

PUBLIC CONTRACTS REVIEW BOARD

Case 1818 – CT2074/2022 – Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Support

12th December 2022

The Board,

Having noted the letter of objection filed by Dr Ronald Aquilina acting for and on behalf of Support Services Limited, (hereinafter referred to as the appellant) filed on the 14th October 2022;

Having also noted the letter of reply filed by Dr Paul Borg, Dr Clint Tabone and Dr Yvette Tonna Board acting for Agenzija Support (hereinafter referred to as the Contracting Authority) filed on the 21st 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 19th October 2022;

Having heard and evaluated the testimony of the witness Mr Anthony Azzopardi (Representative of the Department for Industrial and Employment Relations) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Ms Stephanie Etim Grech (Member of the Evaluation Committee) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Ms Sarah Buhagiar (Member of the Evaluation Committee) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

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

Having noted and evaluated the minutes of the Board sittings of the 22nd November 2022 and 6th December 2022 hereunder-reproduced;

Minutes

Case 1818 – CT 2074/2022 – Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Support

The tender was issued on the 1st April 2022 and the closing date was the 10th May 2022. The estimated value of the tender excluding VAT, was € 1,533,253.

On the 14th October 2022 Support Services Ltd filed an appeal against Agenzija Support as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to have satisfied the award criterion.

A deposit of € 7,666 was paid.

There were five (5) bids.

On the 22nd November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Support Services Ltd

Dr Ronald Aquilina	Legal Representative
Mr Charlo Farrugia	Representative

Contracting Authority – Agenzija Sapport

Dr Paul Borg	Legal Representative
Dr Matthew Zarb	Chairperson Evaluation Committee
Ms Stephanie Etim Grech	Member Evaluation Committee
Ms Sarah Buhagiar	Member Evaluation Committee
Ms Abigail Corso Spiteri	Secretary Evaluation Committee
Mr Oliver Scicluna	Representative
Ms Alison Attard	Representative

Preferred Bidder – Executive Care JV

Dr Alessandro Lia	Legal Representative
Mr Steve Ciangura	Representative

Director 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 Ronald Aquilina Legal Representative for Support Services Ltd said that the Appeal was based on three points. First question is the legal status of the recommended bidder; secondly the reduced points awarded on the collective agreement and thirdly the method of adjudication of the tender where the bearing in mind the range of marks awarded it seems unlikely that both parties should end up with exactly the same number of points. Reference was made to the letter from the Contracting Authority in which they admit that the BPQR was not properly followed and *ex admissis* confirmed that in certain aspects more points were due to either party. This is not reflected in the award as full points were awarded in all cases. This was a defective adjudication and there is vast jurisprudence on this point. Witnesses will be asked to testify.

Dr Paul Borg Legal Representative for Agenzija Sapport said that on the third grievance raised the Authority agreed that this was a BPQR tender with both technical and financial criteria. The Authority maintains that bidders were very close in their submissions but financially the preferred bidder's bid was cheaper and therefore the award was fair and objective.

Mr Anthony Azzopardi (3465M) called to testify by the Appellant stated on oath that he is the Assistant Director at the Department for Industrial and Employment Relations (DIER). He said that the Appellant had registered a valid collective agreement in 2015 with the latest one being dated in 2020 which was valid and still in place. Collective agreement are always valid immaterial of when they are submitted to the DIER and there are no repercussions if it is filed late.

Ms Stephanie Etim Grech (577781M) called as a witness by the Appellant testified on oath that she works as a Procurement Officer at Support and was one of the Evaluators. She has been writing and evaluating tenders since 2016. She explained that the tender had been evaluated separately and marked individually by the evaluation members. The submissions were all identical and if documents were submitted full marks were awarded. The collective agreement examined including the accompanying letter had expired. Referred to Clause 17 of the Collective agreement submitted by Appellant, witness stated that it stated that the agreement was still valid and agreed that the Clause meant that it was still effective but the letter was expired.

Referred to page 10 of the tender dossier in the section dealing with the range of marks allotted witness agreed that this is repeated in several places. Dealing with the collective agreement witness said that only one mark was awarded as it was out of date. Asked to comment on the letter from the Contracting Authority which states that in certain aspects Appellant provided more than was expected witness said that the tender was adjudicated on the basis of the minimum expected and the same marks awarded on submissions that were equally good. Referred to item I.06 witness was asked if the proposed biometric punch clock, which was not asked for, had been offered by the other parties, and if not why were they all awarded the same points. When it was claimed that this was confidential information witness was reminded that the Appeal Court had held that relevant information had to be provided (South Lease Case) information.

The Chairman stated that he will allow the question since it deals with a point on the adjudication.

Witness then replied that she does not recall the point about the biometric punch clock.

At this stage Dr Lia requested a deferment due to another pressing engagement. Dr Aquilina disagreed and wished to pursue the questioning but requested that the witness should stop conferring before answering.

The Chairman said that he accepted to defer the case but that next hearing shall not be a virtual one to ensure that witnesses did not confer whilst giving evidence. He thanked the parties for their attendance and deferred the hearing to the 6th December 2022 at 11.00am.

End of Minutes

SECOND HEARING

On the 6th December 2022 the Public Contracts review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna and Dr Vincent Micallef as members convened a public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

Appellant – Support Services Ltd

Dr Ronald Aquilina	Legal Representative
Mr Charlo Farrugia	Representative
Ms Decoda Sammut	Representative

Contracting Authority – Agenzija Sapport

Dr Paul Borg	Legal Representative
Dr Clint Tabone	Legal Representative
DrYvette Tonna Borg	Legal Representative
Dr Matthew Zarb	Chairperson Evaluation Committee
Ms Stephanie Etim Grech	Member Evaluation Committee
Ms Sarah Buhagiar	Member Evaluation Committee
Ms Veronica Curmi	Member Evaluation Committee
Ms Abigail Corso Spiteri	Secretary Evaluation Committee
Mr Oliver Scicluna	Representative
Ms Caroline Debono	Representative

Preferred Bidder – Executive Care JV

Dr Alessandro Lia	Legal Representative
Mr Steve Ciangura	Representative

Director of Contracts

Dr Mark Anthony Debono	Legal Representative
------------------------	----------------------

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and noted that at the last hearing there were disagreements on what questions might be asked of witnesses. The BPQR process deals with a spectrum of ranges and the Board expects evaluators to be able to give explanations on certain points and certain decisions to maintain a balance between the parties. He then invited the Appellant to proceed with further questions.

Ms Stephanie Etim Grech (577781M) recalled to proceed with her testimony by the Appellant testified on oath. It was pointed out to her that there was a spectrum of marks that could be awarded and it was difficult to accept that there was no difference in the markings between the two parties in question on such a wide range. Witness replied that the Tender Evaluation Committee (TEC) followed the evaluation regulations to award full marks if all the minimum requirements were met. Referred to page 14 of the tender where it states that the range of points is from 0 to 100% witness re-iterated that full marks were given if the requirements were met. Referred to three items – level of service, timekeeping and rostering on page 10 of the tender dossier witness confirmed that full marks were awarded on all three items. Although the Appellant offered a novel proposal of a biometric punch clock no extras marks were awarded and it was treated same as the others. In the transport section the tender allowed for a two hour response time but Support Services Ltd offered one hour but still was awarded the same marks as others. This also applied to the offer of a stand-by driver and alternative transport arrangement over and above what was required. Appellant offered a full time

trainer but the witness could not recall what type of training was offered. There were two other bids that were awarded full marks in the technical offer as they offered items above what was requested.

The Chairman asked the witness how the TEC had concluded that all add-ons carried the same marks. Witness replied that the TEC followed instructions to award full marks on mandatory items.

Ms Sarah Buhagiar (168488) called to testify by the Appellant stated on oath that she was one of the evaluators and this was the first time that she has been called to carry out an evaluation. She confirmed that she had awarded full marks to both Support Services Ltd and to Executive Care as they both submitted replies as requested in the tender. The evaluators had marked the bids individually and then the submissions were discussed with the other evaluators to make sure that expectations had been reached. Witness confirmed that whether the bidders offered the minimum or something better they were still awarded the same marks. There were other bidders who had offered better than the minimum.

In reply to a question by Dr Lia Legal Representative for Executive Care, witness confirmed that any bids reaching the minimum were awarded full marks.

This concluded the testimonies.

Dr Aquilina said that the General Contracts Committee awarded the tender to Executive Care Ltd, an entity that does not exist. There has been no request or attempt to have this award corrected – even the DoC's reply does not agree as they refer to Executive Care Ltd whilst claiming that it does not exist. There has been no attempt to correct this mistake and therefore Appellant sustains that the award is to an in-existent entity.

As regard the Collective Agreement, witness from the DIER has testified that Appellant has a valid agreement registered with a letter confirming this fact. This was totally ignored and the appropriate points were not awarded. This was one of the add-on criteria where points were deducted. On the non-mandatory criteria where the tender allowed a range of marks the TEC rendered the whole exercise ridiculous since if any bidder reached the minimum then full marks were awarded. The PCRB in the past has heard cases similar to this where the evaluation exercise rendered the BPQR basis useless. If the Authority wanted the bids to be on minimum basis it should have used a best priced tender since in a BPQR tender analysis has to be carried out and marked accordingly. Mandatory marks apply only where there is no range. *Ex admissis* the evaluation was not carried out correctly.

Dr Lia stated that the only offer submitted is by Executive Care and they are correctly referred to in the award letter. Support Services exhibited a collective agreement going back to 2013 with an accompanying letter dated in 2020 whilst others offered only recent agreements and that must have some validity – in this respect, in fact, the TEC decision was generous towards the Appellant as the agreement was also registered late.

The PCRB is not bound by their previous decisions regarding BPQR tenders and the Meals on Wheels case did not go further than the PCRB. The remedy in that case was not on the TEC's decision as it did nothing wrong. The TEC followed the terms of the tender as most items were proposing full marks if met. A precontractual remedy was available to the Appellant if it did not feel happy with the terms of the marks and the grid. All the arguments produced are of no use as the TEC acted correctly and once a certain leeway is allowed it must be respected. The BPQR also has an impact on the financial aspect.

Dr Debono said that there is no difference between the DoC and the TEC as the tender offer number was followed. In the case of the collective agreement the TEC has the right to deduct points if the document is not up to date (reference to PCRB Case 1785). The PPR deal with comparative exercise

which was carried out. There is leeway in the adjudication and the decision should not be disturbed as it is reasonable.

Dr Clint Tabone Legal Representative for Agenzija Support said that there is no doubt for which entity the award is intended. It was only at the objecting stage that the Appellant produced proof that the collective agreement is valid. Witnesses explained that the evaluation followed the tender requirements. The evaluation was carried out correctly and it is not right for the Appellant to assume that others did not also offer other things.

Dr Aquilina said that this appeal was not meant as a criticism of the tender but of the way it was interpreted. The tender was anticipating the award of three points if the mandatory criteria were fulfilled and were a range was required it was so stated – so the instructions were clear.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 22nd November 2022 and 6th December 2022.

Having noted the objection filed by Support Services Limited (hereinafter referred to as the Appellant) on 14th October 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2074/2022 as case No. 1818 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ronald Aquilina

Appearing for the Contracting Authority: Dr Paul Borg, Dr Clint Tabone &
Dr Yvette Tonna Borg

Appearing for the DoC: Dr Mark Anthony Debono

Appearing for the Preferred Bidder: Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) The first ground of appeal concerns the legal status of the recommended bidder and the validity of the recommended bid. As already indicated, both in the letter dated 4th October, 2022 and the General Contracts Committee notice of the same date, the recommended bidder is indicated as “Executive Care Ltd”. However, on checking with the Malta Business Register, it transpired that

in reality no company / partnership is registered under the name "Executive Care Ltd." - As "Executive Care Ltd" does not exist, the appellant respectfully submits that:- A) Any tender purported to be submitted by it is not legally valid and should not even have been considered. The fact that a bid by a non-existent entity was not discarded outright at evaluation stage suggests that the evaluation lacked rigour and thoroughness, as is also suggested by other aspects of the evaluation which leave much to be desired; and B) Moreover, as it is not legally validly constituted, "Executive Care Ltd" lacks the distinct legal and juridical personality accorded at law to properly registered companies and therefore cannot validly assume contractual obligations. In other words, any contract awarded to "Executive Care Ltd" (as is being recommended by the General Contracts Committee and as communicated in the aforementioned communications of the 4th October, 2022) would not be legally valid at all and, hence, not enforceable.

In view of the foregoing, the appellant respectfully submits that, even on the basis of the foregoing alone, "Executive Care Ltd" 's offer should be discarded in toto and that the recommendation to award the tender to "Executive Care Ltd" should be revoked.

- b) The second ground of appeal concerns the evaluation's erroneous decision to grant the appellant only one (1) point out of a possible three (3) points in respect of the Collective Agreement.

The Tender (Evaluation Grid item C2 (g) -Page 13) required tenderers to show that *"A Collective Agreement is in place and registered with the Department of Industrial and Employment Relations (or an equivalent foreign Authority if the Economic Operator is registered abroad). In all instances, the Collective Agreement must include the minimum criteria of Employment Law conditions as set by Employment and Industrial Act (EIRA) CAP 452 and subsidiary applicable legislations."* This item is classified as an ADD-ON, with one (1) point being awarded if no such collective agreement is provided by tenderers and three (3) points being award if it is provided.

The appellant does have a valid collective agreement in place duly registered with the Department of Industrial and Employment Relations and did upload a copy of the said collective agreement together with its tender submission. As such, it should have been awarded the relative three (3) points in full.

Nevertheless, the appellant was only awarded one (1) point and the justification / reason provided by the evaluation committee in the evaluation grid states as follows: *"The collective agreement provided is not valid as requested. The collective agreement provided was signed in January 2013 and expired three (3) calendar years from such date of signature."*

With all due respect, the decision not to award the full three (3) points to the appellant on the basis of the foregoing reasoning shows, once again, that the evaluation lacked rigour and thoroughness and indeed was effected very superficially. Indeed, it is respectfully submitted that, had the evaluation committee examined the submitted documentation properly, it would not have reached the mistaken conclusion it reached that the appellant's collective agreement was no longer valid because more than three years had passed from its signing. Indeed the documentation submitted

by the appellant conclusively shows the direct opposite of the decision reached by the evaluation committee, i.e. that the collective agreement was still valid and effective, on the basis of the following considerations:-

The collective agreement itself clearly stipulates this. It is true that clause 16 of the Collective Agreement states that “Dan il-ftehim jibga fis-sehh md-data tal-istess ftehim sa tliet snin kalendarji.” However, the immediately following clause 17 provides:- *“Fi żmien sitt xhur qabel ma jiskadi dan il-ftehim il-partijiet għandhom jiltaqgħu biex jiddiskutu u jiftehm u dwar ftehim kollettiv gdid. jekk sa tliet xhur minn tmiem dan il-ftehim ma jintlaqgħax qbil, Il-Ftehim Kollettiv prezenti għandhu jibqa fis-sehh”* In other words, clause 16 and clause 17 taken together clearly mean that the collective agreement will remain in force, valid and binding upon the parties, until such time as it is replaced by another collective agreement. This, incidentally, is not a feature peculiar to the appellant's collective agreement but reflects a widespread practice in Malta, intended to protect employees rights by assuring permanence to any rights acquired through a collective agreement. It is obvious that the evaluation committee was not aware of the provisions of clause 17 or, worse, choose to ignore it when deciding, erroneously, that the appellant did not have a valid collective agreement in place.

It is submitted that the wording of the collective agreement is crystal clear and should have left no doubt whatsoever that the appellant had a valid collective agreement in place, even if it was signed more than three (3) years earlier. Still, in addition to the foregoing, the appellant uploaded also confirmation in writing by the Director of the Department for Industrial and Employment Relations (letter dated 14th December 2020) which specifically states:- *“This is to confirm that Support Services Ltd has a valid Collective Agreement in place, which Collective Agreement is registered with the Department of Industrial Relations. Careworkers have their conditions of employment regulated by the said Collective Agreement”*

It is not at all clear to the undersigned how the evaluation committee managed to arrive at the conclusion that the appellant did not have a valid collective agreement in place when the very Director of the Department for Industrial and Employment Relations, i.e. the authority in Malta on such matters, is stating in writing that the appellant does have a valid collective agreement in place and that, even more specifically, the appellant's careworkers have their conditions of employment regulated by the said collective agreement. In view of the foregoing, the appellant respectfully submits that the decision of the evaluation committee to award only one (1) point and not the full three (3) points to the appellant on this criterion is manifestly unfounded and should, therefore, be reversed by this Board.

- c) The appellant's third ground of appeal stems from an overall improper evaluation which does not satisfy the requirements of an evaluation on the basis of the best price quality ratio. This ground of appeal concerns the manner in which the technical scores were awarded. The Tender is very clear that the award is to be effected on the basis of the best price/quality ratio "BPQR" and not on the basis of the cheapest technically compliant offer / price only. Over the last years, the PCR and the Court of Appeal have had ample opportunity to express themselves on BPQR (previously

also called MEAT - Most Economically Advantageous Tender). When the BPQR is utilised, bidders are not only allowed but are indeed encouraged to go beyond the tender's minimum stipulated requirements and provide better products / services. Better submissions should be reflected in the technical score, so that the better submission should end up with more points than other submissions, even if other submissions meet the bare minimum stipulated by the tender document. Better submissions which go beyond the bare minimum have always been considered by the PCRFB as "add ons" which should be reflected in the technical score. Thus for example, the Board rightly held that "the marks allocated for each offer were objectively established by the Evaluation Committee and reflected the "add ons" on the minimum Tender requirements, each Bidder offered, in a proportionate and consistent manner".

Finally, and perhaps most importantly, it follows that the technical score in a tender subject to the BPQR cannot and should not be effected in vacuum, in the sense that offers are not to be examined and marked only on their individual merits/demerits. Rather, each offer has to be examined and marked in comparison with other technically compliant offers, so that at the end of the day the tender submission with the best submission gets the best marks and other submissions get lesser marks, depending on the difference in quality of the respective submissions. It follows that this comparative analysis of tender submissions, item by item, comparing the respective strengths and weakness of the offerings, is a sine-qua-non, keystone aspect of adjudication on the basis of the BPQR. BPQR adjudication should never be reduced to a ticking-the-box exercise to determine whether the minimum stipulated specifications / quality / service / document or other submission required in the tender document has in fact been submitted. If that approach is adopted, tender would not be adjudicated on the basis of BPQR but one the basis of the cheapest technically compliant basis, an altogether different basis than that which would have been specified in the tender.

It is respectfully submitted that the decision to award an equal points technical score to the appellant and "Executive Care Ltd" is incorrect and betrays a flawed adjudication which should not be allowed to stand by this Honourable Board. This is especially so when one considers that our client was allotted full marks in respect of each and every one of the evaluation criteria (save, erroneously, in respect of the Collective Agreement) and therefore, presumably, so was "Executive Care Ltd" (on the basis that they were also awarded identical marks on the technical score).

The only logical explanation to the full marks being granted to both our client and "Executive Care Ltd" is that the adjudication committee did not in fact carry out the individual, comparative exercise, in respect of each of the evaluation criteria to determine, in respect of each criterion, which offer / submission is the superior one and instead proceeded to allocate full marks to those tenders which met the minimum criteria set out in the tender document. If, as appears highly likely, full marks were allotted simply for having submitted the minimum which was required, the

adjudication cannot be said to have been validly effected on the basis of PBOR and hence should not be allowed to stand.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 21st October 2022, its verbal submission during the hearings held on the 22nd November 2022 and 6th December 2022, in that:

- a) The first ground of appeal indicated by Support Services Ltd concerns the legal status of the recommended bidder and the validity of the recommended bid. It is to be noted that Support Services Ltd is incorrect in stating that the tender submission by the awarded bidder is not valid and consequently that the tender submission is not to be considered. This is so since, the submission of the tender was actually affected by Executive Care which is a valid joint venture between Executive Group Ltd and Executive Security Services Ltd. Notwithstanding that in the recommendation for award, the awarded tenderer is indicated as 'Executive Care Ltd', this is a mere *lapsus calami* as in fact the bid was submitted by Executive Care, which from the outset was given a unique tender ID of 173521. In fact, the evaluation report clearly indicated and quotes EO Name "Executive Care" and tender ID 173521. It is unfortunate that through a *lapsus calami* the recommended bidder was indicated as "Executive Care Ltd" instead of "Executive Care", however, clearly indicating its tender ID 173521, so that there is no doubt that the tender was submitted by the joint venture Executive Care and was awarded to the same and not to an entity which lacks a distinct legal and juridical personality.
- b) The second ground of appeal concerns the Evaluation Committee's decision to grant appellant only one point of the possible three points in respect to the collective agreement. With all due respect, the argumentation put forward by the appellant does not justify the appellant request that the Evaluation Committee should have awarded the full three points to appellant on this criterion. Whilst, a collective agreement in Clause 16 stipulates that the same collective agreement is valid for three calendar years and in Clause 17 provides "... *jekke sa tlett xbur minn tmiem dan il-ftehim ma jintlaqx qbil, il-ftehim kollettiv prezenti ghandu jibqa' fis-sebh*" It is to be noted that the Evaluation Committee noted that the collective agreement was signed in January 2013 and thus nearly ten years have elapsed from its signing. Further, the letter by the Director of Department for Industrial and Employment Relations is dated 14th December 2020 and even though it confirms that Support Services Ltd has a valid collective agreement in place registered with the Department of Industrial Relations, this Board must note that this letter is also dated more than one and a half years and therefore the information submitted was deemed unsatisfactory. Nonetheless, should this Honourable Board determine that the Evaluation Committee should have awarded three points to the appellant on this criterion, the effects are minimal as to the overall result and consequently should not have any bearing as to the final outcome of this tender.
- c) The third ground of appeal relates to an alleged improper evaluation which did not satisfy the requirements of the evaluation on the basis of the Best Price Quality Ratio (BPQR). For the

avoidance of repetition this tender was awarded on the basis of price/quality for which the assessment was on a 60(technical score) / 40 (price score) basis. It is to be noted that both Support Services Ltd and the awarded tenderer were very close in the technical criteria so much so that they have been awarded an average technical score of 58.79. The Evaluation Committee has conducted its assessment of the tender in accordance with the BPQR criteria in fact on some aspects the appellant provided more than the minimum expected on other aspects it was Executive Care which provided additional add-ons to the minimum. This does not mean that the adjudication was flawed or incorrect but it means that the technical level by both bidders was very close and thus the tender was then awarded in light of the financial aspect. Which meant that over all Executive Care obtained the highest score in the financial aspect. Consequently ranked first overall.

This Board also noted the DoC's Reasoned Letter of Reply filed on 19th October 2022, its verbal submission during the hearings held on the 22nd November 2022 and 6th December 2022, in that:

- a) The first ground of appeal submitted by the appellant attempts to impeach the recommendation for award made by the General Contracts Committee on the basis that the identity of the tender offer submitted by the recommended economic operator is non-existent.

In this respect, the DoC disagrees with the statement of the appellant and submits that the unilateral conclusions drawn up by the appellant are unfounded in fact and in Law since the General Contracts Committee has not issued a recommendation for award, as contended by the appellant, to a fictitious limited liability company bearing company name is Executive Care Ltd.

This submission is being confirmed in view of documentation, including the deed of joint venture submitted by the tenderer, and which bears the signature and details of the joint venture Executive Care. This tender offer had been the subject of the tender evaluation process which had been carried out before the Tender Evaluation Committee.

In accordance with the schedule of offers with respect to the Call for Tenders in caption, it should be amply clear that the identity of the economic operator recommended for award refers exclusively to the tender offer submitted by Executive Care [TID 173521].¹¹ The Schedule of Award results from the opening of tender offers in accordance with rule 13.2 of the General Rules Governing Tenders – “*At the tender opening session, the tenderers' names, the tender ID, and where applicable the tendered price will be published.*” Contrary to the allegations of the appellant, the Tender Evaluation Committee and, thereafter the General Contracts Committee, has not evaluated any tender offer made by Executive Care Ltd since there had been no such tender offer.

- b) The appellant submits and contends that its collective agreement still fulfils the requisites of Law and that it should have been awarded the three marks since it asserts that the agreement had still been valid with the same providing evidence that the Director of the Employment and Industrial

Relations acknowledging the validity of the collective agreement. In view of the submissions and proof submitted by the appellant, it shall be the Tender Evaluation Committee to counter argument and therefore justify the allocation of one mark in stead (sic) of three marks.

- c) The DoC emphasizes that the burden of proof rests on the appellant to duly prove its submissions and unless such evidence is presented, the DoC submits that the decision of the Tender Evaluation Committee is factually and legally correct and should accordingly be upheld by this Honorable (sic) Public Contracts Review Board. For this reason, the DoC submits that the following statements should be considered by the Public Contracts Review Board as unfounded since the same does not suffice as proof: *“The only logical explanation to the full marks being granted to both our client and Executive Care Limited is that the adjudication Committee did not in fact carry out the individual, comparative exercise, in respect of each of the evaluation criteria to determine, in respect of each criterion, which met the minimum criteria”*

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, will now consider Appellant’s grievances.

- a) First Grievance – Legal Status –

This Board notes that the letter as issued by the Department of Contracts, following the recommendation of the General Contracts Committee is listing *“Executive Care Ltd. with Tender ID 173521”* as the ‘Recommended Tenderer’. Even though this Board agrees that the terminology *“Ltd.”* has been wrongly adopted in the drafting of this letter, the ‘Tender ID’ listed it the one which correctly identifies with the bid as submitted by the Preferred Bidder.

Due to this fact, (Tender ID correctly quoted), this Board will not uphold this first grievance of the appellant, as it is comfortable in its conclusion that the letter is correctly identifying the correct economic operator. The unique Tender ID number is proof enough for the proper identification of the recommended bidder and no prejudice was suffered due to this typographical error.

- b) Second Grievance – Collective Agreement – Reference is made to criteria C2 (g) of the Evaluation Grid whose requirements are clear and unambiguous. Undisputed facts are also that the Appellant submitted a copy of the Collective Agreement dated 2013 and also a confirmation from the Department for Industrial and Employment Relations (DIER), being the responsible authority in Malta, dated 14th December 2020 stating that the collective agreement in place is still valid. Therefore, this Board, cannot agree with the statement issued by the Evaluation Committee when it say, *“The collective agreement provided is not valid as requested. The collective agreement provided was signed in January 2013 and expired three (3) calendar years from such date of signature”*. The letter from DIER is dated post the said expiration date as listed in the Evaluation Committee’s reply. This due to other clauses included within the Collective Agreement. When considering these facts, this Board upholds Appellant’s second grievance.
- c) Third Grievance – BPQR Evaluation – This Board makes reference to the following:

- i. Section 1 of Tender Dossier, para 6.1, page 5, states that the Criteria for Award is the Best Price / Quality Ratio (BPQR)
- ii. Page 14 - Section 1 of Tender Dossier, lists three (3) specific, different and distinct rules and instructions to be used and followed along with the Evaluation Grid. These are:
 - A. *“For Mandatory criteria, unless otherwise specified in each criterion, if the Declaration / Proof / List / Picture / Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of ‘0’ shall be allotted, and the bidder shall be disqualified. On the other hand, full marks will be given if the Declaration / Proof / List / Picture / Template (or any other information as requested in each criterion) is provided and it illustrates all minimum requirements stipulated in this call for tenders. If a score of ‘0’ shall be allotted, the bidder shall be disqualified.”*
 - B. *“For other Mandatory Criteria, whereby the specific criterions within the BPQR allows for a gradation of points, a range from 0 up to 100% of the marks per criterion may be allotted. If a score of ‘0’ shall be allotted, the bidder shall be disqualified.”*
 - C. *“For Add-on Criteria, unless otherwise specified in the individual criterion, if the Declaration / Proof / List / Picture / Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of ‘1%’ shall be allotted. On the other hand, full marks will be given if the Declaration / Proof / List / Picture / Template (or any other information as requested in each criterion) is provided and it illustrates all minimum requirements stipulated in this call for tenders.”*
- iii. Testimony under oath of Ms Stephanie Etim Grech where she stated:
 - A. *“.....the tender was adjudicated on the basis of the minimum expected”*
 - B. *“.....the Tender Evaluation Committee (TEC) followed the evaluation regulations to award full marks if all the minimum requirements were met”*
 - C. *“..... full marks were given if the requirements were met.”*
- iv. Testimony under oath of Ms Sarah Buhagiar where she stated:
 - A. *“.....whether the bidders offered the minimum or something better they were still awarded the same marks”*

Board’s conclusions on third grievance

- i. It is clearly evident, from page 14 of the tender dossier, that there were 3 specific, different and distinct rules and instructions to be followed. In brief these are 1) **Mandatory Criteria** - where either a score of ‘0’ or full marks will be allotted depending on whether the minimum requirements are met. 2) **Other Mandatory Criteria** – whereby a gradation of points ranging from 0 to 100% needed to be allotted and 3) **Add-on Criteria** - where either a score of ‘1%’ or full marks will be allotted depending on whether the minimum requirements are met.

- ii. From the extract of the testimonies listed above, it is also clear to this Board, that the Evaluation Committee wrongly interpreted these and ‘used’ only two (2) out of these three (3) criteria. The **“Other Mandatory Criteria”** was totally absent from the evaluation carried out.
- iii. In short, what the Evaluation Committee did, is render this BPQR tender into a cheapest compliant bidder winning the tender. This goes totally contrary to the purposes and objectives of a BPQR tender, whereby economic operators are encouraged to submit offers with a higher technical value and quality. In fact, it may truly result from a BPQR tender that the cheapest offer is not awarded the tender, if another tenderer with a higher bid (financially) is offering something which is technically superior.
- iv. In the opinion of this Board, the tender document is clear and totally unambiguous. In fact specific reference is made to the following *“For Mandatory criteria, **unless otherwise specified in each criterion**, if the Declaration / Proof / List / Picture.....”* (bold underline emphasis added). In Criteria B1 of the Evaluation Grid, (and in other parts of the Evaluation Grid) it is specifically stated that *“**Points shall be allotted within a range from 0 up to 100%**. A score of ‘0’ shall be allotted if this documentation is not submitted. If a ‘0’ score shall be allotted this bid shall be disqualified”* (bold underline emphasis added). Therefore, this Board opines, that even though Criteria B1 was listed as ‘Mandatory’, the Evaluation Board was expected to provide a ‘range’ of points depending on the technical quality being offered. This as per page 14 of the tender dossier *“For other Mandatory Criteria, whereby the specific criterions within the BPQR allows for a gradation of points, a range from 0 up to 100% of the marks per criterion may be allotted. If a score of ‘0’ shall be allotted, the bidder shall be disqualified.”* The Evaluation Committee failed to do so and gave full marks if the minimum requirements were duly supplied. Same applies to all the other criteria where this statement is present.
- v. Even though, this Board has on multiple occasions stated that Evaluation Committees, when assessing a BPQR tendering procedure, are to be afforded an element of ‘leeway’, this statement also goes on to state that *“.....the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, **duties and obligations**.”* (bold & underline emphasis added). By not correctly understanding how the Evaluation Grid was to be assessed and points allotted, this Evaluation Committee went against its duties and obligations imposed on it.

Therefore, when considering all of the above, this Board upholds Appellant’s third grievance and cannot but order the re-evaluation of all the bids in this tender procedure.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 4th October 2022;
- c) To cancel the Letters of Rejection dated 4th October 2022 sent to Support Services Ltd;
- d) To order the contracting authority to re-evaluate all the bids received through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, 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

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member