

The Secretary

The Public Contracts Review Board

Notre Dame Ravelin

Floriana

info.pcrb@gov.mt

6th September 2023



Dear Sir,

Re: CFT 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

Reasoned letter of reply of the Department of Contracts (the DoC) to the reasoned letter of objection filed by Messrs. Cherubino Limited (the appellant)

Whereas

- a. By means of judgment of the Court of Appeal dated 12th July 2023, it had been decided that the tender offers in the call for tenders had to be reconsidered.
- b. That, following the conclusion of the evaluation procedure, it had been decided, amongst others, that the call for tenders is cancelled.
- c. The appellant having been aggrieved by the decision has, in accordance with regulation 270 of the Public Procurement Regulations, 2016, lodged its reasoned letter of objection.
- d. The Ministry for Environment, Energy and Enterprise (the Contracting Authority) has provided its reasoned letter of reply in accordance with regulation 276 of the Public Procurement Regulations, 2016.
- e. The DoC, by means of the present letter of objection, shall present its submissions in response to the reasoned letter of objection.



The DoC submits that in its objection, the appellant submitted three grounds of objection, namely conformity, proportionality, and cancellation, the merits thereof shall be addressed as follows:

1. Conformity

The DoC states that conformity of the supplies of the appellant is to be considered in accordance with the directions issued in terms of the Court of Appeal judgment dated 12th July 2023, where it had been declared that materials consisting in polyester and polyimide material are not sustainable as specified in the green public procurement criteria in the tender document. Accordingly, the communication in the letter is correct and this Honourable Public Contracts Review Board is to uphold the decision of the tender evaluation committee.

2. Proportionality

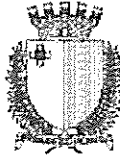
The DoC disagrees that there had been a statement of ambiguity regarding the submission of the appellant. On the contrary, the information provided and communicated to the appellant is clear and unequivocal, in accordance with regulation 272 of the Public Procurement Regulations, 2016.

In accordance with rule 16.3 of the general Rules governing tenders, clarification requests are communicated to tenderers where the tender evaluation committee expresses doubt regarding the content of the technical offer form. Tender Evaluation Committees are bound to adhere to prescribed procedure¹, the content of the tender document and the DoC refers to the Judgment of the General Court in the names Nexans France vs European Joint Undertaking² referred to in Servizi Malta Limited (C-45511) vs Direttur tal-Kuntratti et³

¹ Regulation 39(2) of the Public Procurement Regulations, 2016

² Nexans France vs European Joint Undertaking for ITER and the Development of Fusion Energy, Judgment of the General Court (First Chamber), 20th March 2013

³ Servizi Malta Limited (C-45511) vs Direttur tal-Kuntratti et, Court of Appeal, Ref 84/2019 , 15th July 2019



'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 it has thus defined in regard to any of the tenderers without 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, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.'

Since the sustainability and eco-friendliness of the products of the appellant must be considered in accordance with the green public procurement criteria provided in the call for tenders document, the incumbency of the appellant does not in any manner have a bearing on the call for tenders under examination since the specifications requested by the Contracting Authority in this call for tenders are not necessarily identical to antecedent calls for tenders.

3. Cancellation

The DoC submits that the cancellation of procurement procedures is not a decision that has been undertaken arbitrarily and that it should only be issued on a residual basis, namely where there are no options left. On the contrary, it is based on the specific grounds provided in terms of rule 18 of the General Rules Governing Tenders and, in the circumstances, the decision had been accordingly justified. In this respect, the DoC refers to the case *Sogelma vs European Agency for Reconstruction (EAR)*⁴

'The statement of reasons provided for the cancellation of the tender procedure, namely the fact that none of the tenders received was technically compliant, although succinct, is clear and unambiguous.'

⁴ *Sogelma vs European Agency for Reconstruction (EAR)*, Judgment of the Court of First Instance (Eight Chamber), Case T-411/2006, 8th October 2008



The DoC submits that the appellant's request for a representative of the DoC to provide witness testimony regarding the pre-drafting and drafting stages of the tender procedure is procedurally incorrect and irrelevant since this request exceeds the objective contemplated for the filing of an appeal from decisions taken after the closing date for the submission of an offer in terms of regulation 270 *et seq.* of the Public Procurement Regulations, 2016

Whilst the DoC reserves its rights to make further submissions orally and in writing, the DoC submits to this Honourable Public Contracts Review Board that it is to:

- a) forthwith dismiss the reasoned letter of objection of the appellant as being unfounded in fact and in Law;
- b) uphold and confirm the decision of the tender evaluation committee in the non-conformity of the tender offer of the appellant and the cancellation of the procurement procedure.

Yours sincerely,

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

Av. Mark Anthony Debono

Junior Legal Officer

Department of Contracts

Notre Dame Ravelin

Floriana

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