

PUBLIC CONTRACTS REVIEW BOARD

Case 1812 – CT2297/2021 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Operating Theatre Lights for the Operating Theatres and Outpatients Department at Mater Dei Hospital

13th February 2023

The Board,

Having noted the letter of objection filed by Dr Alessandro Lia on behalf of Lia & Aquilina Advocates acting for and on behalf of Prohealth Limited, (hereinafter referred to as the appellant) filed on the 16th September 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 26th September 2022;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for Pharma-Cos Limited (hereinafter referred to as the Preferred Bidder) filed on the 23rd September 2022;

Having heard and evaluated the testimony of the witness Dr Noel Cassar (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Stanley Iles (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Ian Mark Attard (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 10th November 2022 and 7th February 2023 hereunder-reproduced.

Minutes

Case 1812 – CT 2297/2021 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Operating Theatre Lights for the Operating Theatres and Outpatients Department at Mater Dei Hospital

The tender was issued on the 26th November 2021 and the closing date was the 6th January 2022. The estimated value of the tender excluding VAT, was € 1,101,694

On the 16th September 2022 Prohealth Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not administratively compliant.

A deposit of € 5,508 was paid.

There were ten (10) bids.

On the 10th November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative
Mr Jason Busuttil	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Eng Patrick Borg Cardona	Chairperson Evaluation Committee
Dr Noel Cassar	Member Evaluation Committee
Mr Stanley Iles	Member Evaluation Committee
Mr Ian Mark Attard	Member Evaluation Committee
Mr John Pace	Secretary Evaluation Committee

Preferred Bidder – Pharma-Cos Ltd

Dr Matthew Paris	Legal Representative
Mr Gordon Zammit	Representative

Director of Contracts

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

Dr Alessandro Lia Legal Representative for Prohealth Ltd requested that witnesses be heard prior to submissions.

Dr Alexia Farrugia Zrinzo Legal Representative for the Central Procurement and Supplies Unit (CPSU) asked that before going into the merits of the case the Board should deal with the matter of the documents submitted late by Dr Lia.

The Chairman said that instructions are very clear that additional documents have to be submitted latest at least three days before the date of the hearing. The documents referred to were submitted late and will be ignored but submissions on clarification notes in the tender are accepted since they form part of the tender.

Dr Lia pointed out that the documents were received late from the Department of Contracts (DoC) and hence lateness in submission. Appellant has no control on matters not known at the time the appeal is filed.

The Chairman stated that requests for information falling under PPR 40 should be submitted as early as possible and the other party should not delay the response as that then makes an appeal inevitable.

Dr Paris Legal representative for Pharma-Cos Ltd said that the new grievance was not submitted in the time stipulated in the PPR and therefore the appeal has to be limited to the original submission of the 16th September 2022.

Dr Lia said that information requested from the DoC through the PCRB on 30th September 2022 had been received on 2nd November 2022 – too late to enable proper consideration and he felt it was unfair that he was being penalised by the Board.

Dr Paris said that the request was on the 30th September and was not within the statutory ten days and furthermore there was no request for it to be accepted outside the statutory period. One has to follow Regulation 276 but in this case the ten days were being extended to two months.

Dr Mark Anthony Debono Legal Representative for the DoC mentioned that the Department was not objecting to Dr Lia's request.

Dr Leon Camilleri asked that it be clarified what was requested and when.

Dr Lia replied that his request for a copy of the ESPD was correctly made on the 30th September according to Regulation 40 but the reply was not received till the 2nd November 2022.

Dr Farrugia Zrinzo said that objections must be submitted at the time of the original appeal and one cannot add grievances later – the law is very clear and gives no options on this, using the word 'shall' to reinforce this obligation.

After a short recess to consider the points raised the Chairman stated that the Board having heard and digested what the parties had to say about the additional information submitted by Prohealth Ltd on the 9th of November decides that it is clear that this issue has no connection *per se* with Regulation 40 of the Public Procurement Regulations but has more relevance to Regulations 270 and 271 of those Regulations.

Regulation 271 states clearly, by using the word 'shall', that letters of objection must be submitted within a period of ten days of the letter from the contracting authority or the Department of Contracts. Regulation 270 also uses the word 'shall' when it refers to the details that are to be included in these letters when it states 'shall contain in a very clear manner the reasons for their complaints'. Once the request by Prohealth was filed after the ten day period, the Board is not minded to allow submissions on grievances other than those listed in their letter dated 16th September.

The Board feels that it must remind, in a general way, how requests under Regulation 40 must be submitted to enable matters to proceed efficiently. The moment that letters of award, letters of cancellation and letters of rejection are issued and before the expiry of the ten day period in line with Regulation 271. On requests for further information are made by an economic operator under Regulation 40, the contracting authority or whoever is responsible for the acquisition process has to ensure that a suitable reply is given immediately to the economic operator within that ten day period.

The Chairman then said the Board will proceed to hear the merits of the case.

Dr Noel Cassar (26782M) called as a witness by the Appellant testified on oath that he is a Consultant at Mater Dei Hospital. He went on to state that Prohealth was disqualified as certain technical things were not according to the tender namely that the contact numbers of suppliers was not included in the tender submissions. He was not aware which were the suppliers whose details were missing and he did not contact any of these end-clients.

Mr Stanley Iles (463763M) called to testify by the Appellant stated on oath that he is the Operations Theatre Manager at the Hospital and was an Evaluator. When questioned he could not recall which were the end-clients contact details of which had not been given; neither did he know which were the end-clients the preferred bidder had submitted. Witness said that he did not make any telephone calls to end-users. In the period April/May 2022 Prohealth were awarded several tenders and it was difficult to recall details.

In reply to a question from Dr Farrugia Zrinzo witness said that none of the tenders referred to concerned theatre lights.

Questioned by Dr Paris witness said that that the eligibility requests on suppliers were to gauge the experience of the bidder in supplying products of the same type. As Prohealth did not provide any contact details a clarification was requested but was not replied to. Referred on a screen share to the letter submitted by Prohealth dated 16th May 2022 (Doc 1) witness said that he only saw the document in the last two days and has no recollection of seeing it before. Referred to suppliers Invoice 419.799 witness said that the goods mentioned in that invoice were not products of a similar nature but referred to a coagulating machine. Similarly Invoices 432.430 and 411.001 referred to goods not related to the products requested in the tender.

Dr Lia pointed out that the matter of products of a similar nature was not part of the appeal but Dr Paris said he was asking questions on documents which Prohealth felt relevant.

Referred to Clarification Note of the 16th May and Clarification No 9 witness said that he cannot recall seeing them till two days before this hearing and that requests for operating theatre lights were a very rare request in tenders – in fact some bidders had included subcontractors as points of reference due to this.

At this stage Dr Lia asked for a deferment of the case as he was due to attend to another urgent matter.

The Chairman thanked the parties for their submissions and declared the hearing deferred to a later date.

End of Minutes

SECOND HEARING

On the 7th February 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual meeting to further consider this appeal.

The attendance for this public hearing was as follows:

Appellant – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative
Mr Jason Busuttil	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Eng Patrick Borg Cardona	Chairperson Evaluation Committee
Mr Stanley Iles	Member Evaluation Committee
Mr Ian Mark Attard	Member Evaluation Committee
Mr John Pace	Secretary Evaluation Committee

Preferred Bidder – Pharma-Cos Ltd

Dr Matthew Paris	Legal Representative
Mr John Soler	Representative
Mr Gordon Zammit	Representative

Director of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions noted that Dr Lia had filed a Note late on 6th February 2023 and which had been circulated on the 7th February.

Dr Lia mentioned that the Note was not a request for action but merely a Note to register Appellant's position to enable the Board to consider it and decide on it.

Dr Paris said that there had not been enough time to write a reply to the Note so he will submit the preferred bidder's reply at this hearing.

Dr Paris on behalf of Pharma-Cos Ltd refers to the point made on Article 270, 272 et sequitur of the PPR. These Articles make it very clear that any complaint begins and starts on the exclusion with no reference to the adjudication. The Board was right in the previous hearing to limit the appeal to this. If Prohealth wished to raise any complaint it must be indicated very clearly that it is a complaint. Nowhere is there any reference to this and the Board acted correctly in deciding that submissions had to be made.

The reference to Clarification Question number 9, continued Dr Paris, was to give the impression that the request was a particular one that had to be given only by the bidder. The clarification was only making a distinction between the manufacturer and the bidder and that was the distinction made—when the manufacturer is extraneous to the bid its capabilities cannot be considered. By doing this Appellant is trying to use a different argument and to mislead the Board. The law refers to economic operators and states that it included all parties which form part of the bid.

According to Dr Paris , Dr Lia has decided that Regulation 235 of the PPR should not apply in this tender. The Regulation refers to reliance on capacity of other entities. The Court of Appeal (*FM Core vs Ministry for Gozo*) gave a ruling on the capacity of third parties. Pharma-Cos structured its bid by relying on the capacity of sub-contractors and having that ability throughout the contract, in line with Regulation 235. There is nothing incorrect in the use of sub-contractors and this is confirmed by the Court of Appeal. This is the case with the bid by the preferred bidder.

Dr Camilleri said that what Appellant had submitted was a *rikors* not a Note and took the form of a further submission and was an attempt to alter the public procurement procedures. The original submissions had already been denied by the Board and Appellant was inventing a new procedure which was not part of the PPR. The request should not be accepted but if the Note is accepted the CPSU will demand the right to reply to it.

Dr Lia re-iterated that the Note was the equivalent of a verbal submission.

Dr Debono said that the Department of Contracts had not been notified of this Note and therefore could not comment at this stage.

The Chairman, referring to the *rikors* presented by Dr Alessandro Lia on behalf of his client Prohealth Ltd on the 6th February 2023, said that it is the view of the Board that the argument put forward wherein the Court of Appeal decision in the case *OK Ltd vs Direttur tal-Kuntratti* was quoted, is totally irrelevant. That argument only becomes relevant once a grievance is raised on the technical compliance of the preferred bidder. First it has to be established what grievances were mentioned in the letter of appeal. The technical compliance of the preferred bidder is not mentioned and does not appear anywhere.

It was only on the 30th September, that is much later than the ten days established under Regulation 271 of the PPR, that a request was made for information to enable the Appellant to identify the product offered by the preferred bidder. It is important to emphasize the point that the refusal letter to the Appellant was issued on the 9th September and therefore it had to reply by the 19th September latest to justify its grievance.

The Board must take a stand on the point and relevance the decision in *OK Ltd vs Dipartiment tal-Kuntratti* is loosely used and which only becomes relevant if the request for information had been submitted within the terms of Regulation 271 or if the grievance was clearly indicated as stated in Regulation 270 wherein it states “.....may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints”. This point on the Note is concluded and exhausted and the Board will continue hearing the testimony of Mr Iles which had been interrupted at the adjournment of the first hearing.

Mr Iles reminded that he was still under oath, in reply to questions from Dr Lia, stated that the bid of Prohealth Ltd failed the administrative compliance as the contact details of the end-users were not given. Referred to the clarification letter, with documents attached, of the 16th May 2022 witness said that he could not recall the details of it. [A screen shot of the letter was displayed]. Referred to two items in the letter both exceeding € 250,000 witness said that the tender requested particular details and wanted references on these, not just copies of invoices. The decision to disqualify Appellant was that of every member of the TEC as they all agreed that the necessary details were not provided. The item in question is a long-term acquisition and has to prove reliable long term and the TEC had to ensure this. There was no reference to individuals whereas the tender requested individual names, telephone numbers and email address and names of entities using the product. The evaluation was

proceeded with after Prohealth's bid had been eliminated. Referred to Clarification Note No 1 (10/12/2021) witness said that the reply was that the bidding organisation has to reply on technical and professional ability.

Questioned by Dr Camilleri, witness confirmed that the TEC had requested clarification of details required in the ESPD. Prohealth provided only a set of invoices with no contact details. The products listed in the invoices were not related to the tender in question. The lack of contact details meant that the TEC could not contact Prohealth's clients.

In reply to questions from Dr Paris witness confirmed that the contents of page 6 of the Prohealth letter referred to above, was the reply to the clarification request. Referred to part C of the technical ability section of the ESPD, witness said that only installation was indicated – there was no start or end date, no contact person name, no contact email nor contact phone number.

Mr Ian Mark Attard (388868M) called as a witness by the Contracting Authority stated on oath that he was one of the evaluators and for 36 years has been the Operations Manager Biomedical at MDH. He said that the requested information had not been provided by Appellant. At the evaluating stage it was noted that the ESPD was missing so a clarification was requested but the information received had the contact details missing. At that stage the evaluation of the Appellant bidder was stopped. The TEC needed specific information to enable it to contact end-users to ensure that all requirements on the theatre lights, which also included installation were met. These contact details were missing although the ESPD made it very clear that they were essential.

In reply to questions from Dr Lia witness said that the clarifications referred to were done pre-closing of tender and were only accessible to the TEC after the closing of the tender period. The clarifications were not the work of the TEC. The lack of contact details made a difference in deciding the evaluation.

Questioned by Dr Paris witness said that the reason for disqualification was that the proof supplied through the invoices was not related to what the tender requested as there was no reference to theatre lights but to other items.

This concluded the testimonies.

Dr Lia said that he is requesting that the first step of the administrative evaluation be looked again. Pharma-Cos did not follow question 9 as regards the declaration by bidder. The PCRB would still not change the basis of the appeal whether it had been done in the statutory time or not. In the OK case the Court of Appeal held that the PCRB had to hear the whole case on compliance. Pharma-Cos' use of subcontractors should be considered by the Board in the light of compliance by the bidder. It would be a miscarriage of justice and procedure if the preferred bidder's bid is also not considered. The Board should consider all points whether submitted within ten days or not as the ten day limit is prejudicial to obtaining information in time. Appellant agrees that the contact details were missing – however it must be noted that what the CPSU requested was a reference to themselves. The request for details on points like phone numbers and emails was decided in several previous cases by the PCRB as a matter of substance over form on technical exclusions let alone administrative ones. This is an instance of an inane decision and the epitome of crassness. PCRB Case 900 backs the mentioned principle whilst Case 1605 also backs the substance over form principle. The reason for Appellants disqualification should not count and the Board is being requested to reverse the decision to disqualify on the lack of contacts on the basis of substance and also to ensure that the administrative compliance was carried out correctly.

Dr Paris stated that the PCRB has already decreed on the first grievance of the Appellant's submission and will not deal with it. On the question of substance Appellant is totally incorrect. Having already accepted that information was lacking in its bid, Appellant is now picking and choosing bits here and there to try to exclude the winning bid. There is no doubt that Prohealth's bid failed. In this case Pharma-Cos decided to join in sub-contracting and declared so in the ESPD and provided the subcontractors ESPD following fully and completely the Regulations. Referring to the section on Sub-contracting on page 5 of the tender Dr Paris said that Dr Lia stated the exact opposite to what the tender document states. All Appellant is trying to do is to try to exclude the preferred bidder. Article 235 of the PPR and the EU Directives backs the principle of relying on the capability of third parties. The *FM Core* case (page 26) decision backs the point on reliance on the capability of third parties. Prohealth decided that they would not follow the tender requirements and were excluded – Note 2 clarification clearly indicated what was required but in their letter Prohealth totally ignored what was requested and provided the information they wanted. Following the rules is neither inane nor crass but an obligation. The eligibility criteria were not met and the TEC were right to disqualify. In the Court of Appeal case of 22.6.22 *NQuayMT vs Infrastructure Agency* it was stated that the TEC cannot go on requesting clarifications until a tender becomes compliant. The Board should not prejudice parties that completed the tender bids correctly and the TEC was correct in their requests and their decisions. The Rules Governing Tenders confirm that one cannot keep requesting clarifications. The information requested of the Appellant was valid as it was necessary to confirm the ability to fulfill the contract. Prohealth failed to provide information they were bound to provide. The TEC's decision was morally correct as Pharma-Cos was fully compliant and their decision should be upheld.

Dr Debono said that on the evidence heard the TEC was not in a position to request further clarifications according to PP Regulation 62.

Dr Camilleri said that although directions have been given that the original grievance from Appellant is not part of this Appeal it should not be ignored. The sub-contract point is a simple one – the tender allowed sub-contracting and the recommended bidder complied – although this grievance is not part of the appeal. This was a prime example of how an evaluation should be carried out. The TEC followed the process and requested rectification which was replied to. It is accepted and not contested by the Appellant that the information requested was not provided so the TEC had no alternative when faced with this situation. The proof supplied had no relevance to operating theatre lights and the lack of phone number, email etc. meant there was no possibility of verification. It was logical that the TEC should disqualify. The Regulations apply to all and the fact that the client was the CPSU is irrelevant – why should the members of the TEC go searching for information that the bidder was bound to provide? The TEC could not proceed without this information and the award should be confirmed.

Dr Lia, in conclusion, said that the Board should check the ESPD of the preferred bidder – they cannot ignore the evidence of Mr Iles who stated that according to the ESPD the bidder did not have the capacity. Pharma-Cos does not appear to have the experience shown in the ESPD and the Board should consider this point.

Dr Camilleri noted that the fact that Dr Lia emphasis is only on the preferred bidder speaks for itself.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 10th November 2022 and 7th February 2023.

Having noted the objection filed by Prohealth Limited (hereinafter referred to as the Appellant) on 16th September 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2297/2021 listed as case No. 1812 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

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

Appearing for the Preferred Bidder: Dr Matthew Paris

Whereby, the Appellant contends that:

- a) The reasons given by the Contracting Authority are unfounded -

The relevant provision in the tender document being cited by the Contracting Authority is that in Section 5 (B) (c) (1) at page 5 of the Tender Document.

This section is clearly indicated as Note 2, thus giving the Contracting Authority the right and duty to request clarifications and even rectifications from the relevant bidder. In fact, the Contracting Authority did request a clarification/rectification from Prohealth by means of a request dated 12th May 2022. Prohealth replied to this request by means of a reply dated 16 May 2022 wherein it attached relevant information to all the Contracting Authority's queries. The reply included information about the end-clients of Prohealth, being two, the CPSU itself and Steward Health Care in Gozo. The addresses of the relevant end-clients, including their VAT number was fully available to the evaluating committee members in the documentation sent by Prohealth in their reply, particularly in the invoices attached to their reply. Furthermore, Prohealth confirmed the end clients (clearly indicating them as CPSU and Steward Healthcare Gozo General Hospital) in a declaration (or covering letter) in response to the clarification/rectification request. The experience indicated by Prohealth wherein CPSU was the end client, together, amount to €264,870 - therefore exceeding the minimum requirement in Section 5 (B) (c) (1) of the Tender Document. Even if the Contracting Authority may argue that, with respect to Steward Healthcare, there are no contact details indicated (even though there is clearly an address provided in the Invoices attached to the reply), it certainly cannot say so for its own contact details since these two projects satisfy the criteria of the relative section quoted by the Contracting Authority.

Moreover, it is absolutely astounding that CPSU has disqualified Prohealth, being €200,000 less than the preferred bidder (almost 27% less), for not providing details of CPSU itself and of another entity very well known to CPSU, and all this despite their addresses were duly given in the reply provided by Prohealth and in the documents attached thereto.

For these reasons, the sole ground provided by the Contracting Authority in its letter dated 9th September 2022 is absolutely unfounded both in fact and at law.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26th September 2022 and its verbal submission during the virtual hearings held on 10th November 2022 and 7th February 2023, in that:

- a) As admitted by the objector, the objector did not file information in relation to contracts of a similar nature in the past 5 years (2015 -2020) with an aggregate value of at least €250,000 excluding VAT. According to the tender document section 5 (B) (c) (1) this information had to be provided through the online ESPD which requested various information regarding the recipient of the services.
- b) The objector did not provide any of the information with the initial submission. Since the section in question and the ESPD are note 2 documents, a rectification was in fact requested. The objector was clearly instructed the below: *"Your response must contain all the information that was requested in the online integrated ESPD as per tender response format of this tender as indicated in the Eligibility and Administrative Information section under Selection Criteria - Technical and Professional Ability - Performance of Deliveries of Specified Type"*
- c) The objector replied to the request for rectification by means of a letter dated 16th May 2022.
- d) Apart from the fact that prima facie from the invoices it appeared that the contracts were not of a similar nature as described in the tender document (that is, operating theatre lights), the objector did not submit all the information that was requested in the online integrated ESPD. Information such as the telephone number and email address of the objector's clients were not included.
- e) The board was aware that the invoices submitted with the rectification were not related to the subject matter of the tender, however could not confirm this since no contact details were given.
- f) The evaluation committee has a prerogative and a right to request information from end clients of the bidders. This is clearly indicated in clause 5 (B) (C) 1. The fact that this information was not presented hindered the evaluation committee from carrying out this necessary and important verification.
- g) In its letter of objection, the objector refers to the fact that its clients were CPSU and Steward Healthcare Gozo General Hospital. CPSU submits that this is an advantage that the objector should not opt for since if in an identical case the client of the bidder was not CPSU, there would have been no way how CPSU could get the contact details. However, the most important point is that the evaluation committee is bound by the principle of self-limitation and is bound to decide

upon the information supplied by the bidder. The evaluation committee is not an investigation committee and the same principle used in court cases of *quod non est in actis non est in mundo* is equally applicable in public procurement adjudication reflected in the principle of self-limitation.

- h) It would have been unjust to other bidders if CPSU used publicly available information or inside information and in breach with the principle of equal treatment. The lack of this information led to the disqualification of the offer on lack of administrative criteria, since the evaluation committee could not verify compliance in terms of clause 5 (B) (C) 1 of the Instructions to Tenderers. In anticipation to the objector's argument that the evaluation committee should have proceeded with the evaluation of the objector's tender, CPSU submits that this was not possible, firstly because that would be in breach of the principle of equal treatment and because the information which the objector omitted was essential for CPSU to assess for example if the contracts presented as an example by the objector were in fact of a similar nature.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 23rd September 2022 and its verbal submission during the virtual hearings held on 10th November 2022 and 7th February 2023, in that:

- a) Prohealth failed to rectify its failures –

As clearly indicated by Prohealth itself, it has been given the opportunity to rectify its omissions, and through a rectification request dated 12th May 2022, the contracting authority [Central Procurement and Supplies Unit] granted a deadline of five [5] days for such rectification. Specifically it requested Prohealth to: *"Your response must contain all the information that was requested in the online integrated ESPD as per Tender Response Format of this tender as indicated in the Eligibility and Administrative Information section under Selection Criteria - Technical and Professional Ability - Performance of Deliveries of the Specified Type"*

Through its rejection letter, DOC informed ProHealth that : *"in response to a rectification request, the details of the supplies contracts submitted by the tenderer was not backed-up with all the information as requested in the online integrated ESPD as per Tender Response Format ..."*

It is thus very clear that, ProHealth has failed to submit the required information in the first instance [through its original submission] and subsequently has failed to rectify in its entirety its position when so requested [through the rectification request on the basis of Note 2].

Thereby and without prejudice to other considerations hereunder indicated, DOC was correct to exclude ProHealth, since any other alternative would be in breach of the principle of self-limitation.

- b) Experience quoted is not of a similar nature -

Tender document in Section 5 [b] [c] [1][i.] held that: *"State a minimum of two [2] supplies contracts of a similar nature as described in this Tender document effected during the last five [5] years being 2015 - 2020."*

From the documentation indicated in the tender document, it is amply clear that the supplies contracts by Prohealth are not of a similar nature, and as a consequence the appellant company is in breach of this mandatory selection 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) Initially, reference is made to the note submitted by the Appellant on 9th November 2022. This Board refers to the minutes, whereby after hearing verbal submissions by all parties, the Board's decree was delivered in both hearings explaining the reasons why submissions on 'new' grievances were not being accepted. In summary, even though Regulation 40 of the Public Procurement Regulations ("PPR") allows for dissemination of non-confidential information where requested, any grievances and objections to this Board need to be raised in accordance and within timelines as specified in Regulation 271 of the PPR. Clear reasons substantiating the grievance need to be provided as per Regulation 270 of the PPR.

b) Merits –

i. In the Board's opinion, this is clear cut example whereby the Appellant, *ex admisissis*, did not provide the information requested, and is now attempting to save his bid through the 'extended' use of the principle of proportionality.

ii. It is important to note that the facts of the case were not contested between the parties, i.e. the Appellant initially failed to provide the necessary information in relation to the subject matter of this appeal. The Evaluation Committee duly issued a request for rectification. In turn, the Appellant provided most of the information but again missed the opportunity to provide all that was requested, including a completed ESPD.

iii. The Board does not agree with arguments brought forward by appellant that the missing information and hence the eventual rejection of their bid, was the 'epitome of crassness'. The information requested would have eventually led to the further analysis during the technical evaluation.

iv. Reference is made to Court of Appeal case NQuayMT vs Infrastructure Malta (35/22/1) whereby it was stated "*Jekk oblatur ikun inghata opporunita ta' rettifika imma xorta wahda jibqa amministrativly non-compliant, il-bord ta evalwazzjoni ma jistax isalva dik l-offerta billi joqghod jigri wara dak l-oblatur sakemm dan, forsi, jirrogala l-pożizzjoni tiegħu. F'dan il-każ, il-konsorzju appellat inghata kull cans jissottometti ruhu għat-talbiet ta-awtorita kontraenti, u imputet sibi jekk baqa' jitraskura dak li kellu jagħmel. L-eccess fil-manjaminita u fit-tfittix sabiex jigu salvati offerti akkost ta kollox mbux espressjoni ta proporzjonalita imma huwa sproportzjon kontra min kien "compliant" bil bidu nett. Din il-Qorti mbux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-*

offerta tiegħu, isegwi rigorozimament dak li trid is-sejba għall-offerti u m'għandux jippretendi li jiġi mitlub "jirraġa" l-offerta biex ikun kompatibbli ma dak mitlub."

Hence, this Board does not uphold the Appellant's grievance.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member