

In the Public Contracts Review Board



In the records of an appeal lodged in connection with procurement procedure reference number CT2385/2021 in the names of:

Suratek Limited

versus

Department of Contracts et

URGENT APPLICATION of the appellant Suratek Limited

1. This is an application for the disclosure of documentation and/or information pertaining to the procurement procedure in question.
2. As shall be explained below, the Appellant seeks the disclosure of specific and narrow categories of documentation and/or information for it to be in a position capable of exercising its current remedy effectively.
3. The Contracting Authority has alleged, in its response of 19 June 2023, that "*according to the literature submitted by the Recommended bidder, together with further clarifications which were requested by the TEC even in the re-evaluation process, the offer does indeed satisfy such requirements in that, the model offered by Triomed Ltd does qualify as a full body scanner*".¹
4. The Contracting Authority, in this paragraph, alleges that its decision is specifically founded on (i) literature submitted; and (ii) further clarifications which were requested by the [evaluation committee] even in the re-evaluation process.
5. Given the Contracting Authority's allegations, the Appellant seeks the disclosure of the following documentation and/or information:
 - "literature submitted"**
 - a. A list of the literature submitted by the recommended bidder in its original bid;
 - b. A list of literature submitted by the recommended bidder as a result of any requests for clarification or rectification in the first evaluation process;
 - c. A list of literature submitted by the recommended bidder as a result of any requests for clarification or rectification in the second evaluation process;

For the avoidance of doubt, and at this stage, the Appellant is not seeking the disclosure of the actual literature. The Appellant seeks the disclosure of the title of the document/literature.

"further clarifications"

- d. All requests for clarification or rectification issued by the evaluation committees (first and second);
- e. All replies submitted by the recommended bidders (during the first and second evaluations);

¹ See paragraph 8.

If the *replies* enclose any document which has been specifically marked by the recommended bidder as confidential, then, and at this stage, a list of such documents may be provided *in lieu* thereof.

6. The Appellant submits that its requests for disclosure ought to be upheld for the following reasons.
7. **First**, the requested disclosures are necessary to ensure the Appellant's right to effective judicial protection as required by European Union law when a breach of Union law is involved and as expressly required the principle of effective and rapid remedies in the Remedies Directive.²

It is evident that the documentation and/or information that the Appellant is after has been relied on by the Contracting Authority in reaching the decision which is being contested in the present case. The Appellant, or at the very least its legal counsel, must be aware of this documentation and/or information to be able to effectively scrutinize the Contracting Authority's decision.

8. **Second**, the information to be disclosed simply does not (and cannot) constitute commercially sensitive information or a trade secret which may prejudice the legitimate commercial interests of the recommended bidder, if disclosed.
9. **Third**, this information, which was specifically sent by the recommended bidder to the Contracting Authority within the context of this procurement procedure, has absolutely no commercial value in the wider context of the recommended bidder's activities, and therefore, its disclosure cannot be refused.
10. **Fourth**, the requested information is clearly very important to the award of this procurement procedure—as admitted by the Contracting Authority in its reply. Given the importance of this information, the essential content of the information must be accessible to the Appellant in view of the principle of transparency and the right to an effective remedy.
11. This is, substantively, the approach which has been taken by this Honourable Board and also by the Court of Appeal when dealing with requests for disclosure of information within the context of public procurement challenges:

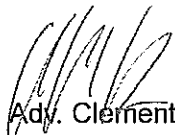
*Speċjalment f'kazijiet ta' din ix-xorta fejn, hafna drabi, lghazla ddur fuq l-istruttura teknika tal-offerta, kull parti ghandha obbligu li tixxef dak kollu li hu rilevanti u relatat mal-offerta taghha. Jekk l-informazzjoni li tkun se tinghata tkun sensitiva, il-Bord jista' jordna li l-informazzjoni tkun accessibli biss ghalha u ghall-partijiet fil-kwistjoni, u li ma jinhargux kopji tad-dokumenti relattivi, izda jibqghu issigillati f'envelop ghall-uzu biss kif inghad. L-avversarju, pero`, ghandu dritt jitlob mill-parti l-ohra kull informazzjoni marbuta mal-kaz u rilevanti ghall-materja quddiem il-Bord.*³

12. Further, the Appellant submits that the requested information ought to be disclosed before the hearing and made available to the Appellant in advance given its right to effective judicial protection, but also, so that the case is efficiently conducted.

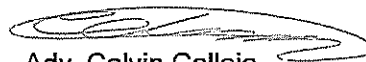
² Directive 1989/665/EC, as amended.

³ *South Lease Limited vs Central Procurement and Supplies Unit I*, Court of Appeal (22 June 2022) [Ref. 72/22/1].

THEREFORE, in view of the above, the Appellant humbly requests that this Honourable Board orders the respondent contracting authority to disclose, before any hearing is scheduled, the information and documentation requested in paragraph 5, to the appellant and/or the appellant's legal counsel, as the case may be, save for any declaration or order that it deems fit and opportune.



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TODAY, 21 JUNE 2023

VALLETTA, MALTA