

29th July 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta



Health JV [TID 149429]

vs

[1] Department of contracts; and

[2] Central Procurement & Supplies Unit;

CT 2007/2021

Tender Name: Tender for the provision of a service for the non-emergency transport for the Ministry for Health including the use of low emission vehicles

LETTER OF REPLY BY SOUTH LEASE LIMITED

Whereas, the Department of Contracts (*hereinafter* **DOC**) issued a call for tenders “for the provision of a service for the non-emergency transport for the Ministry for Health including the use of low emission vehicles

Whereas, following subsequent appeals, both before the Public Contracts Review Board (*hereinafter* **PCRB**) and also before the Courts of Appeal (*hereinafter* **CoA**), the contracting authority was ordered to re-evaluate the offers;

Whereas through a decision dated 11th July 2023, the DOC informed that it is cancelling the tender;

Whereas, Messrs. South Lease Limited (*hereinafter* **South Lease**) and Messrs. Health JV (*hereinafter* **HJV**), on the 21st July 2023, filed separate appeals against the decision of the DOC, albeit for different reasons;

This is a reply by South Lease Limited to the appeal filed by HJV;

Hereunder are the replies to the grounds of objection within the appeal filed by HJV:

1. Preliminary: Court of appeal decision is res judicata

1.1 The Court of appeal judgment in the names of *South Lease Limited vs Dipartiment tal-Kuntratti et.*, dated 22nd June 2022, is *res judicata*, and thereby the contents therein are to be scrupulously observed, without any deviation whatsoever;

1.2 The matter relating to emissions has been discussed and determined by the Honourable Court of Appeal, in particular when it held that,

Kwistjoni oħra marbuta ma' dan ir-rekwizit, hija li skont is-sejha, listatement "must cover all members/companies forming the consortium/joint venture". Issa f'dan il-kaz, il-konsorzju kien magħmul minn tliet kumpaniji u persuna izda d-dokument kien jirreferi għat-tliet kumpaniji biss u mhux ukoll għall-individwu. Mix-xhieda mogħtija quddiem il-Bord, fil-fatt l-ittra relattiva mill-bank sottomessa mill-konsorzju appellat Health JV kienet tindika li t-tliet soċjetajiet indikati kellhom credit facilities izda ma kinitx tindika li l-individwu kellu credit facilities mal-bank

1.3 Without prejudice to all other grievances raised, thereby the evaluation committee/the contracting authority cannot launder the same reasons for rejection and in the process disregard the statements made and done by the Honourable Court of Appeal;

2. Grievance no.1 [Reinstatement of Health JV's Bid]

2.1 HJV seems to suggest that, HJV's bid should be reinstated within the procedure, since although *ex admisis* it failed to provide confirmation of a minimum credit facility in the amount of €700,000 "covering all members/companies forming the consortium joint/venture", Leon Grech was relying on the capacities of the other members of the consortium for the purposes of this selection criteria [Economic and financial standing], and thus it claims that, 'the disqualification of Health JV ought to be quashed and its bid reinstated';

2.2 **South Lease submits that such a claim by HJV is not only legally incorrect but also is conflicting with the tender specifications;**

2.3 Whilst indeed article 235 of the Public Procurement Regulations (*hereinafter PPR*) as transposed from article 63 of Directive 2014/24/EU delves into the concept of reliance on the capacities of third parties (*hereinafter reliance*), as

tool to widen competition, such concept is not absolute and should not be interpreted as applicable in each and every situation;

2.4 Reliance is subjected to the following:

2.4.1 **FIRSTLY** It must be declared

Although not clearly stated within the notice of objection, HJV seems to suggest that Leon Grech was relying on the capacities of the other members of the consortium, to comply with the selection criteria [Economic and financial standing], dealing with access to minimum credit facilities;

Insofar as reliance on the capacities of third parties, this must be declared through the ESPD document submitted by the joint venture/consortium, explicitly indicating that it is relying on someone else's capacities and for which particular selection criteria, as per extract from ESPD document hereunder:

C: INFORMATION ABOUT RELIANCE ON THE CAPACITIES OF OTHER ENTITIES

Question Reference	Reliance	Answer
2C.1	Does the economic operator rely on the capacities of other entities in order to meet the selection criteria set out under Part IV and the criteria and rules (if any) set out under Part V below?	Please select an entry

It cannot be presumed, nor should it be inferred – as it seems to be the situation under review, whereby one of the members of the JV is claiming [at this stage] that it was relying on the capacities of the members, a statement which was never made upon submission of the bid;

2.4.2 **SECONDLY** It must be proven

In accordance with provision 235[1] of the PPR, reliance must be proven, and it cannot be assumed. In actual fact, the law stipulates that,

‘Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example,

by producing a commitment by those entities to that effect.’

In this particular case, other than a document issued by Bank of Valletta, which provides no commitment whatsoever vis-à-vis Leon Grech, no proof of such reliance has been provided. It is thus incomprehensible how HJV is now claiming that it was relying on the capacities of others, without adhering to the legal obligations *ad validitatem*.

Reference is hereby being made to the European Court of Justice Judgment in the names of **Partner Apelski Dariusz v Zarząd Oczyszczania Miasta [C-324/14]**¹, wherein it was held that:

‘ ... it must be stated, first, that, although it is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links, the tenderer is nonetheless **required to produce evidence that *it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract*** (see to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

2.4.3 THIRDLY It’s not always applicable but only ‘where appropriate’

Whilst HJV seems to imply that reliance is applicable anywhere and irrespective of the circumstances, article 235 [1] of the PPR dictates otherwise, since it uses the words ‘where appropriate’;

The latter has also been the consistent position of the COA, wherein *inter alia* in the decision in the names of **Owen Borg kontra Kunsill Lokali ta’ San Gwann**², it held that,

‘Id-dokumenti għas-sejha esigew kopertura tal-assikurazzjoni għall-impjegati tal-offerenti. F’dan il-każ, il-polza ta’ assikurazzjoni li giet ppreżentata ma kinitx tkopri lil Galea Cleaning Solutions JV, li

¹ [37-38] 7 April 2016

² Qorti tal-Appell [Superjuri] – Rikors Numru 265/20 – 6 ta’ Ottubru, 2020

hija konsorzju ta' diversi persuni, iżda lil wiehed mill-membri ta' tali konsorzju.

Din is-soċjeta` argumentat illi kienet dik il-persuna li kienet se timpjega l-ħaddiema u ma kienx meħtieġ li kulħadd jigi kopert b'polza ta' assikurazzjoni. Id-dokumenti tas-sejha, pero`, riedu li l-ħaddiema kollha tal-offerent kellhom ikunu koperti b'assikurazzjoni u mhux uħud minnhom.

Hu veru li skont ir-regoli ta' Public Procurement, offerent, fit-twettiq tal-kuntratt, ikun jista' jinqeda minn persuni esteri li jkollhom kapaċitajiet partikolari, iżda fl-istadju tal-offerta, dak li hu mitlub kellu jigi offrut mill-offerent u mhux minn parti waħda. Jekk offerta saret minn diversi persuni b'joint venture, kienet din li kellha toffri polza tal-assikurazzjoni għall-ħaddiema kollha tagħha.'

Similarly, in the recent COA judgement in the names of **FM Core Limited et vs CareMalta Limited et.**³, it was confirmed that :

Kemm għax il-figuri finanzjarji ma jagħtux serħan il-moħħ dwar il-vitalità ta' membru tal-konsorzju Gold Care għaż-żmien kollu tal-kuntratt, kemm għax l-impenn mogħti minn membru li fuqu jistreh il-membri l-ieħor ma huwiex sħiħ u ma jkoprix il-piżijiet finanzjarji kollha, u kemm għax f'kull każ is-saħħa finanzjarja kumulativa tal-membri kollha tal-konsorzju ma tissodisfax il-kriterji finanzjarji, kellha raġun l-awtorità kontraenti li twarrab l-offerta ta' Gold Care.

In the case under review, the mandatory selection criteria requested that, 'In the case of a consortium/joint venture the aforementioned statement **must cover all members/companies** forming the consortium/joint venture' – Thus rendering in this particular case article 235[1] of the PPR, inapplicable for the purposes of this selection criteria;

³ Appell numru 374/2022/1, 25 ta' Jannar 2023

2.4.4 **FOURTHLY** It cannot be done retrospective

Whilst it a prevalent concept that in certain instances clarifications and rectifications may be made, these should not alter the original bid, nor should they be disproportionate vis-à-vis the interests of third parties. In the ECJ judgement C-387/14, **Esaprojekt sp. z o.o. v Województwo Łódzkie**, third party **Konsultant Komputer sp. z o.o.**⁴, it has been clarified that:

‘Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the contract concerned after the expiry of the time limit laid down for submitting tenders for a public contract’.

It has been made clear that changing ones bid, in an effort to salvage the bid by declaring reliance is not in conformity with EU regulations and thus should not be allowed retrospectively;

2.5 The bid by HJV fails the reliance test on each and every count, and thus any last minute claim to salvage its bid that Leon Grech was relying on the capacities of the other members of the consortium/joint venture is unfounded, incorrect and unsubstantiated;

2.6 In view of the aforesaid, this Honourable Board is being asked to reject this grievance made by HJV;

⁴ 4th May 2017

3. Grievance no.2 [Opportunity to rectify]

- 3.1 HJV is claiming that it should be afforded further possibilities to rectify its bid, and in particular submit a clarification/rectification over a previously rectified/clarified matter – this is not only not permissible, but it is disproportionate vis-à-vis all other tenderers who submitted their tender in accordance with the tender specifications;
- 3.2 The COA in a recent judgment in the names of, **NQUAYMT vs Aġenzija għal Infrastruttura Malta** datata 22 ta' Ġunju, 2022⁵ addressed precisely this matter and held that:

'Jekk oblatur ikun ingħata opportunita` ta' rettifika imma xorta waħda jibqa' administratively non-compliant, il-bord ta' evalwazzjoni ma' jistax isalva dik l-offerta billi joqgħod jiġri wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu. F'dan il-każ, il-konsorzju appellat ingħata kull ċans jissottometti ruħu għat-talbiet tal-awtorita` kontraenti, u imputet sibi jekk baqa' jitraskura dak li kellu jagħmel. L-eċċess fil-manjamina` u fit-tfittix sabiex jiġu salvati offerti akkost ta' kollox mhux espressjoni ta' proporzjonalita` imma huwa sproporzjon kontra min kien "compliant" mill-bidu nett. Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorożimament dak li trid is-sejha għall-offerti u m'għandux jippretendi li jiġi mitlub "jirrangġa" l-offerta biex ikun kompatibbli ma' dak mitlub.

Ir-riferenza li għamel il-Bord għall-każ ta' "Tideland Signal" huwa barra minn loku, għax hawn mhux każ ta' "tender is ambiguously drafted", iżda l-każ fejn il-konsorzju appellat kien negligenti u naqas milli jinkludi informazzjoni importanti, avolja ngħata żewġ ċansijiet biex jagħmel dan. Il-bord ta' evalwazzjoni ppermetta mhux biss rettifika imma anke kjarifika mingħand oblatur wieħed, u ma kellux obbligu jibqa' jitlob spjegazzjoni mingħandu. Il-bord ta' evalwazzjoni huwa wkoll marbut bit-termini tad-dokumenti tas-sejha, u kien imur kontra l-prinċipju ta' trattament raġonevoli u trasparenza li kieku ta preferenza ta' trattamenti lill-oblatur wieħed.

Il-fatt li kellha tintgħażel l-orħos offerta, ma jfissirx li din kellha tiġi aċċettata akkost ta' kollox. Jekk offerta mhix konformi mat-tender dossier jew ma tissodisfax ir-rekwiżiti tal-istess, għandha titqies non compliant u tibqa' monka, u mhux imħollija għax tista' tiġi rrangata. Dan ċertament mhux l-ispirtu tal-proporzjonalita`.

⁵ Qorti tal-Appell - Rikors numru 35/22/1

B'hekk, f'dan il-każ, jirriżulta li l-konsorzju NQUAYMT naqas fl-ewwel lok, li jissottometti offerta administratively complaint, fit-tieni lok, li jirrispondi b'mod sodisfaċenti għal-rectification request, u fit-tielet lok, li jirrispondi għall-clarification request, kif trid il-liġi. Jidher ċar għalhekk, li dan il-konsorzju naqas mid-doveri tiegħu li jkun konformi mar-rekwiżiti tas-sejha għall-offerti kemm dawk amministrattivi, tekniċi u finanzjarji In view of the aforesaid, this Honourable Board is being asked to reject this grievance made by HJV;

3.3 Thus what HJV is seeking through this grievance is special treatment, as opposed to all other economic operators;

4. Grievance no.3 [Quashing of tender cancellation]

4.1 Whilst South Lease agrees, and has specifically requested through its appeal the revocation of the cancellation of the tender procedure, it disagrees with the reasoning made by HJV;

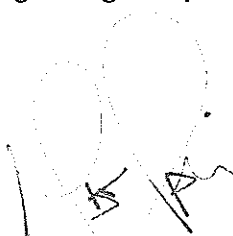
4.2 South Lease contends that the offer by HJV is non-compliant, however it submits that its bid is fully compliant, and thereby the cancellation is unwarranted, unjustified and not permissible;

4.3 In view of the aforesaid, and in accordance with the grievances brought forward by South Lease in its appeal, it requests this Honourable Board to revoke the cancellation of the tender procedure CT 2007/2021;

NOWTHEREFORE, whilst reserving the right to put forward further submissions, South Lease hereby requests this Honourable Board:

- i. to reject in its entirety the requests made by HJV, whilst accepting the request to revoke the cancellation of the tender insofar as it is compatible with the appeal of South Lease filed on the 21st July 2023;
- ii. To do anything else which is conducive and necessary for the proper execution of the above request;

South Lease is hereby reserving the right to present further evidence, both orally or in writing, during the hearing.



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Requested Testimony by: (i) Representatives of the Evaluation committees [first and second];

(ii) Representative of the Contracting Authority;

(iii) Representative of the Appellant company, and other bidders within this procurement procedure;

(iv) Representatives of Government Departments, including Transport Malta, the General Contracts Committee; the Director of Contracts;