



The Secretary

The Public Contracts Review Board

Notre Dame Ravelin

Floriana

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31st July 2023

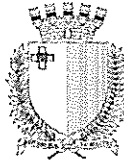
Dear Sir,

070 RE: CT2007/2021 – Tender for the provision of a service for the non-emergency transport for the Ministry for Health including the use of low emission vehicles

Reasoned letter of objection of the Department of Contracts (hereinafter the DoC) to the reasoned letter of objection of Messrs. South Lease Limited (hereinafter the appellant)

Whereas

- a) The Central Procurement and Supplies Unit (the Contracting Authority) has published a call for tenders;
- b) The appellant having been notified of the decision of the tender evaluation committee had been confirmed that the call for tenders procedure had been cancelled;
- c) The appellant, having been aggrieved by the decision of the tender evaluation committee, lodged its reasoned letter of objection in accordance with regulation 270 of the Public Procurement Regulations, 2016;
- d) The DoC, having been notified of the reasoned letter of objection shall by means of the present letter provide its Legal submissions regarding the content of the same letter.



1. Preliminary

The DoC objects to the submission of the appellant that partial information had been submitted to the appellant and submits that it has complied with the requirements stipulated in regulation 242 and regulation 272 of the Public Procurement Regulations, 2016. The letter addressed to the appellant contains all information why the call for tenders is being cancelled and contains a summary of the relevant reasons for the rejection of the tender.

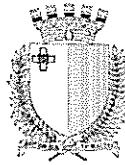
In accordance with Regulation 242(3) of the Public Procurement Regulations, 2016, Contracting Authorities are entitled to *'withhold certain information regarding the Contract award...where the release of such information...would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators'*

The DoC therefore submits that the request of the appellant to order the DoC to furnish relative and relevant information is to be considered in view of the judgment in the names Mediterranean Insurance Brokers vs Direttur Ġenerali tal-Kuntratti¹ that referred to a judgment of the European of Justice in the names of Varec SA vs Etat Belgie²

"il-kuntest ta' reviżjoni mressaq kontra deċiżjoni adottata minn awtorità kontraenti fir-rigward ta' proċedura tal-ġhoti ta' kuntratt pubbliku, il-prinċipju tal-kontradittorju ma jimplikax li l-partijiet ikollhom dritt għal aċċess illimitat u assolut għall-informazzjoni kollha, relatata mal-proċedura tal-ġhoti tal-kuntratt pubbliku in kwistjoni, li giet ippreżentata quddiem il-qorti kompetenti mill-proċedura ta' reviżjoni. Bil-kontra ta' dan, dan id-dritt ta' aċċess għandu jiġi bbilanċjat mad-dritt li operaturi ekonomiċi oħra għandhom għall-protezzjoni tal-informazzjoni kunfidenzjali u tas-sigriet kummerċjali tagħhom....Dan iġġodd aktar u aktar fil-każ tallum fejn it-tagħrif ma kienx strettament relevanti għall-ġhanijiet tal-proċeduri quddiem il-Bord ta' Revizjoni"

¹ Mediterranean Insurance Brokers (Malta) Limited vs Id-Direttur tal-Kuntratti, Court of Appeal, Appeal 11/2016, 27th May 2016

² Varec SA vs Etat Belgie, Court of Justice the Third Chamber, Case C-450/2006, 14th February 2008



The same reasoning had been applied in *Salvatore Mifsud vs Kunsill Lokali Sliema*³

'It-talba tal-Appellant kienet illi jithalla "jeżamina t-tender tal-kumpannija li rebhet l-offerta". Dan id-dokument ikun fih informazzjoni kummerċjali kunfidenzjali u sensitiva u certament l-Appellant ma setax jitlob li jithalla jarah'

In accordance with *Alberta Fire & Security Equipment vs Id-Direttur tal-Kuntratti*⁴, it had been provided that:

"Ir-regola 'audi alteram partem' ghandha tigi skrupolozament osservata, u l-partijiet ghandhom id-dritt li jkunu prezenti fl-investigazzjonijiet li jaghmel id-delegat tal-Board, biex ikunu jistghu jikkontrollaw l-informazzjonijiet li jigu moghtija lil dak id-delegat ghall-finijiet ta' dik l-investigazzjoni."

2. Court of Appeal res judicata

Whilst, in accordance with article 227 of the Maltese Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, the content of the judgment of the Court of Appeal is not subject to appeal, the order of the Court of Appeal specified that: *"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"*. The Court of Appeal did not order the tender evaluation committee to declare that the tender offer is in conformity with the procurement documents.

3. Reason for rejection

In accordance with *Steelshape vs Id-Direttur tal-Kuntratti et*,⁵ it had been held that *"Review by the Court is limited to checking compliance with the procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers....il-principju jibqa' li, bhala qorti ta' revizjoni, il-kompetenza ta' din il-Qorti hija necessarjament cirkoskritta."*

³ *Salvatore Mifsud vs Kunsill Lokali Sliema*, Court of Appeal, Appeal 362/2013/1, 28th February 2014

⁴ *Alberta Fire & Security Equipment Limited vs Id-Direttur tal-Kuntratti et*, Appeal 34/2012, 27th May 2015

⁵ *Steelshape Limited vs Id-Direttur tal-Kuntratti*, Court of Appeal, Appeal 175/2013/1, 7th August 2013



Evidence that the tender offer is compliant with the tender document specifications is provided in terms of regulation 55 of the Public Procurement Regulations, 2016 that provides that economic operators are to provide test reports from conformity assessment bodies as proof of conformity. While the appellant should provide the documentation stated in its reasoned letter of objection, was bound to prove that the supply in compliance with the standard, meets the performance and functional requirements of the contracting authority.

4. Obvious material error

The DoC disagrees with the submission of the appellant and the reference to the judgment delivered by the European Court of Justice since the judgment referred to has provided on Directive 2004/18 that is not the applicable legislation and has now been superseded by Directive 2014/24/EU. In any instance, regulation 62(2) of the Public Procurement Regulations, 2016 provides that all requests must be in compliance with the principles of equal treatment.⁶ The DoC refers to the judgment *Nquaymt vs Infrastructure Malta*⁷ where it had been held that:

“Jekk oblatur ikun ingħata opportunita` ta` rettifika imma xorta wahda jibqa` amministratively non-compliant, il-bord ta` evalwazzjoni ma jistax isalva dik l-offerta billi joqgħod jigrri wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu.”

The same principle had been enunciated in *C&F Building Contractors Limited vs Direttur Ġenerali tal-Kuntratti*⁸

“Effettivament dak li trid l-appellanti hu illi tagħmel tibdil fis-sustanza tal-offerta wara li ż-żmien għall-offerti ingħalaq. Dan imur kontra l-kondizzjonijiet tas-sejha li jgħidu illi “no rectification shall be allowed”.

Therefore, the DoC respectfully submits that there has been no excessiveness in the manner that the Tender Evaluation Committee has provided for its decision.

⁶ Case 1879 of 2023 of the Public Contracts Review Boaed SPD3/2022/057 – “it nonetheless notes that the Technical Offer Questionnaire is a vital document which was mandatorily required in the submission process. Moreover, this document also falls under the remit of Note 3, where no rectifications are possible”

⁷ *Nquaymt vs Infrastructure Malta*, Court of Appeal, Application 35/2022/1, 22nd June 2022

⁸ *C&F Building Contractors Limited (C15308) vs id-Direttur Ġenerali tal-Kuntratti*, Court of Appeal, Application 193/2022/1, 6th September 2022



5. Revaluation based on evaluation

The DoC respectfully disagrees with the statements of the appellant that the tender evaluation committee has not adhered to the orders of the Court of Appeal, since the judgment has not declared that the tender offer had been and is compliant with Section 3.2.3 of the tender document.

In terms of rule 16 of the General Rules Governing Tenders, Evaluation Committee check the compliance of tender submissions in accordance with the instructions given in the procurement documents. The principle of self limitation has been enunciated in *Nexans France vs European Joint Undertaking for ITER and the Development of Fusion Energy (T-415/10)* referred to by the Court of Appeal in *Cassar Fuel Limited vs Gozo Channel (Operations) Limited*⁹

'It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications.'

In accordance with regulation 38 and regulations 53 of the Public Procurement Regulations, 2016, the procurement document, including the technical specifications had been written in clear and unambiguous terms. The conclusions of the tender evaluation committee are in conformity with the principle of adherence to the prescribed procedure.

The DoC stated that the request for the DoC to re-evaluate the bids is procedurally unfounded since this is a function assigned to tender evaluation committees in accordance with rule 16 of the General Rules Governing Tenders.

⁹ *Cassar Fuel Limited v. Gozo Channel (Operations) Limited et., Court of Appeal, Application 5/20, 13th July 2020*

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The DoC reserves its procedural rights to make further oral and written submissions to be addressed to the Public Contracts Review Board including, where applicable in accordance with the procedure prescribed in terms of regulation 90 of the Public Procurement Regulations, 2016.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'M. Debono', written over a horizontal line.

Av. Mark Anthony Debono

Junior Legal Officer

Department of Contracts

Notre Dame Ravelin

Floriana

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