

UFFIĊĊJU TAL-AVUKAT TAL-  
ISTAT  
CASA SCAGLIA, 16  
TRIQ M.A. VASSALLI  
IL-BELT  
MALTA



OFFICE OF THE STATE ADVOCATE  
CASA SCAGLIA, 16  
M. A. VASSALLI STREET  
VALLETTA  
MALTA



Public Contracts Review Board  
Notre Dame Ditch  
Floriana, FRN 1601

5<sup>th</sup> of September 2023

**Reply of the Ministry for the Environment, Energy and Enterprise to the Objection of Cherubino Limited lodged on the 31<sup>st</sup> of August 2023 regarding Tender Ref. No. SPD/6/2022/095 – Framework Contract for the Supply and Delivery of Sustainable Baby Items and Boxes with a Reduced Environmental Impact for the Ministry for the Environment, Energy and Enterprise**

1. By means of its appeal Cherubino Limited raises three grievances:
  - i. That its bid is compliant with the tender specifications;
  - ii. That the Evaluation Committee ought to have requested a clarification if there was an ambiguity in its bid; and
  - iii. That the cancellation of the procurement procedure in question is unjustified.
2. The Respondent is of the view that neither of these grievances is founded.

**Facts:**

3. The Call for Tenders was issued on the 19<sup>th</sup> November 2022.
4. Bids were submitted by Cherubino Limited and by The Organic Kid. Since both bids were deemed to be technically compliant the contract was awarded to The Organic Kid, being the bidder who offered the cheapest price.
5. On the 2<sup>nd</sup> of February 2023 Cherubino Limited lodged an objection before this Board challenging this award decision on the ground, inter alia, that some of the items offered by The Organic Kid were not sustainable and eco-friendly and could not for this reason be deemed compliant.

6. By its decision of 6<sup>th</sup> of March 2023, this Board rejected all of the grievances put forward by Cherubino Limited. On the grievance regarding the sustainability and eco-friendliness of the items offered the Board considered that:

*"ii. GPP Criteria & Scope of Tender – this Board agrees with the argument as brought forward by the appellant that the scope of the tender is to shift to a more sustainable and eco-friendly upbringing of children. However, the Evaluation Committee, due to the principle of self-limitation, is to follow what is 'sustainable and eco-friendly' as listed in the tender dossier. Page 17 of the tender dossier clearly states which items fall under the GPP (Green Public Procurement) criteria and what thresholds they are to meet. The products offered by the recommended bidder were confirmed to be compliant with such criteria (this as requested in the Technical Offer Questionnaire). Moreover, it is also clearly listed that the verification stage will be done 'upon deliver', i.e post award."* (page 9 of the decision).

7. On the 27<sup>th</sup> March 2023 Cherubino Limited appealed the decision of the Board on the ground that the items offered by The Organic Kid were not eco-friendly and / or sustainably sourced because they contained polyester and polyimide. The Respondent and The Organic Kid maintained in their defence that whether the items are eco-friendly and / or sustainably sourced was to be determined according to the Green Public Procurement (GPP) Criteria in the Call for Tenders itself.
8. By its judgment of the 12<sup>th</sup> of July 2023, the Court of Appeal upheld the appeal and ordered that the bids be re-evaluated. It considered that:

*"5. ...Il-Bord fid-decizjoni tiegħu jirrikonxxi l-użu tal-fuq imsemmija materjal fil-prodotti offruti u accettati, iżda jgħid li skont id dokumenti tas-sejha x'inhu "sustainable and eco-friendly" johroġ mill-Green Public Procurement criteria li tnizzlu fl-istess dokumenti. Jgħid li għalhekk, biex jiġi deciz jekk il-prodotti humiex eco-friendly jew le jiddependi minn dawk il-kriterji li stabbiliet is-sejha.*

*6. Jirrizulta, però, li l-istess speċifikazzjonijiet tas-sejha ma jindikawx li l-oġġetti kollha bhala li għandhom jiġu analizzati fuq is-saħħa tal-kriterji ndikati. Hemm oġġetti li kellhom jiġu offruti u li ma humiex soġġetti għal Green Public Procurement criteria. Fil-fatt kif inhu ndikat fl-istess sejha huma biss certi prodotti li għalihom huma applikabbli l-Green Public Procurement criteria, iżda l-prodotti kollha huma soġġetti għall-kundizzjoni ġenerali li jkun sostenibbli u eco-friendly.*

*7. Issa l-prodotti li offriet is-soċjetà preferuta għandhom proporzjon ta' polyester u polyimide li żgur ma humiex eco-friendly u għandhom effett kbir fuq l-ambjent. Hemm il-kutra ż-żghira li għandha 40% polyester, il-ħarqa taċ-ċarruta għandha 20% polyester, filwaqt li l-kalzetti u ingwanti għat-tfal għandhom 18% polyimide. Is-soċjetà preferuta tghid li dawn huma persentaġġi żgħar, però, ebda persentaġġ ma huwa accettabbli u dawn il-prodotti, minhabba dawn il-persentaġġi, ma jistgħux jitqiesu sostenibbli u eco-friendly. Jista' jkun li l-polyester u l-polyimide ma humiex espressament esklużi mid-dokumenti tas-sejha, però, meta l-istess sejha fimsisti fuq prodotti sostenibbli u eco-friendly, ma jistax ikollok prodotti li ma humiex hekk." (emphasis added).*

9. On the 21<sup>st</sup> of August 2023, the Department of Contracts communicated the outcome of the re-evaluation with the participating bidders (see Doc. A and Doc. B). Since none of the bids were compliant with the tender conditions as interpreted by the Court of Appeal the procurement procedure was cancelled.

**Preliminary issue: service of the appeal to The Organic Kid**

10. Reg. 276 of the Public Procurement Regulations lays down the procedural rules to be followed by the Board, inter alia any appeal must be served on all participating tenderers in terms of sub-Reg. (b).
11. Therefore, unless The Organic Kid has also been served with this appeal and given the opportunity to reply any decision of the Board would be null and the case would have to be re-tried.<sup>1</sup>

**First grievance: technical compliance of Cherubino Limited's bid**

12. The judgment of the Court of Appeal is clear in that the items requested are subject to a general condition of sustainability and eco-friendliness, irrespective of any GPP Criteria – *“iżda l-prodotti kollha huma soġġetti għall-kundizzjoni ġenerali li jkunu sostenibbli u eco-friendly”* and *“Jista’ jkun li l-polyester u l-polymide ma humiex espressament esklużi mid-dokumenti tas-sejha, però, meta l-istess sejha tinsisti fuq prodotti sostenibbli u eco-friendly, ma jistax ikollok prodotti li ma humiex hekk.”*.
13. According to the same judgment, this general condition must be interpreted as excluding any percentage of polyester and/or polymide – *“polyester u polymide li żgur ma humiex eco-friendly... ebda persentaġġ ma huwa accettabbli u dawn il-prodotti, minhabba dawn il-persentaġġi, ma jistgħux jitqiesu sostenibbli u eco-friendly”*.
14. Of the items submitted by Cherubino Limited two contain polyester as indicated in the labelling of the samples provided:
  - (a) the re-usable cloth nappy consists of 100% polyester in the outer layer (see Doc. C) and 30% cotton/base: polyester in the inner layer (see Doc. D); and
  - (b) the tote bag is made of 100% polyester (see Doc. E).
15. It follows that these two items fall foul of the general condition of sustainability and eco-friendliness as interpreted by the Court of Appeal. The first grievance ought, therefore, to be dismissed.

**Second grievance: clarifications**

16. In the context of its second grievance Cherubino Limited contends that the Department of Contracts seems to have alleged that its bid is ambiguous.
17. The Respondent strongly rebuts this contention. In no instance did either the Respondent of the Department of Contracts indicate to Cherubino Limited that its bid was in any way ambiguous. The rejection letter communicated by the Department of Contracts clearly indicates the grounds for the rejection of Cherubino Limited's bid. Contrary to whatever impression Cherubino Limited may have, its bid is rather unambiguously non-compliant since it fails to satisfy the

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<sup>1</sup> Judgment of the Court of Appeal of 13 February 2023, Appeal no. 297/2022/1, *Test and Measurement Instrumentation Ltd v. Id-Direttur tal-Kuntratt et.*

general condition of sustainability and eco-friendliness as interpreted by the Court of Appeal given that some of its items contain polyester.


18. The case law of the European Court of Justice is now clear that a contracting authority should request a clarification where it is clear that a bid requires mere clarification to correct obvious material errors.<sup>2</sup> But *“where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification”*.<sup>3</sup>
19. In this case there is no doubt that the bid of Cherubino Limited fails to meet the tender requirements given that the Court of Appeal has already decided that any percentage of polyester renders a bid non-compliant. Therefore, the second grievance ought also to be dismissed.

#### **Third grievance: the cancellation of the procurement procedure**

20. Finally, Cherubino Limited contends that the procurement procedure should not have been cancelled.
21. Given that both bids submitted fail to meet the tender requirements there is no other option but to cancel the procurement procedure as provided in Art. 18.3 of the General Rules Governing Tenders (v4.9, July 2023).

#### **Conclusion**

For all the reasons given above, all three grievances of Cherubino Limited should be dismissed and the decision to cancel the procurement procedure confirmed.



Av. Daniel Inguanez  
daniel.inguanez.2@stateadvocate.mt

*For the Ministry for the Environment, Energy and Enterprise*

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<sup>2</sup> Judgment of 10 October 2013, Case C-336/12 *Manova*, EU:C:2013:647, para. 32.

<sup>3</sup> *Ibid.*, para. 31.

**Documents:**

1. Document A – Rejection Letter of Cherubino Limited;
2. Document B – Rejection Letter of The Organic Kid;
3. Document C – Photograph of the label of the re-usable cloth nappy's outer layer;
4. Document D – Photograph of the label of the re-usable cloth nappy's inner layer;
5. Document E – Photograph of the label of the tote bag.



**Av. Daniel Inguanez**  
*daniel.inguanez.2@stateadvocate.mt*

*For the Ministry for the Environment, Energy and Enterprise*



Doc. A.

21<sup>st</sup> August 2023

**Cherubino Ltd**  
185086

**SPD6/2022/095**

**Framework Contract for the Supply and Delivery of Sustainable, Baby Items and boxes with a reduced environmental impact for the Ministry for the Environment, Energy and Enterprise**

Dear Sir/Madam,

Thank you for participating in the above-mentioned procurement procedure. However, we regret to inform you that the offer submitted was not technically compliant.

The main reason why your procurement proposal was non-compliant is as follows:

In light of the appeals' court decision between Cherubino Limited vs 1) Ministeru għall-ambjent l-energija u l-intrapriża 2) The organic Kid Direttur Generali tal-kuntratti għan-nom u in rappreżentanza tad-Dipartimenti tal-Kuntratti (rikors numru 139/23/1), where it declared that polyester and polyimide material shall not be considered as sustainable and ecofriendly, the evaluation board re-evaluated the tender documents and analyzed the samples submitted, noting the following baby items as non-compliant:

- 1) *Reusable Cloth Nappy: The label attached to the sample provided shows that the outer layer of the nappy consists of 100% polyester. The label attached to the inner layer indicates that it is made of 70% bamboo and 30% cotton/base: polyester*
- 2) *Tote Bag: The label attached to the sample provided indicates that it consists of 100% polyester.*

*Due to the above, the bidder is considered as technically non-compliant and should not be considered further.*

Moreover, kindly note that this procurement procedure is being cancelled in line with Article 18.3(a) of the General Rules Governing Tenders which states that cancellation may occur where the tender procedure has been unsuccessful, namely because no qualitatively or financially worthwhile tender has been received.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt) by 12:00hrs (noon) of 31<sup>st</sup> August 2023 against a deposit of €846.

DIPARTIMENT TAL-KUNTRATTI  
Notre Dame Ravelin  
Floriana FRN 1600 – MALTA  
Direttorat għall-Akkwist Settorali



DEPARTMENT OF CONTRACTS  
Notre Dame Ravelin  
Floriana FRN 1600 – MALTA  
Sectoral Procurement Directorate  
Telephone: 23781506  
e-Mail: [spd6.mfo@gov.mt](mailto:spd6.mfo@gov.mt)

Payments are to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

The official recommendation for cancellation schedule 'Cancellation Notice' can be accessed on the website:  
[www.etenders.gov.mt](http://www.etenders.gov.mt).

Yours sincerely,

Kathleen Pellicano (signed)  
Assistant Manager (Procurement)  
f/ Sectoral Procurement Directorate

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Notre Dame Ravelin  
Floriana FRN 1600 – MALTA  
Direttorat għall-Akkwist Settorali



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Floriana FRN 1600 – MALTA  
Sectoral Procurement Directorate  
Telephone: 23781506  
e-Mail: spd6.mf@gov.mt

21<sup>st</sup> August 2023

The Organic Kid  
185094

SPD6/2022/095

Framework Contract for the Supply and Delivery of Sustainable, Baby Items and boxes with a reduced environmental impact for the Ministry for the Environment, Energy and Enterprise

Dear Sir/Madam,

Thank you for participating in the above-mentioned procurement procedure. However, we regret to inform you that the offer submitted was not technically compliant.

The main reason why your procurement proposal was non-compliant is as follows:

In light of the appeals' court decision between Cherubino Limited vs 1) Ministeru għall-ambjent l-energija u l-intrapriża 2) The organic Kid Direttur Generali tal-kuntratti għan-nom u in rappreżentanza tad-Dipartimenti tal-Kuntratti (rikors numru 139/23/1, where it declared that polyester and polyimide material shall not be considered as sustainable and ecofriendly, the evaluation board re-evaluated the tender documents and analyzed the samples submitted, noting the following baby items as non-compliant:

Tote bag: The label attached with the sample provided indicates that it consists of 100% polyester.

Reusable nappy liners: The label attached with the sample provided indicates that it consists of 100% polyester.

Reusable Cloth Nappy: Inside inner layer is made up of 80% bamboo, 20% polyester. The inner layer is made up of 35% bamboo, 25% cotton and 20% polyester. The outer layer is made up of 100% polyurethane laminate.

Small Blanket: It consists of 2 layers of which one is 100% polyester and the other consists of 60% cotton and 40% polyester.

Socks and Mittens for babies: Socks consists of 75% cotton, 20 % polyester and 5% elasthane.

Due to the above, the bidder is considered as technically non-compliant and should not be considered further.

Moreover, kindly note that this procurement procedure is being cancelled in line with Article 18.3(a) of the General Rules Governing Tenders which states that cancellation may occur where the tender procedure has been unsuccessful, namely because no qualitatively or financially worthwhile tender has been received.

If you intend to object to this decision, the Public Procurement Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt) by 12:00hrs (noon) of 31<sup>st</sup> August 2023 against a deposit of €846.



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BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

The official recommendation for cancellation schedule 'Cancellation Notice' can be accessed on the website:  
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Yours sincerely,

Kathleen Pellicano (signed)  
Assistant Manager (Procurement)  
f/ Sectoral Procurement Directorate

Chiter sheet  
Composition: 100% polyester  
PU Coated

**CZ** Vyrobeno v Číně  
Materiál: 100% polyester s  
polyuretanovým zátěrem (pu)

**DE** Hergestellt in China  
Zusammensetzung: 100%  
Polyester, PU-beschichtetes

**ES** Fabricado en China  
Composición: 100% poliéster  
con capa 100% poliuretano

**FR** Fabriqué en Chine  
Composition 100% polyester  
enduit au polyuréthane

No Fabric Softeners, Bleach,  
Alkaline Detergents or Citric Acid  
File: 70% Viscose bamboo,  
30% cotton / Base polyester  
Made in China



www.wixia.com

Pop-in Nappy  
Bamboo Soaker & booster



Made In China

Composition: 70% bamboo  
viscose 30% cotton



Vyrobeno v Číně

Materiál: 70% bambusová  
viskóza 30% bavlna



Hergestellt in China

Zusammensetzung: 70 %  
Bambusviskose 30 % Baumwolle



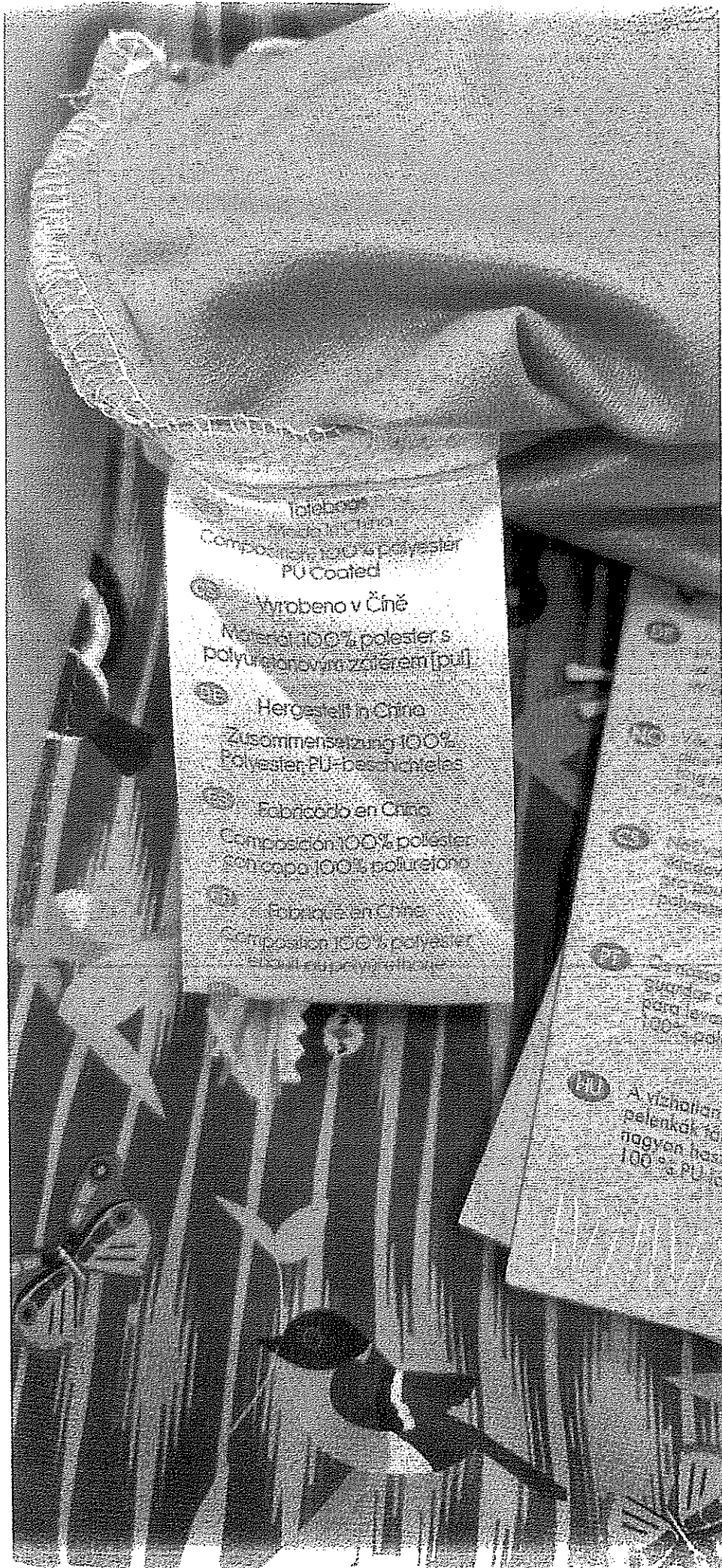
Fabricado en China

Composición: 70% viscosa  
30% algodón



Fabriqué en Chine





Intelle...  
Composition 100% polyester  
PU Coated

Vyrobeno v Číně  
Materiál 100% polyester s  
polyuretanovým zátěrem (pu)

Hergestellt in China  
Zusammensetzung 100%  
Polyester-PU-Beschichtetes

Fabricado en China  
Composición 100% polyester  
con capa 100% poliuretano

Fabricado en China  
Composición 100% polyester  
con capa 100% poliuretano

A vizualizáció  
előzetes és  
nagyon közel  
100% PU