

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1923 – SPD6/2022/095 – Supplies – 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**

**23<sup>rd</sup> October 2023**

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for and on behalf of Cherubino Limited, (hereinafter referred to as the appellant) filed on the 31<sup>st</sup> August 2023;

Having also noted the letter of reply filed by Dr Daniel Inguanez acting for the Ministry for the Environment, Energy and Enterprise (hereinafter referred to as the Contracting Authority) filed on the 5<sup>th</sup> September 2023;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as the DoC) filed on the 7<sup>th</sup> September 2023;

Having heard and evaluated the testimony of the witness Mr Johann Attard (Chairperson of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cherubino Limited;

Having heard and evaluated the testimony of the witness Dr Francis Cherubino (Representative of Cherubino Limited) as summoned by Dr Matthew Paris acting for Cherubino Limited;

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 10<sup>th</sup> October 2023 hereunder-reproduced.

### **Minutes**

#### **Case 1923 – SPD6/2022/095 – Supplies - 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.**

The tender was issued on the 19<sup>th</sup> November 2022 and the closing date was the 22<sup>nd</sup> December 2022. The estimated value of this tender, excluding VAT, was € 169,200.

On the 31<sup>st</sup> August 2023 Cherubino Ltd filed an appeal against the Ministry for the Environment, Energy and Enterprise as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant and against the decision to cancel the tender.

A deposit of € 846 was paid.

There were two bids.

On the 10th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Cherubino Ltd**

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative

**Contracting Authority – Ministry for the Environment, Energy and Enterprise**

Dr Daniel Inguanez	Legal Representative
Mr Johann Attard	Chairperson Evaluation Committee
Ms Marthese Minuti	Secretary Evaluation Committee
Ms Alberta Callus	Evaluator
Mr Glen Chircop	Evaluator
Ms Rachel Tanti	Evaluator
Ms Francine Pace Caruana	Representative
Mr Mark Mascari	Representative

**Preferred Bidder – The Organic Kid.**

Ms Alessia Carbone	Representative (Online)
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**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 Daniel Inguanez Legal Representative for the Contracting Authority said that the point in his letter regarding Regulation 276 was withdrawn as Organic Kid Ltd had obviously been notified of this hearing. In any case there was onus to check the noticeboards.

The Chairman said that Organic Kid was aware of the tender decision which was notified on the noticeboard and uploaded on the website. He requested the representative of Organic Kid to confirm that it was aware of the hearing.

Ms Alessia Carbone that she was notified yesterday of the hearing but had not seen any previous notifications. She agreed that the proceedings could go on.

Dr Paris Legal Representative for Cherubino Ltd gave a resume of proceedings to date in this tender. The point of the tender was to create a culture of sustainability. After the original award to Organic Kid and an appeal by Cherubino, the Court of Appeal directed that the tender be re-evaluated. The Contracting Authority decided that Cherubino's products on two items (Clauses 3.5 and 3.7 in the tender) were not sourced from sustainable material. This was not so, said Dr Paris, as all products offered by Appellant are 100% sustainable materials.

Dr Inguanez pointed out that the Contracting Authority made a distinction between GPP and sustainable use materials.

Dr Debono Legal Representative for the Department of Contracts said that the Court of Appeal decision referred to polyester and polyamide as not sustainable materials.

Mr Johann Attard (2381G) called to testify by the Appellant stated on oath that according to the technical offer the two items in consideration were made of viscose bamboo and recycled polyester. The literature submitted indicated that the products were made from recycled materials. The samples tested were the ones used in the first offer. The second evaluation was carried out by a different team. In its evaluation the Committee stuck to the Appeal Court's decision in regard to not accepting any non-sustainable materials. The Tote bag was made from recycled plastic bottles and bamboo and the nappy outer layer was made of 100% polyester. The Evaluation Committee did not feel there was any need of seeking clarifications as the Court had clearly said that no amount of non-sustainable material was accepted and the labels were clear that there was polyester content. In these terms recycled bottles are not acceptable.

Dr Francis Cherubino (164384M) called to testify by Appellant stated on oath that he is a Director of Appellant Company. He stated that there is a difference between recycled bottle polyester which is eco-friendly and polyester which is a one-time use. Submissions on items 3.5 and 3.7 meet the requirements of the tender as they are produced by a company certified as producing eco-friendly materials. According to the witness the samples shown to him at this hearing were the same as the samples submitted to the Authority and are made from sustainable materials. It is true that the labels state that these are made from 100% polyester but his is recyclable polyester. No clarifications were sought from the Contracting Authority.

Questioned by Dr Inguanez witness said that the cloth nappy is made from 100% polyester from recyclable bottles and so is the Tote bag. Certificate from the company producing this material was tabled (Doc 1). Referred to this document witness confirmed that it does not state that the materials can be recycled after use.

This concluded the testimonies.

Dr Paris referred to the objects of the tender and said that it was fundamental that discussions were related to this objective. The original choice did not meet these eco-friendly and sustainable limitations objectives. Appellant established the principle of sustainability in the first instance. The Court of Appeal said that the Board has to decide if recycled bottles met the tender requirement. It is not clear if the bids were excluded because the material is not recyclable or if it is because its plastic bottles. Witness stated that the Evaluation Committee is following Paragraph 9 of the Court's judgement but it is not clear on what basis the decision was made. The Court did not say that recyclable bottles are not acceptable but that the product has to be sustainable.

We are dealing here, continued Dr Paris, with recycled material wrongly interpreted by the Evaluators. If there was any doubt, *de minimis*, they should have sought clarification. Cancellation of the tender is the last resort. The principle of proportionality was highlighted in the *Polaris* case. The Appellant was correct in its submissions and should have been given the chance to explain.

Dr Inguanez said that the facts are that both sides agree that the Cherubino offer is for two items made from recycled plastic bottles. The Contracting Authority's decision is based on the use of polyester in both items. The Appeal Court decided that polyester and polyamide are not sustainable and not eco-friendly. No percentage of non-sustainable material is acceptable. Paragraph 6 of the

judgement is a general condition barring the use of polyester and polyamide – its clear and mandatory and the Evaluation Committee was guided accordingly and there was no room to seek clarifications.

Dr Debono said that the view of the Department of Contracts is that because a bidder is the incumbent it does not mean that it is compliant. All parties were aware of the Court’s clear decision and there was no need for clarifications. None of the bidders conformed with the GPP regulations. None of the bidders were compliant and the decision follows the directives laid down in CJEU cases when this happens.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 10<sup>th</sup> October 2023.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 31<sup>st</sup> August 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2022/095 listed as case No. 1923 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Daniel Inguanez
Appearing for the Department of Contracts:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) **Offer by Cherubino Limited is compliant with tender specifications -**

The DoC in its rejection letter held that, *“Thank you for participating in the above-mentioned procurement procedure. However, we regret to inform you that the offer submitted was not technically compliant”*. In addition, the DoC indicated that: *“Due to the above, the bidder is considered as technically non-compliant and should not be considered further”*. Cherubino Limited hereby re-confirms that its bid is fully compliant with all tender specifications, and in particular all products on offer are sourced from sustainable and eco-friendly material. Any claims to the contrary and (sic) not only factually incorrect - Cherubino through its technical offer form confirmed that its product is fully complaint (sic). It is also noteworthy to claim that, as an incumbent/previous supplier, Cherubino's product are currently

being used by the contracting authority, and thereby it is fully aware that its products are fully compliant.

b) **Principle of proportionality -**

DoC seems to allege that there has been an ambiguity in the submission of Cherubino, leading to the rejection of the offer of Cherubino. Cherubino declares that there are no ambiguities and this since: i) The technical offer [form note 3] of Cherubino clearly confirmed adherence with all tender specifications ii) The technical literature submitted confirms that the products on offer are sourced from sustainable material iii) The packaging of Reusable Cloth Nappy confirms that it is made from sustainable material iv) Publicly available documents confirm that the products on offer are sourced from sustainable and eco friendly material v) The contracting authority is fully aware that the products on offer are fully compliant, since Cherubino Limited is an incumbent/previous supplier and it is proposing the same identical products. Without prejudice to the aforesaid, even if the evaluation committee had any doubts, or determined that there was an ambiguity, in accordance with the principle of proportionality, it should have sought to resolve such ambiguity through a clarification - as things stand, the evaluation committee did not explore all avenues, and thus rejection and the consequential cancellation are not justified.

c) **Cancellation is not justified -**

Finally it is to be pointed out that the cancellation is not justified - being a matter of last resort, cancellation should only be contemplated if there are no other options. It is the position of Cherubino Limited that cancellation in accordance with article 18 of the General Rules Governing Tenders is not justified, since the submission by Cherubino is technically compliant. In view of the aforesaid, cancellation should not be resorted to.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5<sup>th</sup> September 2023 and its verbal submission during the hearing held on 10<sup>th</sup> October 2023, in that:

a) First grievance: technical compliance of Cherubino Limited's bid -

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 soggetti għall- kundizzjoni generali li jkunu sostenibbli u eco-friendly”* and *“Jista' jkun li l-polyester u l-polymide ma humiex espressament esklużi mid-dokumenti tas-sejha, pero meta l-istess sejha tinsisti fuq prodotti sostenibbli u eco-friendly ma jistax ikollok prodotti li ma humiex hekk.”* According to the same judgment, this general condition must be interpreted as excluding any percentage of polyester and/or polymide – *“polyester u polymide li zgur ma humiex eco-friendly... ebda persentagg ma huwa accettabbli u dawn il-prodotti, minhabba dawn il-persentaggi, ma jistgħux jitqiesu sostenibbli u eco-friendly”*. Of the items submitted by Cherubino Limited two contain polyester as indicated in the labelling of the samples provided: (i) the re-usable cloth nappy consists of 100% polyester in the outer layer and 30% cotton/base: polyester in the inner layer; and (ii) the tote bag is made of 100% polyester. 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.

b) Second grievance: clarifications -

In the context of its second grievance Cherubino Limited contends that the Department of Contracts seems to have alleged that its bid is ambiguous. The Respondent strongly rebuts this contention. In no instance did either the Respondent or 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 general condition of sustainability and eco-friendliness as interpreted by the Court of Appeal given that some of its items contain polyester. 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. 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”*. 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.

c) Third grievance: the cancellation of the procurement procedure -

Finally, Cherubino Limited contends that the procurement procedure should not have been cancelled. 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).

This Board also noted the DoC's Reasoned Letter of Reply filed on 7<sup>th</sup> September 2023 and its verbal submission during the hearing held on 10<sup>th</sup> October 2023, in that:

- a) 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 12\* 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.
- b) 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 procedure and the content of the tender document. 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.

- c) 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.

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 now consider Appellant's grievances.

- a) The Court of Appeal in its judgement of 12<sup>th</sup> July 2023 (139/23/1) clearly stated that:
- i. *“6. Jirrizulta, però, li l-istess speċifikazzjonijiet tas-sejha ma jindikawx li l-oggetti kollha bbala li għandhom jigu annalizzati fuq is-sabha tal-kriteri ndikati. Hemm oggetti li kellhom jigu offruti u li ma humiex soggetti għal Green Public Procurement criteria. F'il-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 soggetti għall- kundizzjoni generali li jkunu sostenibbli u eco-friendly.”*
  - ii. *“7. Issa l-prodotti li offriet is-socjetà preferuta għandhom proporzjon ta polyester u polymide li zgur ma humiex eco-friendly u għandhom effett kbir fuq l-ambjent. Hemm il-keutra z-zghira li għandha 40% polyester, il-barqa tac-carruta għandha 20% polyester, filwaqt li l-keazzetti u ingwanti għat-tfal għandhom 18% polymide. Is-socjetà preferuta tgħid li dawn huma persentaggi zghar, però, **ebda persentagg ma huwa accettabbli u dawn il-prodotti, minhabba dawn il-persentaggi, ma jistgħux jitqiesu sostenibbli u eco-friendly. Jista' jkun li l-polyester u l-polymide ma humiex espressament eskluzi mid-dokumenti tas-sejha, però, meta l-istess sejha tinsisti fuq prodotti sostenibbli u eco-friendly, ma jistax ikollok prodotti li ma humiex hekk.**” (bold emphasis added)*
  - iii. *“9. Peress li l-prodotti offruti mill-offerent preferut kellhom persentagg ta' polyester u polymide, l-offerta tiegħu kienet orhos minn dik sottomessa mis-socjetà appellanti. Dan m'għandux invassal għac-cirkostanzi li l-orhos offerta tigi magħzula senz'altru. Mbux biss il-prodotti kollhom ikunu ta' materjal li stabbiliet is-sejha, iżda meta hawn si tratta minn oggetti għat-trabi u tfal zghar, huwa aktar impellenti li l-materjal ma jkunx artifizjali u ikun sostenibbli.”*
- b) It is therefore within these parameters that the evaluation committee had to re-evaluate the bids received from the economic operators participating in this tender process.

- c) Subject matter of this appeal revolves around items 3.5 (Reusable Cloth Nappy) and 3.7 (Tote Bag) – Section 3 of the tender dossier. These are clearly not subject to the specific Green Public Procurement criteria as mentioned in paragraph 3.8 (page 17) of the tender dossier. However, they do need to follow the subject matter and objectives of the tender document and as stated by the Court of Appeal “.....iżda l-prodotti kollha huma soggetti għall- kundizzjoni generali li jkunu sostenibbli u eco-friendly.”
- d) The Court of Appeal, with reference to polyester and polymide, also stated that “.....għandhom proporzjon ta polyester u polymide **li zgur ma humiex eco-friendly** u għandhom effett kbir fuq l-ambjent. ....**ebda persentagg ma huwa accettabbli**..... Jista' jkun li l-polyester u l-polymide ma humiex espressament esklużi mid-dokumenti tas-sejba, però, meta l-istess sejba tinsisti fuq prodotti sostenibbli u eco-friendly, ma jistax ikollok prodotti li ma humiex bekk.” (bold emphasis added)
- e) As per the testimony under oath of Mr Johann Attard and also through documentation submitted it has been ascertained that the products submitted by Cherubino Limited, for clauses 3.5 and 3.7, contain polyester.
- f) Argumentation brought forward by appellant that its products still are sourced from sustainable materials is still not deemed sufficient since the Court of Appeal was adamant that no percentage of polyester and polymide is to be deemed acceptable.
- g) The fact that the appellant is the current incumbent operator is deemed irrelevant and it does mean that the appellant is automatically fully compliant. Each tender has to be evaluated under its own merits.
- h) This Board finally agrees with Contracting Authority’s comments that a clarification request would have been, in the current circumstances, futile and therefore as per the recent judgement of the European Court of Justice it was not required to issue a clarification request to the appellant.

Therefore, this Board does not uphold the grievances of the appellant.

### **The Board,**

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the cancellation of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Richard Matrenza**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member