

In the Public Contracts Review Board

31st July 2023



Re: Objection 070 – CT 2007/2021 – Tender for the provision of a service for the non-emergency transport for the ministry for health including the use of low emission vehicles

Reply of the Central Procurement and Supplies Unit (CPSU) on behalf of the Department of Health to the reasoned letter of objection lodged by **South Lease Limited** (the Objector).

On the 20th of January 2021, 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 was published. A number of bids were submitted, an evaluation process was carried out and the offer numbered TID 149429 of Health JV was recommended for award.

By means of a letter dated 5th November 2021, the Department of Contracts informed the Objector that their offer was adjudicated as being non-compliant with the technical specifications of the Tender and therefore their offer was being rejected.

On the 15th of November 2021, the Objector filed an objection before this Honourable Board in terms of regulation 270 of the Public Procurement Regulations (PPR).

By means of a decision dated 31st January 2022 this Honourable Board did not uphold the objection filed by the Objector and confirmed the evaluation as conducted.

The Objector filed an appeal to the decision of this Honourable Board before the court of appeal on the 21st February 2022 and by means of a judgment dated 22nd June 2022 decided as below:

11. Kif wiehed jista' jara mill-premess, l-ghazla li ghamlet l-awtorita' kontraenti u sussegwentement ikkonfermata mill-Bord, hija monka u trid tigi mhassra. Iz-zewg decizjonijiet iridu jigu mhassra u peress li din il-Qorti mhix sejra tissupplixxi d-diskrezzjoni taghha dwar l-ghazla flok il-kumitat evalwattiv, sejra tibghat il-kaz lura lill-kumitat evalwattiv biex dan, b'nies godda fuq il-kumitat, jerga' jevalwa fuq l-offerti sottomessi.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' South Lease Ltd, billi tilqa' l-istess, thassar u tirrevoka s-sentenza li ta l-Bord ta' Revizjoni dwar il-Kuntratti Pubblici tal-31 ta' Jannar, 2022, kif ukoll id-decizjoni relattiva li tkun hadet l-awtorita' kuntrattwali (is-CPSU), u tibghat il-kaz ghal quddiem l-istess awtorita' sabiex, tramite persuni li ma kienu bl-ebda mod involuti fil-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak li jinghad f'din is-sentenza. Id-depozitu li thallas ghas-smigh talappell quddiem il-Bord ghandu jintradd lura lis-socjeta' rikorrenti. L-ispejjez marbuta ma' dan l-appell ghandhom jithallsu mit-tliet appellati in solidum.

A re-evaluation process was initiated and by means of a letter dated 11th July 2023 (which erroneously indicated WaV JV as the bidder) the Department of Contracts informed the Objector that its offer was being rejected on basis of technical non-compliance for reasons relating to the Tail Lift Fleet emission levels.

The Objector was also informed that the tender was being cancelled in line with article 18.3(a) of the General Rules Governing Tenders since there was no qualitatively and financially worthwhile tender.

The Objector felt aggrieved with this decision and filed the present objection based on 5 grievances.

CPSU respectfully disagreed with the objection and is filing the below submissions in reply, in the same order of the Objector's grievances.

Submissions

On the First Grievance: Preliminary

1. CPSU submits that detailed reasons for the rejection of the Objector's offer were given in the letter of rejection dated 11th July 2023, just like each and every other bidder which received the reasons of rejection pertaining to the individual bidders;
2. The Objector, in addition with the reasons for rejection of its offer was also informed that the tender process was being cancelled since there was no qualitatively or financially worthwhile tender;
3. Whilst it is understandable that the Objector files an objection letter contesting the reasons for its exclusion, there is no juridical interest in the reasons of rejection of the other bidders, and one would not imagine that the Objector intended to file an objection contesting the exclusion of its competitors.
4. Such objection (contesting the exclusion of other tenderers) is not even possible since regulation 270 of the PPR states that an objection may be filed by any person "having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken", and the Objector does not have any legitimate interest in the reintegration of other competitor tenderers.
5. It is therefore being submitted that this grievance is frivolous, and is only being made in order to claim back the deposit in the eventuality of a decision against the Objector.
6. For the above reasons this first grievance ought to be rejected

On the Second Grievance: Court of Appeal Decision is Res Judicata

7. The Court of Appeal in paragraph 11 of its Judgment of the 22nd of June 2022 states that: *din il-Qorti mhix sejra tissuplixxi d-diskrezzjoni taghha dwar l-ghazla flok il-kumitat evalwattiv, sejra tibghat il-kaz lura lill-kumitat evalwattiv biex dan, b'nies godda fuq il-kumitat, jerga' jevalwa fuq l-offerti sottomessi.*

8. The court goes on to say in its final dispositions "*u tibghat il-kaz ghal quddiem l-istess awtorita' sabiex, tramite persuni li ma kienu bl-ebda mod involuti fil-kaz, terga' titratta u tiddeciedi fuq l-offerti fid-dawl ta' dak li jinghad f'din is-sentenza.*"
9. The above effectively means that the Honourable Court of Appeal still decided that the final decision should be of an impartial evaluation committee who should evaluate the submitted offers. This effectively means that the newly appointed evaluation committee did have a certain degree of discretion as it would be a superfluous to tell a newly appointed evaluation committee "evaluate independently and impartially but decide in this way"
10. Moreover in a similar situation, Case 1843 – CT 2095/2022, where the plea of Res Judicata was being raised, the contracting authority argued that a new evaluation merited a new review and rejected the plea of Res Judicata.
11. For the above reasoned this second grievance ought to be rejected.

On the Third Grievance: Reason for Rejection is Superfluous

12. In this grievance the Objector is claiming that its own declaration in the Technical Offer Form (TOF) is superfluous and is citing the Judgment of **JV HealthCare Limited vs Dipartiment tal-Kuntratti et**, decided by the Court of Appeal on the 12th June 2023;
13. CPSU submits that the above cited judgment relates to the registration of medicinal products and thus the context and circumstances are totally different than the tender merit of this objection. The quoted paragraph from the JV Healthcare judgment is therefore not applicable for the present case;
14. In paragraph 3.3 of the Objection letters, the Objector states that the verification of compliance is not made through the TOF but with other submissions including documentation where necessary. The Objector however fails to state where this is stipulated in the tender document. CPSU respectfully submit that the tender document does not state what the Objector is purporting but it actually states the opposite, in Page 7, Instructions to Tenderers Clause 5 where it states:

Tenderer's Technical Offer Form (Technical Questionnaire) (Note 3)

Kindly note that all technical criteria listed in the Technical Offer are of a mandatory nature and must be filled in. Failure to submit the filled in form will disqualify the submitted offer.

Bidders are to include in their offer all the information requested in the technical offer form and other forms included in this call including but not limited to the literature list.

15. The General Rules Governing tenders are clear in clause 16.3 whereby it is states that:

No rectification shall be allowed in respect of the documentation as accompanied by Note 3 in Clause 5 of the Instructions to Tenderers. Only clarifications on the submitted information in respect of the latter may be requested. No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications.

16. It is crystal clear in the tender document that the emission level of the tail lift van fleet must not exceed the 175g CO₂/KM, in fact the same technical offer form requested the below:

State the emission standards of the Tail lift Vans. These emissions must meet the requirements established in this call and the fleet average emission must not exceed 175g CO₂/km.

17. Additional documentation should have been presented by the bidder to substantiate and not replace the technical offer form. It was evident for the evaluation committee that 196 (and even 176 although the technical offer form is non rectifiable) was not in conformity with what was required in the tender, that is, 175 and hence came to its conclusions.
18. Moreover, CPSU submits that the document submitted by Ing. Aloisio could not change what is stated in the technical offer form.
19. For the above reasons this third grievance ought to be rejected

On the Fourth Grievance: Obvious Material Error

20. The objector submits that the 196g CO₂/KM, written down in the first submission was an obvious material error which should not have led to the exclusion of the Objector's offer.
21. CPSU submits that if this was a material error the first time, it was also an error the second time when the Objector listed 176g CO₂/KM, as it was still more than 175g CO₂/KM, despite the fact that the Technical offer form was non rectifiable and the first submitted number should hold.
22. Moreover unlike what the Objector is stating, it is not the case that there were no changes to the original bid, as the 165g CO₂/KM, featured only following the clarification request, when the Objector was asked to submit clearer documents than those initially submitted, and could not change the original technical offer form.
23. For these reasons this fourth grievance ought to be rejected.

On the Fifth Grievance: Re-evaluation based on Evaluation

24. CPSU respectfully submit that it did comply with the decision of the Court of Appeal and referred the bids to a newly composed evaluation committee to evaluate the bids with the normal evaluation procedure, comparing the submission to the tender document but also taking into consideration the conclusions of the Court of Appeal.

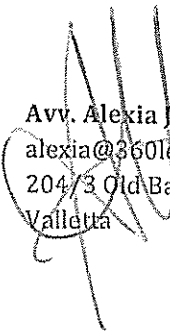
25. The Objector is contradicting itself in this third grievance as it is implying that the second evaluation committee should not have taken consideration of the documents submitted by the Objector following the clarification request whilst on the same letter of Objection in paragraphs 3.5 and 4.4 is referring to the information submitted following the clarification request.
26. The evaluation committee evaluated the documents submitted and conducted the evaluation process in the utmost independent and impartial possible, in line with the fundamental principles of public procurement and came to its independent conclusions, on strong grounds emanating from the specifications as published as will be better explained in the evaluation committee's testimony during the hearing.
27. The ultimate proof that the evaluation committee was not influenced with the decision of the first evaluation committee is that the second evaluation committee did not make the same recommendation as the first evaluation committee and recommended that the tender is cancelled and not awarded to Health JV which was recommended for award in the first evaluation process.
28. For these reasons this fifth grievance ought to be rejected as well.

General Submissions


29. CPSU submits that this Honourable Board should on the basis of the evidence and submissions of CPSU confirm the evaluation process as conducted and confirm the cancellation of the tender for the reasons as explained by the evaluation committee.
30. However, without prejudice to the above submitted, should this Honourable Board, in an unlikely situation, have any doubt on the evaluation, this Honourable Board should still order the cancellation of the tender in terms of regulation 90(3) of the PPR as was done in Case 1843 relating to CT 2095/2022.
31. This is being submitted in order to avoid a vicious cycle of objections, appeals and re-evaluation processes which hinder the ultimate aim of the procurement cycle, that is to have a contract in place for the execution of the required services.

CPSU is hereby reserving its right to present further evidence both written and orally to further its submissions.

In view of the above, the objection lodged by the objectors ought to be rejected in full, whilst the decision of the Evaluation Board confirmed and the relevant deposit forfeited, otherwise cancel the tender in terms of regulation 90(3) of the PPR.



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