BEFORE THE PUBLIC CONTRACTS REVIEW BOARD

South Lease Limited [TID 149385]

-vs-

Department of Contracts; and

Central Procurement and Supplies Unit

Re: 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

REASONED LETTER OF REPLY of Health JV (TID 149429)

Respectfully submits:

In its Reasoned Letter of Objection, South Lease Limited (the 'Appellant') make significant reliance on the judgment delivered by the Court of Appeal in the names *South Lease Limited v. Central Procurement and Supplies Unit et* (Appeal Number 72/22) decided on the 22nd June 2022.

It is respectfully submitted that the Appellant's arguments are incorrect and that the judgment of the Court of Appeal is of no help to the Appellant.

1. Firstly, the Appellant insists that the judgment constitutes a *res iudicata* and that this Board is bound by it. This argument is flawed since it is very clear, from the wording employed in the operative part of the judgment, that the Court of Appeal did not intend to substitute its discretion to that of the evaluation committee.

> *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 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****.*
>
> *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 tal-appell quddiem il-Bord ghandu jintradd lura lis-socjeta` rikorrenti.

The judgment is limited to the cancellation of the award by the previous Evaluation Committee and to the revocation of the PCRB's decision dated 31st January 2022. The Court of Appeal expressly stated that it was not going to substitute its discretion tothat of the Evaluation Committee and that it was therefore ordering a re-evaluation in the light of its findings. The judgment is limited to this and cannot be extended further.

2. Secondly, the Court of Appeal's judgment merely states that paragraph 3.4.2.10 of the Technical Specifications requires that "the fleet average for vans should not exceed 175g CO^2/km". The Court concluded the Tender did not require that each vehicle in the fleet needed to achieve an emission rate that is lower than 175g CO^2/km. the Court concluded that the fleet average had to remain within that range.

Simply put, the problem with the Appellant's argument is that the **average** it has submitted in its Technical Offer exceeds the 175g CO^2/km upper limit. The Tender very clearly states that the Tenderer's Technical Offer is a Note 3 item, hence "No rectification shall be allowed. Only clarifications on the submitted information may be requested."

The Appellant submitted documentation stating that the tail lift vans it was offering had an average emission of 196g CO^2/km, well in excess of the Tender requirement.

The Appellant is now stating that this submission is the result of a material error, i.e. a typographical error on its part. Even if that were to be the case, the Appellant, **acting in breach of Note 3**, subsequently submitted documentation which indicated an **average** fleet emission rate of 176g CO^2/km, which is still in excess of the Tender requirement.

To compound matters even further, the Appellant submitted a self-declaration signed by Mr Joseph Scicluna, one of its representatives, stating an average emission rate of 175g CO^2/km, which self-declaration was not however certified by a competent authority and is therefore irregular.

The Tender states that:

If vehicles being provided are not certified as Euro VI, or Euro V as identified above but technical after-treatment has achieved the same standard, **a certificate approved by an authorised entity must be submitted to the Contracting Authority.**[1]

The self-declaration submitted by the Appellant was not supported by the required certification by an authorised entity and is therefore irregular.

The Appellant subsequently submitted a certificate by Engineer Johann Aloisio of ECL Consulting Engineering, however that document was not part of the Appellant's offer but was submitted *ex post,* **yet again in breach of Note 3**.

It also results that the Appellant did not submit evidence that ECL Consulting Engineering is an authorised entity.

The judgment of the Court of Appeal does not give a free pass to the Appellant to act in breach of the Tender conditions, and more specifically it does not entitle the Appellant to act in breach of Note 3. The judgment merely revoked the previous evaluation, it revoked the decision of the PCRB and ordered a fresh evaluation, *sic et sempliciter*. The Appellant is still bound by Note 3 even in this second evaluation and cannot rely on documentation submitted in violation of Note 3.

In terms of Note 3, the Appellant was only allowed to **clarify** its bid, but it was **expressly precluded** from rectifying it *inter alia* by producing new or corrected documentation.

The argument that the statement in terms of Paragraph 3.4.2.10 of the Tender is superfluous is flawed since the Appellant, in an attempt to circumvent this requirement, is relying on: (i) a self-declaration which was not supported by the required certification by an authorised entity, and (ii) a document issued by Johan Aloisio of ECL Consulting Services, which was however submitted *ex post* in breach of Note 3, and without any evidence that ECL Consulting Services is an authorised entity.

The principle is crystal clear and was succinctly reaffirmed by the Court of Appeal in its recent decision of the 20th March 2023, in *Fremod Limited v. L-Agenzija ghas-Servizzi tal-Qorti u Dipartiment tal-Kuntratti*:[2]

"8. L-awtorità kontraenti ma setgħetx lanqas titlob rettifika peress li din l-informazzjoni kienet parti mill-offerta teknika (Note 3), u s-sejħa kienet speċifika fejn tgħid li ebda rettifika ma kienet permessibbli għall-informazzjoni mitluba f'dik in-nota. F'kull każ, din il-Qorti osservat kemm-

[1] Tender Document p. 34.

[2] App. 542/22, dec. 20/3/2023.

il darba li meta d-dokumenti tas-sejħa jitolbu ċerta informazzjoni, din trid tingħata kif mitlub, aktar u aktar meta dik l-informazzjoni tkun indikatabħala mandatorja."

The Appellant's Objection cannot be upheld because it is entirely based on an argument which flatly runs counter to this *dictum*. The Appellant expects that it can freely disregard the Tender conditions, ignore Note 3 and pretty much conduct itself as it pleases. To uphold such line of argument would constitute a clear breach of the Tender conditions, a clear breach of the Public Procurement Regulations and of the principle of transparency.

In conclusion, Health JV respectfully submits that the Objection filed by South Lease Limited ought to be dismissed in its entirety.

Avv. Massimo Vella