

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1894 – CT2321/2022 – Tender for the Provision of Cleaning Services, with reduced environmental impact, to the Ministry for Finance and Employment and its line department – Lot 1**

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

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of Mr Melchior Dimech, (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 Ivan Sammut and Dr Mark Anthony Debono acting for the Ministry for Finance and the Department of Contracts (hereinafter referred to as the Contracting Authority and DoC respectively) filed on the 3<sup>rd</sup> April 2023;

Having heard and evaluated the testimony of the witness Mr Jonathan Bugeja (Member of the Evaluation Committee) as summoned by the Public Contracts Review Board;

Having heard and evaluated the testimony of the witness Mr Jonathan Bugeja (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Mr Melchior Dimech;

Having heard and evaluated the testimony of the witness Dr Mark Anthony Debono (Representative of the DoC) as summoned by Dr Ivan Sammut acting for the Ministry for Finance;

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

### **Minutes**

#### **Case 1894 – CT 2321/2022 –Tender for the Provision of Cleaning Services, with reduced Environmental Impact, to the Ministry for Finance and Employment and its Line Departments**

##### **LOT 1**

The tender was issued on the 22<sup>nd</sup> September 2022 and the closing date was the 25<sup>th</sup> October 2022. The estimated value of the tender, for Lot 1, excluding VAT, was € 628,277.52.

On the 23<sup>rd</sup> March 2023 Mr Melchior Dimech filed an appeal against the Ministry for Finance and Employment as the Contracting Authority objecting to their disqualification on the grounds that their offer on Lot 1 was not technically compliant.

A deposit of € 3,141 was paid.

There were fourteen (14) bids on Lot 1.

On the 13<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 – Mr Melchior Dimech**

Dr Matthew Paris	Legal Representative
Mr Melchior Dimech	Representative

**Contracting Authority – Ministry for Finance and Employment**

Dr Ivan Sammut	Legal Representative
Dr Fiorella Fenech Vella	Legal Representative
Mr Ivan Portelli	Chairperson Evaluation Committee
Mr Jonathan Bugeja	Evaluator
Ms Jacqueline Attard	Evaluator
Ms Carmen Cassar	Evaluator
Mr Reuben Spiteri	Evaluator

**Preferred Bidder – Floorpul Co Ltd**

Preferred bidder was invited but preferred not to attend

**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 before inviting submissions noted that there is similarity in the appeals and replies on Lots 1, 4 and 5 and proposed to hear all three cases simultaneously. All parties consented.

Dr Paris said that he has no objection to the letter of reply from the Contracting Authority being used on all three lots, although it referred only to Lot 1.

The Chairman stated that the Board will first deal with the preliminary point raised regarding the request by Appellant for information from the Authority, although at this stage it cannot establish the time frame of events as copies of correspondence have not been provided.

Dr Paris said that Appellant's request to the Department of Contracts (DoC) was on the 17<sup>th</sup> March 2023. On the 22<sup>nd</sup> March a reminder was sent to several parties which also included a request for the date of the extension of the validity period of the tender and if all participants had agreed thereto. On the 21<sup>st</sup> March a letter from the DoC said that they were considering the matter. Since no information was provided by the 23<sup>rd</sup> March an appeal was lodged.

Dr Ivan Sammut Legal Representative for the Ministry for Finance and Employment (Ministry) said that the information requested was technical and confidential and could not be provided.

Dr Fiorella Fenech Vella Legal Representative for the Ministry said that the objection to providing documents was that the request to see these documents was a reflection on the members of the Tender Evaluation Committee (TEC) and the Board is the right body to ensure that the documents submitted are in order and as requested in the tender.

Dr Paris denied that this request was a reflection on anyone. The documents requested under Regulation 40 are not confidential – to be thus it has to be indicated as such by the bidder. This was made clear in the Southlease case. How can an Appellant mount a defence if it does not know the basis for such? What is confidential in a request regarding the extension of the validity date of a tender?

The Chairman said that as far as it could be established the timeline in this matter was as follows:

On the 14<sup>th</sup> March 2023 the recommendation for award issued

On the 17<sup>th</sup> March Appellant submitted the first request

On the 21<sup>st</sup> March the DoC replied on the information requested regarding the ISO

On the 22<sup>nd</sup> March there was a second request which also covered the validity extension

On the 23<sup>rd</sup> there was the reply thereon.

The comments by the Authority were only on the first request.

Dr Fenech Vella said that the second request has been rolled into the appeal and is not solely a preliminary point. Once it has been included as a grievance Appellant obviously had the answer.

Dr Paris pointed out that all grievances have to be indicated in the ten day period allowed for the appeal. Once the information is not given appeal has to cover all possible grievances.

The Chairman said that the Board needs to know on what basis the information has not been provided.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that Regulation 242 details what information is to be made available to all – this is to maintain equality. Only the Public Contracts Review Board (PCRB) can give the opportunity for further limited information.

Dr Fenech Vella said that the Authority is in favour of transparency. However, one has to ask how the Appellant missing certain documents equates with him knowing what the preferred bidder has submitted? The time scale on the extension of the validity can be given in evidence later.

Dr Sammut said that the technical information comes under Regulation 40 and cannot be released.

Dr Paris noted that Regulation 40 states exactly the opposite of what has just been stated.

The Chairman said that the Board will take a short recess to consider the points made.

On resumption, the Chairman stated:

“This Board will now give its directions and decision regarding the preliminary objections raised by the Appellant.

The first is in regard to the request that the Appellant be provided with details or confirmation regarding the requirement C2 in the tender – ISO Certification (terms of reference 8.3).

The Board feels that Regulation 242, in its entirety, is totally irrelevant to this matter.

Since it appears that there is certain ambiguities in the tender dossier between page 6 Selection and Award Requirements 5(B(d)) and the Terms of Reference on page 37, 8.3.... this Board will consider this requirement as a selection criteria.

Therefore, what now becomes relevant is Regulation 40(2)(c) which clearly states that “documentation submitted by economic operator attesting that they comply with selection criteria” are not of a confidential nature.

At this stage the Board is requesting that a member of the Evaluation Board testifies to confirm that the preferred bidder has submitted the ISO certificate which has been requested. Thus the rightful plea of the Appellant will be met thus satisfying the first preliminary objection.

In regard to the second point arising from Appellant’s preliminary plea, in these particular circumstances the Board decides that this point should be dealt with on the merits of the case.”

Witnesses were requested to testify.

Mr Jonathan Bugeja (464986M) called to testify by the Board stated on oath that he was a member of the TEC and served on the DoC staff for five years. He said that the criteria regarding the ISO certificates had been fulfilled by the preferred bidder as it had submitted three certificates confirming the systems coverage required. The certificates submitted were in the name of Floorpul Malta Ltd.

Dr Paris requested same witness to testify at the request of Appellant.

Mr Jonathan Bugeja called to testify by the Appellant stated on oath that the TEC was composed of five members (mentioned by name) from different departments of the Ministry, a Chairperson and a Secretary. All the evaluators were involved in the assessment of every lot; there were weekly meetings with an exchange of views. The closing date of the tender was the 25<sup>th</sup> October 2022; the offers were opened that day and first rectification requests sent on the 31<sup>st</sup> October, with further rectification requests sent on 7<sup>th</sup> November. This tender involved a high number of bidders with several lots and necessitated further clarifications on technical points being requested on 11<sup>th</sup> November. Meanwhile the technical aspect of some 70 offers was being evaluated. Nothing could be done between the 23<sup>rd</sup> December and the 4<sup>th</sup> January 2023 because of the Christmas recess. On the 20<sup>th</sup> February the evaluation report was sent to the DoC for vetting and the award was announced on the 14<sup>th</sup> March.

Witness stated that on the 23<sup>rd</sup> January the 90 days evaluation period expired but the evaluation was still proceeding in view of the 12 days lost due to the Christmas break. In his view a tender of 70 bids could not possibly be completed in 90 days. The tender was drafted by the Ministry and approved by the DoC. Witness confirmed that the preferred bidder was Floorpul Co Ltd and no subcontracting nor reliance on third parties was indicated. No clarification was sought on the difference in names as this item came under Note 3. It was confirmed that in the offer of Melchior Dimech a SEPA certificate had been uploaded together with a letter of engagement and that nil points had been awarded on the contract of employment clause due to credit transfer clause and pay slip not having been included. [Document displayed to the Board]. Appellant had only supplied a template of a contract of employment which indicated an IBAN. Conversely, said the witness what the Authority wanted was confirmation that the credit transfer and payslip were stated on the contract of employment. The payslip supplied referred to an employee in 2021 and did not indicate bank account number. The ISO requirement was given a zero mark as all that was provided was a certificate from Tuning Fork covering just one item and stating that Appellant was working towards obtaining three ISO certificates.

In reply to questions by Dr Fenech Vella, witness confirmed that no ISO certificates were provided by Appellant at the time the bid was submitted although this was a mandatory request. It is very unusual that tender bids are so extensive both in the number of lots and bidders-since this was a BPQR basis tender it needed more time to evaluate. The ISO certificates were in the name of Floorpul Malta Ltd

with an address at Ines Soler Street, Santa Lucija. Floorpul was registered on the ePPS system in 2014 with an address at Dom Mauro Inguanez Street.

Questioned by Dr Debono witness said there were around 70 or 80 bids to evaluate with clauses different from the normal tender included to avoid abuse.

Dr Mark Anthony Debono (124390M) called to testify by the Authority stated on oath that once the evaluation report was received by the DoC, it was considered by the General Contracts Committee to base their final decision. . In this case the TEC did not request tenderers to extend the validity of the offers as it would have infringed regulations. General Rules bound bidders to the 90 days.

Questioned by Dr Paris witness said that regulations were infringed as Rule 8.2 was not followed. He was not aware if extension had been requested but specific request has to be made. Under Regulation 8.3 there is a special procedure at the discretion of the TEC on how to process evaluation.

At this stage Dr Debono requested the permission of the Board to withdraw the statement he made earlier in his testimony regarding infringement of regulations.

This concluded the testimonies.

Dr Paris referred to the testimony of Mr Bugeja that 90 days were not enough to carry out an evaluation and pointed out that it was the Authority which decided how a tender is broken up and bidders had no influence on this – it was unfair to complain at this stage when the decision was theirs’ alone. This argument should be ignored completely. There is no distinction between the cheapest priced bid and a BPQR tender in the General Rules – it indicates 90 days which has been interpreted that the 90 days apply only to the evaluation. Article 8.3 uses the term ‘exceptional circumstances’ to extend a tender and is not mandatory. At the moment Appellant is not aware if Floorpul are prepared to accept the tender and presently no tender is valid as it has not been extended. No explanation has been given for the hiatus between the 7<sup>th</sup> November and the 7<sup>th</sup> January – the recess claim has no official proof and can be ignored – it certainly is not an extraordinary circumstance. Whatever dates one uses the 90 day period has been exceeded and the tender is invalid. The TEC and the DoC feel they are at liberty to act as they please. If the present regulations are not strong enough action should have been taken beforehand. PCRB Cases 1434 and 1821 were quoted as instances where decisions regarding extension of the validity of tenders were upheld. This case does not meet the three standards set by this Board.

Referring to the offer by the preferred bidder, Dr Paris said that the documents presented refer to another entity and not to it and should not have been considered – *de minimis* a clarification should have been requested. As to the exclusion of the Appellant the agreement with the Bank regarding direct credit contradicts the evidence of Jonathan Bugeja and the reason for exclusion is different to what was stated in the letter. The BOV agreement with Melchior Dimech is precisely to cover this point about the charges. There has been confusion in the answers provided. The complaint that the document is unsigned is not justified as it was not requested in the tender. The Authority rejected the declaration by an engineer that the ISO certificates will be provided and yet a self-declaration would have sufficed instead. A recent *Cherubino* case drew a distinction between requirement in a bid and contract requirement. Cancellation should be considered in view of what has transpired and it must be borne in mind that due to the Appellant not being fully armed in this appeal a refund of the deposit should be considered.

Dr Debono said that the Board has decided on the right to information. On the second grievance Appellant had to show that the PPR have been infringed. The General Rules give the facility to extend

a tender. Bidder withdrawing a bid has a deterrent. In PCRB Case 1686 it was held that the decision to extend contract does not mean that the offer is not valid. The tender should not be cancelled as this is an administrative matter. The TEC had no alternative except to disqualify as there were discrepancies in Appellant's bid.

Dr Fenech Vella stated that the appeal is meant to hinder the award by requesting cancellation, using procedural points in the General Rules and deviating from the merits. The appeal is lost as documents have not been produced and hence the bid is not compliant. Appellant claims that agreement with the Bank does not exclude the points requested on page 13 C2 (iii) of the tender but there is no reference to credit transfer and payslips and therefore there is no compliance. More than a bank agreement was wanted. The ISO certificates were mandatory at the time of the bid not in the future – a totally hypothetical situation. The addresses shown on the ePPS were changed and Floorpul was the correct company throughout. Appellant was not technically complaint on his offer.

Regarding the period of the tender, continued Dr Fenech Vella, the General Rules are not the PPR and one must treat this matter equitably – the extent of the evaluation required time and the delay was a relatively one of days unlike the case quoted which involved years. It was not mandatory for the TEC to request an extension. If the law does not state anything on timelines then one must consider it equitably on its own merits. Why throw away such lengthy work? The *Sandra Caruana* case (292/2020/1) dealt with General Rule 8.3 and decreed that it was meant to oblige bidder not to withdraw the bid. In PCRB Case 1686 it was decided that the contracting authority had no right to award the tender to another party in lieu of the winning bidder. The Christmas recess is officially recognised by circulars from the DoC that states that no clarifications, awards etc. are allowed during this period

Dr Debono said that Regulation 142 takes precedence over the General Rules. It is not in the best interest to cancel the tender.

Dr Paris concluded by saying that bidders are not given the six days leeway which the Authority claims are minimal and of no consequence. PPR 39 insists that every party must stick to the Regulations. The Authority feels it is above everyone else if past cases of delays are not sustained in this case.

There being no further submissions the Chairman thanked the parties 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 13<sup>th</sup> July 2023.

Having noted the objection filed by Melchior Dimech (hereinafter referred to as the Appellant) on 23<sup>rd</sup> March 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2321/2022 – Lot 1 listed as case No. 1894 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Ivan Sammut & Dr Fiorella Fenech Vella
Appearing for the Department of Contracts:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) Preliminary -

Reference is hereby being made to a request made to the DoC, wherein information about the recommended tenderer's submission has been requested. Additionally, reference is also being made to information requested in relation to the validity of the tenders and extensions thereof.

In view of the fact that this information has not been supplied by the DoC, Mr Melchior Dimech (MD) is hereby reserving its rights to the fullest extent possible to produce additional submissions, documentation and evidence to the Public Contracts Review Board to safeguard its interests and ensure that the legal principle of audi alteram partem is upheld.

In addition, whilst MD is confident on its appeal in merit, it is hereby respectfully requesting the PCRБ 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.

b) Unwarranted extension of the initial validity period -

The General Rules Governing Tender clearly and in unequivocal terms impose that the evaluation of the tender shall be conducted within the period of three [3] months, but in the eventuality of exceptional circumstances, such evaluation may be conducted in a maximum period of five [5] months. The PCRБ has developed an objective and rigorous test for the extension of the validity period, which should be of [a]an urgent nature, [b] extraordinary situation. In addition, PCRБ has been clear that unless these criteria are satisfied, such extension will not be permitted. Whilst it's the onus of DoC to confirm in this situation what warranted the extension of the validity period, it is (sic) MD's position that no such situation has developed to validate any extension whatsoever, if at all.

c) Award in breach of the GRGT -

Without prejudice to the aforesaid, it is the position of MD that the award of this tender has been made outside the validity period, and is thus in breach of provision 19.1 of the GRGT.

Hereunder is a matrix determining the timeframes:

- Date of tender submission deadline – 25<sup>th</sup> October 2022
- Termination of the initial validity period – 23<sup>rd</sup> January 2023
- Date of award of the tender – 14<sup>th</sup> March 2023

Whilst it is unclear whether DoC has formally extended the tender offers, whilst it is unclear what the exceptional circumstances which warranted the extension/s of the initial validity period are, it is very clear that the award has been made after the expiration of the period of the validity of the offer, in blatant breach of provision 19.1 of the GRGT.

d) Reasons for rejection -

Payment of wages through credit transfer

In relation to the written commitment in terms of the credit transfer of wages to employees, MD hereby submits that it has provided the necessary confirmation, inter alia that all such wages shall be made by means of credit transfer, and that all costs shall be borne by the contractor. In clear and unequivocal terms, MD confirmed that the wages shall be made through a direct transfer, and that any charges shall be absorbed by the employer. This is confirmed through multiple documents submitted by MD. Thus and in accordance with provision 62 of the PPR, MD was fully compliant with the tender specifications prior to submission of the offer.

Implementation Services quality standards

MD also confirms that it has provided the necessary comfort that the service to be provided shall be in accordance with the standard required. A confirmation has in this sense been provided by an independent person, thus ascertaining that the level of standard required shall be provided, once the contract is awarded. In accordance with terms of reference [page 21 – tender document] section, *“Where in this tender document a standard, brand or label is quoted, it is to be understood that the Contracting Authority will accept equivalent standards, brands or labels. However, it will be the responsibility of the respective bidders, at tendering stage, to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.”* A confirmation has in this sense been provided by an independent person, thus ascertaining that the level of standard required shall be provided, once the contract is awarded. In any case, economic operator MD hereby confirms that all such standards are available and thus the exclusion on this basis is likewise unfounded.



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 virtual hearing held on 13<sup>th</sup> July 2023, in that:

- a) Preliminary – The appellant had been informed that the request for information could not be acceded to means of a letter dated 23<sup>rd</sup> March 2023. Therefore, the MFIN and the DoC submit that the appellant was required to submit its request for information to the Public Contracts Review Board which in terms of regulation 276(d) of the Public Procurement Regulations, 2016 would be in possession of the information requested and regulation 87 of the Public Procurement Regulations, 2016 has jurisdiction as the competent body to consider such request whilst ensuring the procedural rights of the Contracting Authority and the recommended tenderer are safeguarded as had been provided for in *Varec vs Etat Belge*. Furthermore, the refund of the deposit is dependent on the exercise of discretion of the Public Contracts Review (sic) in accordance with regulation 93(4) and regulation 273 of the Public Procurement Regulations, 2016.
- b) Unwarranted extension of the initial validity period – The MFIN and the DoC do not contest that the general rules governing tenders are applicable, in particular rule 8 thereof. It is submitted that beyond the ninety day period, the MFIN and the DoC are vested with discretion as to whether or not to cancel the tender, as long as such discretion is exercised in accordance with the general rules governing tenders. The derogation to the ninety day rule is where exceptional circumstances justify such the need of the Contracting Authority to extend the period of validity of tender offers. The General Rules Governing Tenders do not specify what constitutes an exceptional circumstance and, in accordance with the decision of the Public Contracts Review Board referred to, this requires an evaluation of the particular of the tender (sic) evaluation procedure, in particular the compiling and communication of the tender evaluation report. Therefore, the tender evaluation committee appointed by the Contracting Authority will be required to provide their evidence regarding the duration of the tender evaluation process.
- c) Award in breach of the GRGT - Regarding the statements that the notification of the award has taken place beyond the validity period, the MFIN and the DoC submit that the General Rules Governing Tenders are to be interpreted as to enable that tender offers remain valid for a total period encompassing 90 days representing the initial period from the deadline for submission of tenders. Following the lapse of the ninety day period, the Contracting Authority has discretion in so far as the General Rules Governing Tenders can direct the Tender Evaluation Committee to request from tenderers the extension of the validity of tender offers since rule 8 has to be read in conjunction with rule 18.4 of the General Rules governing tenders which provides that: *Further to the above, the CGA/SPD reserves the right to cancel the whole tendering process if it confirms that the duration of the evaluation has exceeded the stipulated time limit in clause 8 of these General Rules Governing Tendering*. The DoC refers to principles of discretion should be applicable mutatis mutandis to public procurement procedures when these have been applied elsewhere by Administrative authorities in other spheres of administrative law by reference to *Gaston Caruana vs l-Awtorita Maltija dwar il-Loghob: 'Fejn*

*it-tweġġ ta' xi setgħa jgħib miegħu l-użu ta' diskrezzjoni, l-ligi trid ukoll li dik id-diskrezzjoni tissejjes fuq kunsiderazzjonijiet rilevanti b' harsien tar-regoli ta' għustizzja naturali*” In any instance, the extension of the ninety day period is a procedure which benefits all tenderers as was provided in Health Services Group Limited (C16298) vs Id-Direttur tal-Kuntratti u I-Avukat Generali: *“Din hi procedura stabbilita mill-istess Direttur għal finijiet ta' tigiġid tal-perjodu ta' validita tat-tender, u li għalhekk għandha tigi segwita fl-interess ta' kull min seta' għandu nteress inkluz dawk it-persuni li m' humiex parti f'din il-każza.”* Therefore, if the evaluation procedure would not have been concluded within the ninety day period, the DoC can request tenderers to extend the validity of their tender offers by a further 56 days - representing the amount of two four (4) week extensions. This time frames (sic) means that from the deadline for the submission of tenders, a period of 90 days can be extended to cover a period of 146 days are allowed for the recommended tenderer to be notified. In the present case, the MFIN and the DoC are not in breach of the rule since 140 days are elapsed from the 25th October 2022 (deadline from the submission of tenders) till the 14th march 2023 (notification of award).

- d) Reasons for rejection – The appellant submits that the reasons for rejection are totally unfounded since the same had confirmed and submitted documentation to prove compliance that wages are to be made by means of credit transfer. However, in accordance with the tender document evidence should consist in an agreement between the Bank and the bidder - *“Proof is to be provided either Agreement with a Bank or Written communication between bidder and Bank confirming direct credit settlement of wages.”* With respect to the grievance regarding to (sic) the implementation services quality standards, the appellant states: 'confirms that it has provided the necessary comfort that the service to be provided shall be in accordance with the standard required.' The principle referred to by the appellant results from the application of regulation 53(11) of the Public Procurement Regulations, 2016 which provides that: 'In its tender, the tenderer shall prove by any appropriate means, that the. service in compliance with the standard meets the performance or functional requirements of the contracting authority.'

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.

Following the oral decree issued on the preliminary plea, the major points to be discussed, analysed and decided upon are the following:

1. On the Payment of Wages through Credit Transfer;
2. On the Implementation Services Quality Standards / ISO certificates;
3. On the Validity Period;

1. **On the Payment of Wages through Credit Transfer**

- a. Reference is made to the Tender Dossier Section 1 – Instructions to Tenderers, sub-section 6.3 ‘Evaluation Grid’ - C2 ‘Employment Conditions’. Within this section (C2), part ‘iii’ requested that Employees have a written contract of employment that corroborates with clauses C2(i) and C2(ii).
- b. It is to be noted that the Appellant duly submitted a copy of the agreement he holds with his bankers in relation to credit transfer of wages whereby ‘all costs are borne by the contractor’. This is in line with requirement C2(i) of the Evaluation Grid.
- c. It is also to be noted that the Appellant duly submitted a copy of a payslip as issued to his employees. This is in line with requirement C2(ii) of the Evaluation Grid.
- d. With reference to criterion C2(iii), the Appellant duly submitted a copy of a contract agreement which is used between the contractor and his employees. However, this Board agrees with the findings of the Evaluation Committee that although this document was duly submitted, it did not corroborate the requirements of criteria C2(i) and C2(ii).
  - i. In reference to C2(iii)(a), what the tender dossier required was a specific clause, in the contract agreement, showing that the wages will be paid and transferred to the employee through the agreement as referred to in C2(i). By just listing the IBAN number, in the contract agreement, there would have been no obligation on the contractor to transfer the wages by credit transfer.
  - ii. In reference to C2(iii)(b), similar to above, there is no mention in the contract agreement, that the employee will be furnished with a payslip at the end of the payroll period, be it monthly, fortnightly etc. From a simple review of the contract agreement, it can be stated that the word ‘payslip’ does not feature in such a document.
- e. This Board, therefore, agrees with the statement made by witness Mr Jonathan Bugeja, under oath, that “what the Authority wanted was confirmation that the credit transfer and payslip were stated on the contract of employment”. This in line with criterion C2(iii) of the Evaluation Grid. Since these were not present and / or corroborated, this Board does not uphold this grievance of the Appellant.

2. **On the Implementation Services Quality Standards / ISO certificates**

- a. With reference to this point, 2 different ‘grievances’ were raised by the Appellant. Initially, that the documents presented by the preferred bidder referred to another entity. Secondly, that the authority rejected the declarations issued by an engineer in favour of the Appellant.
- b. On the documents presented by the preferred bidder -
  - i. It is hereby being noted that the preferred bidder duly submitted the necessary ISO certificates in accordance with Evaluation Grid criterion C2(vii). The

‘ambiguity’, if any, was created when the name on the ISO certificates state “Floorpul (Malta) Co. Ltd”, whereas the name on the ePPS system states “Floorpul Co. Ltd”. This is an immaterial difference, since as has been shown, the company’s original name was in fact Floorpul Co. Ltd (as per the ePPS system). This was eventually changed during 2017, through proper channels and procedures with the Malta Business Registry, to Floorpul (Malta) Co. Ltd. Same issue happened with the registered address of the company which was changed during 2016. It is crucial to state that the Company (C) number stated on the Malta Business Registry and documents submitted in this tender procedure is the same.

- c. On the declarations submitted by the Appellant -
  - i. Criterion C2(vii) makes reference to Terms of Reference Article 8 which states *“The bidder is to provide the necessary official documentation in order to confirm that the service provision shall be in accordance with the following standards (or equivalent): a) SM EN ISO 9001: 2015 (or equivalent) ..... b) SM EN ISO 14001:2015 (or equivalent) ..... c) SM EN ISO 45001: 2018 (or equivalent) .....”* It is this Board’s opinion that such a requirement (submission of ISO certificates) was to be provided at **bidding** stage. As per Section 2 - Terms of Reference *“..... However, it will be the responsibility of the respective bidders, at tendering stage, to prove that the standards..... they quoted are equivalent to the standards requested by the Contracting Authority”* Therefore, documents submitted do not fulfil tender requirements.

Following the above analysis, this Board does not uphold this grievance, *“On the Implementation Services Quality Standards / ISO certificates”*, of the Appellant.

**3. On the Validity Period –**

- a. The timeline of events was duly ascertained during the hearing (reference to the minutes)
- b. Before proceeding to the actual merits of this grievance, this Board must indicate its disapproval to argumentation brought forward by legal representatives of the Contracting Authority when they stated *“.... the delay was relatively one of days unlike the case quoted which involved years”*. Rules are rules and have to be followed! The Public Procurement Regulations (“PPR”) and General Rules Governing Tenders on various occasions make reference to timelines which are mandatory in nature. These have to be observed.
- c. On the other hand, the power vested in this Board as per PPR 90(3) to cancel the tendering process, as is being requested by the Appellant, needs to be exercised only if it is in the best overall interest of the situation. If other courses of action are more justifiable, reasonable and proportional, this power should not be the tool of choice and has always been the practice of this Board a tender should be saved whenever possible.

- d. While this Board notes and agrees with Appellant that article 8.3 of the General Rules Governing Tenders should in this circumstance have been applied, since the 90 days period as per article 8.1 had elapsed, this does not necessarily mean that the tender procedure should automatically be cancelled.
- e. If one were to 'allow' for the "two further period of four (4) weeks" extension, such timeframe (from date of closing of the call for tender to recommendation of award), as referred to in the minutes, would not have elapsed.
- f. Moreover, article 8.4 of the General Rules Governing Tenders (GRGT) is not making the cancellation of the tender mandatory.
- g. A number of tests need to be applied first. Initially, one needs to ascertain the "exceptional circumstances" as per article 8.3 of GRGT. Even though it is true that it is the same Contacting Authority that decided how a tender is drafted and issued, one needs also to take into consideration the number of lots and bidders taking part in the tendering process. Moreover, even if the GRGT makes no reference to the Christmas recess, as mentioned by the witness Mr Jonathan Bugeja, it is to be noted that such recess is part and parcel of the procurement process in Malta. Notices in this regard are even issued by the Department of Contracts!
- h. Therefore, since it is this Board's opinion that all of this would fall within the remit of 'exceptional circumstances' and therefore the timeframe would not have elapsed, the most proportionate course of action would be to send the process back to the evaluation committee for re-evaluation to exercise its duty as per article 8.3 of the General Rules Governing Tenders and ascertain if the tenderers are willing to extend the validity of their offer.

Therefore, this Board upholds this grievance of the appellant in part by sending the tender process back for re-evaluation as per paragraph (h) above and does not uphold the request to cancel the tender procedure.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 1:

- a) Does not uphold Appellant's Letter of Objection and contentions in relation to the grievances i) On the Payment of Wages through Credit Transfer and ii) On the Implementation Services Quality Standards / ISO certificates;
- b) To partially uphold the Appellant's concerns and grievance in relation to the Validity Period as per paragraph (h) of the Board's considerations;
- c) To cancel the 'Notice of Award' letter dated 14<sup>th</sup> March 2023;
- d) To order the contracting authority to re-evaluate the bids received for Lot 1 with specific reference to article 8.3 of the General Rules Governing Tenders as per paragraph (h) of the Board's considerations;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant in view of the grievance regarding the validity period.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member