

PUBLIC CONTRACTS REVIEW BOARD

Case 1841 – CT3017/2022 – Services Tender for the Provision of Transport Services Using Minivans and Tail Lift Vans in an Environmentally Friendly Manner

1st February 2023

The Board,

Having noted the letter of objection filed by Dr Reuben Farrugia on behalf of Farrugia Advocates acting for and on behalf of Mr Leone Grech, (hereinafter referred to as the appellant) filed on the 25th November 2022;

Having also noted the letter of reply filed by Dr Dennis Zammit acting for Jobsplus (hereinafter referred to as the Contracting Authority) filed on the 5th December 2022;

Having also noted the letter of reply filed by Dr Matthew Paris acting for South Lease Limited (hereinafter referred to as the Preferred Bidder) filed on the 5th December 2022;

Having heard and evaluated the testimony of the witness Ms Maria Bartolo Galea (Chairperson of the Evaluation Committee) as summoned by the Public Contracts Review Board;

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 24th January 2023 hereunder-reproduced.

Minutes

Case 1841 – CT 3017/2022 – Services Tender for the Provision of Transport Services using Minivans and Tail Lift Vans in an Environmentally Friendly Manner.

The tender was issued on the 13th July 2022 and the closing date was the 13th September 2022. The estimated value of the tender excluding VAT, was € 938,496.

On the 25th November 2022 Mr Leone Grech filed an appeal against Jobsplus as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be the cheapest priced offer.

A deposit of € 4,692 was paid.

There were four (4) bids.

On the 24th January 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Leone Grech

Dr Reuben Farrugia	Legal Representative
Mr Leone Grech	Representative
Ms Ilona Grech	Representative

Contracting Authority – Jobsplus

Dr Dennis Zammit	Legal Representative
Ms Maria Bartolo Galea	Chairperson Evaluation Committee
Ms Loredana Calleja Pandolfino	Evaluator
Ms Charlene Mizzi	Evaluator
Mr Juan Gambina	Evaluator
Ms Olivia Farrugia	Representative
Ms Nicola Cini	Representative
Ms Mathea Formosa Gauci	Representative

Preferred Bidder – South Lease

Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative
Dr Ronald Aquilina	Legal Representative
Mr Joseph Scicluna	Representative

Department 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 Reuben Farrugia Legal Representative for Mr Leone Grech outlined the scope of the tender and went on to details how the preferred bidder failed to meet the tender requirements regarding the alternative fuel and the human resources aspects. Since the time that the appeal was filed, South Lease, *ex admissis*, accept that they did not have 45% of the vehicles using alternative fuel – once this is agreed then the hearing can deal with the legal point, which is; do the specifications have to be satisfied at the tender stage or at contract stage? How can the economic operator submit an offer if the human resources are not available at tender stage? If these resources are not available then the preferred bidder is planning to subcontract the work, which is not stated.

Dr Dennis Zammit Legal Representative for Jobsplus said that the Tender Evaluation Committee (TEC) had followed the tender specifications; the preferred bidder satisfied the requirements which were endorsed by Transport Malta (TM). The tender states that the points contested are required four weeks after the contract is signed and not at the time of the tender. The Contracting Authority's decision follows this ruling.

At this stage Dr Farrugia objected to submissions by the preferred bidder at this time and said that usually this takes place at the final stage of the hearing and only by direction of the Board.

The Chairman directed that the preferred bidder may be heard at this stage on the points raised.

Dr Adrian Delia Legal Representative for South Lease said that Regulation 272 of the Public Procurement Regulations (PPR) provides for similarity of treatment to all parties. The Board is not here to do the work of the TEC by undertaking the process again but merely to check that the evaluation was carried out correctly. The tender cannot be changed except through clarifications. The Appellant, in his appeal, is making vague claims – the correct process is to make clearly defined claims on what were the mandatory criteria. One must also differentiate between selection and award criteria. In the letter of reply the preferred bidder refers to the crucial point ‘after the signing of the contract’ – today only this point can be considered. The tender prohibits otherwise and the TEC actions would be *ultra vires* if it had acted so – whether the resources are there or not is immaterial. The criteria mentioned in page 5 of the tender documents are the only ones that matter.

Dr Farrugia requested that the appeal should be treated on the merits of the case as the preliminary points raised are of no validity.

Dr Zammit mentioned that as a parallel indication it should be noted that Appellant did not supply a list of drivers as this was not requested.

The Chairman said that there will be short recess to enable the Board to consider the points raised.

On resumption the Chairman stated that after considering all the points made it appears that, at this stage, the preferred bidder is raising a preliminary plea, this despite the fact that this matter was not raised in their written submissions. The route that should be followed, therefore, is that the Board proceeds with hearing the case. However, after hearing the initial submissions, the Board is of the view that the most equitable and impartial way forward is that the Board itself calls a competent person from the Tender Evaluation Committee as a witness to answer questions which the Board feels are germane.

Ms Maria Bartolo Galea (458470) called to testify by the PCRB stated on oath that she was the Chairperson of the TEC and that four bids were submitted in this tender. The economic operators were not requested in the technical questionnaire of the tender to provide a list of personnel, only that they needed sufficient drivers. Vehicles had to be EURO VI standard with a percentage of them operating on alternative fuels. Referred to page 5 (C) (ii) and page 16 Exhaust Gas Emissions witness stated that South Lease did not provide technical sheets but these were provided after they were requested. Referred to documents in Annex 2 filed with the Authority’s letter of reply witness confirmed that therein it is stated that 45% of the vehicles will be converted to an alternative fuel if the contract is awarded to them. This satisfied the TEC and she agreed that this meant that at the time of the offer the required 45% did not exist – it was only accepted after TM said they are satisfied. However, witness confirmed that this advice was given without the person involved at TM (Mr Vella Bamber) having seen the tender dossier. Referred to PPR 62 which requires that *ab initio* the Authority must ensure that an operator is eligible to qualify, witness stated that in her view this was satisfied as in the technical questionnaire bidder confirmed these points.

In response to questions from Dr Delia, witness stated that as regards suitability the only technical requirement was that stated in provision 5 (B) (a) in the tender. She agreed that the provision regarding Exhaust Gas Emissions referred to technical requirements. Witness also agreed that the special conditions required submission by the contract stage and confirmed that the document submitted gave comfort to the TEC.

Further questioned by Dr Farrugia witness said that article 16.4 could imply that certification of 45% of the vehicles was not required but will be produced. The term vehicles of the same standard was taken to mean that they can be provided at contract stage. The TEC was satisfied that the vehicles were EURO VI and could be converted later.

This concluded the testimony.

The Chairman said that there would be another short recess to consider the testimony just heard.

On resumption the Chairman said that after hearing the testimony of the Chairperson of the Evaluation Committee the Board feels that there is no point in hearing further the testimony of representatives of Transport Malta and Jobsplus as any evidence from them would be obsolete. Unless there are other relevant witnesses or proofs all that remains of importance are the points of law to be considered in the final submissions. Dr Farrugia was asked to proceed accordingly in the name of the Appellant.

Dr Farrugia stated that the primary grievance of the Appellant is the requirement that 45% of the fleet operates on alternative fuels and referred to the e-mail of the 8th August 2022 from TM listing which fuels were acceptable as alternatives and that EURO VI engines are not acceptable as they run on diesel. In the specification in Section 5, Dr Delia on behalf of the preferred bidder is relying on paragraph B(a) which later on states that the technical criteria are of a mandatory nature. The terms of reference states that the documents have to be included at the tendering stage. In PCRB Case 1633 which dealt with the interpretation of the terms of reference the Board's decision stated that when a brand or standard is quoted it is understood that the Contracting Authority will accept it, however, it is up to the bidder to prove equivalence at tendering stage with no clarification allowed.

Regarding Exhaust Gas Emissions (2.2), Dr Farrugia said that the tender states that the bidder, at bidding stage, must provide technical sheets – the use of must makes it obligatory, and identifies the moment when verification must be done by using the word has, indicating the present not future time. It clearly states 'must' be documented and included in the tender application and approved by a third party and no other interpretation can be put on it. To achieve the tender objections all verifications must be documented and certified at tendering stage – all that South Lease are producing are letters including statements of what they plan to do in the future when the tender is referring to the tendering stage now. By not seeking verification of documents TEC failed to apply the terms of the tender. Literature lists had to be submitted with the offer – South Lease only supplied confirmation that they will be provided but no verification and this seemed to be acceptable to the TEC. Mr Vella Bamber whose advice was sought was not made *au fait* with the tender terms and was made only partly aware of the requirements.

In their appeal South Lease rely on Article 16.4 of the special conditions – this claim is not right as nowhere in the tender is verification allowed at contract time; the only items requested do not relate to the 45% requirement. In the offer, vehicles to be used had to be stated and therefore the fleet to be used had to be identified. Bidder was obliged to state vehicles to be used and if they met the requirements. PCRB Regulation 62 is precisely there to avoid a situation of a bidder submitting an offer without being eligible and without having the necessary documents – a situation similar to the offer by South Lease now in front of this Board.

Dr Delia started by quoting from PCRB Case 1788 regarding the recognition of the TEC seeking advice from outside bodies. He then went on to differentiate between the selection and award requirements

in a tender, but more importantly the objectives and if the TEC have followed those objectives. The Board has not heard any proof of this as it is not necessary. The reply to Clarification Note 1 confirms the four week period for submitting documents. In the Court of Appeal Case *Aurelia vs Regjun Xlokk* it was stated that special requests did not have to be submitted at tender stage and in the Appeal Case *Cherubino vs Direttur tal Kuntratti* it was held that the execution of a contract was not a matter for the PCRB but if the offer was capable of performance if the bid is accepted. Special Conditions 16.4 clearly allows the provision at contract stage and the TEC relied on this. Demonstrating practicable reasonableness in a tender is a factor and in this case what was requested was offered. If it turns out that eventually it is not provided then action will be taken at the appropriate stage. If the Board decides otherwise it will be merely speculating on the future.

Dr Zammit mentioned that the Appellant is the incumbent contractor and has an interest in prolonging the process. Nowhere in the Appeal was it indicated that the tender requested the production of logbooks which Appellant claims are the only valid documents – the argument on logbooks is not relevant. Government policy is to widen competition and restrictions in tenders militate against this. Reference was made to PCAB Cases 167 and 168 where the Board stated that provision of equipment by the time of the starting stage is acceptable. Self-limitation principle prevented the TEC from requesting log books. In the *Cassar Fuels* Case (2020) the Appeal Court stated that the PCRB could not depart from the terms of the tender.

In conclusion Dr Farrugia said that the provision by Mr Grech of the log books was to prove that 45% of the fleet meets the tender requirements. The *Cherubino* Appeal Court case refers to a five year experience, volume of work and dealt with a product and is totally out of context to this case. In this case verification was required at the bidding stage. All claims by the other side founder when one examines the reply to Clarification Note 10 asked by South Lease themselves. The Contracting Authority replied that any Euro standard is acceptable if it is illustrated at the bidding stage – in other words the Euro emission standard is to be declared at the bidding stage.

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 24th January 2023.

Having noted the objection filed by Mr Leone Grech (hereinafter referred to as the Appellant) on 25th November 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT3017/2022 listed as case No. 1841 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Dennis Zammit

Appearing for the Preferred Bidder:

Dr Matthew Paris, Dr Adrian Delia &

Dr Ronald Aquilina

Whereby, the Appellant contends that:

- a) The claim in this procedure is that, in Mr. Grech's opinion, the preferred bidder, namely South Lease, is not technically compliant since:
 - i. it lacks the necessary vehicles, with the required specifications, to perform the services contemplated in this tender.
 - ii. it lacks the necessary human resources to execute the contract under review
- b) From the tender requirements it is evident that the preferred bidder has to fulfil the following requirements
 - i. has to have available minibuses and tail lift vans in sufficient number to carry between 25 and 60 adults in the mornings and afternoons, which number of vehicles cannot be less than 6 one of which is to be a tail lift van;
 - ii. the mini-vans and tail-lift van to be used have to have a year of registration being not older than 2005 and 45% of said vehicles must be certified as using alternative fuels in accordance with Directive (EU) 2019/116;
 - iii. has to have available sufficient drivers to be able to perform the services under the contract which would range at approximately 18 trips per day with normal mini-vans and 4 trips per day using the tail-lift vans;
 - iv. have at his disposal additional vehicles (in excess of what is stated in para a) satisfying the technical requirements in paragraph (b), including tail-lift vans, and drivers in order to keep the fleet of vehicles used in the performance of the services of the required number

It is our opinion that the preferred bidder, namely South Lease, is not able to fulfil the said requirements and therefore should not have been awarded the contract under review.

- c) In assessing the fulfilment or otherwise of the requirements stated above, reference is solely to be made to official documentation, namely:
 - i. as to the number of vehicles available to the preferred bidder reference is to be made to the official registration of vehicles with Transport Malta, which fact is evidenced by the "log books" of the respective vehicles;
 - ii. as to the year of registration reference is to be made to the official registration of vehicles with Transport Malta, which fact is evidenced by the "log books" of the respective vehicles;

- iii. as to the type of fuel used by the respective vehicles reference is to be made to the official registration of vehicles with Transport Malta, which fact is evidenced by the "log books" of the respective vehicles;
 - iv. as to the number of drivers employed by the preferred bidder reference is to be made to the list of employees duly registered with Jobs Plus;
- d) It is humbly submitted that no alternative documentation can be relied upon in order to verify the above apart from the official documentation indicated above. This is being submitted in view of the fact that:
- i. all and any information relative to a motor vehicle is solely deemed correct and valid at Law if it results in the relative "log book" It is to be reminded that each owner of a motor vehicle has an obligation, at Law:
 - to obtain the prior approval in writing of Transport Malta prior to undertaking any changes in the specifications of a motor vehicle, including changes to the seating capacity or seating arrangement, any mechanical alteration to the chassis or engine or change of the engine of any motor vehicle, in default of which this would constitute a violation of the Law apart from the fact that such change would be deemed illegal. In actual fact subarticle (2) of the relative article of the Law states that no person shall have in his possession, and no person shall use, order or cause to be used any motor vehicle which he knows to be in contravention of the provisions of sub-regulation (1).
 - to notify the transfer of a motor vehicle from one person to another within seven days of the date of transaction, such that the new owner may be duly registered as such with the competent authorities, which in the case of public transport vehicles is Transport Malta;
 - ii. all and any information relative to employment of individuals is solely deemed correct if it results from the official records of Jobs Plus, in default of which such employment would be deemed illegal in terms of Law;
- e) Therefore, what is required to verify compliance are solely two documents:
- i. the log books of the relative vehicles offered by the preferred bidder; and
 - ii. the list of employees engaged by the preferred bidder as drivers issued by Jobs Plus;

If the requirements do not result from the above documents, no other documents may be used to attempt to satisfy compliance. For this purpose, the appellant is hereunder requesting that a representative of Transport Malta and a representative of Jobs Plus attend for the hearing to testify in relation to the above.

- f) Furthermore, the appellant is of the opinion that the only manner in which South Lease could possibly fulfil part of the requirements stated above would be to sub-contract the majority of the services to third parties, which sub-contracting would constitute a substantial percentage of the

services. Such an eventuality would be in breach of the general principles of public procurement, in that the contractor would not have the ability to actually perform the services but would be practically relying upon the ability of third parties for the performance of the large majority of the services. As is reiterated in local and European decisions whilst sub-contracting is acceptable in public procurement the award of contracts to entities that are unable to perform the majority of the services is not acceptable. Sub-contracting and the percentage thereof is permissible for the purposes of supporting the main contractor and not intended to practically replace the main contractor. A different approach would lead to a situation where contracts are awarded to entities that have no ability to fulfil the technical requirements but rely entirely on the abilities of third parties..... such is not acceptable or desirable in terms of the general principles of public procurement.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5th December 2022 and its verbal submission during the hearing held on 24th January 2023, in that:

- a) The appellant is stating that the preferred bidder, namely South Lease Ltd is not technically compliant because:
 1. It lacks the necessary vehicles, with the requested requirements to perform the services stated in the tender document, and,
 2. It lacks the necessary human resources to execute the services required.
- b) Regarding point 1, bidder through the technical offer questionnaire confirmed that:
 - i. the minivans and tail-lifts used shall accommodate circa 25 to 60 trainees;
 - ii. a minimum of six (6) minivans of which one (1) must be equipped with a tail lift will be made available;
 - iii. all the vans registration date is from 2005 onwards;
 - iv. the drivers shall be competent persons in possession of the required license/s (sic) and experience;
 - v. he will provide the required number of vans to cover a maximum of 18 trips per day (9 trips morning and 9 trips afternoon) during the execution of the contract from Monday to Friday and a maximum of 4 trips per day for tail lift vans;
 - vi. 45% of vehicles will use alternative fuels.

As can be attested from the Technical Offer Questionnaire submitted by South Lease Ltd, the bidder 'Agreed' to all the requirements listed under this form. Bidders had to submit the technical sheets of the vehicles where emission standards are defined. Following a clarification by the Evaluation Committee (EC), South Lease Ltd submitted a declaration by a third party engineer stating that the procured fleet shall be converted to LPG as sustainable fuels. The Bidder also

declared that the fleet, which is already euro 6 shall be converted to sustainable fuels if the tender is awarded in their favour. This document was accepted by the EC in line with the provisions of the Literature List. Furthermore, as is within its full powers the EC sought guidance from the Ministry for Environment, Energy and Enterprise whether the offer can be considered as technically compliant at bidding stage as the bidder did not have in his possession 45% of the fleet running on sustainable fuel but will be converted only if the award is in his favour. The Ministry replied back that the "bids are compliant with the GPP requirement as long as 45% of the vehicles will use alternative fuels after contract award".

Thus, the offer of South Lease was in fact valid and up to specifications and therefore, deemed as both administratively and technically compliant.

- c) In his second point raised, the appellant alleges that the preferred bidder does not have the necessary human resources, mainly that the preferred bidder does not have the necessary drivers at his disposal. At no point did the CA ask the bidders to submit information on either the number of drivers employed by the bidders, nor a list of employees duly registered with Jobsplus. In fact, the appellant himself did not submit this information at bidding stage either as this was neither requested nor necessary. The CA solely asked for the bidders to agree to be compliant to the following requirements as listed in the Technical Offer Questionnaire.
- i. Drivers shall be competent persons in possession of the required licence/s and experience,
 - ii. they must be fully conversant with traffic regulations as well as the conditions of the contract
 - iii. to provide a recent police conduct (obtained in the last 6 months) for the drivers
 - iv. to provide a copy of a valid drivers' permit
 - v. to provide a TM tag for the drivers

Verification of the above is required by the CA only after the signing of contract as per Article 6.1 - Personnel and Key Experts under the Terms of Reference of the Tender Document, herein attached and marked as Annex 5.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 5th December 2022 and its verbal submission during the hearing held on 24th January 2023, in that:

- a) The appeal filed by the appellant is nothing more than a fishing expedition, intended to prolong unnecessarily the award of this contract. Indeed, the appellant presents this Board with no evidence whatsoever to back his claims except his "opinion" that South Lease is not able to fulfil tender requirements. However, the same appellant misrepresents tender requirements in that the appellant reads into the tender document requirements which do not result therefrom and which in fact run counter to the express provisions of the tender document itself. It is only on the basis of his wrong

reading of the tender document that the appellant arrives at the likewise wrong "opinion" that South Lease is not technically compliant while nonchalantly and cavalierly asserting that "there is no doubt that Leone Grech is both technically and administratively compliant".

b) Personnel and equipment

In his appeal, the appellant quotes various extracts from the tender document to support his (incorrect) interpretation of the tender. Very conveniently, however, the appellant omits to mention a crucial aspect of the tender relating to personnel and equipment, namely Article 16.4 of the Special Conditions which clearly and unequivocally stipulates that:-

“After the signing of the contract, the Contractor must provide the following documents within four (4) weeks from Commencement Order Notification by the Project Leader: The Contractor shall provide a list of the minivan drivers to be deployed under this contract. Minivans and Drivers: i. A recent Police Conduct (obtained in the last 6 months) ii. a copy of a valid drivers' licence. iii. a Transport Malta (TM) Tag. iv. A copy of all vehicles' valid licenses. v. Logbooks of minivans. The Contractor must also submit a list of all the vehicles which will be used for the whole duration of the contract. Such list should contain vehicle registration number and shall be submitted within four (4) weeks from notification by the Project Leader”

Contrary to the appellant's unfounded assertions, therefore, the tender document leaves no doubt whatsoever that the aforementioned documentation regarding personnel and vehicles did not need to be submitted as part of the tender submission / technical literature. The Tender therefore clearly provided that the examination of the said documentation was not to fall within the remit of the evaluation committee and that it was to take place only after the relative contract is signed and not before. It is respectfully submitted that, faced with such clear and unambiguous wording, had the evaluation committee proceeded to demand and/or examine such documentation as part of its evaluation exercise, it would have acted ultra vires and would have usurped for itself powers which were not granted to it by the tender document. Indeed, it is further respectfully submitted that should this PCRБ accede to the appellant's request and embark on an exercise of collating and examining South Lease's personnel and equipment documentation at this stage, this PCRБ itself would be acting ultra vires and in violation of the tender stipulation that such documentation would be examined after and not before the tender is awarded. Finally, the fact that the list of vehicles to be utilised for the execution of the contract need only be submitted "within four (4) weeks from notification by the Project Leader" and not at tender stage, clearly negates and totally quashes the appellant's arguments that the necessary vehicles are to be/or should be readily available upon the submission of the tender document. There is absolutely nothing in the tender document which precludes the selected contractor from utilising vehicles acquired even after closing date for submissions and, indeed, even after the conclusion of the contract, as the appellant erroneously submits. For the record and for the comfort of the PCRБ, Messrs. South Lease hereby confirms that it has the ability and the capacity to honour all of its obligations under this procurement.

c) Doctrine of self-limitation

The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board, the Court of Appeal and the Court of Justice of the European Union (CJEU) on various occasions. This doctrine lays down that tender submissions are adjudged only on the basis of conditions stipulated within the tender document and nothing else, thereby ensuring predictability and transparency. In the recent PCRB decision with number Case 1665 of 2021 [27th December 2021], this Honourable Board held that: *“This Board opines that the Evaluation Committee did not observe the principle of Self-Limitation when it deemed the Appellant's offer as technically non-compliant when it adjudged the equipment of the Appellant company on issues not included within the Tender Dossier”*

South Lease respectfully submits that if the appeal submitted by the appellant had to be upheld, it would infringe the principle of self-limitation, and all other procurement principles regulated inter alia by article 39 of the PPR.

It further respectfully submits that if the appellant genuinely felt that there was any shortcoming in the way the tender document was drafted, the appellant had other remedies available to it of which he did not avail himself prior to the submission of his bid. The submission of his bid conclusively confirms his acceptance of all tender conditions by which he is now bound. Finally, it is also respectfully submitted, that should the evaluation and recommendation be confirmed and after South Lease's personnel and vehicle documentation is scrutinised after the contract is signed (as stipulated in the tender documentation) and, for the sake of the argument only, they are found to be lacking or South Lease fails to honour its contract commitments, both the Contracting Authority and the appellant may avail themselves of the various remedies provided at law, including in terms of the Public Procurement Regulations.

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) This appeal is based on two (2) main grievances (reference to para [a] of Appellant's contentions).
 - i. In relation to the first grievance, i.e. the lack of necessary vehicles, it was established that the appellant submitted a number of logbooks to satisfy Item No. 1.13 of the Technical Offer Questionnaire (reference to Article 2.2 of the Terms of Reference). The Preferred Bidder submitted a declaration stating *“Kindly be informed that all vehicles provided have a Euro 6 engine. The technical sheet of the vehicle declaring that the engine is Euro 6 is herewith being attached. If our offer is favourably considered 45% of the fleet shall be converted to alternative fuel (liquified petroleum*

gas) as previously declared in the Engineer's report submitted with the tender offer and which is being forwarded again."

- ii. As for the second grievance, through the testimony under oath of Ms Maria Bartolo Galea it was ascertained that none of the economic operators submitted a list of personnel (drivers).
- b) Therefore, in the opinion of this Board, the only relevant matter to be considered is whether such specification had to be satisfied at the tender stage or at contract stage.
- c) Relevant sections of the tender dossier are hereby being reproduced
- i. Paragraph 16.4 – Section 2 – *"After the signing of the contract, the Contractor must provide the following documents within four (4) weeks from Commencement Order Notification by the Project Leader: The Contractor shall provide a list of the minivan drivers to be deployed under this contract. Minivan and Drivers: i) a recent Police conduct ii) A copy of valid drivers' licence iii) A Transport Malta (TM) tag iv) A copy of all vehicles' valid licenses v) Logbooks of minivans....."*
 - ii. Paragraph 16.4 – Section 2 – *"the minivans to be used during the duration of the contract, must be compliant with the criteria set in the Terms of Reference, Section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards."*
 - iii. Paragraph 2.2 – Section 3 – *"the bidder must provide the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved the required standard, the measures must be documented and included in the tender application, and this must be approved by a credible third party."*
- d) It is this Board's opinion that the Evaluation Committee correctly interpreted such clauses in the sense that both the logbooks of vehicles to be used and the specific list of minivan drivers (personnel) were required to be provided after the signing of the contract, more specifically within four (4) weeks from Commencement Order Notification by the Project Leader.
- e) Arguments brought forward by Appellant to the contrary of such interpretation are deemed irrelevant and erroneous by this Board.
- i. Where in paragraph 16.4 of section 2 the appellant referred to *"the minivans to be used during the duration of the contract, must be compliant with the criteria set in the Terms of Reference, Section 3. In the case that other vehicles are used other than those proposed and indicated in the offer, these must be of the same standards."*, this Board opines that this applies in cases where in the course of the contract the contractor would be in need of changing the vehicles being used.
 - ii. As for the arguments in relation to paragraph 2.2 of Section 3, this Board opines that this criterion applies only to any vehicles which at tender application stage would have been already upgraded to the required standard. This as per the wording used and emphasised in bold and underline hereafter *"the bidder must provide the technical sheets of the vehicles where emission standards are defined. **For those vehicles where technical upgrade has achieved the required standard**, the measures must be documented and included in the tender application, and*

this must be approved by a credible third party.” Hence this does not apply to South Lease Ltd’s offer.

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

The Board,

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in 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

Ms Stephanie Scicluna Laiviera
Member