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The Secretary  
Public Contracts Review Board  
Notre Dame Ditch  
Floriana

Reasoned Letter of Reply

**Re: CT3011/2023**

***Tender for the Provision of Mystery Shopping Services in the Public Administration (the "Tender Procedure")***

Dear Sir, Madam,

**1. Introduction**

- 1.1 We are instructed by PricewaterhouseCoopers ("PWC"), to file this written reply in accordance with the provisions of regulation 276(c) of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the "PPR"), in reply to the objection filed on 11<sup>th</sup> December 2023 by EMCS Advisory Ltd. (the "Complainant") before the Public Contracts Review Board (the "Board") in connection to the Tender Procedure (the "Objection").
- 1.2 PWC notes that, whilst it is the Department of Contracts (the "Contracting Authority") which is best placed to reply to the Complainant's objections – since it is the Contracting Authority which undertook the evaluation – the documentation regulating the Tender Procedure is sufficiently clear on the matters raised for PWC to be in a position to set out hereunder its replies on the Objection, based on the information available to it at this stage.

**2. Facts**

- 2.1 The Contracting Authority dispatched a contract notice for the Tender Procedure on 2<sup>nd</sup> June 2023.
- 2.2 The tender document governing the Tender Procedure (the "Tender Document"), as published, contained the following statement in section 3.3:

*"Contracts will be awarded **lot by lot**, in accordance with the award criteria at Article 6." [emphasis added]*

- 2.3 Interested parties had the right to submit clarifications till 17<sup>th</sup> June 2023.
- 2.4 No interested party submitted clarifications regarding the award of the lots.



- 2.5 No interested party submitted a remedy before closing in accordance with Regulation 262 of the PPR, which requires said remedy to be filed within the first two-thirds (2/3<sup>ds</sup>) of the time period allocated in the call for competition for the submission of offers.
- 2.6 The Deadline for Submission of Tenders was 4<sup>th</sup> July 2023.
- 2.7 Multiple interested parties submitted a tender for each lot as follows:
- 2.7.1 PWC
  - 2.7.2 IDEA Advisory Service Limited ("IDEA")
  - 2.7.3 Powered Knowledge ("PK")
  - 2.7.4 Complainant
  - 2.7.5 Retail International Solution SPC
  - 2.7.6 YAMA YAMI LTD
  - 2.7.7 Marketing Advisory Services Ltd.
- 2.8 We understand that Retail International Solution SPC, YAMA YAMI LTD and Marketing Advisory Services Ltd. were disqualified (this based on the fact that they did not appear in the letter dated 1<sup>st</sup> December 2023 notifying the Complainant that its tender was not deemed to be the offer with the Best Price Quality Ratio (BPQR)).
- 2.9 On 1<sup>st</sup> December 2023, the Complainant was notified that its tender was not successful.
- 2.10 On 11<sup>th</sup> December 2023, the Complainant filed the Objection, listing the following grievances (the "Grievances"):
- 2.10.1 The tendering procedure in question did not safeguard and warrant transparency, objectivity and equality of treatment between all the tenderers because the Tender Dossier had no award criteria addressing the situation of a bidder placing highest in more than one Lot but having the same value in all the bids and, consequently, the tendering procedure in question violated and breached the general principles of law, namely equality of treatment and transparency and lacked objective award criteria in such a situation and afforded no certainty of outcome in the procedure; and/or
  - 2.10.2 The Bidders were manifestly not treated equally and this inequality of treatment lead to the disqualification of EMCS; and/or
  - 2.10.3 Subsidiarily to the first two grievances and without prejudice thereto, the rejection of EMCS' bid was entirely disproportionate considering the fact that EMCS' bid was better ranked in two out of three lots whilst PK's bid placed only once better than that of EMCS.
- 3 Preliminary Plea: Objection is invalid**
- 3.1 The Grievances of the Complainant relate, in their entirety, to the manner in which the Tender Document was drafted.
- 3.2 The PPR and the Tender Document provide a number of remedies to tenderers who consider the Tender Document to be drafted in a manner which is unclear or which breaches the PPR.

#### *Clarification Meeting*

- 3.3 In terms of the Tender Document, a clarification meeting was held on 12<sup>th</sup> June 2023 (therefore, ten (10) days after dispatch of contract notice).
- 3.4 If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so as can be seen from the minutes of meeting (Clarification Note No. 3 – Meeting Minutes).

#### *Clarifications*

- 3.5 In addition to the Clarification Meeting, tenderers were afforded the right to submit requests for clarifications up until 17<sup>th</sup> June 2023.
- 3.6 If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so, as can be seen from the clarifications published (Clarification Note No. 1, Clarification Note No. 2 and Clarification Note No. 4).

#### *Remedy before Closing*

- 3.7 In terms of Regulation 262 of the PPR, as also reflected in General Rule 5 of the General Rules Governing Tenders, tenderers had the right to file a reasoned application before the Board, within the first two thirds (2/3) of the time period allocated for submission of offer, challenging (amongst other things) the content of the Tender Document.
- 3.8 Indeed, Regulation 262(1)(c) allows for requests to *"to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure"*, whilst Regulation 262(1)(e) allows for requests to *"cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued."*
- 3.9 If the Complainant had any concerns with the content of the Tender Document, this was the time when it had to exercise its final remedy in relation to the Tender Document.
- 3.10 The Complainant, for the third (3<sup>rd</sup>) time as explained above, failed to exercise the remedies available to it.
- 3.11 The Tender Document provides, in Section 4.4, that the General Rules Governing Tenders (amongst others) are applicable to the Tender Procedure. In terms of General Rule 5.2:

*"Tenderers bear **sole liability for examining** with appropriate care the procurement documents, including those design documents available for inspection, and any clarification notes to the procurement documents issued during the tendering period, and **for obtaining reliable information with respect to conditions and***



***obligations** that may in any way affect the amount or nature of the tender or the execution of the services/supplies/works.....” [emphasis added]*

3.12 Therefore, each tenderer had an obligation to carefully assess the Tender Document prior to submission.

3.13 The Complainant, upon submission of its tender, accepted in full and in its entirety the content of the Tender Document. This is clearly and expressly stated in General Rule 9.4 which provides as follows:

*“In submitting a tender ..... **the tenderer accepts in full and in its entirety, the content of this tender document** ..... Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document.....” [emphasis added]*

3.14 The contents of the Tender Document were disclosed and known to all parties at the outset. The Complainant cannot, at the 11<sup>th</sup> hour simply because it has not been successful in its tender for each of the lots, submit grievances to the Board which relate to the manner in which the Tender Document was published.

*Case-law of the Board and Court of Appeal on this Preliminary Plea*

3.15 The Board, and the Court of Appeal, have been very consistent in their approach on this matter. In a nutshell, if a grievance relates to the content of the Tender Document, the grievance could have only been raised (at the latest) in a remedy before closing in terms of Regulation 262.

3.16 Any grievances relating to the Tender Document raised at a later stage have, rightly so, been discarded by the Board and Court of Appeal.

3.17 Reference in this reply shall be made to only a few of the recent decisions and judgments on this point:

3.17.1 *Case 1588 – MFEA/PPCD/035/2020 - Tender for the Provision of a Roaming, Outdoor, Photographic Exhibition showcasing EU-Funded Projects in Malta and Gozo for the Planning and Priorities Coordination Division*

This case was decided on 8<sup>th</sup> July 2021. The Board held as follows:

*“The Board opines that the arguments brought forward by the Appellant during the virtual hearing are arguments that should have been brought forward under a Call For Remedies ‘before closing date of a call for competition’ under Regulation 262 rather than an appeal / objection under Regulation 270, ‘decisions taken after the closing date for submissions of an offer.’ The Board does not uphold Appellant’s second grievance.”*

3.17.2 Case 1578 – TM 026/2020 - Tender for the Provision of Services of an Insurance Broker for Transport Malta (TM)

This case was decided on 9<sup>th</sup> July 2021. The Board held as follows:

*“If the appellant was convinced that the information given in the tender document was not clear or sufficient, he was obliged to ask for clarifications. If such clarifications did not satisfy his doubts he then was obliged to seek remedy before this Board as per Article 262 of the Public Procurement Regulations. In the present case, the Board feels that appellant should have asked for remedies to clear any doubts before submitting his offer. Appellant did not do so. **Appellant cannot now, once his offer was rejected, object claiming the tender document was flawed and prevented bidders from making appropriate offers.** Appellant had enough time to do this since clarification number four also extended the tender closing date to the 19<sup>th</sup> February 2021.” [emphasis added]*

3.17.3 Case 1690 – CT2097/2021 – Supplies Tender to Procure and Implement a CCTV System including Environmentally friendly Equipment and Client Workstations within Government State Schools

This case was decided on 11<sup>th</sup> March 2022. The Board held as follows:

*“Therefore, this Board opines, that the Appellant should have either used Regulation 262 of the Public Procurement Regulations to seek remedy if it was of the opinion that the tender specifications and conditions were impossible to be met, or at the very least to make a clarification request to the Contracting Authority during the bidding process.”*

3.17.4 Case 1733 – SVP 04/2022 – Call for Quotations for the Provision of Waste Collection Services using Environmentally Friendly Transportation Services at St Vincent De Paul Long Term Care Facility

This case was decided on 30<sup>th</sup> May 2022. The Board held as follows:

*“If the Appellant found this reply as being ambiguous, it had tools at its disposal, such as putting forward more clarification requests and finally filing a Call for Remedies objection as per Regulation 262 of the Public Procurement Regulations. **It cannot at this stage lament about details, or lack of, which were known to it as from the beginning of the tender procedure.**” [emphasis added]*

3.17.5 Court of Appeal (Superior Jurisdiction), Application Number 95/21/1: Truevo Payments Limited (C62721) v. 1. Direttur tal-Kuntratti; 2. Ministeru għall-Finanzi u x-Xogħol U 3. Credorax Bank Limited (C46342).



This case was decided by the Court of Appeal (Superior Jurisdiction) on 30<sup>th</sup> June 2021, declaring the objection filed by Credorax Ltd before the Board null and without effect, as its grievances all related to matters which had to be raised through a remedy before closing. Court held as follows:

*"7. Mhux l-istess jista' jingħad fil-kuntest tal-aggravju l-ieħor tas soċjeta` issa appellanti, dak marbut mal-inammissibilita` tal-azzjoni in vista tar-rimedju ikkontemplat fir-Regolament 262 aktar qabel indikat. Hu ċar li l-ilmenti tas-soċjeta` Credorax Ltd huma diretti lejn il-proċedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-soċjeta` qed tilmenta mill-użu tal-proċedura tal-ghoti tal-kuntratt b`negozjati, fuq il-mod kif ġie imfassal il-proċess ta' din il-proċedura u li ma kienx hemm l`approvazzjoni tad-Direttur tal-Kuntratti għall-użu ta' din il-proċedura.<sup>1</sup>*

*Dawn it-tlett aggravji li abbaži tagħhom il-kumpanija appellata Credorax Ltd pprezentat l-appell tagħha jirriwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taħt ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel iddata tal-għeluq ta' sejha għall-kompetizzjoni u mhux, bħal fil-każ ta llum, wara dik id-data, u saħansitra wara d-deċiżjoni dwar l-ghoti tal-kuntratt.<sup>2</sup>*

*8. Saret referenza għas-sentenza tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea tat-12 ta' Frar, 2004 , fil-każ fl-ismijiet Grossman Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich (C-230/02, CJEU) fejn fost il-konkluzjonijiet milhuqa jingħad is-segweni: "1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract awarded.*

*(Sottolinear ta' din il-Qorti).*

*9. Jidher ċar mill-premess illi darba li, anke f'dan il-każ, il-kuntratt ġie rakkomandat u s-soċjeta` Credorax Ltd naqset li tfittex ir-rimedju opportun*

<sup>1</sup> Emphasis added by PWC.

<sup>2</sup> Emphasis added by PWC.

*skond il-liġi qabel l-qheluq tat-terminu qhall-preżentata tal offerta, ma tistax aktar tappella biex tressaq l-aqqravji taqħha.<sup>3</sup>*

- 3.18 In view of the above, it is submitted with respect that the Objection filed by the Complainant should be deemed null and without effect, since the Grievances all relate to matters which were known to the Complainant prior to closing date for submission of tenders and, therefore, could only be raised in accordance with Regulation 262.
- 3.19 Surely, had the Complainant been awarded a Lot (by, for whatever odd reason, inverting the order in which it awarded the Lots), the Complainant would not have challenged the award. The Complainant is only contesting the way the Tender Document was drafted at this late stage because it was unsuccessful.
- 3.20 PWC therefore respectfully requests that the Board rejects the Objection as null and without effect.
- 4 First Grievance: The tendering procedure in question did not safeguard and warrant transparency, objectivity and equality of treatment between all the tenderers because the Tender Dossier had no award criteria addressing the situation of a bidder placing highest in more than one Lot but having the same value in all the bids and, consequently, the tendering procedure in question violated and breached the general principles of law namely equality of treatment and transparency and lacked objective award criteria in such a situation and afforded no certainty of outcome in the procedure.**
- 4.1 Without prejudice to the submissions in Section 3 above, the First Grievance is unfounded both in fact and at law.
- 4.2 The Tender Document stated that:
- 4.2.1 *“Tenderers may submit a tender for several lots (one or more lots), however only one (1) Lot can be awarded to any particular tenderer.” (Section 3.1)*
- 4.2.2 *“In case the same bidder ranks highest (final ranking) in more than one lot, s/he shall be awarded the lot with the highest value.” (Section 3.1)*
- 4.2.3 *“Contracts will be awarded lot by lot, in accordance with the award criteria at Article 6.” (Section 3.3)*
- 4.3 It is therefore clear that the Contracting Authority would award the contracts lot by lot.
- 4.4 PWC scored the most points for Lot 1. The Contracting Authority therefore had to award Lot 1 to PWC, unless two (2) cumulative conditions subsisted:
- 4.4.1 Firstly, PWC ranked the highest in more than one Lot – this condition subsisted as PWC ranked first in all three (3) Lots.
- 4.4.2 Secondly, the financial offer for the other Lot(s) that PWC was ranked highest for was higher than that of Lot 1 – this condition did not subsist, as PWC’s offer for all three (3) Lots was exactly the same.

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<sup>3</sup> Emphasis added by PWC.



- 4.5 In view of the fact that PWC ranked first for Lot 1 and had no other Lot for which it (a) ranked first, and (b) offered a higher value, Lot 1 had to be awarded to PWC.
- 4.6 The Contracting Authority had to then proceed with awarding Lot 2, excluding therefrom PWC since it had already been awarded Lot 1.
- 4.7 Same process had to be followed in relation to Lot 2. The award of Lot 2 to IDEA is therefore also in line with provisions of the Tender Document.
- 4.8 Finally, Lot 3 had to be awarded. In this case, given that both PWC and IDEA had already been awarded Lot 1 and Lot 2, respectively, the third ranked tenderer was awarded Lot 3 – that is, PK.
- 4.9 The Complainant's first grievance that awarding the contract, lot by lot, in chronological order constitutes a breach of the PPR is therefore entirely unfounded.
- 4.10 The Contracting Authority was obliged to award it in this manner, in accordance with the Tender Document and the principles of equal treatment, non-discrimination and self-limitation.
- 4.11 The Complainant's claim that, with objective and proper award criteria, it would have been awarded Lot 1 is baseless and unsubstantiated. The Complainant ranked third in Lot 1 and it cannot seriously expect that the Contracting Authority would completely invert the order for award of the Lots and start by awarding Lot 3, then proceed to award Lot 2 and finally Lot 1, so that the Complainant wins one Lot.
- 4.12 The Tender Document (and common sense) dictate that lots are awarded in chronological order, lot by lot.
- 4.13 If the Complainant misunderstood the terms of the Tender Document – and, for whatever reason, considered that the Contracting Authority would award the lots one by one starting from the last lot as opposed to starting from the first lot – then the Complainant should have clarified this or filed a remedy before closing (as explained in Section 3).
- 4.14 PWC therefore submit, with respect, that the lots were awarded in accordance with the terms of the Tender Document known to all parties at the outset. This grievance should therefore be rejected.
- 4.15 In addition, and without prejudice to the above, the request for cancellation of the Tender Procedure, at this late stage when all the prices submitted by the tenderers and their technical scores have been disclosed, is seriously prejudicial to all tenderers and completely disproportionate (in breach of the principle of proportionality).



- 5 Second Grievance: The Bidders were manifestly not treated equally and this inequality of treatment lead to the disqualification of EMCS.**
- 5.1 Without prejudice to the submissions in Section 3 above, the Second Grievance is unfounded both in fact and at law.
- 5.2 Firstly, the Complainant was not (to our knowledge) disqualified. Indeed, the letter dated 1<sup>st</sup> December 2023 from the Contracting Authority to EMCS does not state that its tender was not deemed to be compliant, but simply that it was not the offer with the Best Price Quality Ratio (BPQR).
- 5.3 This grievance is therefore unfounded and ought to be rejected.
- 5.4 Without prejudice to the above, in the justifications for this grievance, the Complainant embarks on a comparison of Lots 1 and 3 and states that the Contracting Authority should have awarded PWC Lot 3 and not Lot 1.
- 5.5 It is unclear why Lot 2 is not included in this comparison.
- 5.6 In any case, the Complainant then claims that if the Contracting Authority respected the principle of equal treatment the evaluation would have resulted in a tie between PK and Complainant and, consequently, it would have not been in a position to award the tender without discriminating against the one or the other.
- 5.7 The Complainant then requests that the Board orders the cancellation of the Tender Procedure.
- 5.8 In substance, this second grievance is not different from the first grievance. The Complainant seeks to argue that the award of Lot 1 should not have been first, simply because PWC was ranked first for other Lots and had the same financial offer across all Lots.
- 5.9 As explained above, the fact that PWC had the same offer across all lots simply meant that the Contracting Authority did not have to have recourse to the part of Section 3.1 which required it to award PWC the Lot with the highest value. Lot 1 was therefore rightly awarded to PWC and the remaining lots correctly followed the procedure outlined in the Tender Document.
- 5.10 Since the substance of this grievance is the same as that of the first grievance, PWC relies on its submissions in Section 4 (and, of course, Section 3 which sets out the preliminary plea).
- 6 Third Grievance: Subsidiarily to the first two grievances and without prejudice thereto, the rejection of EMCS' bid was entirely disproportionate considering the fact that EMCS' bid was better ranked in two out of three lots whilst PK's bid placed only once better than EMCS.**
- 6.1 Without prejudice to the submissions in Section 3 above, the Third Grievance is unfounded both in fact and at law.



- 6.2 The substance is once again no different from that of the other Grievances, save that the Complainant is applying a different principle to the same facts.
- 6.3 The Complainant claims that, since it scored higher than PK in two out of three Lots, the Complainant should have been awarded one of the Lots. This argumentation is entirely unsupported since the Tender Document did not create a competition between 3<sup>rd</sup> and 4<sup>th</sup> ranked tenderers.
- 6.4 PWC will avoid repetition of the arguments made in the previous sections and reiterates that the same arguments are applicable to this grievance. The Tender Document required award of contract lot by lot, and this is what the Contracting Authority did.
- 6.5 The Principle of Proportionality does not in any manner contemplate awarding a Lot to the Complainant because it came 3<sup>rd</sup> in two lots out of three (3). This argument is entirely unfounded, unsupported and quite frankly absurd. The principle of proportionality would not permit the Contracting Authority to do what the Complainant is suggesting it should have done. In a nutshell, this principle provides that the Contracting Authority should not adopt a measure which exceeds the limits of what is necessary in order to attach the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous.<sup>4</sup>
- 6.6 In this case, the Contracting Authority had only one appropriate measure – that is, awarding the contract lot by lot as per Tender Document which was accepted, in full, by all tenderers.
- 6.7 On the contrary, cancelling the Tender Procedure (as requested by the Complainant in its first two Grievances) would be entirely disproportionate and prejudicial to all tenderers who submitted valid tenders in accordance with the requirements set out in the Tender Document.
- 7 Conclusion**
- 7.1 The Objection is, for the reasons explained in Section 3 hereof, null and without effect as it relates to matters which were known to the Complainant prior to the deadline for submission of tenders and the Complainant failed to file a remedy before closing in accordance with Regulation 262. It is submitted, with respect, that the case-law of the Board and the Court of Appeal are crystal clear and the Objection should therefore be rejected.
- 7.2 Without prejudice to the above, the Objection is entirely unfounded both in fact and at law. The principles of equal treatment, non-discrimination and transparency (and self-limitation) required the Contracting Authority to award the contract Lot by Lot. The Contracting Authority complied with this requirement. The Objection of the Complainant therefore ought to be rejected even if it is not deemed null and without effect.

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<sup>4</sup> *Tideland Signal v Commission*, T-211/02 paragraph 39.

- 7.3 Without prejudice to the above, the cancellation of the Tender Procedure as requested by the Complainant is the most draconian and disproportionate measure of all, which would prejudice all tenderers. The request for cancellation is therefore in breach of the principle of proportionality and ought to be rejected.
- 7.4 In view of the above, PWC respectfully requests the Board to:
- (i) consider the Objection to be null and without effect;
  - (ii) without prejudice to (i) above, find against the Complainant's requests in its Objection and confirm the decision of the Contracting Authority to award the lots, lot by lot, in the manner it awarded said lots.
- 7.5 This reply is without prejudice to any further submissions that PWC may be allowed to make during the proceedings relating to the appeal forming the subject-matter of the Objection.

Yours faithfully,



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Steve Decesare