

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1890 – CT2025/2020 – The Provision of Cleaning Services using Environmentally Cleaning Products for Entities within the Active Ageing and Community Care (AACC) – Lot 2**

**10<sup>th</sup> July 2023**

The Board,

Having noted the letter of objection filed by Dr Peter Paul Zammit acting for and on behalf of X Clean Ltd, (hereinafter referred to as the appellant) filed on the 23<sup>rd</sup> March 2023;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for the Active Ageing and Community Care (hereinafter referred to as the Contracting Authority) filed on the 3<sup>rd</sup> April 2023;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Director General of the Department of Contracts) as summoned by Dr Peter Paul Zammit acting for X Clean Ltd;

Having heard and evaluated the testimony of the witness Ms Mary Grace Balzan (Secretary of the Evaluation Committee) as summoned by Dr Peter Paul Zammit acting for X Clean Ltd;

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 4<sup>th</sup> July 2023 hereunder-reproduced;

### **Minutes**

#### **Case 1890 – CT 2025/2020 – Provision of Cleaning Services using Environmentally Friendly Cleaning Products for Entities within the Active Ageing & Community Care (AACC)**

##### **LOT 2**

The tender was issued on the 15<sup>th</sup> May 2020 and the closing date was the 16<sup>th</sup> June 2020. The estimated value of the tender, excluding VAT, was € 3,659,861.

On the 23<sup>rd</sup> March 2023 X Clean Ltd filed an appeal against the Active Agency and Community Care as the Contracting Authority objecting to the decision on the award of Lot 2 in the tender under BPQR criteria.

A deposit of € 534 was paid.

There were eight (8) bids on Lot 2.

On the 4<sup>th</sup> July 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 – X Clean Ltd**

Dr Peter Paul Zammit LP	Legal Representative
Ms Kristina Xuereb	Representative

**Contracting Authority – Active Ageing and Community Care**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Ms Nadia Cauchi	Chairperson Evaluation Committee
Ms Mary Grace Balzan	Secretary Evaluation Committee
Mr Mario Farrugia	Evaluator
Mr Carmel Camilleri	Evaluator
Ms Janet Pace	Evaluator

**Preferred Bidder – Dibaw Services Joint Venture**

Dr Christopher Vella	Legal Representative
Dr Alessandro Lia	Legal Representative
Mr Giulio La Scala	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 prior to inviting submissions proposed that since the appeals and submissions on Lot 1 and Lot 2 were identical the two cases should be heard simultaneously.

All parties agreed.

Dr Peter Paul Zammit Legal Representative for X Clean Ltd said that he presumes that there is no difficulty in accepting the time line premise as presented as being the basis of this appeal. If that is agreed there is no point in discussing that point. The second issue is the question of the award on the 23<sup>rd</sup> March 2023. The primary concern here is that the General Rules Governing Tenders allow 90 days limit for the award - two extensions are allowed in exceptional circumstances and once those 90 days are exceeded then the Contracting Authority is bound to cancel the tender. In this case more than 90 days have elapsed.

Dr Clement Mifsud Bonnici Legal Representative for Active Ageing and Community Care said that as is the normal custom Appellant should identify all grievances raised in the original submissions. All grounds of the appeal must be heard otherwise the Board will end up with an unbalanced and unintelligible hearing.

The Chairman emphasised that the initial submission must cover whichever grounds Appellant wishes to raise; this followed by proofs and final submissions.

Dr Zammit said that the original letter of appeal covered all Appellant's grievances. Throughout this re-evaluation Appellant was only informed of the award and was not requested to submit its input –

it is not even aware if it was actually carried out. Why was X Clean not asked to be involved in the re-evaluation, asked Dr Zammit. The Court's decision was that the Dibaw's offer was to be re-evaluated. The Contracting Authority did not refer to X Clean or seek their input and they were kept completely in the dark on what was happening.

Dr Mifsud Bonnici pointed out that the Authority confirms that the re-evaluation was carried out but cannot understand why the Appellant expected to be consulted during the process of the re-evaluation.

Dr Calvin Calleja Legal Representative for the Contracting Authority said that his submissions will follow the reasoned letter of reply. On the 31<sup>st</sup> August 2021 the Court of Appeal delivered its decision which was implemented. The Authority requested further information from Dibaw Services Joint Venture under Regulation 243 of the Public Procurement Regulations (PPR). It was satisfied with the replies received; the re-evaluation was carried out and it reached the same decision as previously. The Appellant has an interest in requesting cancellation of this tender and maintaining the *status quo* since it is the incumbent operator.

Dr Zammit requested the hearing of witnesses.

Mr Anthony Cachia (142658M) asked to testify by the Appellant stated on oath that he is the Director General of the Department of Contracts (DoC). He was requested to give a time line of what happened between the 31<sup>st</sup> August 2021 and the 23<sup>rd</sup> March 2023 when the decision was notified and the reasons therefor. Witness stated that such detailed information was not to hand and full correspondence was more likely to be with the Contracting Authority.

At this stage the Chairman pointed out that due to the Court proceedings on this same tender by Allserve things were at a stand still until that case was decided on the 10<sup>th</sup> October 2022. The Authority, therefore, could not do anything in the interim period, which given the statutory periods allowed for appeals etc meant nothing could be done till the 30<sup>th</sup> October.

Ms Mary Grace Balzan (474775M) called as a witness by the Appellant testified on oath that she was the Secretary of the Technical Evaluation Committee (TEC). Witness explained that following the Court of Appeal's decision, after allowing the necessary period for possible appeals the Committee requested the re-opening of the ePPS to proceed with the re-evaluation. Some fresh members needed to be appointed to the TEC. The TEC then requested from Dibaw clarification of their bid in line with the parameters laid down in the Court decision. The documents of the earlier evaluation were inspected. The workings of the offer were checked and it left no doubt in the minds of the TEC.

In reply to further questions witness stated that that the new Committee was formed in November 2022 with the decision of the award being published on 14<sup>th</sup> March 2023. Witness explained that the evaluation report usually does not show the date when the TEC was appointed. Witness was also asked to list the qualifications of the members of the TEC.

Dr Mifsud Bonnici and Dr Debono objected to this question as it was not part of the appeal and the qualification of the members could not be raised now. The Board upheld the objection.

As further information was requested from the witness on various dates the Chairman proposed a short recess to enable witness to seek the necessary information.

On resumption of the hearing Ms Balzan gave the following resume on dates:

On 10<sup>th</sup> October 2022 the Public Contracts Review Board published its written decision having previously given their verbal decision on the 22<sup>nd</sup> September 2022

On the 13<sup>th</sup> October 2022 an e-mail was sent to the Permanent Secretary to approve the formation of the new TEC

On the 17<sup>th</sup> January 2023 the evaluation report with its recommendation was sent to the DoC

On 14<sup>th</sup> March 2023 the DoC published the decision.

Witness then stated that clarification had been requested on the six points mentioned in Regulation 243 of the PPR in regard to abnormally low bids exactly as directed by the Appeal Court. Queries were directed on the administrative costs as this was the only difference between the bidders. The clarification note sent to Dibaw on the 18<sup>th</sup> October 2022 fully followed Regulation 243.

In reply to questions from Dr Debono witness said that the TEC was satisfied with the replies received which conformed with PPR regulations and social points and criteria. She confirmed that the evaluation report was sent to the DoC on 17<sup>th</sup> January. This was confirmed in an email but witness could not recall if receipt was acknowledged.

It was confirmed to Dr Mifsud Bonnici by the witness that X Clean were the incumbent operators in this case.

Dr Zammit, in reply to his question, was informed by witness that the clarification was issued on the 18<sup>th</sup> October 2022 and replied to on the 24<sup>th</sup> October.

This concluded the testimonies.

Dr Mifsud Bonnici said that no formal request for information on the aspect of the abnormally low tender was made before the appeal. The Contracting Authority is bound not to divulge this information as it is confidential and sensitive. He then asked for the following to be recorded verbatim:

“Dr Clement Mifsud Bonnici on behalf of the Contracting Authority would like to minute for the record that prior to the appeal being lodged, and to date, the Contracting Authority has received no request for the disclosure of information relating to the exercise conducted by the Evaluation Committee on recommended bidders allegedly abnormally low offer. As noted in the Contracting Authority’s response the information in question contains commercially sensitive information and is therefore confidential. Therefore the Contracting Authority is not free to disclose this information without this Board’s or the Court’s authority.”

Dr Zammit requested the following to be recorded verbatim:

“Contrary to what the other party is stating e-mails were sent directly to the Department of Contracts requesting information with subsequent replies by Ms Jacqueline Gili specifically requesting all the information from 31<sup>st</sup> August 2021 to the date of the award with subsequent reminders which however were never answered. As regards the sensitive commercial data this was never requested. What we requested is whether the evaluation compared the answers received by Dibaw with the original studies performed by the Contracting Authority and why no clarifications were requested from any other tenderers in an effort to ensure clarity of submissions and an even playing field for all tenderers.”

Dr Debono also requested a verbatim note to be recorded:

“Dr Debono refers to Regulation 242 which stated only particular information may be provided to tenderers. Information may be withheld as it may prejudice legitimate and commercial

interests of the particular tenderer. The Department of Contracts refers to the European Courts of Justice judgement in the case *Varec vs Belgium* (4.2.2008) wherein it was held that on the basis of the principle of adversariality that when a request for information is submitted all interested parties should be allowed to make submissions thereon. Consequently the Department of Contracts had not been in a position to provide information to the Appellant.”

Dr Zammit stated that there is divergence in dates without justification and not in accordance to the Regulations. The Board is being requested to establish properly the actual dates which according to the Appellant do not concur with the General Regulations. Any discrepancy, even of one day, makes the whole thing null. It is vital that the dates are adhered to. The members selected on the TEC may not be qualified to judge on cases like this and this is against the public interest. From the information received it does not appear as if Regulation 243 was satisfied. From the information received one understands that the award was made on the 14<sup>th</sup> March; on 16<sup>th</sup> March the first e-mail was sent by Appellant with a final reminder sent on the 18<sup>th</sup> April but no further information was provided despite further requests. The procedure was not carried out correctly – since the 31<sup>st</sup> August there have been serious omissions to the disadvantage of X Clean. Price changes since the date of the first bid have altered considerably and it does not make sense to award tender on those prices as recent price increase figures published indicate. A European Courts of Human Rights Case (*Public Service Commission*) backs the point for decisions to be made by competent persons.

Dr Christopher Vella Legal Representative for Dibaw Services Joint Venture said that at this hearing it became evident that the grievances in the original appeal had been ignored as two fresh grievances were raised today – dates and qualification of TEC members. Further information was sought regarding re-evaluation carried out under Regulation 243 when witness confirmed that the exercise was correctly carried out with clarification having been sought and reply received. The TEC having taken the correct steps in reaching that decision confirmed that the offer was not abnormally low. There have been insinuations that the exercise was not carried out correctly. There is no entitlement to confidential information and the law is very clear on this point. This is a fishing exercise by a competitor who is seeking information for use in future tenders. None of the grievances have been substantiated and the decision of the Authority should be confirmed.

Dr Debono stated that Regulation 243 allows a certain discretion in the hands of the Authority and it stated that it is satisfied with the explanation of the bidder. BPQR tenders allow discretion as confirmed in PCRB Case 1577. Certain information is sensitive and there is a limit to what can be provided to an Appellant. Rule 8 of the General Rules nowhere specifies that delays in decisions must lead to cancellation – the operative word is ‘may’. Rule 7 states that a bidder cannot change a bid price. There was no delay in reaching a decision in this case and none of the bidders have been prejudiced.

Dr Calleja said that Ms Balzan in her testimony said that the TEC was satisfied with the replies received. In an abnormally low bid it is not a matter for the TEC if a profit is being made – it simply have to check if laws on matters like labour, environment and others have been observed and to ensure that at least the minimum wage is catered for (PCRB Case 1140). It is not in the realm of the TEC to judge the purpose or the scope of the bidder. In Court of Appeal case 162/2014 *Kerber vs Wasteserv* it was held that there could be a wider purpose or reason for the bid. As regards the completion of the evaluation within a time limit, Regulation 8 gives discretion on cancellation if the evaluation is not finished in time. Past versions of the General Rules obliged automatic cancellation; once the new versions were introduced, following the 2017 Directive this ceased to be an obligation and became discretionary.

Dr Mifsud Bonnici noted that even if the TEC was obliged to cancel this was hardly the fact here as the dates indicate that the tender was processed correctly in the correct time. The Appellant did not ask for the exercise carried out by the TEC on the abnormally low aspect but merely asked for a comparison between bids – comparisons are irrelevant as the assessment was made once the Court of Appeal ordered a re-evaluation. The Court of Appeal tied hands in the process and assessment is obviously incorrect. Wages are laid down and obliged to be paid by law and therefore the dispute hinges on the cushion of administrative expenses. It is obvious that the preferred bidder is still interested and has provided a cushion for profit and therefore there is no reason to still consider this offer as abnormally low.

There being no further submissions the Chairman thanked the parties for their submission and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 4 July 2023.

Having noted the objection filed by X Clean Ltd (hereinafter referred to as the Appellant) on 23<sup>rd</sup> March 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2025/2020 – Lot 2 listed as case No. 1890 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Peter Paul Zammit

Appearing for the Contracting Authority: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Preferred Bidder: Dr Christopher Vella

Whereby, the Appellant contends that:

- a) The process following the Appeal Court decision of the 31st August 2021 is flawed procedurally, legally and materially, in that as per the General Rules Governing Tenders V4.0 governing this contract, have not been followed, : this in particular and not exclusively with regard to Heading 8 titled Period of Validity of Tenders, in Particular regulations 8.3 and 8.4 thereof.
- b) The process following the Appeal Court decision is flawed legally and material (sic), in that as per the General Rules Governing Tenders V4.0 governing this contract have not been followed, this in particular and not exclusively with regard to Heading 16 titled Tender Evaluation Process in particular 16.1 and 16.2.

- c) There has been given no information whether the verification and audit process whereby Reg 243(1) of SL 601.03, as mandated by the Appeal's Court have in actual fact been carried out,
  - a. Neither has appellant been informed with a reasoned opinion with regard to his objection thereof of the process whereby Reg 243(1) of SL 601.03 was implemented, and if such was applicable to the date of the issue of the tender, as any other documents which may have been drawn up back dated and not referring to said period may not be the subject matter of such an evaluation as has already been decided by the Appeals Court in Saniclean vs X Clean vs Dept of Contracts et decided on the 20<sup>th</sup> July 2020.
- d) The lack of any information as to the whether (if any) the different objections submitted to the PCRFB (which decision has been declared null) and the Court of Appeal (which were not decided upon by the said Court of Appeal) in particular with regard to the certification and verification process have been addressed and this further in line with General Rules Governing Tenders V4.1 issued in July 2020;
- e) The lack of verification as to technical compliance listed under 16.3 and enhanced with the tender specifications under Main Title 5. Selection and Award Requirements being title 1 Performance of Services of the Specified Type, wherein it was necessary to submit (and the evaluation committee to verify) documentation/certification as to the performance of similar works with relevant conditions, as specified therein.
- f) Furthermore, objector holds that in the marking process, Dibaw Services having lost marks in the process of evaluation in particular in those mandatory, and those that allow for discretion which is indicated that such discretion may have been exercised generously. Such an example is exemplified by the lack of indications given for pay dates in 2023, which omission has only been given a minor point deduction. It is being termed minor in view of the fact that tender submissions are final and no new conditions may be attached thereto after the process. In this regard it is being submitted that since the required pay dates were not submitted, then the Contracting authority would (following the lack of data submitted) be entering into a contract which is in breach of employment laws and regulations since it cannot enter any new conditions in the tender award, and the dates of pay for 2023 are omitted. Thus a more stringent marking here should have been applicable.
- g) Appellant further points out that since the issue of the tender in it's (sic) original format and requirements, market situations effecting both the products and service/management requirements to such an extent that they are making the relevant data both technically and financially irrelevant and untenable to a degree making the tender specifications in both the technical and financial fora different and thus necessitating changes to the award contract and subsequent execution of such a nature as to substantially change the nature of the tender and therefore the tender as is should be withdrawn to ensure a clear contractual obligation and a level playing field between all parties involved in the tendering process.

- a. Such changes include but are not restricted to
  - i. the original time frames set for the execution of the tender;
  - ii. The mandatory wages and thus the total financial allowance pre disposed and conditioned;
  - iii. The cost of material which is to be utilised in the execution of the services required;
  - iv. New health regulations emanating from the covid-19 requirements and post covid legal requirements.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 3<sup>rd</sup> April 2023 and its verbal submission during the hearing held on 4<sup>th</sup> July 2023, in that:

a) Preliminary Plea -

The Appellant dedicates the better half, and specifically point (1), (2) and (5), of its Appeal to alleging that the procurement process is in breach of a number of rules stipulated in the General Rules Governing Tenders (the "General Rules"). These allegations are, however, unsubstantiated, in that the Appellant fails to give any reason for which the procurement process as conducted by the Contracting Authority has fallen foul of the General Rules which form part and parcel of the Tender.

On the contrary, it is the Appellant who, by failing to give sufficiently-explained reasons to substantiate its allegations, has fallen foul of its duty to lodge an objection "*which shall contain in a very clear manner the reasons for their complaints*" as required by Regulation 270 of the PPR.

This rule is not merely a rule of procedure, a 'tick-the-box' exercise: the underlying justification is to uphold the *audi alteram partem* principle and ensure that parties are placed on an equal footing. As things stand, this Appeal places the Contracting Authority in an indefensible position because it is unable to deduce from the allegations raised by the Appellant how the procurement process has breached the General Rules, and if necessary, to investigate the veracity of the same.

For the foregoing reasons, and others which may be adduced in due course, the Contracting Authority humbly submits that points (1), (2), and (5) of the Appeal lack the necessary motivation in terms of law *ad validitatem* and requests this Honourable Board not to consider them further in the hearing of this Appeal.

b) Second Ground of Appeal: Abnormally-Low Verifications -

For background purposes, the Court of Appeal ordered the Contracting Authority to carry out an investigation into the potentially "abnormally-low" nature of the tender submitted by the Recommended Bidder in its judgement of 31 August 2021.



The Contracting Authority can confirm that it carried out the exercise stipulated in Regulation 243 of the PPR as mandated by the Court of Appeal. Following its investigation and subsequent to the replies received from the Recommended Bidder, the Contracting Authority concluded that the evidence supplied by the Recommended Bidder satisfactorily accounted for the low level of the price proposed in its tender.

The Court of Appeal judgement, it is submitted correctly so, did not order the Contracting Authority to disclose the results of its investigation in terms of Regulation 243. Nor does the Appellant have any right at law to "*a reasoned opinion with regard to his objection*".

The replies received by the Contracting Authority from the Recommended Bidder in response to the former's request for information in terms of Regulation 243(2) are not public information which the Contracting Authority is at liberty to disclose.

As this Honourable Board will be undoubtedly aware, Regulation 40(1) imposes an obligation on contracting authorities not to disclose "*information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders*".

c) Third Ground of Appeal: - The Application of BPQR

By means of its third ground of objection, the Appellant claims, or rather alleges, that the evaluation committee exercised its discretion to award and allot marks to the Recommended Bidder "*generously*". The unwritten insinuation which naturally arises, is that the evaluation committee somehow carried out its functions in such a way as to favour one economic operator over the other.

The Contracting Authority humbly submits that the seriousness of this allegation is overshadowed only by the failure to corroborate it with proof. The Contracting Authority firmly and categorically rejects this allegation, and urges this Honourable Board to reprimand the Appellant for raising such an unsubstantiated claim with no apparent justification other than the fact that the evaluation committee scored the Appellant lower than the Recommended Bidder.

Both the Contracting Authority and its evaluation committee have fully adhered to their obligations to treat all economic operators fairly, equally, and in a transparent manner in accordance with Regulation 39 of the PPR.

d) First Ground of Appeal: Validity Period of Tenders -

Without prejudice to its preliminary plea, the Contracting Authority humbly submits that Clause 8 of the General Rules is simply not applicable to the case at hand. This Tender is affected by a set of circumstances independent of the workings of the evaluation committee. The first recommendation of award was met by two appeals filed by the Appellant and a separate bidder

and which were the subject of this Honourable Board's judgement in Case Number 1552, 1553, and 1554 of 8 April 2021. These were then subsequently the subject-matter of Court of Appeal judgements with reference number 126/2021/1, 127/2021/1, and 128/2028/1 delivered on 31 August 2021.

The Contracting Authority was subsequently obliged to carry out its abnormally-low investigation of the bid submitted by the Recommended Bidder. This exercise could only be commenced following this Honourable Board's decision in Case Number 1552 on 10 October 2022 whereby the Contracting Authority was also ordered to carry out a re-evaluation of all the bids.

The Contracting Authority humbly submits that the award of the contract was suspended via the standstill period in terms of law, with particular reference to Regulation 275 and Regulation 286(2) of the PPR. This suspension occurred as a matter of law which overrides the applicability of the General Rules in question.

e) Fourth Ground of Appeal: Cancellation of the Tender -

By way of its fourth ground of objection, the Appellant claims that the technical and economic parameters of this Tender have changed to such a degree as to leave the Contracting Authority with no choice other than to cancel the same. Nor has the Appellant brought any proof to substantiate the allegation that the Tender is no longer viable and needs to be withdrawn, but has merely cited events which invariably occurred with the passage of time over two appeal stages connected with this Tender.

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 witnesses duly summoned, will now consider Appellant's grievances.

When considering the 'discrepancies' between the appellant's written submissions and verbal submissions in the grievances brought forward, the most relevant are deemed the following:

1. Period of Validity of Tenders – Rule 8 of the General Rules Governing Tenders
2. Regulation 243 of the Public Procurement Regulations S.L. 601.03 ("PPR") – Abnormally Low
3. Price Changes – Rule 7 of the General Rules Governing Tenders
4. Qualifications of Members of the Evaluation Committee

It is also to be noted that in the Appellant's written submissions, a number of grievances were brought up, some of which were not thoroughly substantiated. This goes contrary to regulation 270 of the Public Procurement Regulations S.L. 601.03 ("PPR") when it states that *".....which shall contain in a very clear manner*

*the reasons for their complaints.*” However, in the interests of transparency and expediency, for this specific case, this Board will none-the-less pronounce itself on such grievances.

1. Period of Validity of Tenders – Rule 8 of the General Rules Governing Tenders

- a. The Board refers to the timeline of events as presented by Ms Mary Grace Balzan during her testimony under oath, with which the Board agrees.
- b. Rather than agreeing with the Appellant’s arguments, it must be noted that the Contracting Authority proceeded in a very meticulous and rapid manner to execute the order given to it by the Court of Appeal.
- c. The Contracting Authority and its Evaluation Committee were precluded from initiating the ordered re-evaluation before the ‘other’ appeal (filed by All Clean Services Ltd) was concluded and decided upon by this Board (Case 1552 oral decision presented on 22<sup>nd</sup> September 2022 while the written decision was published on 10<sup>th</sup> October 2022). The statutory twenty calendar days for an eventual appeal before the Court of Appeal as per regulation 284 of the PPR also had to be respected. When these statutory dates expired, the Evaluation Committee, it must be said, acted swiftly to execute the order given by the Court of Appeal.
- d. Therefore, the timeframes envisaged under Rule 8 of the General Rules Governing Tenders, must not start as the appellant is suggesting (31<sup>st</sup> August 2021 – date of decision of 127/2021/1), but if anything only after those of point ‘c’ above. The initial 90 day period as per heading Rule 8.1 and the possible extensions as per Rule 8.3 of the General Rules Governing Tenders were not in the opinion of this Board exceeded.

Hence, this Board does not uphold this grievance of the Appellant.

2. Regulation 243 of the Public Procurement Regulations S.L. 601.03 (“PPR”) – Abnormally Low

- a. The Court of Appeal decision issued on 31<sup>st</sup> August 2021 clearly stated “..... *u tordna, minfok, illi l-process ta’ evalwazzjoni tal-offerti u tal-ghazla jsir mill-gdid wara li l-awtorita kontrenti **tkun talbet minghand Dibaw** it-taghrif kif irid ir-reg. 243(1) tal-L.S. 601.03” (bold & underline emphasis added)*
- b. From the testimony under oath of Ms Mary Grace Balzan, it clearly emerged that clarifications were duly sent out to Dibaw in relation to regulation 243(1) of the PPR. Dibaw replied within the specified timeframes imposed within the General Rules Governing Tenders (i.e. five (5) working days from notification).
- c. The statement from Ms Balzan when she stated “*The Tender Evaluation Committee then requested from Dibaw clarification of their bid in line with the parameters laid down in the Court decision. The documents of the earlier evaluation were inspected. The workings of the offer were checked and it left no doubt in the minds of the TEC.*” leaves no doubt that the Court of Appeal’s order was duly executed.

- d. Finally, it is to be noted that the Evaluation Committee was not obliged to inform the Appellant specifically that a clarification request was sent to a specific economic operator. All information would have been present in the ePPS which is a public tool for economic operators participating in the tender procedure. The progress of the ‘other’ appeal (All Clean Services Ltd) was also in the public domain. Therefore this Board does not agree with arguments from the appellant that it was kept in the ‘dark’ over proceedings.

Hence, this Board does not uphold this grievance of the Appellant.

3. Price Changes – Rule 7 of the General Rules Governing Tenders

- a. Arguments brought forward by Appellant that “Price changes since the date of the first bid have altered considerably and it does not make sense to award tender on these prices.....” are not entertained by this Board. Rule 7 of the General Rules Governing Tenders is adamant when it states *“The price offered must include all of the works/ services/ supplies to be provided. Unless otherwise provided in the procurement documents, the prices quoted by the tenderer are fixed and not subject to revision or escalation in costs”*. The Board opines that the preferred bidder is then at liberty at not accepting the award, as per other headings of the said document, should it feel that the award is not in its best interests.
- b. Other mechanism issued by the Department of Contracts in the last months also deal with possible actions that can be taken in regards to the increase in prices.

Hence, this Board does not uphold this grievance of the Appellant.

4. Qualifications of Members of the Evaluation Committee

- a. The qualifications of the members of the evaluation committee was not part of the Court of Appeal deliberations and Court’s pronouncement. In fact, the decision did not order the members of the evaluation committee to be changed.
- b. Moreover, not even in the same letter of appeal filed 23<sup>rd</sup> March 2023, was any grievance brought forward.

Therefore, such a grievance, in this Board’s opinion, should not be entertained any further and it is hereby being rejected.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 2:

- a) Does not uphold Appellant’s Letter of Objection and contentions,

- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to Dibaw Services,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Dr Vincent Micallef**  
**Member**

**Mr Stephanie Scicluna Laiviera**  
**Member**