

PUBLIC CONTRACTS REVIEW BOARD

Case 1884 – CT2361/2022 – Framework Agreement for the Provision of General Road Works including the Laying of Asphalt for the Ministry For Gozo

27th June 2023

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Gatt Tarmac Limited, (hereinafter referred to as the appellant) filed on the 27th March 2023;

Having also noted the letter of reply filed by Dr Tatiane Scicluna Cassar acting for Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 6th April 2023;

Having also noted the letter of reply filed by Dr Joshua Grech acting for Road Structures Limited (hereinafter referred to as the Preferred Bidder) filed on the 6th April 2023;

Having heard and evaluated the testimony of the witness Mr Joseph Cutajar (Chairperson of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Gatt Tarmac 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 13th June 2023 hereunder-reproduced.

Minutes

Case 1884 – CT 2361/2022 – Framework Agreement for the Provision of General Road Works including the Laying of Asphalt for the Ministry for Gozo.

The tender was issued on the 31st October 2022 and the closing date was the 6th December 2022. The estimated value of the tender, excluding VAT, was € 2,268,903.

On the 27th March 2023 Gatt Tarmac Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically non-compliant.

A deposit of € 11,345 was paid.

There were four (4) bids.

On the 13th June 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Gatt Tarmac Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Mario Gatt	Representative
Mr Nathaniel Gatt	Representative

Contracting Authority – Ministry for Gozo

Dr Tatiane Scicluna Cassar	Legal Representative
Mr Joseph Cutajar	Chairperson Evaluation Committee
Perit Godwin Sultana	Evaluator
Ms Joanne Rose Farrugia	Evaluator
Ms Lily Said	Evaluator

Preferred Bidder – Road Structure Ltd

Dr Joshua Grech	Legal Representative
Mr Louis Grima	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 Clement Mifsud Bonnici Legal Representative for Gatt Tarmac Ltd said that the appeal is on issues of a legal nature. It appears as if the Contracting Authority has done its utmost to disqualify the Appellant by putting forward arguments to create a situation. The reply of the Authority disclosed Appellant's technical offer which is confidential and is meant to protect commercial interests. One would expect some sanctions from the Board on this point, and in the circumstances Appellant would expect a refund of its deposit.

Dr Tatiane Scicluna Cassar the Legal Representative for the Ministry for Gozo said that Public Procurement Regulation (PPR) 40.2c allows disclosure of certain documentation submitted by the economic operators. The information, which is not confidential was submitted only to the Board. Appellant did not submit a specific declaration form which came under Note 3. It is not up to any bidder to decide what to submit in lieu of the provided form. This gives an advantage to one party and there are several cases to back the fact that bidder has to abide strictly with the terms as particularly decided in *Intermarket vs Director of Contracts*. If a document is expressly requested and a different document is submitted this infringes the principle of transparency.

Dr Joshua Grech Legal Representative for Road Structures Ltd said that the appeal is on the decision taken by the Authority. There was an obvious ignoring of the tender terms and one has to consider if the Authority's decision was correct. This is not a case of *ex post facto* consideration and the remit of the Board is to decide if the correct decision was reached.

Dr Mifsud Bonnici stated that the matter of the tools was not a selection criteria. The technical offer is confidential and the Authority cannot rely on Regulation 40 for justification. The normal practice on this matter was not followed. The *Varec* case is clear that the remedy can be sought for non-disclosure of requested information.

Dr Scicluna Cassar pointed out that that Tools and Equipment was one of the selection criteria requested and it was this list that was divulged not the technical offer.

Dr Mifsud Bonnici said that the selection criteria are confidential in nature as is well-known. Reference was made to the CJEU Case C54/21 *Polska vs Commission* in this context. He requested that in questioning the Chairperson of the Tender Evaluation Committee (TEC) the other evaluators should not be in the room. As this was contrary to the normal practice the Chairman proposed a short recess to consider Dr Mifsud Bonnici's request.

On resumption Dr Mifsud Bonnici asked that it be recorded verbatim that:

"Dr Mifsud Bonnici for the Appellant requested that during the testimony of the Chairperson of the Evaluation Committee other members of the Evaluation Committee leave the Court Room such that they are not influenced by the testimony of the Chairperson should they be subsequently summoned".

The Board acceded to this request.

Mr Joseph Cutajar (1379G) called to testify by the Appellant stated on oath that he was the Chairperson of the TEC, that he is a Director at the Gozo Ministry and has a Masters qualification in Physics and has in the past evaluated several tenders connected with road works. He provided details of the other members of the TEC. According to the witness no experts were appointed or consulted by the TEC. No technical details were requested specifically on the tools but supporting documentation was required. This information was required to satisfy the Authority that the tools would be available for use on the contract. Literature lists were not requested. As regards the tools and equipment the TEC relied on the self-declaration and no further verification was carried out.

Questioned by Dr Grech, witness said that the tools and equipment form in the tender dossier had to include supporting documents – in this case a totally different table was provided with no cross reference to photographs. It was the TEC's view that not enough information was provided as a different template was used with a lack of photos.

This concluded the testimony.

Dr Mifsud Bonnici referred to the three grievances on this objection. The first was that there was no mandatory request for photos. There was no mandatory request and in fact this is mentioned in only one instance in the tender and it is qualified by the words 'where possible' which are very clear – despite this the Authority claim that photos were mandatory. CJEU Case 226/09 *Commission vs Ireland* (paragraphs 42 and 43) give a very clear interpretation of the word 'where possible'. The *Fremont* case quoted by the Authority was different in that the request there was mandatory but in this case the photos were to be submitted 'where possible'. If one considers the request in the technical offer there is no mention of photos because they are not mandatory. The final reason on this point is a matter of utility. Why disqualify a bid when the tender did not ask for a specific requirement which was of no utility to the evaluation of the tender? This specification was not requested and the TEC cannot disqualify on this point.

The second grievance according to Dr Mifsud Bonnici was in regard to the self-declaration which once provided had to be relied upon by the TEC and the matter usually stops there. The TEC had enough information to rely on. The principle that the self-declaration is binding was upheld in the *Kooperativa ta Ghawdex* Case (C/A Case 369/22 para 14). *SC Construct* Case (CJEU C 403/21) held that there is discretion in performance conditions to satisfy all requirements.

Appellant's final grievance is regarding the principle of proportionality. One has to consider the aim of the tender and the reason for disqualification. The bidder was required to sign the form, which he did and stated 'as attached' – all the requested information was supplied. This is a matter where substance overrides form. The detailed list provided binds the bidder and what the Authority required was fulfilled. An action to reject a bid simply on this basis would be excessive. If the information is incomplete there is nothing wrong in using the information supplied (*Ballut Blocks Case 440/2021*). In this case what was provided was enough.

Dr Grech stated that the principles regarding equality and transparency were not followed by the Appellant company as it decided what to submit. The perfectly good form supplied in the tender dossier was ignored and replaced. The Authority wanted a specific Note 3 document but bidder ignored this and is now trying to justify its action. What was the problem with providing the form supplied? In the replaced list one column was left out which was not acceptable and the photos supplied did not corroborate with the details of the equipment. The TEC had no choice but to select a fully compliant bid. The other three bidders must obviously have also followed the tender requirements and only the Appellant acted otherwise. The form clearly stated that it came within the ambit of Note 3 and the consequences were clear. The Board should not be expected to correct an erroneous submission. On the point claiming that information was wrongly divulged by the Authority, this is not a matter for the Board to decide. The information was only limited to the Board and Appellant is not correct in its claim as this point is *ex post facto*. In any case the Board has given a decision on this point.

Dr Scicluna Cassar said that contrary to what was claimed there was no bad intent by the Authority as the technical information was only sent to the Board. The point in question is that a declaration form was replaced at the whim of the bidder. The TEC is under an obligation to ensure proper procedure is carried out in an evaluation. The *AIB Insurance Brokers* case quoted by Appellant in their letter of objection is totally different to the present case. The application of Note 3 was totally ignored and there is a clear admission by Appellant that it did not provide the designated form and unlike the *AIB* case this was not a case of oversight.

It has been claimed that the self-declaration is intended to comply with the regulations, but the bidders self-declaration is invalid since it was not the one provided and required in the tender. The claim by Appellant that supporting documents were not mandatory is not right as there are several requests in the tender for supporting documents where possible. It is up to the Appellant to judge what is required to provide the service required. Appellant also claims that the necessary tools and equipment are in hand and therefore it is possible to provide supporting documents. This begs the question – why then were they not provided? Supporting documents on only 18 out of 71 items of equipment were supplied without any cross-referencing. The TEC could not be expected to indulge in guessing games. The Authority would be creating a dangerous precedent and lacking proportionality if it had accepted an offer when incorrect documents were provided and they were correct in the decision they took.

Dr Mifsud Bonnici said that on the proportionality aspect the other bidders were not prejudiced by the Appellant's replacement list as this gave it no advantage. The only item missing in Appellant's list was the photos column and therefore it is a matter of substance over form since the list is perfectly correct. The replacement list was still evaluated. The aim of the tender and specifically that of the contested list was to verify that the tools were available, and this it did. The *AIB* case was regarding rectification but in this case clarification was possible. The Authority was mistaken in providing confidential documents although in the end it did not affect matters.

Dr Grech said that there has to be fairness on all bidders . The Appellant created prejudice by creating their own form. The TEC wanted peace of mind and that criteria was necessary - there was just no justification in changing the tender requirements and the message is that proportionality does not mean that a bidder can change the rules.

Dr Scicluna Cassar concluded by saying that the decision was a positive reflection on the action of the TEC.

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 sitting of the 13th June 2023.

Having noted the objection filed by Gatt Tarmac Limited (hereinafter referred to as the Appellant) on 27th March 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2361/2022 listed as case No. 1884 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Tatiane Scicluna Cassar

Appearing for the Preferred Bidder: Dr Joshua Grech

Whereby, the Appellant contends that:

a) First grievance - Submission of Photographs and Other Supporting Documentation

By means of the first 3 reasons of rejection, the Contracting Authority is alleging that the tender mandatorily required that photographs and other supporting documentation of equipment and tools are submitted with the bid. The Appellant submits that this is not the case.

The Tender did not expressly and mandatorily require the submission of photos and/or other relevant documentation and only provided that these may be submitted "where possible".

It must be further noted that the reference to "photos and/or other relevant documentation" was not even included in the same requirement in the Technical Offer and on page 3:

Therefore, the Appellant submits that the tender did not mandatorily require the submission of "photographs" and "supporting documentation" with respect to tools and equipment. On this basis, it must be submitted that the evaluation committee's conclusions, as stated in the reasons for rejection, are in default of the tender conditions and of the principle of self-limitation. The Appellant's submissions are also being made within the context that the Contracting Authority did not specify a minimum or indicative list of tools and equipment that it was expecting tenderers to have, and in fact, the technical specifications do not list or require any minimum tools or equipment. Further no specific technical literature was requested in the Tender Dossier, and in fact, no List of Literature was prepared as part of the procurement documentation. As this Honourable Bord (sic) is aware, "technical literature" and the List of Literature is invariably a Note 2 issue, and therefore, these would have been rectifiable. However, and in any case, this is a moot issue in the present case given that the submission of photographs and supporting documentation was not mandatorily required. On a concluding note on this, the interpretation and application of the tender conditions that the Contracting Authority is purporting to adopt exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the Tender, and this, in breach of the principle of proportionality.

b) Second grievance – Self-Declarations sufficed

By means of the first 3 reasons of rejection, the Contracting Authority is alleging that the tender mandatorily required that photographs and other supporting documentation of equipment and tools are submitted with the bid. The Appellant submits that, in this specific Tender, the Contracting Authority elected to employ the tool of self-declaration of compliance to verify the technical compliance or otherwise of the bidder's proposed tools and equipment with "the applicable laws and regulations and/or relevant authorities" and with the tender conditions. This is patently evident from the absence of a mandatory requirement for the submission of photographs and other supporting documentation, but also from the final column of the Tools and Equipment Declaration Form which required bidders to confirm or otherwise "Y/N" whether the tool or equipment was "Self assessment: Compliant." In any case, the Tender required, and the Appellant duly submitted, an over-arching self-declaration which confirms compliance with the technical specifications of the Tender.

Further, and if the Contracting Authority were to ignore such self-declarations, this would be tantamount to the imposition of an obligation on tenderers to satisfy (i) performance conditions of the contract, and/or, (ii) obligations arising from special laws applicable to the subject-matter of the contract, at the time of the submission of bids. This has been held to impose an excessive requirement on tenderers; such interpretation and application adopted by the Contracting Authority ought to be set aside given its incompatibility with law, in particular, the principles of

proportionality and transparency, and because it will dissuade economic operators from participating in that procurement procedure.

c) Third grievance – Principle of proportionality

By means of the last fourth reason of rejection, the Contracting Authority found that "the form used to list the equipment was not the one provided by the Contracting Authority as was instructed in the tender document" and further that this was not capable of rectification. The Appellant submits that this is not a good reason for rejection.

Regulation 39(1) of the PPR clearly stipulates that 'contracting authorities [...] shall act in a transparent and proportionate manner. The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued and that when there exists a choice between several appropriate measures, recourse must be had to the least onerous one. The Contracting Authority's decision is in breach of its duty to act in a proportionate manner and this for the following reasons:

Firstly, and as this Honourable Board can see from the Tenderer's Technical Offer submitted by the Appellant, the Appellant has: a. signed the Tools and Equipment Declaration Form; and b. submitted a supporting form, which is substantially and functionally in the same form as the table in the said Form, which provided the: (a) details mandatorily requested by the Tools and Equipment Declaration Form; and (b) additional details which were not requested by the Tools and Equipment Declaration Form, but which additional details are nevertheless relevant to the subject-matter of the eventual contract.

Second, and even if, for argument's sake, the Appellant's bid is, somehow, considered to be technically non-compliant, the Contracting Authority should have allowed the Appellant to submit it afresh by way of a rectification or clarification, without any substantial modifications to the content of the technical offer, in application of the principle of proportionality.

The Contracting Authority's decision exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the Tender. Further, the evaluation committee opted for the most onerous route of excluding the Appellant's bid rejected the appellant's bid rather than pursue less onerous routes.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th April 2023 and its verbal submission during the hearing held on 13th June 2023, in that:

- a) Clause 5(C)(i)(d) is clear and unequivocal - the provision of information or details, is to be supported with photos and/or other relevant documentation. The burden of proof rests on the

bidder to make it possible to furnish photographs or any other pertinent documentation to corroborate the information provided. According to Article 58(1) of Directive 2014/24, "*contracting authorities may only impose requirements that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. These requirements should be related and proportionate to the subject-matter of the contract.*" The requirements of the tender document to support the information provided with photos and/or related documentation cannot be considered to be in breach of the principle of proportionality and in this respect, this requirement had to be fulfilled by the bidder.

- b) The "*where possible*" does not create the opportunity for bidders to comply or fail from submitting the information requested. It is in fact the contrary. It places the onus on the bidder to provide the information requested and to do whatever it takes to provide supporting photos and/or other relevant documentation.
- c) Further to this, in a custom-made document entitled "Plant and Equipment to be Employed on Contract" the Appellant listed 71 tools/equipment and provided photos for only 18 of these. Through the photos provided, the Evaluation Committee was unable to determine the distinctiveness of each tool/equipment (photos could have been taken from different angles to simulate multiple tools or equipment) and could not relate or cross-reference the photos with the models of the tool/equipment listed in the table. The response to this Tools and Equipment Declaration Form falls under Note 3, that is: "No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification.". Therefore, as per Public Procurement Regulations, the Evaluation Committee could not issue any requests for rectifications. It is to note that no supporting photos and/or other relevant documentation were submitted for the rest of the list, that is, for the other 53 tools and equipment listed. The Contracting Authority therefore reiterates that the onus was on the bidder to provide supporting photos and/or other relevant documentation. Moreover, the Contracting Authority could not understand how the task of producing a photo and/or relevant documentation of, for example, of an Isuzu Pick-Up was impossible to achieve.
- d) In a recent judgment, with the names *Fremond Limited vs L-Agenzija ghas-Servizzi tal-Oorti* (sic) u *Dipartiment tal-Kuntratti* decided on the 20th March 2023 which judgment confirmed decision given by this Board and also dealt with missing documents, the Court of Appeal held that: "*Mbux każ li l-awtorità kontraenti titlob li jingiebu d-dokumenti t-"tajba", ghax mbux kompitu tal-awtorità li titlob hi d-dokumenti. Id-dokumenti tas-sejba kienu cari x'ghandu jigi pprezentat, u kull oblatur irid isegwi l-istruzzjonijiet moghtija u mbux jistenna li l-awtorità taghmel tajjeb ghan-nuqqasijiet tieghu.*"
- e) It is to note that in the order of precedence of contract documents in Article 3 of the Special Conditions, Clause 5(C)(i)(d) supersedes the technical offer form and as such the lack of reference to "photos and/or other relevant documentation" in the Technical Offer Form and Questionnaire

is made up by the fact that these were requested in the Selection and Award Criteria technical specifications in Section 1 Instructions to Tenderers. Nonetheless, the Tools and Equipment Declaration Form [a component of and clearly cross-referred in the Technical Offer (Note 3) makes it clear to the potential bidders that: *"The Economic Operator is to provide details in the table below of the key equipment and plant proposed for the successful completion of the specified works taking into account the requirements of the Specifications and Conditions of Contract."*

- f) The Contracting Authority would like to point out to the Honourable Board that the Appellant is attempting to mislead this Board by claiming that a positive response to a self-declaration query in the final column of the Tools and Equipment Declaration Form is also positively confirming that the Appellant will be abiding with the tender conditions. Clause 5(C)(i)(d) states that "(...) With a Yes 'Y' Declaration, the bidder will be also confirming that the listed equipment will be compliant to the applicable laws and regulations and/or relevant authorities." and stops short of stating what the Appellant is attempting to infer. In this context, the Contracting Authority would like to elaborate on the fourth reason of rejection. Bidders were specifically instructed to use the Tools and Equipment Declaration Form provided in the technical offer form, as in Clause 5(C)(i)(d) being reproduced hereunder: *"(d) Details of the Tools and Equipment proposed for the successful completion of works. Bidder is to provide details [in the table provided in the technical offer form] of the key equipment and plant proposed for the successful completion of the specified works taking into account the requirements of the Specifications and Conditions of Contract. [...]"* Appellant decided otherwise and instead provided a custom-made table. As per clause 39(1) and (2) of the PPR: *"39(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. 39(2) The tenderer must be selected in a transparent manner and according to a prescribed procedure."* In view of this provision, the Contracting Authority fulfilled its obligation to treat bidders fairly and impartially. To ensure this, and to ensure that adjudication follows a prescribed procedure, the Contracting Authority did not accept the custom-made form provided by the Appellant as it could not consider any Tools and Equipment Declaration form other than that explicitly provided in the tender document.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 6th April 2023 and its verbal submission during the hearing held on 13th June 2023, in that:

- a) The main reason for the rejection of the appellant's tender and consequently of the appeal revolves around the fact that the appellant has failed to submit the necessary documentation relative to the technical requirements as per tender. It is clear in the tender document as well as the General rules regulating the tender that the 'Tenderer's Technical offer' is listed under Note 3. In fact in Paragraph 5 of the Tender document - Selection Criteria, the technical requirements are defined as follows: "Tenderer's Technical Offer in response to specifications to be submitted online through

the prescribed Tender Response Format and by using the Tender Preparation Tool provided. (Note 3)" The corresponding definition of Note 3 clearly states that "No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification." Therefore, the fact that the appellant decided not to provide the technical requirements using the format duly provided in the tender document automatically brought about the non-compliance of the appellant's tender and consequently the tender could not be evaluated any further. Furthermore, it should be noted that the form which should have been submitted - Tools and Equipment Declaration Form - is also termed as being 'Note 3' and thus no rectification could be made to the document as submitted. Therefore, even if the tenderer would have used the correct form, something which as said is already in default, the submission did not contain all the information requested in the tender document - one of which was 'supporting documents including photographs'. It is therefore very clear that in not submitting the information correctly using the correct forms, the tenderer should have known that his offer would not be considered any further since he would be in default of the rules and regulation governing the tendering process.

- b) Similarly, the second ground, being based on the same reasoning cannot be upheld, since it is not true that the self-declarations sufficed. The tender document dictates otherwise. The fact that the bidder failed to submit the information which was requested ab initio should have been rigorously adhered to. The lack of such information is primarily tantamount to a lack of respect to the rules and regulations pertaining to the tender document, putting the other bidders at a disadvantage given that the winning bidder has submitted all the necessary documentation (photos and/or logbooks as was duly requested by the tender document), and thirdly, would inherently show that the appellant did not possess such necessary tools and equipment at the time of bid. Consequently the lack of such information cannot be considered in favour of the appellant since in its turn, this would greatly prejudice the position of the other bidders to the tendering process.
- c) Lastly, the appellant makes reference to the principle of proportionality. It should be duly pointed out that this principle has been defined by the Court of Justice of the European Union in its decision of the 12th November, 1996 in the names United Kingdom vs Council of the European Union in the following manner: *"As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it."* The principle of proportionality should be taken and established by taking into account the other bids and tenders involved in the process. In the case quoted by the appellant, contrary to this case, the Court considered that: *"Fil-każ tallum id-dokument nieqes ma huwiex dwar kondizzjonijiet tal-offerta nfisha, iżda huwa obbligazzjoni li ghandu jintrabat biha l-offerent li jhars il-kondizzjonijiet tas-sejba, u ma jibdel xejn mill-offerta nfisha."* In this current situation, the list provided did not respect the form, details and requirements requested by the tender document.

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) 1st grievance – submission of photographs and other supporting documentation -
 - i. Reference is made to the tender document Section 1 – Instructions to Tenderers, paragraph 5 (C)(i)(d) which clearly states that “.... *It is confirmed that **where possible** information / details are to be supported with photos and / or other relevant documentation.*” (bold & underline emphasis added).
 - ii. It is therefore this Board's opinion that the requirement for 'photos and / or other relevant documentation' was not of a mandatory nature. Arguments presented by the Contracting Authority that this places the onus on the bidder to provide information and 'to do whatever it takes to provide supporting photos and /or other relevant documentation' is not upheld by this Board. The responsibility of drafting a clear and unambiguous tender document rests primarily on the Contracting Authorities.
 - iii. It has been ascertained on multiple occasions that a Contracting Authority, through its Evaluation Committee, cannot adjudge bids of economic operators on items not included in the tender document. This more so when the sole criteria for award will be the price.
 - iv. This Board opines that the *Fremond* case is not relevant to this appeal as the context is different. In this case, the appellant has been evaluated on a criteria which was not specifically imposed on it by the tender dossier.
 - v. Therefore, this Board upholds appellant's first grievance.
- b) 2nd grievance – Self-Declarations sufficed –
 - i. Reference is made to the “Tools and Equipment Declaration Form” which in its last column clearly states that prospective bidding economic operators are to self-assess their technical compliance by marking a “Y” or “N” in the column entitled “Self-Assessment: Compliant”.
 - ii. This clearly shows that the Contracting Authority allowed economic operators to Self-Declare their technical compliance or otherwise with regards to their proposed tools and equipment.
 - iii. Once duly provided, Contracting Authorities have to rely on such declarations.
 - iv. Therefore, this Board upholds appellant's second grievance.
- c) 3rd grievance – Principle of Proportionality –
 - i. The appellant provides 2 mains reasons why its grievance should be upheld.
 - ii. In the 'second' reason, the Appellant is expecting an opportunity to submit the 'Tools and Equipment Declaration Form' afresh, albeit without any substantial modifications to the content of the technical offer. It is this Board's opinion that if the Evaluation Committee

proceeded in this manner, it would have very likely disrupted the principle of equal treatment that economic operators are entitled to.

- iii. In its 'first' reason, appellant is arguing that they in fact submitted the 'Tools and Equipment Declaration Form'. This Board, in all fairness, concurs with such a statement. Reference is made to the Appellant's submitted bid, whereby it is evidenced that there is a **signed** 'Tools and Equipment Declaration Form'. There is also written the words "As attached".
- iv. Therefore, what remains to be analysed is whether what was 'attached' is in fact a direct resemblance of the 'Tools and Equipment Declaration Form' or not. This will impinge on technical compliance or otherwise.
- v. After thorough deliberation, it is in fact noted that all the columns / data requested in the 'Tools and Equipment Declaration Form' have in fact been replicated and provided by the appellant.
- vi. The only 'difference' is that there was no cross referencing between the 'photos / supporting documents' provided to which item they specifically related to.
- vii. Once it has been duly ascertained that the 'supporting documents' was not a mandatory criteria, this Board opines that such a 'discrepancy' / 'difference' could have been easily clarified by means of a clarification request. It is duly mentioned that clarifications are allowable under Note 3.
- viii. Therefore, this Board upholds appellant's third grievance.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 6th March 2023;
- c) To cancel the Letters of Rejection dated 6th March 2023 sent to Gatt Tarmac Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Gatt Tarmac Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings.
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member