

PUBLIC CONTRACTS REVIEW BOARD

Case 1821 – CT2251/2021 – Supplies - Tender for the Supply of Total Knee Replacement System on Pay Per Use Basis

15th December 2022

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 1st August 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 9th August 2022;

Having heard and evaluated the testimony of the witness Ms Rita Zammit (Chairperson of the Evaluation Committee) as summoned Dr Matthew Paris acting for Cherubino 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 sitting of the 1st December 2022 hereunder-reproduced.

Minutes

Case 1821 – CT 2251/2021 – Tender for the Supply of Total Knee Replacement System on Pay per Use Basis.

The tender was issued on the 30th October 2021 and the closing date was the 11th January 2022. The estimated value of the tender excluding VAT, was € 5,143,850.

On the 1st August 2022 Cherubino Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the failure of the Director of Contracts to provide them with certain information under Reg 270 pf the Public procurement Regulations.

A deposit of € 25,719 was paid.

There were three (3) bids.

On the 1st December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera 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 – Cherubino Ltd

Dr Matthew Paris

Legal Representative

Dr Francis Cherubino

Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri

Legal Representative

Dr Alexia Farrugia Zrinzo

Legal Representative

Ms Rita Zammit

Chairperson Evaluation Committee

Ms Solange Vella

Secretary Evaluation Committee

Director of Contracts

Dr Mark Anthony Debono

Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions noted that further to hearing submissions on the preliminary point raised the Board will also hear submissions on Item 5 in the letter of objection - namely the ePPS malfunction.

Dr Debono Legal Representative for the Department of Contracts (DoC) said that the Department had made an Application dated 11th August 2022 for an Interlocutory Decree and asked for this Application to be heard first.

The Chairman requested a short recess to consider this point. On resumption he stated that the Board had decided to deal first with the DoC's Application.

Dr Debono stated that the Appellant had no juridical interest as this appeal deals with the offer of a tender. One must refer to PPR 262 which deals with whether there was an offer or not.

Dr Paris Legal Representative for Cherubino Ltd said that it is Regulation 270 which lays down the methodology of how an appeal can be based. There is no need to qualify as a bidder but any person who has an interest or who has been harmed is entitled to seek a remedy whether right or wrong. This situation is identical to the one in the Krypton case (PCRB 1790) in which Krypton had no interest but they claimed that if they had known the facts they would have participated and the Board agreed with this argument. In this particular case the Appellant tried to submit a bid but for some technical reason this failed – therefore they do have an interest. Once a report was submitted advising bidder that the bid had failed then that is recognition that it was an interested party and a judicial protest had been filed to this effect. The Interpretation Act makes it clear that the law gives the right to contest a decision.

At this stage there was a recess to enable the Board to consider the submissions made.

On resumption the Chairman said that the Board had heard the submissions made by the Appellants and the DoC in regard to the Application made by the said DoC. The Board denies the request of the Applicant on the ground that from the nature of the Application as well as from the submissions made it is abundantly clear that the Appellant actually participated in the tender process. Consequently the Board decrees that the same Appellant has juridical interest in pursuing this case.

Dr Debono rather forcefully expressed the view that the DOC does not agree with the decision just delivered and the Board is incorrect in its decision as Appellant never submitted an offer on the ePPS. The decision of the Board, in the view of Dr Debono, is null and void.

The Chairman said the Board will at this stage hear submissions on the preliminary request and the ePPS malfunction.

Dr Paris, dealing with the preliminary point said that on the 14th July 2022 he had requested the DoC for confirmation regarding the extension of the tender and to which no reply was received. On the 17th November there was a decision by the European Court of Justice which basically stated that information on relevant matters, but not confidential ones, had to be provided. Reference was made to documents COV1 and COV2 filed by DoC in their letter of reply covering exchange of information between the DoC and Appellant and Technoline and Ms Rita Zammit; therefore the reply was eventually given. It is necessary, for the reasons given in the letter of appeal to safeguard the Appellant's deposit as the appeal was necessary as the requested information was not forthcoming. In the mentioned letter reference is made to the Firetech case on the reason why the deposit should be refunded.

Dr Debono said that the request was for relevant information without specifying exactly what was requested. The DoC is bound by Regulations as to what information it can provide and the only information allowed to be given is that mentioned in Regulation 242. The principle on the refund of deposit is based on decisions of the Board which is an argument to be discussed later.

Ms Rita Zammit (276864M) called to testify by the Appellant stated on oath that she was the Chairperson of the Tender Evaluation Committee (TEC) on which there were five members, three of them evaluators. The closing date of the tender was on the 11th January 2022 and the evaluation process started on 28th February. According to the witness the TEC did not meet as a body but each evaluator worked independently of each other. The first clarification sent on 17th March was a request for samples and the evaluation was completed on the 19th May and forwarded to the DoC by e-mail on the 9th June 2022. The delay in completing the evaluation was due to the consultants not being available due to pressure of work - there were no undue reasons for the delay. Referred to the exchange of correspondence between her and Bjorn Bartolo on 25th July 2022 witness said that there was no other correspondence except for the clarification note asking for samples. In this instance an e-mail was sent as the ePPS was no longer available as the tender was closed by then. The TEC did not do anything when the original validity date of the tender expired as they left this to the DoC to deal with.

In reply to a question from Dr Debono witness re-iterated that the evaluation was carried out individually and the need to extend the validity date was necessary as the evaluation took its time.

Dr Leon Camilleri Legal Representative for the CPSU, in reply to his question, was told by witness that there were two extensions of four weeks each in the tender validity.

Questioned by Dr Paris, witness stated that it is the usual practice to let the DoC decide if an extension is requested.

On further question by Dr Camilleri witness said that she was not aware that extensions had been requested but understood that they had actually been requested.

Another question from Dr Debono, elicited the reply from witness that she had never requested an extension and usually it was up to the DCC to request such extensions.

In reply to a final question from Dr Camilleri witness said that this was not a departmental tender but one issued by the DoC.

Dr Paris asked for verbal confirmation from the witness that no extension request was asked for.

Dr Camilleri – “According to the witness did not request”.

Dr Paris – “The Evaluation Committee is responsible in the use of the ePPS”.

Dr Debono – “The use of the ePPS is not the responsibility of the DoC but of Euro Dynamics”.

Dr Paris – “The DoC have been requested to attend since the 1st August 2022 and there is no reason why they should not be present”.

Chairman – “Dr Paris made it clear what he required”.

Dr Debono – “According to the e-mail the Evaluation Committee asked the preferred bidder if its offer was still valid if extended”.

Dr Paris – “There is some doubt as to who sent the clarification and doubt if it was sent”.

Dr Debono said that he could not clarify who authorised the extension and undertook to check with the Department if the right person can be traced.

The Chairman proposed a short recess to enable Dr Debono to make enquiries. Dr Paris, not to delay proceedings said that he was renouncing his right to request further witnesses.

This concluded the testimony of Ms Zammit.

Dr Paris said that there was an obligation of transparency and equality and their relevance to the claim was worrying in terms of the PPR. The tender requested documents related to the PPR and the General Rules with a number of obligations on how the evaluation had to be carried out. The General Rules, Section 8, but especially Section 8.3 dealt with exceptional circumstances. Witness Ms Zammit said that there was nothing extraordinary in taking a long time to complete the evaluation and that this was quite normal practice and hence there was nothing exceptional here. Dr Debono claims that there was no need to request permission from the DoC seemingly exempting the TEC from going to the DoC to request permission but there is no right given to the TEC to give themselves permission and the correct process is to seek the permission of the DoC. The date of the e-mail seems to indicate that it was sent midway during the evaluation process and the DoC arguments are all hearsay and dated after the close of tender. The Regulation stresses that it ‘must’ be made in writing through a clarification and there was an obligation on the TEC to request clarification through the ePPS.

From the evidence heard it is clear that none of the guidelines were followed. Between the 11th January and the 28th February nothing happened and when the clarification was sent the 90 days had already expired – once the 90 days expired without any action having been taken there was nothing further they could do. Reference was made to PCRB Case 1434 dealing with the authorisation of extension and Case 1022 where the correct procedure was not followed in the validity period leading to cancellation. Once the TEC failed to do anything by 90 days the tender lapsed on the 91st day. General Rules Article 19.1 clearly states that prior to the expiration of the period of validity the successful tenderer should be notified and the DoC is obliged to advise. Even the PPR in Regulation 276 limits the Board to a decision within six weeks provided there are no extraordinary circumstances. The TEC said that there were no extraordinary circumstances in the case of this tender but the DoC decided that it has powers to extend. The PPR even limits the Courts to set times.

The above, continued Dr Paris, brings out the obligations imposed on parties. Neither the Courts nor the PCRB have used the extraordinary clause to delay matters, but the DoC seem to have this right – they are breaking their own rules ignoring the fact that deadlines appeal to all. The e-mail exchanged between Bartolo and Zammit is dated 25th July after the award of the tender and the DoC should be ashamed at trying to defend an indefensible case.

Dr Camilleri said that Ms Zammit testified on facts and the Authority remits itself to the decision of the PCRB.

Dr Debono stated that everyone has the right to a hearing. The TEC indicated that they treat cases on a case by case basis. General Rule 8 is clear that the 90 days can be extended and it does not matter how this is carried out even without the need to use the ePPS. There is no time limit on concluding a call as the 90 days are only indicative. General Rule 19 was followed by the DoC and there was nothing illegal in the actions they took. The offer is still valid and should be confirmed. The deposit should not be refunded by the Board as no proof was submitted within the terms of the law.

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 sitting of the 1st December 2022.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 1st August 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2251/2021 listed as case No. 1821 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia J Farrugia Zrinzo

Appearing for the DoC: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) **Preliminary**- Reference is hereby being made to a request made to the DoC, wherein information about the period of validity of the tender, as well as about the notification of award, has been requested. In view of the fact that this information has not been supplied by the DoC until the date of submission of this appeal, CL is hereby reserving its rights to the fullest extent possible to

produce additional submissions, documentation and evidence to the Public Contracts Review Board to safeguard its interests and ensure that the legal principle of audi alteram partem is upheld.

- b) **Locus Standi** - This appeal is being filed in accordance with article 270 of the Public Procurement Regulations, S.L. 601.03, which inter alia grants access to this remedy to, “.. *any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement...*” It is clear that prima facie CL satisfies the above criteria and this inter alia in view of the fact that: i) It's tender offer was not uploaded for a fault attributable to the DoC, as will be technically confirmed during the proceedings before the PCRB; and ii) DoC has breached the General Rules Governing the tenders, to the detriment of inter alia of CL having and having had an interest in this procurement procedure.
- c) **Unwarranted extension of the initial validity period** - The tender document in provision 4.8, stipulates that: “*The contents of this procurement document complement the latest version of the General Rules Governing Tenders applicable on the date of the publication of this tender, the Terms of Use and the Manual for Economic Operators applicable to Government's e-Procurement Platform (available from the Resources section of www.etenders.gov.mt).*” Thus and thereby, it is sufficiently clear that the applicable General Rules Governing Tenders are directly applicable to this procurement procedure. The GRGT in provision 8.1 holds that the initial period of validity of tenders is of circa three [3] months. The provision holds that: “*Tenders must remain valid for a period of 90 days after the deadline for submission of tenders indicated in the contract notice, the procurement document or as modified in accordance with Clause 10.1. Any tenderer who quotes a shorter validity period will be rejected*”. The GRGT thereafter provides for a mechanism through which the initial validity period may be extended (hereinafter "the extended validity period"), subject to three main and cumulative conditions: i) An exceptional circumstance ii) All the tenderers are asked to extend their offer iii) The extension is for a maximum of eight weeks. The above stated, is determined through provision 8.3 of the GRGT. This clearly and in equivocal terms imposes that the evaluation of the tender shall be conducted within the period of three [3] months, but in the eventuality of exceptional circumstances, such evaluation may be conducted in a maximum period of five [5] months. The concept of exceptional circumstances has been outlined in the PCRB decision with number 1434 dated 12th March 2020', wherein the PCRB emphasised that:
- “It should also be mentioned that, an extension to the validity period, is only Authorised in exceptional circumstances and in this particular case, no such urgent or exceptional instances existed.”* The PCRB has developed an objective and rigorous test for the extension of the validity period, which should be of [a] an urgent nature, [b] extraordinary situation. In addition, PCRB has been clear that unless these criteria are satisfied, such extension will not be permitted. Whilst it's the onus of DoC to confirm in this situation what warranted the extension of the validity period, it is CL's position that no such situation has developed to validate such extension.

- d) **Award in breach of the GRGT** - Without prejudice to the aforesaid, it is the position of CL that the award of this tender has been made outside the validity period, and is thus in breach of provision 19.1 of the GRGT.

Date of publication of tender - 30th October 2021

Date of tender submission deadline - 11th January 2022

Termination of the initial validity period - 11th April 2022

Termination of the extended validity period/s - 9th May/ 6th June 2022

Date of award of the tender - 21st July 2022

Whilst it is unclear whether DoC has formally extended the tender offers, whilst it is unclear what the exceptional circumstances which warranted the extension/s of the initial validity period are, it is very clear that the award has been made after the expiration of the period of the validity of the offer, in blatant breach of provision 19.1 of the GRGT.

- e) **ePPS malfunction** - As announced through formal communication and through the judicial protest, CL was negated the opportunity to bid for this tender in view of an ePPS malfunction attributable to DoC and/or its agents and/or its contractor, in any case to the detriment of CL. As it will be shown during the PCRB sitting, the technical configurations of CL functioned appropriately, including but not limited to support services, whilst on its part a number of malfunctions which ensued on the day and on the subsequent days following the closing date of this tender, confirm that the ePPS was not properly configured/functioning on the day of submission, thus negating CL to opportunity to successfully submit its offer for consideration by DoC.

This Board also noted the DoC's Reasoned Letter of Reply filed on 9th August 2022 and its verbal submission during the virtual hearing held on 1st December 2022, in that:

- a) **Preliminary** –

In response to the preliminary plea, the DoC submits that the only provision granting a right *ex lege* to information under the Public Procurement Regulations, 2016 is regulation 242(2) which entitles tenderers or candidates having submitted tender offers the right to be informed of the outcome of the tender evaluation process. Since it does not result that the economic operator had participated in the current tender process, such request cannot be acceded to by the Public Contracts Review Board. Article 40 of the Public Procurement Regulations does not give any right to the economic operator, but simply permits the Contracting Authorities and the Central Government Authority, for reasons of transparency, to disclose information only where such information is not considered to be commercially sensitive.

In any instance, the DoC hereby submits that since the request for information had been addressed to the Public Contracts Review Board, the DoC hereby protests that it had not been given sufficient

time to respond and comply with the request for disclosure of information and therefore abide by its duty of transparency in terms of regulation 39 of the Public Procurement Regulations, 2016. As per the Standard Operating Procedure adopted in accordance with regulation 40 of the Public Procurement Regulations, 2016 the DoC would not have had any objection to disclose the information, even if the economic operator has not submitted a valid tender offer, as long as commercially sensitive information would not be disclosed and that any Public Law governing the disclosure of information, in particular the provisions of the Freedom of Information Act, Chapter 496 of the Laws of Malta are adhered to. Provided that the request for information is now *sub judice* and pending before the Public Contracts Review Board, the DoC hereby submits that it is the Public Contracts Review Board which is the only competent judicial forum having jurisdiction to decide upon such request for information. This principle is reflected in regulation 242(3) of the Public Procurement, Regulations, 2016, namely: *“Contracting authorities may decide to withhold certain information..where the release of such information would... prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators”*

Furthermore, the DoC also refers to rule 14(2) of the General Rules Governing Tenders which state that: *“Information concerning checking, explanation, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law”*. For the Public Contracts Review Board to balance the needs of both the economic operator and the recommended tenderer regarding the provision of information, the Public Contracts Review Board must also take into consideration the submissions of the Central Procurement and Supplies Unit and the recommended tenderer on such request for information.

b) **Locus standi -**

Contrary to the submissions of the economic operator, the juridical interest under regulation 270 of the Public Procurement Regulations, 2016 does not result *prima facie*, even if the DoC concedes that the economic operator can avail of the criteria being *“any person, having or having had an interest or who has been harmed or risks being harmed”* The DoC submits that the juridical interest must be duly proven, taking into consideration the ePPs account utilised in order for the tender offer to be uploaded. According to Regulation 2 of the Public Procurement Regulations, 2016 the legal definition assigned to the word "tenderer" refers to an economic operator which has submitted a tender. Therefore, *prima facie*, the right to lodge the present objection cannot be stated to subsist since as an economic operator having not submitted a tender goes against the principle enunciated under regulation 242(2)(e) of the Public Procurement Regulations, 2016 stating that *“the authority responsible for the tendering process inform...any unsuccessful tenderer of his right to appeal a decision taken...”*

This principle is confirmed by the economic operator itself by the presentation of 'Doc2' attached to the objection which explicitly provides that – *“Tenderers are informed that any objection to the decisions*

listed above must reach the Public Contracts Review Board by not later than Monday 1st August 2022, or 10 days from the date of notification to the respective bidder.....” Since the economic operator had not been among the tenderers, it implies that it did not submit a tender, and therefore it had not been notified of any award. Therefore, the DoC submits that it cannot avail itself of the right of objection to the recommendation of award to Technoline Ltd as per the procedure therein. Furthermore, the DoC hereby submits that the only remedy (*ubi ius ibi rimedio*) available to the economic operator to address the issue of the submission of the tender offer had been the pre-contractual call for remedies in terms of regulation 262(1)(b) of the Public Procurement Regulations, 2016: *“To determine issues relating to the submission of an offer through the government’s e-procurement platform”*.

Without prejudice to the aforesaid, the DoC hereby declares that the failure for the upload of the tender by the economic operator together with any documentation therewith had not taken place by reason of way of any default from their end. The DoC is not involved in the upload of tender offers and the required documentation, this being the responsibility of the tenderer to carry out through the tender preparation tool as stated in Rule 9.4 of the General Rules Governing Tenders V4.4. In terms of rule 9.1 of the General rules Governing Tenders v4.4 specifies the procedure to be followed by tenderers communicating their tenders: *“Tenders must be compiled, packed and uploaded on www.etenders.gov.mt before the deadline specified in the procurement document and/ or the CfT workspace of the ePPS, or as otherwise modified in accordance with Clause 10 of this document.”* Should the tenderer have been successful in the upload of the tender, this would have been confirmed via email: *“An email receipt will acknowledge the submission of the tender. Tenders submitted by any other means will not be considered.”*

The tender opening date on the epps website had been set at 30th October 2021, with the time limit for receipt of tenders being the 11th January 2022. With all due respect, the tenderer cannot be stated to have exercised the diligence of a *bonus pater familias* when it had submitted its tender at stage so near to the deadline for the submission of tender offers, ignoring the possibility for the need of assistance in the upload of its tender.

These are the guidelines which the economic operator should have adhered to in accordance with rule 9.4 of the General Rules Governing Tenders and therefore any liability should be borne exclusively by such economic operator: *“Prospective tenderers take full responsibility to submit their electronic tender response (offer) well before the tender submission deadline in order to avoid last minute upload restrictions. Tender offers must be fully uploaded/accepted by the ePPS prior to the deadline for submission of offers, that is, tenders in transit upon tender submission deadline will be rejected.”*

c) **Unwarranted extension of the initial validity period -**

In accordance with rule 8.3 of the General Rules Governing Tenders, it is stated that *“the Tender Evaluation Committee, if approved to internally through the Contracting Authority, may request that tenderers extend the validity of tenders.”*

Therefore, as will be duly be proven during the eventual hearing of the present objection the members of the Evaluation Committee appointed by the Contracting Authority shall provide the reasons justifying the need for the request of time for the validity of tenders. The decision quoted by the economic operator is not applicable in the present circumstances since the subject-matter of the Public Contracts Review Board refers to a services tender and does not involve a supply, namely the procurement of a medicinal product.

The DoC submits that since the subject matter of the tender procedure is a medicinal product, a higher degree of diligence is required to be exercised by the Tender Evaluation Committee in the carrying out of the evaluation process and the subsequent award of the contract to the recommended tenderer.

The DoC submits that the economic operator, having had experience in submitting offers for tenders issued by the Contracting Authority, the Central Procurement and Supplies Unit, should be sufficiently aware as to the normal duration taken by Tender Evaluation Committees in conducting their evaluation processes leading to the award of contract, together with the reasons in support thereof.

d) **Award in breach of the General Rules Governing Tenders -**

The DoC submit that there had been no breach of the General Rules Governing Tenders as submitted by the economic operator. Article 19.1 of the General Rules Governing Tenders v4.4 states that the notification of the award of the contract has to be submitted to the recommended tenderer prior to the expiry of the validity of the offer of the same. In accordance with the General Rules Governing Tenders, the validity of tenders is related to the tender procedure being maintained by the Tender Evaluation Committee in order for it to conclude the evaluation process. Therefore, any extensions of the tender procedure requires a corresponding extension in the validity of the tender offer. In any instance, the one hundred and forty six (146) day time period had been complied with by the the (sic) time limit by the Tender Evaluation Committee, given that the opening of tender offers on the 11th January and the evaluation report being issued on the 6th June. Following the lapse of such time period, the DoC submits that the validity of the tender offer does not automatically take place, since the cancellation of a tender offer may or may not take place.

Without prejudice, the General Rules Governing Tenders do not exclude the possibility that the Contracting Authority may require further extensions and, on the basis of the principle of *ubi lex voluit dixit, ubi lex noluit, tacuit*, the same rules provide that a tender procedure is not automatically cancelled – *“Following the further extension by eight (8) weeks, the non-conclusion of the evaluation process may lead to the cancellation of the tender.”* This means that, for reasons which are to be provided by the Tender Evaluation Committee, should the tender procedure not have been

cancelled after the lapse of the one hundred and forty six (146) days and therefore be still *in vigore*, a recommended tenderer would be required by the Tender Evaluation Committee through the Contracting Authority to maintain its tender offer valid.). This is the reason why the recommended tenderer should be able to maintain his tender, at least, for another sixty (60) days in accordance with rule 8.5 of the General Rules Governing Tenders since the recommended tenderer is entitled to either choose or reject the award of the contract through the electronic public procurement system (ePPs).

The validity or otherwise of the offer of the recommended tenderer, Technoline Ltd has been confirmed by the Tender Evaluation Committee appointed by the Central Procurement Unit, through a request to the recommended tenderer. In any case, the economic operator does not take into consideration the waiver in the decision in terms of Doc2 – *“Tenderers are to note that this information does not imply any obligation on the part of Government to actually implement any of the decisions indicated”*. Since there is no automatic consequence following the lapse of the periods stated under rule 8, the DoC submits that there exists no breach of the General Rules Governing Tenders in the award of the contract as submitted by the economic operator as submitted by the economic operator.

e) **ePPs malfunction -**

By means of a Counter Judicial Protest dated 25th January 2022, the DoC had provided reasons to the economic operator as to the functioning of the Electronic Public Procurement System: *“Illi jibda biex jinghad illi s-soċjetà protestanti digà giet provduta b'rapport tekniku, cioè system logs tal-attività tal-protestanti fuq is-sistema tal-ePPS”*.

As aforesaid, the economic operator had been responsible for uploading its tender via the tender preparation tool and had a remedy under regulation 262 of the Public Procurement Regulations, 2016. The DoC hereby refers to rule 11.2 of the General Rules Governing Tenders which provides that: *“No liability can be accepted for delays or technical difficulties (as per Terms of Use and Manual for Economic Operators of the Government e-Procurement Platform) that preclude tender offers from being submitted in time.”* The defendant having jurisdiction as to technical difficulties is the company Euro Dynamics as provided in the judgment Specialist Group Cleaners vs Central Procurement and Supplies Unit et.,

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) **Locus Standi and Department of Contracts ("DoC") application of 11th August 2022** – The Board refers to its oral decision provided during the hearing and as listed in the minutes above. To reach this interlocutory decision the Board considered the DoC's application, legal submissions made both in writing and during the hearing and the attempt by the Appellant to participate in the tendering procedure through the ePPS system. It is the opinion of this Board, that the Appellant does in fact have *locus standi* and a juridical interest in the present appeal.
- b) **Validity period** – The Board opines that the main bone of contention of the case revolves around the 'Validity period' of such procedure.

Reference is made to the following paragraphs in the General Rules Governing Tenders ("GRGT"):

- i. Paragraph 8.1 "*Tenders must remain **valid for a period of 90 days** after the deadline for submission of tenders indicated in the contract notice, the procurement document or as modified in accordance with Clause 10.1. Any tenderer who quotes a shorter validity period will be rejected.*" (bold & underline emphasis added)
- ii. Paragraph 8.3 "**In exceptional circumstances, the Tender Evaluation Committee, if approved to internally through the Contracting Authority, may request that tenderers extend the validity of tenders** [without the need to extend the validity of the Tender Guarantee (Bid Bond) (as being referred to in Article 9.2 of these General Rules)] for two further periods of four (4) weeks each. Such requests and the responses to them must be made in writing **through the ePPS in the form of a clarification**, with the prior consent of the relevant authority, namely the DCC/SPD or CGA as applicable. A tenderer may refuse to comply with such a request without forfeiting his tender guarantee (Bid Bond). However, his/her tender will no longer be considered for award. If the tenderer decides to accede to the extension, he/she may not modify his/her tender." (bold & underline emphasis added)
- iii. Paragraph 8.4 "*Following the further extension by eight (8) weeks, the non-conclusion of the evaluation process may lead to the cancellation of the tender.*"

Reference is now made to document 'Doc COV1' as submitted by the Department of Contracts, being an email dated 26th May, sent by Mr Joseph Xuereb – Senior Principal at the Central Procurement and Supplies Unit ("CPSU") to a number of CPSU employees, including Ms Rita Zammit (Chairperson of the Evaluation Committee) whereby:

- i. "*In cases when the evaluation is not finalised within the 90 days from closing date of offers, and the validity period is to be extended for up to "two further periods of four (4) weeks each" as stipulated in the General Rules Governing Tenders in order to hasten the process, a waiver has been given by the Department of Contracts to proceed with submitting the request to the bidders without the need to obtain the prior consent of the relevant*

authority, namely DCC or CGA as applicable. **As per Clause 8.3 of the General Rules Governing Tenders, such requests and the responses to them must be made in writing through the ePPS in the form of a clarification.**” (bold & underline emphasis added)

- ii. “The Department of Contracts emphasized the importance that the Evaluation Committee concludes the evaluation of offers at the very earliest possible, and within the stipulated timeframes. However in cases when the evaluation period exceeds both the validity period of 90 days and the two periods of 4 weeks each (as stipulated in the General Rules Governing Tenders), as per direction from Department of Contracts, the evaluation committee should proceed with the evaluation without sending the request for the extension of validity of offers, and then it will be up to the bidder to accept / reject the offer at award stage.”

Reference is finally made to the testimony under oath of Ms Rita Zammit whereby she stated:

- i. “The delay in completing the evaluation was due to the consultants not being available due to pressure of work - there were no undue reasons for the delay.”
- ii. “.....there was no other correspondence except for the clarification note asking for samples.” (this in relation to other correspondence with the preferred bidder.

Conclusions

- i. The Board notes that the GRGT provide clear instructions in relation to the period of validity of tenders.
- ii. In summary, paragraph 8.1 provides a general rule that tenders must remain valid for a period of 90 days.
- iii. Paragraph 8.3 goes on to provide, two further extensions of four (4) weeks each. However paragraph 8.3 herein mentioned should not be read in isolation of the three provisos that conditions such article. The provisos clearly state that 1) such extensions are to be permitted in “exceptional circumstances”, 2) “if approved to internally through the Contracting Authority” and 3) “such requests and the responses to them must be made in writing through the ePPS in the form of a clarification.....”
- iv. The email from Mr Joseph Xuereb is being interpreted, by this Board, that a waiver has been granted to the CPSU in relation to proviso (2) only of paragraph 8.3 of the GRGT. In fact, such email goes on to state “As per Clause 8.3 of the General Rules Governing Tenders, such requests and the responses to them must be made in writing through the ePPS in the form of a clarification.”
- v. As per testimony of Ms Rita Zammit it was established that:
 - A. There was no undue reason for the delay, hence no existing exceptional circumstances prevailed at the time, consequently the element required in proviso (1) was not met with and therefore lacked the applicable justification.
 - B. No clarifications for the two four week extensions was done through the ePPS, therefore proviso (3) is not met.

Hence, this Board cannot but uphold the Appellant’s grievances.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 22nd July 2022;
- c) To cancel the tendering process as per regulation 90(3) of the Public Procurement Regulations,
- d) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member