

PUBLIC CONTRACTS REVIEW BOARD

Case 1893 – CT2123/2022 – Supplies - Tender for the Provision of Mechanical and Electrical Maintenance Services at Mount Carmel Hospital Health Centres across Malta

21st August 2023

The Board,

Having noted the letter of objection filed Dr Katya A. Gatt on behalf of Camilleri Preziosi Advocates acting for and on behalf of Mekanika Ltd, (hereinafter referred to as the appellant) filed on the 10th May 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 19th May 2023;

Having heard and evaluated the testimony of the witness Mr Daniel Gauci (Representative of Mount Carmel Hospital) as summoned by Dr Steve De Cesare acting for Mekanika Ltd;

Having heard and evaluated the testimony of the witness Mr John Camilleri (Member of the Evaluation Committee) as summoned by Dr Steve De Cesare acting for Mekanika Ltd;

Having heard and evaluated the testimony of the witness Ing Frankie Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Steve De Cesare acting for Mekanika Ltd;

Having heard and evaluated the testimony of the witness Mr Joseph Mifsud (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 11th July 2023 hereunder-reproduced.

Minutes

Case 1893 – CT 2123/2022 – Supplies – Tender for the Provision of Mechanical and Electrical Maintenance Services at Mount Carmel Hospital and Mental Health Centres across Malta – Central Procurement and Supplies Unit (CPSU)

The tender was issued on the 4th August 2022 and the closing date was the 6th September 2022. The estimated value of the tender, excluding VAT, was € 1,969,440.

On the 10th May 2023 Mekanika Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not the cheapest compliant offer.

A deposit of € 9,847.20 was paid.

There were four (4) bids.

On the 11th 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 – Mekanika Ltd

Dr Steve Decesare	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Simon Caruana	Representative
Mr Stefan Deguara	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Eng Frankie Caruana	Chairperson Evaluation Committee
Ms Alison Gatt	Secretary Evaluation Committee
Mr John Camilleri	Evaluator
Mr Victor Galea	Evaluator
Mr Joseph Mifsud	Evaluator (Online)
Eng Franco Cassar	Representative

Preferred Bidder – Mr Anthony Falzon

Dr Maurice Meli	Legal Representative
Dr Martina Cuschieri	Legal Representative
Mr Anthony Falzon	Representative
Ms Tara Falzon	Representative

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 invited submissions.

Dr Steve Decesare Legal Representative for Mekanika Ltd said that the grounds of the appeal had been put forward in the reasoned letter of objection and would now ask for witnesses to be heard.

Mr Daniel Gauci (128061M) called to testify by the Appellant stated that he has been the Head of Operations at Mount Carmel Hospital (MCH) since 2019. He referred to a National Audit Report highlighting the lack of maintenance at the 11 wards currently operating at the Hospital. During the transitional period witness discovered a number of non-qualified persons working as tradesmen. Eventually a full tender has been issued reflecting the present needs for construction, maintenance, emergencies and small additional projects. Fifteen personnel are to be transferred under the transfer of business regulations to the new contractor. It is essential that there is a qualified technician on each specific service in use , as for example, plumbing, air-conditioning etc. Resources have to be

available throughout the week and on-call to cover emergencies. Witness confirmed that he was not part of the Tender Evaluation Committee (TEC).

Mr John Camilleri (28162G) called as a witness by the Appellant stated on oath that he is an operative at MCH and that he evaluated all four bids submitted. He stated that the preferred bidder had submitted his bid in his own name and that he would be using his own labour force without subcontracting. When witness was referred to the General Rules Governing Tenders he stated that the Chairperson of the TEC would be the best person to answer questions thereon. Evidence of experience of at least three years in mechanical and electrical services in hospital work was provided in the name of Anthony Falzon – his previous work was indicated to be on boilers. The TEC had checked the information provided and was satisfied that the preferred bidder had met the requirements.

A question by Dr Maurice Meli Legal Representative for Mr Anthony Falzon elicited the information that Mr Falzon is a sole Director of A. Falzon Energy Projects Ltd (C51294).

Dr Decesare said that it has just become known that Anthony Falzon put a bid in as a sole trader. This adds another grievance in regard to the appeal. He then asked that the following note should be recorded verbatim:

“Dr Decesare on behalf of Mekanika Ltd states that following the testimony of Mr John Camilleri it transpired that the expected technical abilities quoted by the bidder Mr Anthony Falzon in this offer related to an entity with the name A. Falzon Energy Projects Ltd. It also transpired that A. Falzon Energy Projects Ltd was not appointed as a sub-contractor.

In view of these facts the Appellant Mekanika Ltd requests the Board to include a third grievance relating to the submission by Anthony Falzon of a bid of another entity.”

The Chairman proposed a short recess to enable the Board to consider this request.

On resumption the Chairman said that the Board met the request of Dr Decesare and will allow the additional grievance to be included. He asked if the other parties wished to make any submissions on this point.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) requested that the following submission be recorded verbatim:

“The CPSU objects to the request for an additional grievance for three reasons:

1. The objector has already indicated that he was suspicious of this fact but made no request
2. Para 5.18 of the objection letter did not stop him from perusing this point
3. The reply of the Contracting Authority has already indicated that the bidder was A Falzon Energy Project Ltd.”

The Chairman directed another recess for the Board to consider this further submission.

On resumption of the hearing the Chairman stated that the Board had considered the submissions of the Appellant and the Contracting Authority. The preferred bidder remitted itself to this Board’s decision.

The Chairman further stated:

“The Appellant claims that the preferred bidder according to the ePPS is Anthony Falzon in his own name and not in the name of or as a representative of A Falzon Energy Projects Ltd C51294 as actually confirmed at this hearing.

Moreover this Board has established also from the document referred to as “Recommendation of Award” TID-000179535 signed by the Director General of Contracts that the name appearing in that document is “Anthony Falzon”.

In view of this the Board is more than convinced that the Appellant’s request to include an additional grievance must be met and this since the Appellant could never be in a position to know of this fact in the statutory time limits laid down”.

Dr Alexia Farrugia Zrinzo Legal Representative for the CPSU requested permission for their reply to this ruling to be made in writing.

The Chairman agreed as this would enable the Board to complete the hearing at this sitting.

Dr Debono on behalf of the Director of Contracts said that in line with Regulation 270 the Board should allow submissions on this point in writing.

The Chairman pointed out that this has already been agreed.

Dr Camilleri said that once the grievance was accepted he requested that he be allowed to reply to it.

He stated:

“Following the Board’s decision to admit a third grievance by the objector, the CPSU submits that although the ePPS profile number of the users name of the bidder was Anthony Falzon, the Company registration number and the VAT number indicated A. Falzon Energy Project in the ePPS profile”

Dr Meli added that in addition to what has just been submitted it must be noted that the same profile indicates that the organisation is one that is listed as “large”.

The Chairman directed that the appeal continues to be heard.

Engineer Frankie Caruana(576063M) called as a witness by the Appellant testified on oath that he is an engineer by profession and was the Chairperson of the TEC and he was fully familiar with the PPR and the General Rules Governing Contracts. His attention was directed to General Rule 9.3. Witness confirmed that during the evaluation there was no discussion regarding the fact that there appeared to be two different entities. In Clause 4.2.3 of the Scope of the Works in the tender witness was asked if they found any reference to Bed Head Panels in the preferred bidders offer to which witness said that they first checked eligibility and then asked for clarifications thereon. After the technical evaluation was completed the TEC requested Falzon for certain items and this was attended to. In the evaluation process the TEC ensured that enough labour was provided to meet the tender request and sought assurance that bidder was qualified to tackle technical matters. Bidder mentioned seven persons with their technical qualifications which together with a number of personnel was enough to meet the tender requirements. Some persons were listed under two headings. Bidder offered 17 personnel in all with seven qualified. The tender required 12 personnel which with the seven made it compliant.

Witness was asked how it was that the tender asked for 12 persons but only seven was shown as the minimum number. Witness replied that some persons were experts in two skills and it was subsequently satisfactorily explained to the TEC how all the skills would be covered. According to the

witness Clause 4.6 which indicates the minimum quantity of personnel required for the contract states that the figure was only indicative. Witness confirmed that the TEC had checked all the prices of all the bids submitted. Falzon's bid was the cheapest but it was not abnormally low – this was 61% of the estimated tender price which the TEC did not consider as abnormally low and so no clarifications were sought on the price of the offer.

Questioned by Dr Camilleri, witness said that in the financial bid of the preferred bidder the administrative costs in the Falzon bid were low and this was the only discrepancy noted when compared to other bids.

In reply to questions by Dr Meli, witness stated that the preferred bidder covered all the costs required as itemised in the tender; in some instances there was the need to request further information. The TEC considered the costs reasonable and were comfortable that the bidder could fulfill the terms of the tender. Certificates were requested to ensure competence. Clarification was sought from Falzon in respect of the duplication of roles of one individual. All documentation in this bid was in the name of Anthony Falzon. The Appellant's offer was also lower than the tender estimated price.

Replying to Dr Decesare, witness stated that as the Health and Safety officer's offer indicated another trade a clarification was sought-witness was asked if he was aware that this was a Note 3 item but did not reply. Witness said that the TEC had not evaluated the cost required for personal protective equipment, immunisation etc as this was not indicated in the BOQ.

Mr Joseph Mifsud (485867M) called to testify on line under oath by the Contracting Authority stated that he was one of the evaluators and had 31 years' experience as operations engineer at the power station and lately as maintenance manager at the Foundation for Medical Services. He confirmed that the preferred bidder was Anthony Falzon. The bid price seemed reasonable to him. Witness stated that clarifications, statements and declarations including the key expert forms submitted by the preferred bidder were all signed by Anthony Falzon on behalf of A Falzon Energy Projects Ltd. All bids submitted were checked in great detail, itemised and compared and witness could confirm that all were comparable except for the administrative operational fees. On the technical compliance aspect the TEC checked the eligibility. Clarifications were sought requesting details of costs on various trades and labour requirements and this information was supplied together with information of courses undertaken by individuals and their qualifications. The cost of the attendance and time verification records was low and the TEC decided that this was reasonable as the company was small and expenses were therefore low.

Questioned by Dr Meli, witness said that all factors in the offers of all bidders were taken into consideration by the TEC. All bids were broken down under the various headings and checked and seemed reasonable based on the witness's experience of market rates. The preferred bidder's rates were considered reasonable. The administrative fees were low but considered reasonable as bidder is a small company and therefore could keep costs low.

Dr Decesare asked the witness if he was aware of the cost of the biometric attendance recording system and if the preferred bidder had provided for this (Spec 14.1.19 in the tender). Witness replied that he had not checked if this was allowed for and that company had only 20 employees and it was easy to maintain records. Falzon had worked on boilers at some hospital and was familiar with keeping records. Witness confirmed that the only difference in the bids submitted was in the administrative operational fees – one was € 50,000 below and two were € 50,000 above that of the preferred bidder.

Dr Decesare pointed out to the witness that the offer of the preferred bidder is € 450,000 less than that of Mekanika - witness said that one quarter of this discrepancy was accounted for by the administrative fees and that there is a 31% difference between the bids on this item. The employees of the preferred bidder were all documented as registered with name and number and Jobsplus documents were available for some of them. The prices of bidders on labour costs were similar but the tender did not require bidder to state individual keyworkers pay. It was confirmed that the global amount of wages paid was not checked but were considered reasonable. The BOQ requested a lump sum for all workers with no distinction; they were graded according to skills and technical ability. Overtime rates were required for skilled workers and rates for four different skills. The rates for the Health and Safety officer and other key experts were not requested in the tender.

This concluded the testimonies.

Dr Decesare said that Appellant has three grievances – at this stage he will deal with two of them; the third one will be dealt with in writing. On the technical compliance aspect he referred the Board to Court decision on the OK Ltd case (121/17). The experience being offered by the preferred bidder is of another entity and not of the bidder-the tender requested at least two key experts and a separate Health and Safety officer – it was indicated by a witness that the nominated person in the preferred bidder's offer was to carry two roles which meant automatic disqualification. Anthony Falzon has experience in three roles but there is no evidence that there is other experience available. Regarding the 40 hours requirement instead of 12 personnel only seven were nominated by the preferred bidder. The CPSU state that they do not agree with Mekanika that the TEC should have suspected that Falzon's bid is abnormally low. The offer is actually 39% lower and reference is made to the various cases listed in the letters of both Appellant and the CPSU on the need to compare prices and other EU guidelines. . Witness stated that fifteen persons presently employed have to be taken over and there are items like tools, immunisation etc. to be considered. An assessment on average cost basis indicates the obvious difference between prices and is enough to create a suspicion of low bids and therefore demands an investigation. One bid was well over budget and the difference is vast and it should therefore be eliminated. The remaining bids should have been assessed on the various yardsticks laid down regarding estimate, price, average cost and compared to the tender estimated value. Mekanika's calculation work out that the bid should have been at around € 1.4million. The claim that Mekanika' bid is also too low can be countered by inviting the TEC to check it fully and completely and ensure that all requirements have been catered for. In the X Clean case the Court of Appeal held that if there is a substantial difference in prices then it is mandatory that the bids should be investigated.

Dr Meli said the tender should be awarded to the cheapest bidder once it is technically compatible. Mekanika's claim is based on several unsubstantiated allegations. From the testimonies heard it is obvious that the preferred bidder's offer went through stringent vetting. Mekanika's bid is € 300,000 lower than the estimate and one cannot base decisions on percentages but must take all factors into consideration. Mr Mifsud testified that every price was compared and that the evaluation was fully carried out and correct. Mekanika is not the market place decider. Witnesses confirmed that all factors were considered as realistic in the evaluation and this should be confirmed as the three grievances mentioned have been covered.

Dr Debono said that it has not been proven that the Contracting Authority was lacking in their evaluation. Article 1.3 allows the Authority to accept a lower price than the estimated price of the tender. To reject the tender one must invoke Regulations 13 and 16 of the PPR.

Dr Camilleri stated that the difference between a low tender and an abnormally low tender is in the parameters which make sense. A witness has stated that the prices have been compared and the

difference makes sense. The offer is low but not abnormally so; that is the scope of public procurement. The TEC ensured this in their evaluation and decided that the only difference between the bids was in the administrative fees. Comparing percentages with the other bids is not a good yardstick but if one takes only the three cheaper bids then all three offers make sense. Proof has been provided that preferred bidder had seven employees to cover 12 trades and therefore was cheaper. The TEC cannot be bound by non-existent clauses and there is no clause in the tender demanding a separate person for each trade except Health and Safety. There are self-limitation limits on the evaluators too. On the technical compliance requirements no proof has been provided that experts required have not been provided. If the tender is found to be abnormally low then a re-evaluation should follow.

Dr Decesare in a final comment noted that where the tender allowed separate persons it stated so – the same person could not cover more than one trade.

Before declaring the hearing closed the Chairman directed that the final date for written submissions was the 18th July for the Appellant and the 25th July for the Authority. He then thanked the parties for their contribution.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 11th July 2023.

Having noted the objection filed by Mekanika Ltd (hereinafter referred to as the Appellant) on 10th May 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2123/2022 listed as case No. 1893 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Steve De Cesare & Dr Katya A. Gatt
Appearing for the Contracting Authority:	Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo
Appearing for the Preferred Bidder:	Dr Maurice Meli
Appearing for the Department of Contracts:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) 1st grievance – Abnormally Low Offer –

The estimated contract value for this Tender Procedure was €1,969,440.00 excluding VAT. The Recommended Bidder's offer, on the other hand, was for €1,200,006.40 excluding VAT. The

Recommended Bidder's offer, therefore, is €769,394 cheaper than the estimated contract value; that is, amounting to just under 61% of the estimated contract value.

The Recommended Bidder's offer is also significantly lower than the average of the four (4) offers - it is equivalent to circa 23.5% of the average price of all bids - and circa 28% cheaper than the second lowest bid.

There is no doubt that this offer is, at least prima facie, abnormally low.

Therefore, the contracting authority was obliged to examine whether this offer is economically sustainable and allows for proper performance in accordance with the tender requirements. Such an assessment should be thorough, and include the assessments set out under Sections 4.5.4 to 4.5.11 of this Objection. In Mekanika's extensive expertise and experience, the offer is not economically sustainable, and suggests a lack of proper understanding of the technical requirements and, or significant costing errors on the part of the Recommended Bidder.

When one considers the costs which needed to be covered by the offer, as highlighted in the Tender Document the Recommended Bidder's offer is, without a doubt, abnormally low. Amongst others, the costs to be covered include wages (including for the 15 workers currently employed in the provision of the services which are required to be taken up by the Recommended Bidder, the Key Experts, supervision / management staff, and so on), all tools required (which are numerous), biometric attendance recording software and equipment (see below), transportation, clerical and financial support. This is all the more so when one considers that the Recommended Bidder will be tied to its price for a minimum of 3 years (see Sections 3.1 and 3.6 of this Objection), with two (2) possible extensions of one (1) year each (bring this to a possible five (5) year period) thereof, and that there are extensive penalties set out in the Tender Document for delays and other breaches.

The risk of such a situation, apart from a breach of other tenderers' right of equal treatment, is the Recommended Bidder being unable to carry out the obligations incumbent upon it pursuant to the tender contract and seeking to do the bare minimum to avoid significant losses, to the detriment of the well-being of patients and, potentially, the tax payer.

Mekanika's offer was for the amount of €1,651,199.61 excluding VAT. Mekanika considers that its offer is highly competitive, partly aided by the fact that it is the incumbent contractor of major healthcare facilities in Malta, therefore benefiting from economies of scale and investments in human and other resources which it has already made. By way of example, the biometric attendance recording software and equipment required by the Tender Document, is a highly costly technology already in the possession of Mekanika and used by it in connection with the tender awarded to it for Mater Dei Hospital (and which the Recommended Bidder does not yet possess). Mekanika submits that it is necessary, both in terms of the PPR and in the public interest, to examine whether

a proper assessment of the Recommended Bidder's offer was made by the contracting authority in order to ascertain that this was not abnormally low, as is incumbent on the contracting authority by law and the decisions of the CJEU and the Court. As is best highlighted in the Court's decision in the X Clean Limited case, it is in the Board's remit and duty to carry out such examination, in order to ensure that the principles of transparency, fairness and equal treatment are preserved, and so that it may ascertain the well-being of patients and best value for taxpayers' money.

b) 2nd grievance – Technical Compliance

Firstly, Mekanika submits that the Recommended Bidder does not meet the experience requirements set out in Article 5(c) of Section 5 of the Tender Document, as delineated in Section 3.3.1 of this Objection. Particularly, for example, the Recommended Bidder has no experience with some of the maintenance services set out in Article 4.2.3 of Section 3 of the Tender Document.

Secondly, with respect to its capacity/capability to implement the contract, Mekanika firstly points to the requirements set out in the Tender Document relating to work force, as well as certain related certification required. To Mekanika's knowledge, the Recommended Bidder does not itself currently employ the Key Experts and work force required.

Secondly, with respect to the biometric attendance technology above-mentioned, as already stated the Recommended Bidder does not currently possess such technology and hardware.

Thirdly, Mekanika points out that the Tender Document establishes a 6-week mobilisation period for the commencement of services from contract signature date: Mekanika has reasonable suspicion that the Recommended Bidder will not be in a position to meet such requirement.

c) 3rd grievance – ePPS submission – as per letter dated 18th July 2023

It is submitted, with respect, that the Recommended Bidder ought to be disqualified for, amongst other reasons, his failure to submit an offer in compliance with the provisions of the Tender Document and the law. The fact that the Recommended Bidder submitted the cheapest priced offer does not mean that its bid must be saved at all costs and awarded the contract. On the contrary, such offer must (as provided in clause 6.1 of the Tender Document) satisfy the "administrative and technical criteria". In this case, it is evident that neither of these criteria were satisfied. Indeed, limiting ourselves to the Third Grievance for the purposes of this submission, the Recommended Bidder's own admission that it did not use its sole trader account to submit the tender under its name but did so to submit a tender on behalf of another organisation is, in and of itself, sufficient to mandate the exclusion of the Recommended Bidder from the process.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th May 2023, its verbal submission during the hearing held on 11th July 2023 and the letter filed on 25th July 2023 (in relation to the 3rd grievance), in that:

a) 1st grievance – Abnormally Low Offer –

Primarily, CPSU submits that the primary aim of the public procurement legislation regime in Malta and throughout the European Union is that the State and ultimately, the general public obtains a service or supplies which are up to the required standards and specifications and at the best price possible. This general principle is fine tuned with other safeguards such as that against abnormally low tenders, however such safeguards should only be triggered in the general public interest. The appellant claims that the fact that the estimated contract value is €1,969,440.00 and the recommended offer was that of €1,200,006.40, this must have triggered the attention of the evaluation committee and flagged as abnormally low. The offer of the objector which is €1,651,199.61 which is also considerably lower than the estimated tender value. CPSU submits that the evaluation committee has examined in depth and requested clarifications from all the bidders at evaluation stage in order to ascertain compliance with all tender condition and conditions at law.

Regulation 243 of the Public Procurement Regulations provides that: *“243.(1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.”*

The objectors are claiming that it should have appeared to the evaluation committee that the offer of the recommended bidder was abnormally low. CPSU disagrees and this because there was no reason why the evaluation committee should have suspected this. The recommended bidder's offer was 61% of the estimated contract value which in the opinion of the evaluation committee is a reasonable percentage considering that prices in today's market are very competitive.

The law does not provide a definition of abnormally low prices and does not even provide for any guidelines (mandatory or recommendations) on how to identify abnormally low prices, however this Honourable Board had identified a number of methods how an evaluation committee can flag a potentially abnormally low offer, in case number 1140 delivered on the 15th of March 2018, in an objection relating to cleaning services, when it stated that: *“In practice, methods are often used for the identification of tenders that appear to be abnormally low, such as: • An analysis of the price (Costs) proposed by an economic operator, is made in comparison with the objective of the particular procurement; • A comparison is carried out between the tendered price and the estimated value of the tender so that an assessment of the proportion of deviation from the estimated price is established; • A comparison is made of the offer with the average of the other quoted rates for the same procurement.”*

The first bullet point has been duly analysed and assessed by the evaluation committee which ascertained even as above stated, by means of evaluation clarifications that the recommended

bidder satisfies the minimum tender criteria and budgeted all its expenses for the minimum tender criteria in its financial bid form.

In this regard, the objector makes a number of assumptions, such as that the recommended bidder does not own the tools and equipment required for the performance of the work requested - this is purely speculative and lacks and (sic) basis. Moreover, the fact that the objector is attempting to use in (sic) his advantage the fact that he is the incumbent does not help its position at law. With regards to the comparison to the estimated contract value, apart from the fact that 61% of the estimated contract value, although low is not 'abnormally low', CPSU also submits that the estimated contract value is usually calculated on the contract value of the incumbent economic operator which is Mekanika Ltd, thus the objector has a bearing on the allegedly 'apparent abnormally low offer' of the recommended bidder.

With regards to the average of the quoted rates, it is submitted that only 4 offers were submitted which were all very different, with the highest offer being €5,403,146.25. This would drastically increase the average in a way that the other offers would not be reasonable in comparison to the average. If one had to eliminate the highest offer and take an average of the other 3 offers, this would be €1,606,881. The offer of the recommended bidder is circa 75% of this average value and is therefore in CPSU's humble opinion within the parameters of reasonableness and acceptability considering that all the mandatory criteria have been budgeted.

Additionally and in conclusion, CPSU submits that the law does not prohibit low tenders, but only requires that potentially abnormally low are flagged and if need be disqualified. Since the objector is claiming abnormally low (sic), it must duly prove and substantiate, since no evidence on such claim has yet been presented.

In view of the above the grievance of the objector should be rejected. Should however this Honourable Board decide that it should have appeared to the evaluation committee that the bid of the recommended tenderer or any other tenderer could possibly be abnormally low and that the evaluation committee should have asked for justifications in term of regulation 243 of the Public Procurement Regulations, then this Honourable Board should refrain from deciding on the objector's second and third demand and refer the tender for re-evaluation instructing the evaluation committee to ask for justifications on the quoted price

b) 2nd grievance – Technical Compliance –

The objector claims that the recommended bidder is not technically compliant because it does not possess the level of experience requested in article 5(c) of the tender document. Article 5(c) of the tender document is the list of key experts - The same list of Key experts provides that the same person can occupy more than one key expert role except for the Health and Safety Officer.

The Objector submits that the recommended bidder does not have the necessary experience with some of the maintenance services set out in article 4.2.3 of Section 3 of the Tender Document. CPSU submits that this claim is purely speculative, because the objector can never know the expertise that the recommended bidder possesses. Additionally the list in clause 4.2.3 of the tender document is only an indicative list. The preferred bidder has satisfied to the best judgment of the evaluation committee, all the technical criteria of the tender including all the expertise, technical and Key Roles.

Additionally the claims of the objector are purely speculative and should these speculations materialise this would be a matter of execution of contract which is a matter between the contracting authority and the contractor - this falls outside the remit of this objection and respectfully, of this Honourable Board.

CPSU submits that since the recommended bidder fulfils all of the requirements of the tender, the evaluation committee or this Honourable Board, should not reject the offer of the recommended bidder or cancel the award simply because the objector has *"reasonable suspicion that the recommended bidder will not be in a position to meet such requirement"*

c) 3rd grievance – ePPS submission

Clause 9.3 of the general rules is clear and not contested, however, the evaluation committee is bound to consider all submission from a wider perspective and whilst respecting the tender clauses in line with the fundamental principles of equal treatment and self limitation, is also bound to make its decision in a proportionate and reasonable manner.

This Board also noted the Preferred Bidder's verbal submission during the hearing held on 11th July 2023 and the letter filed on 25th July 2023 (in relation to the 3rd grievance), in that:

- a) Mr Anthony Falzon firstly clarifies and submits that it was always the Preferred Bidder's intention to submit the bid on behalf and for the company A. Falon Energy Projects Limited (C-51294) and not in his personal name as a sole trader. Mr. Falzon is the sole shareholder and director of the company A Falzon Energy Projects Limited (C-51294). He is also the only person vested with the legal representation of the same company. The Preferred Bidder submits that the company's account on the Electronic Public Procurement System was created by the company's administrative employees.

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 initially consider Appellant's third grievance.

a) The Board notes that during the testimony under oath of Mr John Camilleri, it became known that the Preferred Bidder, did not intend to submit his bid as a sole trader (Mr Anthony Falzon), but as a company (A. Falzon Energy Projects Ltd). Whilst the ePPS account used for the bid submission was that of Mr Anthony Falzon, listed as a sole trader, all evidence of technical and professional ability, including the technical offer form, related to A. Falzon Energy Projects Ltd. Moreover, it was also ascertained that A. Falzon Energy Projects Ltd was not listed as a sub-contractor to Mr Anthony Falzon (preferred bidder).

b) Reference is now made to rule 9.3 of the General Rules Governing Tenders ("GRGT") which states as follows:

*"Electronic Public Procurement System (ePPS) users holding a **sole trader account** are kindly reminded that their **account can only be used to submit tenders under their sole trader's name and not on behalf of any other organisation.***

*In case a tender needs to be submitted by any other type of Economic Operator (e.g. **Company**/Joint Venture/Consortium), an account needs to be created either through the ePPS as per Terms of Use for Economic Operators and **only this account must be used to submit the tender.** In the case where a person requires to submit a tender on behalf of an entity which may be an organisation or Joint Venture/Consortium, the submission must be performed through the account of the entity. The latter must assign the person an account to perform the submission on its behalf, if the person is not already assigned. The entity will be considered as the economic operator submitting the tender.*

.....

*The Department of Contracts/Contracting Authority/Sectoral Procurement Directorate or the Evaluation Board **will disqualify** Economic Operators who do not abide by the above instructions." (bold & underline emphasis added)*

c) It is this Board's opinion that the GRGT, in such a case, are clear in what should have been expected of the Contracting Authority. The use of the words "**will disqualify**" do not leave any element of leeway to the Evaluation Committee which should have disqualified the bid as submitted by Mr Anthony Falzon from the outset.

d) Reference is now also made to the argument presented by the Contracting Authority whereby they state that the Court of Appeal already pronounced itself in a similar situation in the case Firetech Cross TLS Joint Venture vs Dipartiment ta-Kuntratti (Case 281/2015) decided on the 30th October 2015. This Board does not agree with such an argument due to the fact that in that specific case, the subject matter were two (2) companies which formed a Joint Venture (JV) for the sole purpose of bidding for that specific tender procedure. This is different to the case at hand where the issue

revolves around a sole trader and a limited liability company. These two ‘business types’ are very different in nature, especially from a Company Law point of view.

Therefore, this Board upholds the Appellant’s third grievance.

With such grievance being upheld, this Board deems it irrelevant to pronounce itself on the first and second grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant’s third grievance;
- b) To cancel the ‘Notice of Award’ letter dated 2nd May 2023;
- c) To cancel the Letter of Rejection dated 2nd May 2023 sent to Mekanika Ltd;
- d) To order the contracting authority to re-evaluate the bids received in the tender procedure whilst also taking into consideration this Board’s findings;
- 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.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member