

The Secretary
The Public Contracts Review Board
Notre Dame Ravelin
Floriana
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5th December 2023

Dear Sir,

RE: 105 – Cft CT4001/2023 – Leasing of premises to house inpatient psychiatric services facility (IPSF)

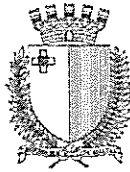
Reply of the Department of Contracts (the DoC) to the application filed by Messrs. Caring First Limited (the applicant) dated 16th November 2023, for the disclosure of the lease agreement.

Whereas

1. On the 27th of April 2023, the Contracting Authority has published a call for tenders for the leasing of premises to house inpatient psychiatric services.
2. In terms of a letter dated 29th September 2023 communicated to the applicant, it had informed that its tender did not satisfy the administrative and technical criteria and that the recommendation for award had been made in favour of CareMalta Group Ltd.
3. The applicant, having been aggrieved by the decision of the Contracting Authority, opted to file a reasoned letter of objection dated 6th October 2023.
4. The Contracting Authority, the DoC and the recommended tenderer all replied to this reasoned letter of objection on the 16th October 2023.
5. The appellant, to obtain information communicated a request dated 16th November 2023
6. In the submissions of both the recommended tenderer and the Department of Contracts it is emphasized that no decision regarding the grievances contained in the reasoned letter of objection dated 6th October 2023 has not been issued.
7. In this respect, whilst it is being stated that all grievances are to be provided in reasoned letters of objections within ten days from notification, the filing of requests beyond the ten-day period can only be allowed with the permission of the Public Contracts Review Board.
8. In virtue of an email dated 1st December 2023, the Public Contracts Review Board granted the respective entities a ten-day period within which a reply to the application can be presented.

Submissions

9. In terms of an application dated 16th November 2023, the appellant is seeking the disclosure of an alleged lease agreement entered between the recommended tenderer and HILA Homes Ltd.
10. In terms of article 562 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, the burden of proof is incumbent on the appellant to prove the existence of a lease agreement.
11. The evidence presented by the appellant has been obtained from the Malta Business Registry consisting in financial statements of the company HILA Homes Ltd. The notes



to the financial statements indicating lease payments does not by itself mean that there is a lease agreement in place between the same.

12. It is submitted that even if the allegations of the appellant prove that there is in existence a lease agreement, since lease agreements confer personal rights over things including buildings, such agreements are subject to non-disclosure and confidentiality clauses intended to protect commercially sensitive matters. This principle tallies with regulation 40(3) and regulation 242(3) of the Public Procurement Regulations, 2016 where Contracting Authorities may not prejudice the legitimate commercial interests of any one economic operator.
13. Regulation 48(8) of the Public Procurement Regulations, 2016 provides that in communications, exchange and storage of information, the integrity and confidentiality of tenders is to be maintained and preserved.
14. Whilst not directly related to public procurement, the DoC refers to the Ispas case¹ where it had been stated that access to files does not confer upon tenderers an unlimited right to request information and there is no right to see the complete file.
15. It is being submitted that the appellant is not entitled to carry out an evaluation of the tender offer of the recommended tenderer since such function is vested solely in the tender evaluation committee in terms of article 11 of Section 4 of the general Rules governing tenders in the call for tenders document.
16. Therefore, in the ambit of public procurement, in *Evropaiki vs Commission*² the appellant may not argue that its procedural rights for an effective remedy are being prejudiced, since it is established that there exists no obligation for a full copy of the evaluation report to be provided to the tenderer by the Contracting Authority.

Therefore, if there is in existence a lease agreement and in view of the above submissions, the DoC requests this Honourable Public Contracts Review Board:

- a) not to accede to the request of Caring First Limited;
- b) if disclosure is authorised by this Public Contracts Review Board, any disclosure is to be strictly restricted to the respective entities, namely the appellant, the Contracting Authority, and the Department of Contracts.

Yours sincerely,

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¹ Teodor Ispas, Judgment of the Court (Third Chamber), Case C-298/2016, 9th November 2017

² *Evropaiki vs Commission*, Order of the Court (Seventh Chamber), Case C-561/10P, 20th September 2011