



The Secretary
The Public Contracts Review Board
Notre Dame Ravelin
Floriana
info.pcrb@gov.mt



6th November 2023

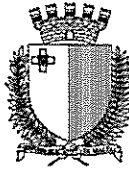
Dear Sir,

RE: CT4001/2023 – Tender for the leasing of premises to house in patient psychiatric services facility (IPSF) to the Central Procurement and Supplies Unit, obo Mental Health Services

Reasoned letter of reply of the Department of Contracts (the DoC) to the reasoned letter of objection filed on the 27th October 2023 by Messrs. Caring First Limited (C-28125) (the appellant)

Whereas

1. The Central Procurement and Supplies Unit (the Contracting Authority) has published a call for tenders ('the tender') for the leasing of premises to house inpatient psychiatric services facility (IPSF) to the Central Procurement and Supplies Unit, obo Mental Health Services on the 27th April 2023.
2. Following the closing date for the submission of tender offers and conclusion of the tender evaluation procedure, the appellant had been informed of the findings of the tender evaluation committee by means of a letter dated 29th September 2023 that the tender had been recommended for award.
3. The appellant had filed a reasoned letter of objection dated 6th October 2023 based on the grievance that information had not been provided in terms of regulation 21 of the Procurement of Property Regulations (S.L.601.12 of the Laws of Malta) and, as stated in paragraph 13 thereof: *'This requested information is essential for the appellant to determine whether to lodge an appeal with this Honourable Board against the decision to award the public contract to the recommended bidder or otherwise.'*
4. The DoC has filed its reasoned letter of reply on the 16th October 2023 where it had been stated that 'withdrawing its letter of the 29th September 2023 wherein its award decision was communicated to the bidders, and shall be re-issuing the same letter indicating the address of the preferred bidder';
5. The ten (10) day period for the filing of a reasoned letter of objection stipulated in regulation 271 of the Public Procurement Regulations, 2016 had lapsed on the 9th October 2023 and pending these proceedings the Public Contracts Review Board has not published a decision.
6. Pending these proceedings, the appellant *sua sponte* and contrary to the regulations, filed another reasoned letter of objection dated 27th October 2023 wherein three grievances have been raised, namely (a) compliance with the terms of the tender (b) encumbrance of property and (c) non-disclosure of information;



1. First grievance

In this grievance, the appellant states in considerable detail that the proposed site does not have sufficient area to be able to adhere to the call for tenders document specifications, including to provide accommodation size for bedrooms. The calculations have been made by the appellant *ex parte* by the appellant such that the evaluation of the tender offer by the tender evaluation committee is rendered not plausible.

With all due respect, it shall be the members of the tender evaluation that are best able to confirm or deny the statements made by the appellant. Without prejudice, the submission that parking in Paola is limited is irrelevant in so far as specification 4.5.5.1 of the call for tenders document stipulates that street parking is not to be considered as part of the parking space.

Furthermore, the DoC respectfully submits that the right of the appellant to raise additional grounds of objection is not procedurally correct and is not lawful since the right to contest the decision of the Contracting Authority is time-barred by the provisions of the Procurement of Property Regulations (S.L.601.12) and the Public Procurement Regulations (S.L.601.03). There is no provision in these regulations that enables an appellant to raise further grounds of objection and therefore the principle '*ubi lex voluit dixit, ubi lex noluit tacuit*' is to apply.

2. Second grievance

The burden of proof is incumbent on the appellant to prove that the management by the third-party entity is an encumbrance since the statement has only been made on a *prima facie* basis, without referring to how the third party is currently managing and operating the proposed site.

This grievance is related to the way the tender evaluation committee appointed by the Contracting Authority has evaluated the tender offers and the DoC submits that it shall be such committee members that will be called to testify regarding the compliance of the tender offer by the recommended tenderer. In any instance, the post contract stage is not a matter that the tender evaluation committee would be evaluating.¹

Without prejudice, the statement that the proposed site is under the management of a commercial entity is not by itself evidence that the property is encumbered if the recommended tenderer provides its commitment that the required space for the provision of the services is readily available.

3. Third grievance

The disclosure of information in Public Procurement has particular limitations in so far as, in terms of regulation 20 of the Procurement of Property Regulations, 2020, this may impinge on the equality among economic operators. The Court of Justice of the European

¹ Case 1891 of 2023, CT2163/2022 Supplies – Tender for the supply of chenodeoxycholic acid 250mg tablets, 10th July 2023;



Union has interpreted the disclosure of information on a number of occasion including in the case of *Antea Polska S.A. vs Panstwowe Gospodarstwo Wodne Wody Polskie*:²

'Article 18(1), Article 21(1), and Article 55(3) of Directive 2014/24 must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning...must be interpreted as meaning that the contracting authority assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial or fair competition;'

Contrary to the submissions in the reasoned letter of objection, the disclosure of information is therefore not an absolute right that constrains the DoC and the Contracting Authority to divulge any or all information that is requested. In this respect, the Public Contracts Review Board is being requested to acknowledge the principle of property rights stated in the above-mentioned judgement and submissions in its considerations and reasoning.

The Public Contracts Review Board may not declare that the DoC and the Contracting Authority are in breach of their duties at Law since the information that had not been confidential was disclosed, as declared *ex admissis* by the same appellant.

Therefore, in view of the aforesaid, the DoC requests that the Honourable Public Contracts Review Board dismisses the reasoned letter of objection, with there being no objection to the refund of the deposit.

Yours sincerely,

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Floriana
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List of Witnesses

Members of the Tender Evaluation Committee appointed by the Contracting Authority, representatives of the contracting authority, representatives of the appellant company and the recommended tenderer.

² *Antea Polska S.A., vs Panstwowe Gospodarstwo Wodne Wody Polskie*, Judgment of the Court (Fourth Chamber), Case C-54/2021, 17th November 2022;

