

17th July 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta



South Lease Limited [TID 149385]

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

REASONED LETTER OF OBJECTION

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, Messrs. South Lease Limited [C-65614] Limited (*hereinafter “Appellants”*) submitted an offer for this procurement procedure;

Whereas, by means of a letter dated 5th November 2021, the appellants were informed the offer is being rejected;

Whereas, the appellants felt aggrieved by such a decision, and thereby are submitting an objection with the Public Contracts Review Board (*hereinafter “PCRB”*), which was determined on the 31st January 2023;

Whereas, the appellants appealed from the decision of PCRB before the Courts of Appeal, whereby on the 22nd June 2022 it overturned the decisions of the firstly constituted evaluation committee (*hereinafter “First EC”*) and of the PCRB and ordered the re-evaluation of the bids submitted;

Whereas, following an evaluation by the second evaluation committee (hereinafter "Second EC") through a letter dated 11th July 2023, addressed to WaV JV [and not to the Appellants] it was established that the tender was cancelled;

Whereas, by means of a letter dated 18th July 2023, DOC was asked to provide the reasons for cancellation, as well as the reasons for the rejection of all bids [if applicable], however up until the date of submission of this appeal, DOC did not provide such information;

Whereas, Appellants feels aggrieved by such a decision, and thereby are submitting their objection within the time-frame and accompanied with the relative payment (copy of payment enclosed as DOC1), based on the following grievances:

1. *Preliminary*

- 1.1 Reference is hereby being made to a request made to the DoC, wherein information about the cancellation and the rejection of the all bids has been requested;
- 1.2 In view of the fact that partial information has been supplied by DoC, Appellant is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the Public Contracts Review Board (hereinafter "PCRB") to safeguard its interests and ensure that the legal principle of *audi alteram partem* is upheld;
- 1.3 Thereby, the PCRB is being requested to render an interlocutory decree ordering DOC to furnish all the relative and relevant information;
- 1.4 Finally and in addition to the above stated, whilst Appellant is confident on its appeal in merit, it is hereby respectfully requesting the PCRB to refund the deposit in its entirety, and this in view of the fact that DOC has failed to provide the necessary and relevant information [as requested], thus the appellant did not have all the necessary information to take an informed decision prior to submitting its objection. In substantiation of this position, reference is hereby being made to Court of Appeal decision *Firetech Cross TLS Joint Venture vs Dipartiment tal-Kuntratti* dated 30th October 2015, which dealt with a similar situation, and which confirmed that unless the necessary information is available, the deposit paid should be refunded in its entirety;

2. Court of appeal decision is res judicata

- 2.1 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;
- 2.2 The matter relating to emissions has been discussed and determined by the Honourable Court of Appeal, in particular when it held that,

Materja oħra li holqot problema hu r-rekwizit li, fir-rigward talemissjonijiet, fis-sejha kien hemm klawsola li tghid hekk: "the fleet average for vans should not exceed 175 Co2 /km". Is-socjeta` appellanti offriet vannijiet li whud kellhom emissjonijiet taht dak stabbilit u oħrajn aktar minn hekk. Il-Bord donnu stenna li kull vann inkluz fl-offerta kellu jkollu emissjonijiet taht il-175 Co 2 / km, izda s-socjeta` appellanti – bir-ragun tara din il-Qorti – targumenta li l-klawsola ma tesigix li kull vettura proposta minn oblatur kellu jkollha 175 Co 2 /km rating, izda li l-average tal-vetturi kollha f'daqqa proposti minn oblatur ikunu inqas minn dak stabbilit. Jista' jkun li l-hsieb tal-awtorita` kontraenti kien li kull vettura kellu jkollha dak ir-rating, pero` jekk hu hekk dan il-hsieb ma giex espress fid-dokument tas-sejha, u oblatur ma ghandux jigi penalizzat fuq is-sahha ta' klawsola li mhix cara fit-tifsira tagħha.

- 2.3 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;

3. Reason for rejection is 'superfluous'

- 3.1 In its reasons for rejection¹, the DOC held *inter alia* that,

'In the technical offer form section 3.2.3 the bidder stated that the Average Emissions of the Tail-lift Vans are 196 g/km, while he stated that the Average Emissions of the Tail-Lift Vans are 176 g/km when resubmitting the technical offer form following a clarification request for the submission of Literature.'

- 3.2 The aforesaid has been declared by DOC in view of the reply submitted by the appellant within the technical offer form (hereinafter 'TOF'). Notwithstanding that

¹ It is hereby important to state that the letter of rejection/cancellation was addressed to WAV JV and not South Lease Limited, thus it is not clear if the reasons for rejection should have been addressed to WAV JV or South Lease Limited – A request for information on this matter is pending

the TOF is of a NOTE3 status, in a recent Court of Appeal judgement in the names of JV HealthCare Limited versus Dipartiment tal-Kuntratti et (12th June 2023), Court confirmed that wheresoever a statement is superfluous and unnecessary, it should not be considered by the contracting authority, and in particular it should not be used to reject an offer:

“Effettivament dan ifisser illi d-dikjarazzoni li jrid id-dokument tas-sejha illi “I confirm that the company I am representing is licensed by the competent authority in Europe to trade this medicinal product” hija superfluwa fiċ ċirkostanzi tal każ tal lum. Ifisser ukoll illi l-premessa illi “The response provided by the preferred bidder in Spec 3.8 of its technical offer form is erroneous”, illi fuqha hija msejsa d-deċiżjoni tal-Bord ta’ Reviżjoni, hija hażina; konsegwentement, id-deċiżjoni wkoll hija hażina.”

3.3 It has been made amply clear by the Tender document itself that, verification of compliance with the tender requirements had to be done through the submission of the appropriate, including where necessary though the submission of documentation in conformity with the criteria requirements, and not through the TOF, thus in the case under review the statement within the TOF was superfluous;

3.4 This has been specifically confirmed through “3.4.2.10 – TECHNICAL SPECIFICATIONS FOR TAIL-LIFT VANS:”, wherein it is held that:

“Verification: Bidder must list the technical specifications for Tail Lift vans demonstrating that he complies with the criteria established under this heading”

3.5 Whilst confirming that the appellant has submitted a list confirming that it complied with the criteria established [and this through a self-declaration], in accordance with the tender document verification, it provided the necessary additional confirmation through an independent certificate by Ing. Alosio confirming the veracity of the statement provided by the appellant;

4. Obvious material error

4.1 Without prejudice to the aforesaid, and whilst reiterating that any verification should have been done in accordance with the tender requirement [and no other], the 196 g/km included within the TOF was a clear and obvious material error, which should have not led to the exclusion of the appellant;

4.2 Whilst article 39 of the Public Procurement Regulations (hereinafter “PPR”) emphasis the principles of equal treatment and level playing-field, it has been confirmed on many occasions that the correction of obvious errors should not

lead to the rejection of the offer, in particular when these do not alter the contents of the bid;

4.3 In a European Court of Justice ruling, Case C-336/12, dated 4th July 2012, in the names of Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S, the principle that obvious material errors that do not alter the bid should be corrected and should not lead to disqualification. The ECJ held that

“32 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (SAG ELV Slovensko and Others, paragraph 40).

33 In SAG ELV Slovensko and Others, the Court laid down certain requirements to mark the bounds of the contracting authority’s right to make a written request to the tenderer or tenderers concerned for clarification of their bid.

34 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation (see, to that effect, SAG ELV Slovensko and Others, paragraphs 42 and 43).

35 Next, the request must relate to all sections of the tender which require clarification (see, to that effect, SAG ELV Slovensko and Others, paragraph 44).

36 In addition, that request may not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (see, to that effect, SAG ELV Slovensko and Others, paragraph 40).

37 Lastly, as a general rule, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (SAG ELV Slovensko and Others, paragraph 41).”

4.4 In the context under review, the self-declaration signed by the company director, as well as all the additional documentation submitted both in the first instance, as well as in the second instance, confirm that there has not been any changes to the original bid, and thereby the rejection of the appellant's bid is not only disproportionate, but also excessive in the circumstances;

5. Re-evaluation based on evaluation

5.1 In clear and unequivocal terms, the Court of Appeal held that,

“Ghaldaqstant, ghar-ragunijiet premessi, tidddisponi 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.”

5.2 Notwithstanding the aforesaid and without prejudice to the other grievances on the merit, the Second EC failed to adhere to the orders of the Court of Appeal, and based its re-evaluation on the workings and outcomes determined by the First EC;

5.3 This is *inter alia* confirmed through the letter of rejection, wherein the Second EC held that,

“The bidder did not submit proof that ECL Consulting Engineers is an authorized authority and further clarifications could not be requested as the:

a. Previous board had already asked for literature to be submitted;”

5.4 In accordance with the decision of the Court, the evaluation committee, as newly re-constituted, had to re-evaluate the bids afresh and not rely in any manner on what was previously determined by the First EC;

5.5 The evaluation by the Second EC has been influenced by the findings and the determinations of the First EC, thus and in subordination of the grievances presented above, the PCRB is hereby being called upon to order and instruct the DOC to re-evaluate all bids in accordance with the decision of the Court of Appeal, whilst discarding all workings, findings and determinations of previous evaluation committees;

5.6 Thus and without prejudice to all other grievances, *de minimis* the cancellation is unfounded and should be revoked;

NOWTHEREFORE, whilst reserving the right to put forward further submissions, the Appellant company hereby requests:

Preliminary

- i. to order the DOC/CPSU to provide the necessary information in relation to the cancellation of the procurement procedure; and
- ii. To do anything else which is conducive and necessary for the proper execution of the above requests; and
- iii. To refund the deposit paid in its entirety, in view of the failure to provide information;

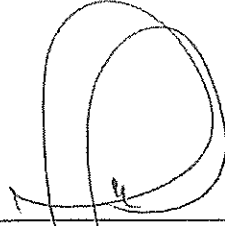
In merit

- iv. To revoke
 - a) the 'presumed' rejection issued in relation to the offer the appellant company; and
 - b) the cancellation of the procurement procedure
- v. To order the DOC / CPSU to re-instate the offer of the appellant company;
- vi. To do anything else which is conducive and necessary for the proper execution of the above requests;
- vii. If appropriate, to order that the offer of the appellant company is fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender;
- viii. To refund the deposit paid in its entirety in view of the wrong evaluation;

In subordination of the above:

- ix. To order the DOC/CPSU to re-evaluate the bids submitted strictly in accordance with the decision of the Court of Appeal decision dated 22nd June 2022;
- x. To do anything else which is conducive and necessary for the proper execution of the above requests;
- xi. To refund the deposit paid in its entirety in view of the failure to adhere to the Court decision;

Appellant company is hereby reserving the right to present further evidence, both orally or in written, during the hearing.



Dr Adrian Delia LL.D
adriandelia20@gmail.com

Dr Matthew Paris LL.D
matthew@dalliparis.com

Dr Ronald Aquilina LL.D
ronald@ronaldaquilinalegal.com

- Requested Testimony by:
- (i) Representative of the Evaluation committees [first and second]
 - (ii) Representative of the contracting authority
 - (iii) Representative of the Appellant company:
 - (iv) Representatives of Government departments, including Transport Malta, the General Contracts Committee; the Director of Contracts ;

**APS BANK
Plc**Registration
Number:
Address:C 2192
APS Centre, Tower Street B'Kara
BKR 4012Transaction
Reference:
Printed on:
Printed By:186627583
15:4220.07.2023
JOSEPH
SCICLUNA**Transfer to third party**Debit account: 44114110039
Status: Authorized

Currency: EUR

| | |
|----------------------------------|-----------------------------------|
| Amount: | 50000.00 |
| Credit account: | MT55MALT011000040001EURCMG5001H |
| Payment date: | 20.07.2023 |
| Payment reference: | CT2007/2021/SouthLease/AppealDepo |
| Fee: | 0.00 |
| Charges: | SHA |
| Sort code: | |
| Swift code: | MALMTMTXXX |
| Beneficiary bank name: | CENTRAL BANK OF MALTA |
| Beneficiary bank address line 1: | Castille Place |
| Beneficiary bank address line 2: | Valletta |
| Beneficiary bank country: | |
| Beneficiary name: | Cashier Malta Government |
| Beneficiary address line 1: | Castille Place, Valletta |
| Beneficiary address line 2: | |
| Beneficiary zip code: | |
| Beneficiary city: | Valletta |
| Beneficiary country: | |