd</sup> November 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1808 – CT 2050/2022 – Tender for the Lease of 48 Plug-in Hybrid Vehicles for the Members of the Judiciary**

The tender was issued on the 1<sup>st</sup> May 2022 and the closing date was the 2<sup>nd</sup> June 2022. The estimated value of the tender excluding VAT, was € 3,155,328.

On the 30<sup>th</sup> September 2022 Princess Operations Ltd filed an appeal against the Courts Services Agency as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not administratively compliant.

A deposit of € 15,776.64 was paid.

There were three (3) bids.

On the 3<sup>rd</sup> November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Princess Operations Ltd**

Dr Albert Libreri  
Mr Joseph Camenzuli

Legal Representative  
Representative

### **Contracting Authority – Court Services Agency**

Dr Christopher Mizzi  
Dr Carlos Bugeja  
Ms Laura Desira  
Mr Daniel Mifsud  
Ms Bronia Farrugia  
Ms Maria-Louisa Busuttil

Legal Representative  
Legal Representative  
Chairperson Evaluation Committee  
Secretary Evaluation Committee  
Member Evaluation Committee  
Member Evaluation Committee

### **Department of Contracts**

Dr Mark Anthony Debono

Legal Representative

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

Dr Albert Libreri Legal Representative for Princess Operations Ltd said the basis of the appeal was that the Contracting Authority was allowed to move beyond the parameters of the tender. In their interpretation of 'similar nature' the Authority introduced three criteria. The record of leasing of cars over three years was not in the tender document; ignoring contracts for periods less than a year was also not in the tender whilst the daily rate offered was not a matter within the Authority's ambit as it had no right to decide on this point. Reference was made to Court of Appeal case of 26<sup>th</sup> October 2022 Koperattiva Ghawdxija tal-Indafa Pubblika vs Kunsill Regionali Ghawdex u Dipartiment tal Kuntratti where it was held that the Authority cannot involve itself in the way a contract was going to be financially fulfilled. The Authority had no right to decide on the daily rate offered.

In dealing with the decision to ignore contracts under 12 months, said Dr Libreri, the Authority has no right to decide on what money value should be taken or what should be ignored. At the very most they were obliged to seek clarifications which was done and replied to by the Appellant. Bidder would have provided any further documents if it had been asked. The outcome was wrongly calculated by the Authority as the value of the contract in the years in question was in excess of €1.9 million – even if certain figures were eliminated the value of the contracts would still exceeds €1 million even though the tender did not request this at the start.

Dr Christopher Mizzi Legal Representative for the Court Services Agency requested the evidence of a witness.

Ms Laura Desira (153388) called to testify by the Contracting Authority stated on oath that she was the Chairperson of the Tender Evaluation Committee (TEC) and said that Appellant was disqualified at the first stage when experience was checked against the tender requirements. She referred to Section 1 Clause 5B(c) which deals with the leasing of cars during a period of years and the value of the contracts. Appellant's submission was vetted for contracts of a similar nature and if they reached the figure of € 1 million. There were insufficient details on the EPPS so a clarification for full details was requested. The reply covered 142 contracts with individual details and values. In order to avoid a superficial decision and be objective the TEC checked each contract separately and found divergences in the outcome. Three tests were set up, all non-discriminatory on three basis to set up a wide benchmark to check their similarity to the requirements. These tests were:

Test 1 - A figure of € 10,000 to match the figure used as contract value threshold  
Test 2 – 1 year's duration contracts as compared to the 5 year requirement in the tender  
Test 3 – daily rate based on current contract covering all running costs to compare like for like

This exercise enabled a comparison with the tender requirements. The TEC contacted certain public organisations as mentioned by bidder to fulfill due diligence and as their requirements were on the same basis. Four of the Government agencies (detailed) did not confirm that they had contracts with the bidder with stated reasons. Values were not agreed with contracts entered into by LESA and OPM. These diligence tests created doubts in the mind of the TEC. As clarifications had already been requested it was not possible to query these anomalies further. Out of a small sample of 9 organisations issues were found on the first four.

Questioned by Dr Carlos Bugeja Legal Representative for the Court Services Agency witness stated that these tests were carried out on all bidders. The scope was to compare bids for similarity to save as many bids as possible. The total contract value was not reached under any calculations and several examples of particular cases were quoted.

In reply to questions by Dr Libreri witness stated that the tender requirements regarding years and value were stipulated on page 5 of the tender dossier. The evaluation followed the wording of the tender and data was requested to compare similarity but this was not known by bidders. Disqualification of Appellant was due to not reaching threshold since in executive vehicle leasing there are extra costs not found in small contracts. The information provided was sufficient for the TEC to form an opinion. Further rectification was not possible. The tender allowed only request for list of contracts and not for sample leasing contracts. The daily rate was given by Appellant in reply to a clarification request, added witness, and that bidder would have failed all three tests. Bidder was provided with a list of contract valuations indicating how the million figure was not reached – this figure would only have been reached if contracts that were not similar were considered. The TEC went to great lengths to establish similarity and based its findings on the way similarity was decided.

This concluded the testimony.

Dr Libreri said that the drafter of the tender had one view of similarity whilst the TEC had their own interpretation which were never known to the bidder. In the Case *Pharmacos vs Director of Contracts* (30.3.22) it was made clear when clarification can be sought and the TEC cannot claim that it cannot ask for more than one clarification.

Dr Christopher Mizzi stated that when one talks of ineligibility one has to remember that technical and professional parameters are a matter of law. Regulation 112 of the PPR was not invented by the Authority and it has the ability to tie down requirements to 'similar nature'. The TEC had to create an objective test to conclude matters and it was necessary to analyse data and reach conclusions as to what was acceptable. The Board has to judge if the TEC acted proportionately and if the correct criteria were chosen. Choosing a € 10,000 threshold was a far cry from the tender value and more than proportionate. Same can be said for the daily rate and removing contracts at a rate of less than € 12 removes contracts not of a similar nature. Choosing contracts of more than one year's duration is again more than proportionate. The focus of the Board should be to ensure that the principle of proportionality was followed. The three tests have put the TEC's mind at rest that the tender criteria were followed.

Dr Carlos Bugeja said that the TEC had not considered what was in the tender draft but what was actually stated – one cannot interpret similar nature except through objective tests. The

tests created by the TEC were the most objective method to remove subjectivity and one could not compare small contracts to a € 3 million contract. The tests were very objective and it was not a question of whether one contract or another should be considered. The decision of the TEC was correct and should be upheld.

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 3<sup>rd</sup> November 2022.

Having noted the objection filed by Princess Operations Limited (hereinafter referred to as the Appellant) on 30<sup>th</sup> September 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2050/2022 listed as case No. 1808 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Albert Libleri

Appearing for the Contracting Authority: Dr Chris Mizzi & Dr Carlos Bugeja

Whereby, the Appellant contends that:

a) Tender Parameters Testing -

The Committee based its decision of non-compliance on 3 factors, namely: (a) that the value of the majority of the contracts submitted by the Company were deemed *“not proportionated to the magnitude of this Call for Tenders”*; (b) the short term contracts (less than 1 year) submitted by the Company were *“not comparable to the requirements of this Call for Tenders”*; (c) the daily benchmark rate of less than €12.11 submitted by the Company was deemed not realistic since the Company would be *“financially and operationally unable to meet the extent of such contractual obligations and requirements.”*

That in examination of all the above-mentioned 3 factors, the Committee has used as basis for its justification that the lists of suppliers provided by the Company were in their majority not of “similar nature” as stipulated in Article 5(B)(c) of Section 1 of the Tender Document.

That with due respect to the Committee, the use of the criteria of “similar nature” applied by it is nowhere explained or described in the Article quoted above as related to either the magnitude of

the present tender or to the duration of over 1 year of the list of other contracts in the Company's history or to the daily rate applied by the Company in its list of suppliers' contracts.

The term “supplies of a similar nature”, as expressed in the Tender Document, can only be deemed to relate to the tenderer's history of car leasing contracts during the period from 2019 to 2021 and nothing else. Consequently if the Committee had in mind to apply such restrictions or qualifications, such intention should have been expressed a priori in its Tender Document. Once such restrictions or qualifications were never mentioned in the Tender Document, the Committee was not justified to apply them in their consideration of the Company's bid once such bid was within the parameter of the sum of €1,000,000 stipulated in the said Article.

That without prejudice to the above, the principle of magnitude of the present tender which the Committee decided to unilaterally adopt in order to exclude the Company's contracts below the threshold of €10,000 does not hold logic as all car leasing contracts import the same obligations, conditions and exigencies which any bidder is in duty bound to observe whatever the amount of the contract. In such context what should have been relevant to the Committee was to enquire from the Company or examine its capability to perform the undertakings it was offering in its bid - something which the Committee never required from the Company as it was entitled to do in terms of Note 2 of Article 5(B)(c) of Sections 1 of the Tender Document which entitled it to request *“to either clarify, rectify any incorrect and/or incomplete documentation, and /or submit any missing documents within five (5) working days from notification.”*

That without prejudice to the above, the Company submits that there is also no justifiable logic in the Committee's decision to rule out the Company's supply of contracts with a maximum duration of 1 year on the basis that such short term contracts *“do not pose the same conditions and requirements of those long-term contracts.”* From the records there does not exist any request by the Committee to the Company to exhibit a copy of its so called short-term contracts (as it was entitled to request under the said Article 5(B)(c) 1) and consequently it was not in any position to presume that the Company's obligations and commitments under its short-term contracts was not commensurate to the same onerous obligations which would apply to long-term contracts as envisaged by the tender in question.

That without prejudice to the above, the Company also contests the Committee's decision/conclusion regarding the exclusion by the Committee of the contracts in the Company's list where the daily rate is below that of €12.11. Besides the fact that the Tender Document never mentions any minimum daily rate, the said document also never mentions that the Committee would be excluding any list supplied by the Company where the daily rate would be less than the said rate. In such event therefore, the Committee was obliged, and indeed entitled (as per said Article), to require the Company to explain how it was able to operationally meet its obligations with such rates and not to simply presume its inability to do so and exclude such contracts from

its evaluation. In such context, the Company submits that, should the Committee have required clarification on such issue, the Company would have shown that its operation of roughly about 1,500 vehicles for car-rentals and leasing enables it to have insurance rates at preferential rates and to be able to apply different rates and costings in order to be able to quote daily rates which in the context of car leasing are better than those of its competitors in the market.

That in its decision the Committee refers to its Findings where it tables a list of the contracts supplied by the Company. That first of all the Company wishes to observe that in the said findings, although the Committee lists a total of 121 contracts supplied by the Company, in actual fact the list supplied comprises 142 contracts. The total value of the contracts submitted by the Company is €1,110,310.27 which amount is therefore compliant with the minimum of €1,000,000 stipulated as the threshold for the bid.

b) Due Diligence Exercise -

That under the Due Diligence Exercise mentioned in the Committee's decision, it states that 4 of the suppliers (Agency for the Welfare of Asylum Seekers, Wasteserv Malta Ltd, Commissioner of Police and Malta Enterprise) were not supplied by the Company. While this is technically correct since said contracts were contracted with Christian Borg, it should be noted that said Christian Borg is the ultimate sole shareholder of the Company and, had the Committee requested clarification, the Company would have provided proof that although the contracts were contracted with Christian Borg, the income was applied to the accounts of the Company which is the reason why the Company declared such contracts as its own. In any event, the total of such 4 contracts was circa €61,000 and consequently, the deduction of such amount from the total value of contracts between 2019 and 2021 would still leave an amount of circa €1,049,000 - i.e. €49,000 above the minimum stipulated amount of €1,000,000.

That the Committee also mention that the amounts of LESA and the OPM do not tally with the amounts stated. Had the Committee requested verification about such issue, it would have resulted that the discrepancy regarding LESA (€57,832 as opposed to €67,100 in the issued invoices) is €9,268 more while the difference between the quoted €25,267 and the actual €21,118 invoiced is €4,149 less. Consequently the calculation regarding the minimum stipulated would have resulted in  $€1,049,000 - €9,268 + €4,149 = €1,043,881$  - an amount still in excess of the minimum stipulated and therefore compliant to the minimum tender requirement.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10<sup>th</sup> October 2022 and its verbal submission during the virtual hearing held on 3<sup>rd</sup> November 2022, in that:

a) **List of principal supplies of similar nature for a minimum value of €1,000,000 -**

Section 1 - Instruction to Tenderers, point 5(B)(c) - Technical and professional Ability, for this supply contract the following is being required *“List of principal supplies of a similar nature being leasing of cars during the years 2019 and 2020 and 2021. The minimum value of which must not be less than €1,000,000.00 in total for the quoted period. This information is to be submitted online through the prescribed tender response format (tender structure)”*

In the evaluation of this administrative part of the tender, the Evaluation Committee deemed that in order to be able to make a comprehensive analysis a clarification be issued for the bidder to provide a list of contracts that make up the required list of principal supplies of similar nature for the sum indicated covering the targeted years.

A rectification request was issued to the bidder to provide this list of principal supplies contracts including their contract value for each for the years 2019, 2020, and 2021. A reply was submitted including a list of 142 contracts. The list included client name, a start and end date and the contract value.

The Evaluation Committee considered the data provided by the bidder meant to provide the necessary information to substantiate the required list of principal supplies of similar nature. The Evaluation Committee had therefore to analyse the submitted list as being in conformity with the requirements of the tender document in the sense that this list of supplies would be in line with the requirements under Section 1 - Instruction to Tenderers, point 5(B)(c):

- a. Leasing of cars of a similar nature;
- b. Covering the years 2019, 2020 and 2021;
- c. And, the total of such list must not be less than €1,000,000.

By applying these requirements to the list submitted the Evaluation committee would not only be abiding by the Tender Document prescriptions but it would be applying the basic principles of public procurement of level-playing field and non-discrimination.

In analysing point (b) and (c) above the evaluation committee had to rely on the declaration of the bidder according to his submissions under the rectification. However some reservations cropped up during the due diligence exercise as will be described further on. On the other hand, point (a) required some further elaboration by the Evaluation Committee in order to assess that the presented list refers to contracts that is similar to the tender scope. In this latter case the Evaluation Committee is duty bound to analyse the data as submitted by the bidder and any condition imposed by the tender document such as in this case the qualifier of the contracts being of similar nature, such qualifier need to be substantiated by the Evaluation Committee's scrutiny of the bid information. For this reason the Evaluation Committee devised three kinds of tests which could be carried out on the data as submitted by the bidder, for which in all three tests the bidder failed to satisfactory achieve a list of contracts for the value of at least €1,000,000.

All the analysis carried out by the Evaluation Committee is conducive to the administrative requirement under Section 1 - Instruction to Tenderers, point 5(B)(c). The objective tests therefore

(contract value, contract duration and daily rates) have been applied in a non-discriminatory fashion and in an equal level playing field among bidders manner. The Evaluation Committee is the responsible selection organ during evaluation of tenders and has to abide by the principle of self-limitation wherein the evaluation carried out has to be directly linked to the tender requirements and solely based on the tender criteria.

In the opinion of the defendant, the tests applied by the Evaluation Committee are in line with the basic principle of public procurement of proportionality and their application has been carried out in proportion to the magnitude of this tender, to the duration of this tender and a daily rate prevalent for this tender process. All tests are in relation to the fulfilment of Section 1 - Instruction to Tenderers, point 5(B)(c), therefore the Evaluation Committee had every right due to its inherent nature to conduct such tests in order to reach a decision for the administrative part of the tender evaluation.

The tests invoked for the analysis of the requirement under Section 1 - Instruction to Tenderers, point 5(B)(c) of the tender are sufficiently described in the letter to unsuccessful sent to the bidder on the 20th September 2022. Therefore apart from being in line with public procurement regulations the evaluation committee did provide all justifications for its workings and therefore also in line with the principle of transparency.

b) **Due diligence exercise as per General Rules -**

With reference to the due diligence exercise which has been invoked through the application of Article 16.2 of the General Rules Governing Tenders states that *“Evaluation Committee reserves the right to verify the information and documentation provided, by contacting directly the respective clients mentioned by the tenderer”*. After that the Evaluation Committee had targeted government contracts for this due diligence exercise, a list of inaccuracies (sic) of the bid information emerged. This meant that the list of contract as submitted by the bidder may be prone to further inaccuracies (sic) which were not sampled by the Evaluation Committee. Having said this, the evaluation committee posed this finding as an added ground to the administrative non-compliance of the bidder, which in any case had not fulfilled the tender requirement as dealt by in the previous paragraphs of this reply.

The findings of the due diligence exercise are fully explained in the letter to bidder of the 20th September 2022 and the extents of which are explained.

The objector through this appeal procedure is trying to justify the results of the incongruent information found through this due diligence exercise. This is not acceptable and any additional information cannot be entertained at this stage. Moreover, there was no hinderance for the objector to 'come clean' ab initio during the rectification exercise at evaluation stage and provide the explanations to his own supplied information in the list of contracts. The additional information presented at appeal stage is inadmissible as it breaches the basic principles of public procurement such as transparency and level playing field among bidders. The application of the due diligence



exercise was albeit envisaged in the General Rules governing Tendering also in line with the basic principles of public procurement.

In this instance the evaluation committee could not opt for a further rectification of the submission since it would involve a change in offer following a first time round rectification exercise. This is not possible under the Tender Document. In these circumstances the Evaluation Committee had little leeway and its conclusions are based purely on the submitted information by the bidder. Any derogation from this conduct would only result in a breach of the basic principles of public procurement.

This Board also noted the DoC's Reasoned Letter of Reply filed on 5<sup>th</sup> October 2022 and its verbal submission during the virtual hearing held on 3<sup>rd</sup> November 2022, in that:

- a) The DoC hereby submits and clarifies that the decision for non-compliance is undertaken by the Tender Evaluation Committee. Therefore, the statement *"from the decision communicated to Princess Operations Limited by letter from Anthony Cachia (Director General Contracts) dated 20th September 2022"* needs to be clarified to refer to the decision undertaken by the Tender Evaluation Committee.
- b) Without prejudice, the DoC submits that the evaluation of tender offers and decisions issued thereupon is governed by the procedure laid down in rule 16 of the General Rules Governing Tenders and inter alia regulations 53 and 232 of the Public Procurement Regulations, 2016. Furthermore, since the award criteria is based on the best price quality ratio, the Tender Evaluation Committee appointed by the Contracting Authority is vested with discretion.

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 now consider Appellant's grievances.

- a) The main bone of contention of this appeal revolves around the wording used in Technical and Professional Ability criteria as per Section 1 – Instruction to Tenderers, paragraph 5(B)(c) of the tender dossier which states *"List of principal supplies of similar nature **of a similar nature** (sic) being leasing of cars during the years 2019 and 2020 and 2021. The minimum value of which must not be less than €1,000,000 .....*" (bold & underline emphasis added).
- b) Therefore, what needs to be ascertained, is whether the Evaluation Committee 'exceeded' its powers, duties and responsibilities by the way it went through the evaluation process.
- c) By her own words, Ms Laura Desira, under oath, confirmed that the three (3) tests 'used' by the Evaluation Committee to assess this specific administrative criteria were duly carried out on the bids of all bidders / economic operators taking part in the tender process.

- d) Moreover, this Board also refers to the explanations provided by Ms Laura Desira, under oath, which are also re-produced in writing in the Letter of Rejection dated 19<sup>th</sup> August 2022, whereby the rationale used and adopted when formulating these tests, is in the opinion of this Board, to be reasonable and sound. One example is the figure of €10,000 adopted for ‘Test 1’ whereby, only the contracts provided by Appellant exceeding €10,000 were deemed ‘relevant’ and ‘of a similar nature’ to this tender procedure. This Board in fact considers this €10,000 figure to be somewhat extremely conservative, considering that the Estimated Procurement Value amounts to €3,155,328. It is also in line with public procurement whereby for amount of less than this figure, no open tender procedure is required. The rationales used in ‘Test 2’ and ‘Test 3’ are also deemed to be reasonable and conservative.
- e) This Board also notes that the Evaluation Committee correctly made use of tools available to it, i.e. clarifications and rectifications, to obtain further information from the economic operator, now Appellant on this criteria.
- f) Therefore, this Board opines that when considering all of the above, the Evaluation Committee when adopting these three (3) tests still managed to keep a level playing field between all economic operators, while also acting in a proportionate manner in line with the principle of self-limitation kept intact.
- g) This Board notes that the grievance entitled ‘Due Diligence Exercise’ is deemed to be irrelevant following the paragraphs above, as the Appellant company would still not pass the requirements of criteria 5(B)(c) of Section 1 of the tender document.

Hence, this Board does not uphold the Appellant’s grievances.

**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 recommending the cancellation of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Dr Vincent Micallef**  
Member