



15th October 2023

Public Contracts Review Board
Notre Dame Ravelin,
Floriana,
Malta

Caring First Limited [TID 193241]

Vs

[1] Department of Contracts;

[2] Central Procurement & Supplies
Unit;

[3] Mental Health Services;

[4] CareMalta Limited [TID 193171]

CT: 4001/2023

**Tender Name: Leasing of Premises to House Inpatient Psychiatric Services Facility (IFSP)
to The Central Procurement and Supplies Unit, obo Mental Health Services**

REASONED LETTER OF REPLY

Whereas, the Department of Contracts (hereinafter "**DOC**") issued a call for tenders for the "**Leasing of Premises to House Inpatient Psychiatric Services Facility (IFSP) to The Central Procurement and Supplies Unit, obo Mental Health Services**";

Whereas, Messrs. CareMalta Limited (hereinafter "**CM**" and/or "**the recommended bidder**") submitted a bid for this procedure, together with the appellant company;

Whereas, by means of a letter dated 29th September 2023, CM were recommended for award, whilst Messrs. Caring First Limited (hereinafter "**CFL**" and/or "**the appellant company**") were informed that their bid was being rejected, since it was not the cheapest priced offer satisfying the administrative and ;

Whereas, by means of an objection dated 06th October 2023, CFL filed an objection in accordance with *inter alia* article 59 of S.L. 601.12;

Whereas, CM contends that the decision of the DOC communicated by means of the award letter to CM and the rejection letter to CFL should be confirmed by the PCRB, and this based on the following grounds:

1. Preliminary plea

- 1.1 Reference is hereby being made to the second request by CFL wherein it requested the PCRB to:

Declare that the standstill period with respect to the proposed award shall only start to lapse from the date of the disclosure of the requested information in paragraph (a) above by the Department of Contracts and/or the Contracting Authority to the Appellant

- 1.2 This request is illegal, and any acceptance shall be in breach of article 271 of S.L. 601.03, which clearly and unequivocally imposes a period of ten (10) days as a standstill period, as follows:

The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period.

[added emphasis]

- 1.3 With due respect, the PCRB has no such authority, and would it proceed to uphold the request by CFL, it would act ‘ultra-vires’ and definitely outside its permitted functions established by the Public Procurement Regulations;
- 1.4 There are multiple decisions which confirm that such periods are peremptory and cannot in any manner and under no circumstances be extended, or in any other modified, as is being requested by CFL;
- 1.5 Reference is hereby being made to a Court of Appeal decision, dated 30th September 2015, in the names of **TOAD Management Services Limited Vs Synthesis Management Services Ltd u Regjun Centrali**, which clearly stipulated that:

“L-osservanza tat-termini stabbiliti fil-Kodici ta’ Organizazzjoni u Procedura Civili u f’ligijiet ohra speciali li jirregolaw il-kondotta tal-proceduri quddiem il-Qrati u quddiem it-Tribunali huma ta’ ordni pubbliku u ma jistghu jigu bl-ebda mod injorati u lanqas bil-kunsens tal-partijiet rinunzjati jew mibdula. Dawn it-termini jehtieg li jigu osservati u dan taht piena ta’ irritwalita` u nullita` tal-proceduri li ghandha, fejn tokkorri u fejn hekk jirrizultaw lilha, tigi wkoll sollevata mill-Qorti ex officio In-nullita` tattakka l-att innifsu.

Dan igib bhala konsegwenza illi t-terminu procedurali ghal proponiment ta’ l-appell kellu jigì osservat strettament u ‘ad unguem’. Din mhiex kwistjoni ta’ formalizmu izda ta’ mizura ta’ dixxiplina processwali li mill-osservanza taghha tibbenefika l-andament kif imiss tas-sistema kollu. Ma jista’ qatt ikun disputat illi t-termini ghal kompiment ta’ atti processwali huma dawk stabbiliti mil-ligi

Għal dawn il-motivi l-Qorti qed tilqa l-pregudizzjali sollevata mis-socjeta appellata, tiddikjara l-appell bhala wiehed intavolat fuori termine bi ksur tarRegolament 85(5) tal-Avviz Legali 296 tal-2010 li jirrendieh irritu u null, u bla effett fil-ligi. Tostjeni milli tiehu konjizzjoni ulterjuri tieghu u tordna li l-istess appell jigi kancellat minn fuq il-listi, bl-ispejjez jibaghu supportabbli missocjeta` rikorrenti appellanti."

- 1.6 In view of the preliminary nature of this plea, this Honourable Board is being asked to firstly determine this plea in accordance with article 276(f) of S.L. 601.03, prior to proceeding with determining anything further;

2. **Request for information**

- 2.1 Whilst indeed, economic operators should be given limited information, and this in line with local and ECJ judgements, the information should be relevant to the requests made, proportionate [especially when compared to the grievances and requests made], and not anti-competitive [with a view of abusing one's right for information];
- 2.2 In the context under review, the requests made by CFL are nothing more than a fishing expedition – there is a major difference between a limited right conferred by law for information in accordance with *inter alia* article 21 of S.L. 601.12 and the unreasonable request for information by CFL which goes far beyond what is permissible at law, and which is solely intended to distort competition!
- 2.3 Hereby specific reference is being made to a most recent decision by the ECJ, which specially deals with this point, in the names of **Antea Polska S.A., v Państwowe Gospodarstwo Wodne Wody Polskie** [C-54/21], wherein it was held that:

In that regard, the Court has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators¹

- 2.4 It is imperative that the request for information by this Honourable Board is analysed in accordance with the relevance of the requests made by CFL, and no information which is not relevant to such requests is released;
- 2.5 The right for information in public procurement should not be extended to appease curious needs, nor should it be equated with an unreasonable right to be given information as is the request by CFL, but on the contrary it is a limited right which is pegged to the grievances and the requests of the objector – thus a right which is relevant to the cause under review, which is limited and not exaggerated, which is not anti-competitive, which is not a fishing expedition – in simple terms, a right which CFL is seeking to abuse with its unreasonable requests!
- 3. **Appeal not in accordance article 270 of S.L. 601.03**
 - 3.1 Reference is hereby being made to article 270 of S.L. 601.03 which specifically states that:

*Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period, may file an appeal by means of an objection before the Public Contracts Review Board, **which shall contain in a very clear manner the reasons for their complaints***



- 3.2 The appeal by the appellant company does not contain “in a very clear manner the reasons for their complaints”, in particular when CFL alleges that the “award is wrong and illegal”, without making any indication whatsoever of why is the award “wrong” and on what premise it is claiming that the award is “illegal”;
- 3.3 Once again, this is nothing other than a tame attempt by CFL, which is being forcefully rebutted as totally unfounded – CM’s offer is the cheapest priced, satisfying the administrative and technical criteria, and any claim to the contrary is unfounded and wrong;
- 3.4 It is imperative to note that, both article 59 [S.L. 601.12] and article 270[S.L. 601.03] define procedures on procurement appeals, and do not as stated by CFL define any procurement principles or legal obligations - thus an award can never be declared as “wrong and illegal in terms of Regulation 59 of the Procurement of Property Regulations and Regulation 270 of the Public Procurement Regulations”;

NOWTHEREFORE, CM hereby requests the Board to:

i. PRELIMINARY

to decide the plea raised by CareMalta Limited [vide preliminary plea above] in relation to the illegality of the second request by Caring First Limited, and thereby declare that the standstill period is peremptory and the Public Contracts Review Board cannot declare that the standstill period with respect to the proposed awards shall only start to lapse from the date of the disclosure of the requested information;

ii. SUBSEQUENTLY

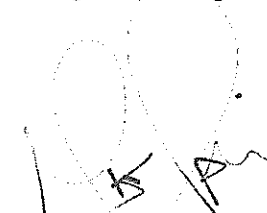
- a. to determine that the request for information as made by CFL is excessive and is in excess of what is permissible in accordance with article 21 of S.L. 601.12; and/or

- b. to determine that the request for information as made by CFL is not relevant to and/or is not pertinent to the grievances and the requests by it in its appeal dated 6th October 2023; and/or
- c. to determine that the information requested will distort competition, as it is beyond the scope of the appeal as presented by CFL; and/or
- d. Without prejudice and in subordination to the above, if any information is provided, it should be strictly and limitedly released in accordance with regulation 21(2)(b) of S.L. 601.12;

iii. FINALLY

- a. To reject the claim that the proposed award is wrong and illegal, and in particular declare that an award can never be declared as “wrong and illegal in terms of Regulation 59 of the Procurement of Property Regulations and Regulation 270 of the Public Procurement Regulations;
- b. To do anything else which is conducive and necessary for the proper execution of the above;

CM is hereby reserving the right to present further evidence, both orally or in written, during the hearing.



Avv. Matthew Paris
matthew@dalliparis.com

Required for testimony;	[1]	Representatives of the Evaluation Committee;
	[2]	Representatives of the Contracting Authority;
	[3]	Representatives of the Department of Contracts;
	[4]	Other witnesses which might be required