

PUBLIC CONTRACTS REVIEW BOARD

Case 1859 – CT2074/2022 – Re-issue – Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Sapport

4th April 2023

The Board,

Having noted the letter of objection filed by Dr Ronald Aquilina acting for and on behalf of Support Services Limited, (hereinafter referred to as the appellant) filed on the 27th February 2023;

Having also noted the letter of reply filed by Dr Paul Borg, Dr Clint Tabone and Dr Yvette Tonna Board acting for Agenzija Sapport (hereinafter referred to as the Contracting Authority) filed on the 8th March 2023;

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 6th March 2023;

Having noted the letter of objection filed by Dr Alessandro Lia acting for and on behalf of Executive Care JV, (hereinafter referred to as the Preferred Bidder) filed on the 9th March 2023;

Having heard and evaluated the testimony of the witness Dr Claudette Fenech (Representative of the Malta Business Registry) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Mr Stephen Vella (Chairperson of the Evaluation Committee) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

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

Having noted and evaluated the minutes of the Board sitting of the 30th March 2023 hereunder-reproduced;

Minutes

Case 1859 – CT2074/2022 – Re-Issue - Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Sapport

The tender was issued on the 1st April 2022 and the closing date was the 10th May 2022. The estimated value of the tender excluding VAT, was € 1,533,253.20.

On the 27th February 2023 Support Services Ltd lodged an appeal against Agenzija Sapport as the Contracting Authority on their exclusion on the grounds that their offer failed to satisfy the BPQR criteria

A deposit of € 7,666 was paid.

There were five bids.

On the 30th March 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Support Services Ltd

Dr Ronald Aquilina	Legal Representative
Eng Frederick Azzopardi	Representative
Mr Charlo Farrugia	Representative

Contracting Authority – Agenzija Sapport

Dr Clint Tabone	Legal Representative
Dr Yvette Tonna Borg	Legal Representative
Mr Stephen Vella	Chairperson Evaluation Committee
Mr Giancarlo Farrugia	Secretary Evaluation Committee
Mr Raymond Muscat	Evaluator
Mr George Sultana	Evaluator

Preferred Bidder – Executive Care JV

Dr Alessandro Lia	Legal Representative
Mr Steve Ciangura	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 prior to inviting submissions noted that a preliminary point had been raised and this needed to be discussed first apart from the rest of the appeal.

Dr Ronald Aquilina Legal Representative for Support Services Ltd said that Appellant submits that the preferred bidder is not eligible for the award as its bid is invalid. In page 22 of the tender Terms of Reference 4.2.1 b it states that the Contracting Authority is seeking the services of a care worker company or consortium for the provision of care workers services. The preferred bidder does not qualify on this definition as at the date of the tender the provision of care workers was not included in the Memorandum and Articles of Association of the companies forming the Executive Care Joint Venture (JV). Executive JV is acting *ultra vires* as they are acting outside the terms of the objects clause and as a consequence it is not bound by any contracts they may enter into. Appellant claims that the bid is in the name of the consortium but if one of the companies forming that consortium does not qualify then it is not legal.

Witnesses were requested.

Dr Claudette Fenech (53572M) called to testify by the Appellant confirmed on oath when referred to Documents H and I (submitted by Appellant in letter of appeal) the Memorandum and Articles of Association as those of Executive Group Ltd and Executive Security Services Ltd.

In reply to questions from Dr Lia, Legal Representative for Executive Care JV witness stated that joint ventures were not registerable at law and licencing was not required for registration except in the case of financial institutions.

Mr Stephen Vella (513466M) called to testify by Appellant confirmed that the letter from BT Advocates dated 19th October 2022 addressed to the PCRB (filed as Doc F) confirmed that the composition of the JV is made up of two companies.

The concluded the testimonies.

Dr Lia noted that the bidders in the tender are Executive Services JV which is not registerable as a joint venture and the make up of the companies forming it is immaterial.

Dr Aquilina recited the main objects of the Memorandum of both companies and said that it is clear that nowhere is there any reference to care or care workers and hence they were not authorised to offer that service. At the date of the close of tender neither company was allowed to offer care services, not even in the subsidiary clauses. In January 2023 the Memorandum was changed to include care worker services – this is totally irrelevant to this case as it was not valid at the time of the tender submission but merely confirms that at the date of the tender the Company was not conforming. The tender makes the requirement of care workers very clear but neither one of the Companies can offer care workers services.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts referred to Regulation 56 of the PPR and said that the bid is by a joint venture which has a separate juridical entity and the individual companies should not be considered in this case.

Dr Lia said that the Evaluation Committee should only consider the joint venture without any need to look into the individual companies forming it. We are here dealing with procurement not company registration. Executive Care and Executive Services are separate entities and if they were to be awarded the contract all payments would go to JV. The argument about what the individual companies can or cannot do is irrelevant and this is supported by decisions of the Court of Appeal. The entity performing the care worker services is the JV and that is what has been declared. Should the Board feel that it is the separate companies that are the bidders this would lead to absurd decisions on the role of having joint ventures. The action of JV is not *ultra vires* as the Authority is fully aware of the situation and fully conscious of the facts. Dr Fenech in her testimony stated that joint ventures are not registerable and there are no licencing requirements and they are thus unable to list their functions.

Dr Aquilina said that the whole point of the tender is the requirement for care workers companies and if that point is not satisfied one cannot bid. If one followed the argument that the individual companies should be ignored then one can get away with legalising through a joint venture a bid for a service in which one has no experience at all. The need to provide care workers services is clear and this does not exist in this preferred bid as there is no registration.

Dr Lia said that a joint venture is not registrable.

Dr Debono pointed out that according to the General Rules Governing Tenders (article 2.4) a joint venture is regarded as a separate entity.

The Chairman proposed a recess to enable the Board to consider the submissions made on this preliminary point and decide on it. On resumption the Chairman notified the parties that the Board will deliver its decision in writing at a later date, thanked them for their submissions and in the meantime the hearing stands adjourned.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of 30th March 2023.

Having noted the objection filed by Support Services Limited (hereinafter referred to as the Appellant) on 27th February 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2074/2022 as case No. 1859 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Ronald Aquilina
Appearing for the Contracting Authority:	Dr Clint Tabone & Dr Yvette Tonna Borg
Appearing for the DoC:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder:	Dr Alessandro Lia

This is a preliminary decision on the first grievance filed by the Appellant, Support Services Limited. At the request of the Preferred Bidder, that such grievance should be heard on a preliminary basis before continuing on the actual merits of the case, i.e. the other grievances filed by the appellant, the Board acceded to this request.

Whereby, in relation to the first grievance, the Appellant contends that:

- a) The Appellant's First Ground Of Appeal relates to the ineligibility of Executive Care to participate in this tender and the invalidity of its tender bid. The Tender document expressly states that "*the Contracting Authority is seeking the service of a care workers company or consortium for the provision of care worker services*". Executive Care is a consortium made up of two companies - Executive Group Limited (C80156) and Executive Security Services Limited (C45125).

At the closing time for the submission of tenders and up till the time of writing, Executive Security Services Limited had as its main object "*to provide security services at places of entertainment, night clubs, outside events, bar and restaurants. To employ people and provide management services to third parties and to provide static guarding services as well as high profile security services.*" Its objects clause preclude it, therefore, from providing care worker services and as such it was and remains ineligible to participate in this tender since it is not a care worker company as expressly required by the tender document.

At the closing time for the submission of tenders, Executive Group Limited had as its objects "*to provide human resources support services to any types of companies and entities providing services or operating establishments in relation to catering, hospitality, cleaning, construction and restoration services.*" At the relevant time, namely the closing time for the submission of tenders, its Memorandum of Association's objects clause precluded it from providing care-worker services and hence it was ineligible to participate in this tender as it was not a care-worker company as expressly required by the tender document.

Indeed, it is respectfully submitted that the submission of a bid by Executive Group Limited and Executive Services Limited in respect of this tender falls foul of the ultra-vires doctrine in company law. Companies can only act strictly within the powers and objectives set out in the objects clause of their Memorandum of Association. Anything done by a company not covered by the said powers and objectives is null and void and without effect.

It is pertinent to point out at this stage that the relevant moment in time in determining whether the bid submitted by Executive Care is valid or not is the closing time for the submissions of tenders. Any changes to either company's Memorandum of Association after the closing time for the submission of tenders should, therefore, be disregarded as it cannot have the effect of rendering valid an offer invalidly submitted in the first place. The Appellant is indeed aware that very recently, (10th January, 2023) Executive Group Limited did change its object clause to cover the provision of care worker services. As already stated, however, this change so late in the day, is irrelevant and does not remedy the fatal flaw in Executive Care's bid. If at all, it serves as further evidence in the sense that, at closing time for the submission of tenders, Executive Group Limited was not authorised to provide care worker services.

It is respectfully submitted, therefore, that Executive Care's bid is not valid and that Executive Care were not eligible to participate in this tender which was open only to a "care-worker company or consortium"

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8th March 2023, its verbal submission during the hearing held on the 30th March 2023, in that:

- a) The evaluation committee has conducted its assessment in line with the Best Price / Quality Ratio (BPQR) whereby the evaluators have assessed the selection criterion found and set out in the tender document.
- b) In assessing the eligibility criteria for the award of the contract, the Evaluation Committee has assessed that each and every economic operator provided the required documentation as to enable them to be eligible to participate in the tendering process and thus, file their respective bid.

This Board also noted the DoC's Reasoned Letter of Reply filed on 6th March 2023, its verbal submission during the hearing held on the 30th March 2023, in that:

- a) First Ground of Appeal - In accordance with Regulation 56 of the Public Procurement Regulations, 2016, a tenderer can be either a natural or a legal person or a public entity or group of such persons and, or entities. In accordance with Rule 2.4 of the general rules governing tenders where joint ventures are concerned, the tender evaluation committee is to consider the same joint venture by itself when satisfying the criteria established in the tender document. Therefore, the DoC submits that the submissions concerning economic operators and the presentation of evidence consisting in documentation pertaining to economic operators which have not submitted a tender offer is irrelevant in the present proceedings. It is consequently being submitted that the Public Contracts Review Board should in accordance with Regulation 90(4) of the Public Procurement Regulations, 2016 order that the submissions and the documentation are removed from the acts of the proceedings. Without prejudice, in accordance with regulation 39(3) of the Public Procurement Regulations, 2016 tender specifications in procurement documents are not designed to exclude or restrict economic operators from participating in procurement procedures.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 9th March 2023, its verbal submission during the hearing held on the 30th March 2023, in that:

- a) First grievance –
 - i. This issue should be decided preliminary and before the merits of the case
 - ii. The M&A of the company is wide enough to cater for this scope of this tender
 - iii. None-the-less it is the JV who is participating in this tender procedure and not the individual companies

This Board, with specific reference to the first grievance as filed by the appellant, and 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 the Appellant's first grievance and deliver its preliminary decision on it.

- a) Initially, this Board agrees with appellant's argumentation that what is relevant for evaluation and eventual award of the tender, is that documentation which was submitted as part of the economic operators' bids. Therefore, if relevant at all, it would be the Memorandum & Articles of Association as they were submitted and in their form as at the closing date of the call for tenders which would need to be taken into consideration. Any subsequent changes to these M&As post the closing date of the call for tenders are to be considered irrelevant. However, one needs to analyse if the M&As of the companies forming the Joint Venture are relevant to proceedings.

- b) To analyse this, reference is initially made to the testimony under oath of Dr Claudette Fenech whereby she confirmed that Joint Ventures are not registerable at law. Therefore, they do not need to register with the Malta Business Registry (MBR) and as a consequence their objects and objectives are not 'public' knowledge. This is not however to say, that their objects would be identical to the company's forming it.
- c) It is this Board's view that in relation to Procurement Law, Joint Ventures are to be regarded as separate entities. As such, it is their specific objects which should be considered for evaluation. In reference to this, the Board agrees with the Evaluation Committee's decision that the Joint Venture agreement of the Preferred Bidder duly satisfies the requirements of article 4.2.1 of Section 3 of the tender dossier. This article states that "*The Contracting Authority is seeking the service of a care workers company or consortium for the provision of care worker services.....*" (bold & underline emphasis added) Since the 'consortium' / joint venture meet this requirement, in relation to this specific requirement, it is to be deemed compliant.

Therefore, this Board does not uphold the Appellant's first grievance and directs the hearing to continue on the other grievances of the same appellant.

The Board,

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

- a) Does not uphold the Appellant's first grievance;
- b) Put off the appeal for continuation to a second hearing to be advised to all parties involved in due course;
- c) In respect to the deposit paid by the appellant and whether that should be refunded or otherwise to the same appellant shall be reserved for the final decision.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member