

## PUBLIC CONTRACTS REVIEW BOARD

### Case 1661 – CT5000/2021 – MFED 473/2021 – Negotiated Procedure for the Provision of Environmental Cleaning Services in State Schools and Educational Facilities (including Summer)

27<sup>th</sup> December 2021

The Board,

Having noted the application for ineffectiveness filed by Dr Clement Mifsud-Bonnici, Dr Antoine Cremona and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Management Consulting Service Industry (MCSI) Ltd, (hereinafter referred to as the appellant) filed on the 10<sup>th</sup> September 2021;

Having also noted the letter of reply filed by Dr Kristina Busuttil and Dr Daniel Inguanez acting for the Ministry for Education (hereinafter referred to as the Contracting Authority) filed on the 29<sup>th</sup> September 2021;

Having also noted the letter of reply filed by Dr Marycien Vassallo on behalf of 8 Point Law acting for and on behalf of Brightness Joint Venture (hereinafter referred to as the Contract Beneficiary) filed on the 30<sup>th</sup> September 2021;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Director General of the Department of Contracts) as summoned by Dr Clement Mifsud-Bonnici acting for the appellant.

Having heard and evaluated the testimony of the witness Ms Maria Galea (Director General for Strategy and Support at the Ministry for Education) as summoned by Dr Clement Mifsud-Bonnici acting for the appellant.

Having heard and evaluated the testimony of the witness Dr Kenneth Grech (Consultant in Public Health) as summoned by Dr Daniel Inguanez acting for the Contracting Authority.

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 30<sup>th</sup> November 2021 hereunder-reproduced.

#### Minutes

### Case 1661–CT5000/21 and MFED 473/2021. Negotiated Procedure for the Provision of Environmental Cleaning Services in State Schools and Educational Facilities (including Summer)

#### Application for Declaration of Ineffectiveness of a Contract (PPReg. 277)

The Ministry for Education on 10<sup>th</sup> August 2021 awarded the Negotiated Procedure to Brightness JV without prior publication for an estimated value of € 2,460,647.

On the 10<sup>th</sup> September 2021 Managing Consulting Service Industry (MCSI) Ltd lodged an application to declare the contract resulting from the Negotiated Procedure ineffective.

On 30<sup>th</sup> November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant/Claimant – Managing Consulting Services Industry (MCSI) Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Paul Degiorgio	Representative

**Contracting Authority – Ministry for Education**

Dr Daniel Inguanez	Legal Representative
Ms Maria Galea	Representative
Ms Josette Sant	Representative

**Contract Beneficiary – Brightness JV**

Dr Marycien Vassallo	Legal Representative
Mr Shannon Camilleri	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations.

Dr Clement Mifsud Bonnici Legal Representative for MCSI Ltd stated that this appeal was in terms of Regulation 277 of the Public Procurement Regulations (PPR) which required two elements to enable a challenge thereon, namely – publication in the Official Journal of the European Union and if it is permitted at law. The introduction of this Regulation was introduced to counter the most extreme cases of abuse in public procurement. The Contracting Authority does not dispute that it was not published in the EU Journal and Claimant maintains this was not an extreme urgency situation.

The Claimant is making three requests– a declaration of ineffectiveness of the contract, a penalty on the Authority and compensation. The first two points will be dealt with now while the question of compensation can be considered later. According to the EU Directive negotiated procedure has a very restricted interpretation and if the Authority has awarded such a contract then it has to prove its case. Reference was made to CJEU 318/94 (para 13), 385/02 (para 19) and 394/02 (para 33) in support of this.

Dr Daniel Inguanez Legal Representative for the Ministry for Education made it clear that the Ministry will rely on extreme urgency needs and that this was an addition to an existing contract with an effective start of 2020 and still effective as ending on 31<sup>st</sup> December 2021. The need for this negotiated

procedure was that the allocated hours were used more quickly and exhausted earlier than anticipated due to the need of enhanced cleaning.

Dr Marycien Vassallo Legal Representative for Brightness JV said that she relies on the statement made by Dr Inguanez and the policies which had been submitted regarding COVID requirements.

Mr Anthony Cachia (142658M) called as a witness by Claimant stated on oath that he is the Director General of the Department of Contracts (DoC). In this Case the Department received a request for a negotiated procedure through the General Contracts Committee (GCC). If approved the Authority is advised accordingly to proceed with the negotiations taking place directly between the Authority and the economic operator. There are various types of negotiated procedures and for different reasons and occasionally instances where after approval and negotiations the matter is again referred for final approval to the DoC. In this case there was a request on the 5<sup>th</sup> April 2021 and it was approved by him on the 2<sup>nd</sup> July. Each request is different as regard the length of time required for approval. Witness stated that he was not aware why it took three months to approve this application. The DoC and the GCC rely on what the Authority requests.

Asked to state the number of hours required for extra COVID cleaning, witness said that he cannot say how many of the extra hours requested were due to the pandemic. Questions raised with an Authority were either verbal or written but he could not recall what happened in this case as no minutes of meetings are kept: the decisions were simply implemented after discussions. Occasionally a written request for a negotiated procedure was discussed at the GCC to see if it was justified with the odd request for further information or even a meeting to decide it. It is likely that the 5<sup>th</sup> April request needed further information but witness was unable to confirm this as no minutes are kept and the procedure is not recorded in writing, nor could he recall if he had requested copies of the COVID protocols. Mr Cachia continuing his testimony stated that he approved in his 2<sup>nd</sup> July letter what had been requested but he could not recall what had been requested. He confirmed that the procedure had not been published in the European Journal.

Questioned by Dr Inguanez regarding a letter signed by Ms Graziella Calleja, witness stated that that person's role was to present requests from Contracting Authorities to the GCC – she acted on behalf of the DoC to notify decisions to applicants. Funds have to be available for a negotiated procedure to be approved and sometimes the GCC takes several sessions to approve a request. Witness confirmed that he had followed the COVID emergency information notices from the European Commission on using the public procurement framework through negotiated procedures which meant that the GCC had to take this into consideration regarding the effect on schools in the pandemic crises.

In request to further questions from Dr Mifsud Bonnici, witness agreed that the EU communication was issued on the 1<sup>st</sup> April 2020 a full one year before the request for the negotiated procedure and that in the Regulations before the negotiated procedure section there is another section referring to accelerated procedure and that negotiations should only be used if accelerated procedure is not possible. Finally witness agreed that in Section 2.3 there is no reference to schools but to hospitals and health institutions.

Ms Maria Galea (80081M) called as a witness by Claimant testified on oath that for four years she has been the Director General for Strategy and Support at the Ministry for Education. She is responsible for the procurement process and cleaning processes in schools. She stated that the contract was signed on the 26<sup>th</sup> September 2019 active till January 2020. The spike in cases in March 2020 led to the schools closure. In September 2020 the schools protocol was introduced imposing guidelines on cleaning measures accentuated by the groupings in classrooms in secondary schools needing cleaning

after each group, and increased cleaning which lead the Ministry to realise that there were not enough cleaning hours. In April it was realised that the value of the contract would be exhausted by August 2021. The emergency was due to the fact that the schools had to reopen in September 2021 applying new COVID protocols.

Witness stated that on 5<sup>th</sup> April the Authority requested a negotiated procedure with a variation in hours and financial value not an extension of the period of the contract. The new tender, already drafted in April (when the negotiated procedure was requested) would be ready by seven or eight months before the end of the contract subject to financial clearance since it was exceeding the previous contract in value. The draft of the tender was not sent to the DoC immediately it was completed but around July and issued in late October/early November. The Negotiated procedure was posted on the ePPS in July. The two entries therein on 28<sup>th</sup> and 30<sup>th</sup> July were likely due to some error which needed correction. The Authority received two approvals from the DoC – the approval in principle of the negotiated procedure and final one after the receipt of funds was approved. Brightness JV was at that stage invited to give their best financial offer. The cleaning contract rates are set by Government hence the same rates as those in April approved and agreed.

According to the witness, the protocol requirements were roughly 1900 to 2000 hours daily but the percentage increase because of protocol was not available. Referred to a letter from the Ministry dated 23<sup>rd</sup> September 2020 to the contractor Brightness JV, witness stated that this was near the start of a new academic year and due to the pandemic it was felt necessary to remind them of their obligations under the contract. The reason for the e-mail of the 2<sup>nd</sup> January was similarly to ensure that standards were not slipping. The e-mail of the 19<sup>th</sup> September regarded the sickness replacement and it was usual to enforce this and was followed up by the Permanent Secretary. Witness could not recall if the negotiated procedure call was published in the European Journal.

In reply to questions from Dr Ingunez witness stated that the open tender was signed in September 2019 effective January 2020 due to the opening of the schools and the transfer of business requirements, and is due to expire on 31<sup>st</sup> December 2021. Enhanced cleaning followed Public Health Department guidelines; as a result schools had to alter schedules, classes could not be mixed and segregation enforced. The proportion of hours required due to COVID measures was worked out by schools with an average cohort of 33,000 pupils and 7,000 employees between them. The hours of the old contract were exhausted sometime in August and the hours secured through the negotiated procedure should last the Authority through to December, whilst the approval of the additional hours on the old contract had seen the Ministry out till August. Due to the new tender not being on a like with like basis but sought approval for additional funds the Ministry for Finance did not reply to the request and required further negotiations. Once the funds were approved the open tender was published and is still 'open'. On the negotiated procedure the Authority could not use an alternative contractor as the Ministry for Finance policy dictated that a contract could not run for less than one year.

Answering questions by Dr Mifsud Bonnici witness said that the protocol on extra hours obliges documentation on toilet cleaning but in other cases the head of school ensures that the extra cleaning is carried out. Each college has a cleaning supervisor to check cleaning is carried out but no detailed records are maintained. The Ministry estimated the hours on requirements and the original procedure in September 2020 was a bit of a 'green estimate'. At the time of the negotiated procedure the Authority had experience of how things were working out. Witness concluded by saying that she was not aware of the reason for the gap between the April application and the July approval.

Dr Kenneth Grech (47667M) called as a witness by the Contracting Authority testified on oath that he is a Consultant in Public Health with responsibility for COVID co-ordination crisis measures. He tabled details of the number of cases in the pandemic and indicated spikes in the number of cases in 2020 and 2021 by month. In March 2021 cases were at their highest but decreased thereafter. What happened in the schools, according to the witness, was a reflection of what happens in the community. As time went by the Health Authorities gained experience how to deal with cases and to take the appropriate measures. There was no need to close the schools again following original closure as the measures in place were adequate with enhanced protocols for cleaning of premises to control the risk of transmission by touch.

Questioned by Dr Mifsud Bonnici witness stated that after March 2021 the number of cases reduced as a result of additional measures in the public sector but not in schools – in general cases starting declining from April onwards then in July there was a spike due to the English Language schools and the tourist season-this is reflected in the schools figures.

This is the conclusion of testimonies of witnesses for both parties.

Dr Mifsud Bonnici stated that one must consider whether this was a case of extreme urgency or not. If it is not as, Claimant maintains, then one must consider whether there are overriding reasons. The case for extreme urgency derives from EU Directive 2014/24 which in Recital 50, further influenced by CJEU decisions, states that negotiated procedure is to be used in very exceptional circumstances or otherwise a free for all with no control in public procurement would ensue. The application for ineffectiveness is therefore there to examine the grounds chosen. There are three principles in cases of extreme urgency and all factors have to be present: interpretation, factors all present and Contracting Authority to prove their case. The EU Directive goes beyond cases and deals with the principle of proportionality and hence it has to be strictly necessary and the grounds have to relate to events brought about by matters beyond the control of and which cannot be attributable to the Authority, and must be unforeseeable and independent.

The law must be interpreted by EU law on the limits on tenders – the time period is not the start and end date but the time taken to produce a tender – the essential is the time available to issue a tender and evaluate it not to external factors. What is the unforeseeable event that the Authority is relying on; if credible was urgency due to the Authority and can other procedures have been used asked Dr Mifsud Bonnici? The parameters of extreme urgency have not been met in this Case as the Authority is relying on the protocols as events to apply for a negotiated procedure when the protocols were first issued in 2020 in August and September and not changed in 2021. In October 2020 it was already known what was required to clean schools under COVID conditions. The 5<sup>th</sup> April 2021 application had to be substantiated on what existed at the time not on later events. If the matter was really urgent why did the Authority wait three months for approval with neither the DoC nor the Authority appearing to know the reason for the delay? A gap of three months does not indicate urgency and there was time enough to issue a tender and evaluate it. The request for a negotiated procedure cancels the claim of extreme urgency with a further month's delay to publish the procedure on the ePPS – enough time to issue an accelerated procedure. The need to open schools in September has been claimed as the reason for the urgency when a tender could have been completed during the holidays. COVID was present since March 2020 and it was inevitable and foreseeable that spikes would occur. Dr Grech in his testimony confirmed that from April cases started to decline and this does not tally with the arguments regarding the claim of urgency.

Contrary to what has been claimed the contract does not end in December as the two years start when the contract was signed on 26<sup>th</sup> September 2019 and is therefore already expired and the Ministry

misguided the DoC when it claimed that the contract ended on the 31<sup>st</sup> December 2021. The Ministry also claims that it did not have the ability to measure the hours used prior to and after the protocols as no data was available – this vitiates the process as there is no proof that what was requested was strictly necessary and hence their case fails. The Commission’s communication of the 1<sup>st</sup> April covers hospitals and similar health institutions; the principles might cover schools but it cannot be used to justify the case for extreme urgency.

According to Dr Mifsud Bonnici, the testimony of Mr Cachia indicated that the negotiated procedure was to cover a stop gap situation – this was no stop gap as once it was known that the hours were going to be exhausted by August there should have been a tender issued from there on. The timing of the new tender is erratic and is likely to lead to a further case of another application for ineffectiveness. The PCRB could declare the contract ineffective but this is not an option since the contract is ending in December and therefore it is superfluous to shorten it and thus the award of a penalty is the alternative. Appellant does not want a fine on the Ministry but an occasion to declare the contract ineffective as there is no overriding reason raised by the Authority. The principle of proportionality has been breached as the Authority exceeded all necessary aims and the timings are all incorrect. CJEU Cases 532 and 605 mentioned by Dr Inguanez are not quite to the point as they deal with derogation and in paragraph 49 of Case 532 it states that derogation is subject to proportionality and discrimination and as regard Case 605 one must not form the idea that because it is a health matter one can ignore everything else. The Authority cannot use COVID as an excuse to ride roughshod over public procurement.

Dr Vassallo said that the urgency is referred to in the attachments presented on the COVID measures and it is not a question of anticipating spikes in cases. The principles on the guidance notes of the Commission apply equally to schools.

Dr Inguanez stated that the unforeseen circumstance in the spike in cases in March was a matter of extreme urgency leading to the 5<sup>th</sup> April application. There was another spike in late summer requiring enhanced cleaning for the start of the schools year. A matter of extreme urgency cannot be resolved by the issue of an accelerated tender which, in any case, could not be issued because of finance restrictions – funding approval did not happen till late summer. The fresh tender was already drafted in April but had to have the financial aspects changed and would have needed considerable time to evaluate to its high level value.

Regarding the calculation of hours, Dr Inguanez continued to state that the old contract with the variation was sufficient only till the end of August as the increase in hours reduced the value of the contract. The opening of schools would not have been possible if the cleaners were not available. The contract is restricted to termination on 31<sup>st</sup> December 2021 within the execution period of two years as the original. The overriding reasons were a necessity as schools could not open without cleaning and it would be superfluous to terminate the contract as it expires in less than a month. The Authority worked with diligence to keep school open and in terms of the transfer of businesses ramifications had to use the same contractor and thus the question of a penalty does not arise. As to the new open tender the delays were occasioned due to the uncertainties connected with the approval of the financial requirements.

Dr Mifsud Bonnici pointed out that administrative problems are not a defence to bypass the law. The Court of Appeal in the Vivain Corporation Case (12/21/1) stated that one cannot rest on administrative problems to circumvent competition. The law is the law.

Dr Inguanez said the issue of finance is not an administrative problem but a reality.

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 30<sup>th</sup> November 2021.

Having noted the application filed by Management Consulting Service Industry (MCSI) Ltd (hereinafter referred to as the Appellant) on 10<sup>th</sup> September 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT5000/2021 – MFED 473/2021 listed as case No. 1661 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 Kristina Busuttil & Dr Daniel Inguanez

Appearing for the Preferred Bidder: Dr Marycien Vassallo

Whereby, the Appellant contends that:

a) **The Declaration of Ineffectiveness**

- i. That, for the Claimant to succeed in its application, it must show that the Contracting Authority awarded this contract without prior publication of a contract notice in the OJEU without this being permissible at law. This is the permitted ground under Regulation 277(2) of the PPR. The Claimant has not located a “contract notice in the OJEU” in connection with the Negotiated Procedure, and therefore, the only question that remains is whether the award of the Negotiated Procedure without prior publication was permissible at law.
- ii. That the Negotiated Procedure could have been awarded without prior publication in terms of Regulations 150 et seq. of the PPR which require: a) The Director General (Contracts)'s prior approval to use the negotiated procedure without prior publication. This approval must be requested and provided in writing in advance. The Contracting Authority must have sent a duly substantiated request to substantiate the need to use this procedure; and b) that one of

the grounds provided for in Regulation 154 of the PPR for the use of the negotiated procedure without prior publication subsists.

- iii. The Claimant submits that according to Regulation 150(1) of PPR, the prior approval of the Director General (Contracts) must have been obtained for the use of a negotiated procedure without prior publication, and, that it is practice, that the Director General's prior approval is also obtained prior to the award of any public contract pursuant to negotiated procedure. This is not just a formalistic tick-the-box exercise. It is an approval which is required as a matter of law; *ad validitatem*.
  - iv. The claimant submits that it has no evidence in hand, at the date of filing of its application, that this prior approval was duly obtained. On this basis, the Claimant is assuming that such a prior approval was not obtained since: (i) as shall be explained in the subsequent paragraph, any such request (if made at all) could not have substantiated the use of the negotiated procedure without prior publication and/or (ii) the Contracting Authority entered into this contract directly despite the fact that the estimated financial value of the Negotiated Procedure exceeds the relevant thresholds.
  - v. The Claimant has gone through each ground exhaustively listed in Regulation 154 of the PPR (in the case of public service contracts) and none of those grounds exist in the case of the Negotiated Procedure.
  - vi. Therefore, and on this basis, the Contracting Authority had no basis or grounds to award the Negotiated Procedure to the Contract Beneficiary by way of a “negotiated procedure without prior publication” in accordance with law.
  - vii. For the above-mentioned reasons and others which may be brought during the proceedings, the Contracting Authority could not award the Negotiated Procedure to the Contract Beneficiary without prior publication. The Contracting Authority was duty bound to issue a fresh fair, open and non-discriminatory competitive tender procedure following the lapse of the 2018 Tender and not resort to the negotiated procedure without prior publication. This fresh tender ought to have been issued and publicised on the Official Journal of the European Union as required by law.
- b) **Penalty** – In view of the circumstances of the case, the Claimant is also seeking the imposition of the penalty provided for in Regulation 281 of the PPR on the Contracting Authority. The Claimant notes that Regulation 280(1) of the PPR provides that the penalty imposed shall be done *“after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities”*
- c) **Request for Compensation** – The Claimant is formally lodging a request for compensation as a result of the direct award of the Negotiated Procedure and in terms of Regulation 278 of the PPR. However, the Claimant is not able to liquidate the amount of compensation that it is due, in particular, since it does not have sight of the scope of services being procured. This is something that this Honourable Board will be able to do in view that it will have access to this information.



This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 30<sup>th</sup> November 2021, in that:

a) **Facts** – Due to the re-opening of schools and the adoption of enhanced cleaning practices in conformity with the above-mentioned Guidelines the value of the 2018 Tender contract, representative of cleaning hours awarded, was being used up earlier than had been expected in early 2018 when the 2018 Tender was drafted and issued. At that time in early 2018 nobody could have envisaged the Covid-19 health crisis. The value of the 2018 Tender contract was depleted even before the period of execution is to end on the 31st December 2021. Given this state of affairs, on the 5th of April 2021 the Respondent Ministry reacted quickly by seeking the approval of the General Contracts Committee for the issue of a negotiated procedure without prior publication. Approval was given by the General Contract Committee on the 2nd July 2021 on the basis of Regulation 154(1c) of the Public Procurement Regulations (S.L. 601.06) - that is, “for reasons of extreme urgency brought about by events unforeseeable by the contracting authority”. While approval for the negotiated procedure was being obtained the Respondent Ministry had already started with the drafting of a new tender for the conclusion of a public contract for the provision of cleaning services in schools. Given that this new tender could not be issued in time for the provision of cleaning services to be uninterrupted, the negotiated procedure with reference 473/2021 was concluded with Brightness JV and the Contract was signed on the 27th of August 2021. The Contract shall terminate on the 31st of December 2021, therefore, together with the 2018 Tender contract. The tender which is currently being drafted is therefore envisaged to cover a period beginning from 1st January 2022.

b) **Regarding the lack of existing grounds for ineffectiveness** –

- i. It must first be stated at the outset that, contrary to what the Claimant seems to suggest, the Respondent has used the negotiated procedure without prior publication for the Contract in question, after having obtained the approval of the General Contracts Committee, and on the basis of extreme urgency in terms of Regulation 154(1c) of the Public Procurement Regulations. The Court of Justice of the European Union (CJEU) has stated that the use of the negotiated procedure on the basis of extreme urgency is subject to three conditions: (1) an unforeseeable event; (2) extreme urgency rendering impossible the observance of time-limits laid down for calls of tenders; and (3) a causal link between the unforeseeable event and the extreme urgency.

**An unforeseeable event**

The emergence of the Covid-19 health crisis could sure not have been foreseen when the 2018 Tender was being prepared. Even the European Commission has issued guidance classifying as an unforeseeable event the need for medical equipment and facilities during the pandemic. The ‘Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis’ (2020/C 108 W01) states in

particular that “The number of COVID-19 patients requiring medical treatment is rising daily and in most Member States, is expected to increase further until the peak will be reached. These events and especially their specific development has(sic) to be considered unforeseeable for any contracting authority.” (para. 2.3.1). In much the same manner, the new required standards relating to the enhanced cleaning of school premises must be considered an unforeseeable event.

Particularly, the direction of the health authorities to adopt enhanced cleaning measures due to the Covid-19 health crisis, and the extent of such measures, could also not have been foreseen. In May 2021 the Ministry for Health, by means of the Advice and guidelines to the educational sector for the re-opening of primary and secondary schools in Malta, advised that primary and secondary schools should apply enhanced cleaning to their premises. The said guidelines, namely pages 27 and 28, required inter alia that:

- premises be cleaned daily using a combination of soap, water and disinfectant;
- disinfectants be left for 10 minutes before being removed;
- premises be cleaned thoroughly between one cluster of students and another;
- toilets be cleaned regularly, at least three times a day;
- common resources used by students must be cleaned appropriately at regular intervals and at the beginning and at the end of the day;
- floor cleaning should be carried out more regularly and frequently throughout the day;
- handles, railing, light switches, tablets, phones, and all other grip areas be cleaned particularly thoroughly and, if possible, several times a day in heavily frequented areas.

The attempts of the Respondent Ministry to implement all of the above resulted in an unprecedented increase in workload required to maintain the sanitary standard which would provide the students with a safe environment. These enhanced cleaning measures continue to be enforced through the issue of progressive guidelines most recently in the detailed Guidelines for the Education Sector up to Secondary Schools issued in September 2021. When the Respondent Ministry drafted and issued the 2018 Tender it could not have possibly known of the situation which would arise shortly after that contract came into force and could not, therefore, make contingency for a higher demand of cleaning hours which needed to be catered for, and for a higher budget.

#### Extreme urgency

Adherence to the sanitary standard and enhanced cleaning measures required by the above-mentioned guidelines issued by the health authorities has a direct effect on the health and safety of all students of school age who depend on the Respondent Ministry to provide them with a safe environment. In this sense, the need to procure further hours than those originally stipulated in the 2018 Tender contract was undoubtedly a matter of extreme urgency in order

to ensure that schools remain open in safe conditions for the students and staff. In particular, the 2018 Tender contract is to end on 31st December 2021 but due to the Covid-19 health crisis the value awarded will be used up before that date. Also, since requesting approval for the issue of the negotiated procedure in April 2021 the Respondent Ministry has attempted to draft and issue a call for tenders before the value of the 2018 Tender contract is used up but this has not been possible.

For the above reasons, the remark by the Claimant that the urgency has been caused by the contracting authority's negligence or delay to issue a new tender is unfounded. It is the unforeseen circumstances which have been brought about by the Covid-19 health crisis and the urgent need to continue operating schools with a higher sanitary standard than is ordinarily required that bring about the applicability of Regulation 154(1)c).

*A causal link between the unforeseen circumstances and the extreme urgency*

In the case at issue there also exists a causal link between the unforeseen circumstances, that is (sic) the increasingly burdensome cleaning measures which were not needed at the time when the 2018 Tender was drafted, and the extreme urgency resulting from the need to ensure safety of school pupils and staff during the continued operation of primary and secondary schools. The Respondent Ministry could not meet this need with urgency had it resorted to a call for tenders precisely because, even while arrangements were being made to obtain approval for and proceed with a negotiated procedure, the enhanced cleaning standards had to be adopted.

- c) *The existence of overriding reasons relating to a general interest* – In line with Regulation 280(2) of the Public Procurement Regulations, the Public Contract Reviews Board may find that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained and therefore cannot consider the contract ineffective. Even if, for the sake of the argument, the Board were to find that the reason of extreme urgency is not justified (something which the Respondent contests), the Respondent Ministry submits that there exist overriding reasons of general interest which require that the Contract be maintained. Specifically, the need for the Contract has resulted from the public interest need to adopt enhanced cleaning measure to mitigate the risk of Covid-19 infections in State schools.
- d) *Regarding the request for penalties* – According to Regulation 280(1) of the Public Procurement Regulations: "If the Public Contracts Review Board declares a contract to be ineffective, it shall impose penalties on the authority responsible for the tendering process and the contracting authority after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities." Given that the Contract has been legitimately issued through a negotiated procedure for reasons of extreme urgency there is no ground for the ineffectiveness of the ground and, in consequence, no ground for the imposition of penalties.

- e) Regarding the request for compensation - The Claimant also requests compensation in terms of Regulation 278 of the Public Procurement Regulations. According to that Regulation “the applicant may request the Public Contracts Review Board to liquidate and order the authority responsible for the tendering process and the contracting authority to compensate him for actual damages suffered.” Without prejudice to all that has been submitted above, even if the Board should deem it fit to award compensation to the Claimant, it can only grant compensation for actual damages suffered. Whereas Article 2, paragraph 1, sub-paragraph (c), of Directive 89/665/EEC (also called the Remedies Directive) requires that a claimant must be able to request damages in the public procurement review procedures of the Member States, there is no EU-level harmonisation of what these damages should cover.

This Board also noted the Contract Beneficiary’s Reasoned Letter of Reply filed on 30<sup>th</sup> September 2021 and its verbal submission during the virtual hearing held on 30<sup>th</sup> November 2021, in that:

- a) In terms of Reg. 277(2) of S.L. 601.03 appellant contends that since it could not locate the publication of the notice for the proposed award of the negotiated procedure on the Official Journal of the European Union, the notice was never published and this in breach of the mentioned regulation. Applicant conveniently makes no reference to the exception to Reg. 277 (2) provided for in sub-regulation (4) which provides that sub-regulation (2) is inapplicable where:-
- (a) the authority responsible for the tendering process or the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2014/24/C and Directive 2014/25/EC;
  - (b) the authority responsible for the tendering process or the contracting authority has published in the Official Journal of the European Union a notice as described in Article 3a of Directive 89/665 or Article 3a of Directive 92/13 expressing its intention to conclude the contract, and;
  - (c) the contract has not been concluded before the expiry of a period of at least ten calendar days with effect from the day following the date of the publication of this notice.

If the notice was not published in the Official Journal of the European Union, sub-regulation (4)(a) is applicable since the negotiated procedure without publication at the merits of this appeal is permissible due to the exceptionality of the circumstances which fall squarely with preamble 50 of Directive 2014/24/E provides:-

In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not

least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

This Board, after having examined the relevant documentation to this application and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider, as follows.

- a) The Board opines that the first issue to be tackled is regulation 150 of the Public Procurement Regulations (“PPR”) which administers ‘Negotiated procedures without prior publication’;
  - i. Whereby in 150 (1) it is stated *“Upon being requested in writing by the contracting authority the Director may, subject to any conditions he may deem appropriate to impose, approve the use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts as specified in the following regulations.”*
  - ii. Regulation 150 (2) continues to state, *“The request made by the contracting authority must duly substantiate the need for the negotiated procedure”*.
  - iii. The Board notes that the Contracting Authority wrote to the Director General of the Department of Contracts on the 5<sup>th</sup> April 2021 requesting the use of a ‘Negotiated procedure without prior publication’ in terms of Regulation 154(1)(c) of the PPR. An approval by the Department of Contracts (DoC) was issued on the 2<sup>nd</sup> July 2021.
  - iv. Hence the Board opines that the requirement of regulation 150 (1), i.e. the request in writing by the Contracting Authority to the Director, was met. Moreover, the requirement of regulation 150 (2), i.e. the request to be duly substantiated, was also met with the reference to regulation 154(1)(c).
- b) The second issue that the Board will now consider is whether the parameters of 154(1)(c) were duly observed or otherwise.
  - i. 154(1)(c) states: *“The negotiated procedure without prior publication may be used for public service contracts in the following instances: where in so far as is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority;”*

- ii. Regulation 154(1)(c) therefore brings about three (3) specific criteria / parameters to be observed, i.e. an unforeseeable event, the time limits factor and finally the circumstances invoked to justify extreme urgency shall not be attributable to the contracting authority. The Board opines that all these 3 requirements need to be satisfied.
- iii. **Unforeseeable event** – the ‘original’ tender drafted and awarded during years 2018/2019 certainly pre-dates the Covid-19 pandemic. Therefore, it is the Board’s opinion that the Contracting Authority could not foresee such an eventuality when preparing the ‘original’ tender in reference to the number of hours required and total financial value for the effective cleaning of State Schools and Educational Facilities (‘state schools’). The Board further opines that additional cleaning hours would have been required especially after the guidelines by the Ministry for Health were issued which required enhanced cleaning at regular and more frequent intervals.
- iv. **Extreme urgency** – The Board opines that the closing of schools due to the Covid-19 pandemic and the re-opening of such with new enhanced cleaning mechanisms is not something which the Contracting Authority could have foreseen. Also, such decisions were being taken according as to how the pandemic was evolving in the Maltese islands and the Contracting Authority was duty bound to act rapidly to such decisions. Apart from not being able to foresee such events, the Board notes that the Contracting Authority was responsible for the effective implementation of such guidelines issued by the Ministry for Health if and when the schools were to be re-opened. The health and safety of all students, teachers and other workers within school premises was and still is a responsibility resting on the shoulders of the Contracting Authority as it is obliged to provide a safe and secure working environment for all mentioned above.
- v. **The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority** – This Board again refers to the responsibility mentioned above which rests on the Contracting Authority to provide a safe and secure working environment for all within state schools. Also, on the fact that the enhanced cleaning guidelines are issued by another competent authority and the Ministry for Education is duty bound to observe all such guidelines in the interest of the whole population. The Board opines that no-one could have predicted when schools were going to be closed, re-opened etc, hence proper budgeting of hours could not have been done during the year 2020 with such a confidence level to be certain that the tender would have had within it sufficient working hours to cover till end of 2021. It was only later that the situation started to crystallize. This certainly not to the fullest extent as even today, the pandemic is still with us and with it, it brings uncertainty, especially in the forecast of resources required. The Board certainly opines that such events could not be attributable to the contracting authority.

Therefore, this Board opines that the 'requirements' listed in regulation 154(1)(c) have all been met.

**In conclusion this Board;**

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

- a) That the Contracting Authority acted in terms of the Public Procurement Regulations and disposes of the application as brought forward by the Appellant / Claimant.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Dr Charles Cassar**  
Member

