

In the Public Contracts Review Board

31st July 2023

Re: Objection 069 – CT 2007/2021 – Tender for the provision of a service for the non-emergency transport for the ministry for health including the use of low emission vehicles

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

On the 20<sup>th</sup> of January 2021, a call for tenders for the provision of a service for the non-emergency transport for the ministry for health including the use of low emission vehicles was published. A number of bids were submitted, an evaluation process was carried out and the offer numbered TID 149429 of Health JV was recommended for award.

By means of a letter dated 5<sup>th</sup> November 2021, the Department of Contracts informed the bidders with the outcome of the evaluation.

On the 15<sup>th</sup> of November 2021, South Lease Limited filed an objection before this Honourable Board in terms of regulation 270 of the Public Procurement Regulations (PPR).

By means of a decision dated 31<sup>st</sup> January 2022 this Honourable Board did not uphold the objection filed by South Lease Ltd and confirmed the evaluation as conducted.

South Lease Ltd filed an appeal to the decision of this Honourable Board before the court of appeal on the 21<sup>st</sup> February 2022 and by means of a judgment dated 22<sup>nd</sup> June 2022 decided as below:

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

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



A re-evaluation process was initiated with a new evaluation committee and by means of a letter dated 11th July 2023 the Department of Contracts informed the Objector that its offer was being rejected on basis of administrative non-compliance for the below reason:

Minimum credit facility does not cover all members of the Joint Venture as Mr. Leo Grech is not included. This does not comply with 5(b)(i) which states that 'the minimum credit facility/credit balance required for the duration of this project is Seven hundred Thousand Euros (€700,000). The tenderer must submit a statement by a bank or a financial institution recognised by the MFSA (Malta Financial Services Authority) (or an equivalent authority in the country of origin of the bank) certifying such credit facilities during tendering stage. In the case of a consortium/joint venture the aforementioned statement must cover all members/companies forming the consortium/joint venture.

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

The Objector felt aggrieved with this decision and filed the present objection based on 3 grievances.

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

#### **Submissions**

##### On the First Grievance: Reinstatement of Health JV's bid

1. CPSU submits that the decision of the 11th of July 2023 was a result of a new evaluation by a new evaluation committee following a decision of the Court of Appeal which annulled both the first evaluation and the first decision of the PCRB of the 31st of January 2022, therefore the first evaluation and the first decision of the PCRB should not be used as a reference for this current evaluation subject of this objection.
2. On this matter, the Court of Appeal in its decision of the 22nd of June 2022 stated that:

*9. Kwistjoni ohra marbuta ma' dan ir-rekwizit, hija li skont is-sejha, listatement "must cover all members/companies forming the consortium/joint venture". Issa f'dan il-kaz, il-konsorzju kien magħmul minn tliet kumpaniji u persuna izda d-dokument kien jirreferi għat-tliet kumpaniji biss u mhux ukoll għall-individwu. Mix-xhieda mogħtija quddiem il-Bord, fil-fatt l-ittra relattiva mill-bank sottomessa mill-konsorzju appellat Health JV kienet tindika li t-tliet soċjetajiet indikati kellhom credit facilities izda ma kinitx tindika li l-individwu kellu credit facilities mal-bank.*
3. By means of the above quoted paragraph it is clear that the interpretation of the Honourable Court of Appeal, to which the new evaluation committee subscribe, is that all the members of the joint venture should have credit facilities with a bank. The court has in fact underlined the word 'all' in the above quoted paragraph.

4. It is uncontested that the letter from Bank of Valletta did not list Leone Grech as one of the persons holding credit facilities with the bank and therefore in line with the above interpretation as also adopted by the court of appeal, the evaluation committee came to its conclusion which in the humble opinion of CPSU are legally justified.
5. For the above reasons the first grievance ought to be rejected.

On the Second Grievance: Opportunity to Rectify

6. CPSU submits that the Objector could not be given the opportunity to rectify since according to note 2 rules, only 1 rectification is allowed on each shortcoming. This has been availed of during the first evaluation process whereby the Objector was given the chance to submit a second bank statement/letter.
7. In addition to the above stated and without prejudice to the same, adopting the interpretation as put forward in the submissions to the previous grievance and as adopted by the Court of Appeal, a rectification would still not be possible to resolve the non-compliance pointed out by the evaluation committee.
8. The relevant clause from the tender, Instruction to Tenderers paragraph 5, deals with a bank statement which covers all members forming the joint venture and not separate statements for the separate members of the joint venture. This effectively means that the only way in which the Objector could become compliant is if BOV also indicated Mr Leo Grech as a person holding credit with the Bank. If this was the case, the bank would have listed Mr Grech just like it listed the other 3 companies.
9. The fact that Mr Grech was not listed, effectively means that Mr Grech does not hold any credit facilities with BOV.
10. The General rules governing tenders state that:

*In evaluating the information submitted by the tenderer following a request for a rectification, the Evaluation Committee must ensure that an economic operator is ab initio eligible to qualify for a tender and must consequently be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of the same.*

11. Since Mr Leo Grech was not listed down in the letter/statement issued by BOV, it is amply clear that adopting the reasoning of the Court of Appeal, Mr Leo Grech was not ab initio eligible and a request for clarification at this stage would therefore confirm administrative non compliance at closing date for submission of offers.
12. For the above stated reasons and other reasons as will be further elaborated during the hearing this second grievance ought to be rejected.

On the Third Grievance: Quashing of Cancellation of Tender

13. CPSU submits that this Honourable Board should on the basis of the evidence and submissions of CPSU confirm the evaluation process as conducted and confirm the cancellation of the tender for the reasons as explained by the evaluation committee.

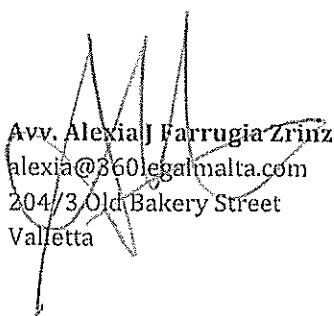
If the evaluation with reference to the offer of the Objector and to the offer of South Lease Ltd is confirmed by this Honourable Board, it would effectively mean that there is no qualitatively and financially worthwhile tender and the cancellation in terms of article 18.3(a) of the General Rules Governing Tenders should be confirmed.

14. However, without prejudice to the above submitted, should this Honourable Board, in an unlikely situation, have any doubt on the evaluation, this Honourable Board should still order the cancellation of the tender in terms of regulation 90(3) of the PPR as was done in Case 1843 relating to CT 2095/2022.


15. This is being submitted in order to avoid a vicious cycle of objections, appeals and re-evaluation processes which hinder the ultimate aim of the procurement cycle, that is to have a contract in place for the execution of the required services.

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

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



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