

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1859 – CT2074/2022 – Re-issue – Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Support**

**8<sup>th</sup> January 2024**

The Board,

Having noted the letter of objection filed by Dr Ronald Aquilina acting for and on behalf of Support Services Limited, (hereinafter referred to as the appellant) filed on the 27<sup>th</sup> February 2023;

Having also noted the letter of reply filed by Dr Paul Borg, Dr Clint Tabone and Dr Yvette Tonna acting for Agenzija Support (hereinafter referred to as the Contracting Authority) filed on the 8<sup>th</sup> March 2023;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 6<sup>th</sup> March 2023;

Having noted the letter of objection filed by Dr Alessandro Lia acting for and on behalf of Executive Care JV, (hereinafter referred to as the Preferred Bidder) filed on the 9<sup>th</sup> March 2023;

Having heard and evaluated the testimony of the witness Dr Claudette Fenech (Representative of the Malta Business Registry) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Mr Stephen Vella (Chairperson of the Evaluation Committee) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Mr George Sultana (Member of the Evaluation Committee) as summoned by Dr Ronald Aquilina acting for Support Services Limited;

Having heard and evaluated the testimony of the witness Mr Oliver Scicluna (Representative of Agenzija Support) as summoned by Dr Ronald Aquilina acting for Support Services 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 sittings of the 30<sup>th</sup> March 2023 and 26<sup>th</sup> September 2023 hereunder-reproduced;

### **Minutes**

#### **Case 1859 – CT2074/2022 – Re-Issue - Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Support**

1<sup>st</sup> hearing -

The tender was issued on the 1<sup>st</sup> April 2022 and the closing date was the 10<sup>th</sup> May 2022. The estimated value of the tender excluding VAT, was € 1,533,253.20.

On the 27<sup>th</sup> February 2023 Support Services Ltd lodged an appeal against Agenzija Sapport as the Contracting Authority on their exclusion on the grounds that their offer failed to satisfy the BPQR criteria

A deposit of € 7,666 was paid.

There were five bids.

On the 30th March 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Support Services Ltd**

Dr Ronald Aquilina	Legal Representative
Eng Frederick Azzopardi	Representative
Mr Charlo Farrugia	Representative

**Contracting Authority – Agenzija Sapport**

Dr Clint Tabone	Legal Representative
Dr Yvette Tonna Borg	Legal Representative
Mr Stephen Vella	Chairperson Evaluation Committee
Mr Giancarlo Farrugia	Secretary Evaluation Committee
Mr Raymond Muscat	Evaluator
Mr George Sultana	Evaluator

**Preferred Bidder – Executive Care JV**

Dr Alessandro Lia	Legal Representative
Mr Steve Ciangura	Representative

**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 prior to inviting submissions noted that a preliminary point had been raised and this needed to be discussed first apart from the rest of the appeal.

Dr Ronald Aquilina Legal Representative for Support Services Ltd said that Appellant submits that the preferred bidder is not eligible for the award as its bid is invalid. In page 22 of the tender Terms of Reference 4.2.1 b it states that the Contracting Authority is seeking the services of a care worker company or consortium for the provision of care workers services. The preferred bidder does not qualify on this definition as at the date of the tender the provision of care workers was not included in the Memorandum and Articles of Association of the companies forming the Executive Care Joint Venture (JV). Executive JV is acting *ultra vires* as they are acting outside the terms of the objects clause and as a consequence it is not bound by any contracts they may enter into. Appellant claims that the bid is in the name of the consortium but if one of the companies forming that consortium does not qualify then it is not legal.

Witnesses were requested.

Dr Claudette Fenech (53572M) called to testify by the Appellant confirmed on oath when referred to Documents H and I (submitted by Appellant in letter of appeal) the Memorandum and Articles of Association as those of Executive Group Ltd and Executive Security Services Ltd.

In reply to questions from Dr Lia, Legal Representative for Executive Care JV witness stated that joint ventures were not registerable at law and licencing was not required for registration except in the case of financial institutions.

Mr Stephen Vella (513466M) called to testify by Appellant confirmed that the letter from BT Advocates dated 19<sup>th</sup> October 2022 addressed to the PCRB (filed as Doc F) confirmed that the composition of the JV is made up of two companies.

The concluded the testimonies.

Dr Lia noted that the bidders in the tender are Executive Services JV which is not registerable as a joint venture and the make up of the companies forming it is immaterial.

Dr Aquilina recited the main objects of the Memorandum of both companies and said that it is clear that nowhere is there any reference to care or care workers and hence they were not authorised to offer that service. At the date of the close of tender neither company was allowed to offer care services, not even in the subsidiary clauses. In January 2023 the Memorandum was changed to include care worker services – this is totally irrelevant to this case as it was not valid at the time of the tender submission but merely confirms that at the date of the tender the Company was not conforming. The tender makes the requirement of care workers very clear but neither one of the Companies can offer care workers services.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts referred to Regulation 56 of the PPR and said that the bid is by a joint venture which has a separate juridical entity and the individual companies should not be considered in this case.

Dr Lia said that the Evaluation Committee should only consider the joint venture without any need to look into the individual companies forming it. We are here dealing with procurement not company registration. Executive Care and Executive Services are separate entities and if they were to be awarded the contract all payments would go to JV. The argument about what the individual companies can or cannot do is irrelevant and this is supported by decisions of the Court of Appeal. The entity performing the care worker services is the JV and that is what has been declared. Should the Board feel that it is the separate companies that are the bidders this would lead to absurd decisions on the role of having joint ventures. The action of JV is not *ultra vires* as the Authority is fully aware of the situation and fully conscious of the facts. Dr Fenech in her testimony stated that joint ventures are not registerable and there are no licencing requirements and they are thus unable to list their functions.

Dr Aquilina said that the whole point of the tender is the requirement for care workers companies and if that point is not satisfied one cannot bid. If one followed the argument that the individual companies should be ignored then one can get away with legalising through a joint venture a bid for a service in which one has no experience at all. The need to provide care workers services is clear and this does not exist in this preferred bid as there is no registration.

Dr Lia said that a joint venture is not registrable.

Dr Debono pointed out that according to the General Rules Governing Tenders (article 2.4) a joint venture is regarded as a separate entity.

The Chairman proposed a recess to enable the Board to consider the submissions made on this preliminary point and decide on it. On resumption the Chairman notified the parties that the Board will deliver its decision in writing at a later date, thanked them for their submissions and in the meantime the hearing stands adjourned.

End of Minutes

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2nd hearing

The tender was issued on the 1<sup>st</sup> April 2022 and the closing date was the 10<sup>th</sup> May 2022. The estimated value of the tender excluding VAT, was € 1,533,253.20.

On the 27<sup>th</sup> February 2023 Support Services Ltd lodged an appeal against Agenzija Sapport as the Contracting Authority on their exclusion on the grounds that their offer failed to satisfy the BPQR criteria

A deposit of € 7,666 was paid.

There were five bids.

Following a Court of Appeal ruling on the 12<sup>th</sup> July 2023 that all grievances raised by Appellant must be heard at one hearing, on the 26<sup>th</sup> September 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman. Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider further this appeal.

The attendance for this public hearing was as follows:

**Appellant – Support Services Ltd**

Dr Roland Aquilina	Legal Representative
Ms Charlotte Sant Portanier	Representative
Mr Charlo Farrugia	Representative

**Contracting Authority – Agenzija Sapport**

Dr Ryan Pace	Legal Representative
Dr Miguel Cauchi	Legal Representative
Mr Stephen Vella	Chairperson Evaluation Committee
Mr Giancarlo Farrugia	Secretary Evaluation Committee
Mr Raymond Muscat	Evaluator
Mr George Sultana	Evaluator
Mr Oliver Scicluna	Representative

**Preferred Bidder – Executive Care Ltd**

Dr Alessandro Lia	Legal Representative
Mr Steve Ciangura	Representative

**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.

The Board Secretary asked that it be minuted that Dr Ryan Pace had represented him in a civil matter involving a property transaction. The Chairman reminded the parties that the Secretary did not vote on Board decisions and asked if there were any objections to the Secretary recording the Minutes. There were no objections.

Dr Ronald Aquilina Legal Representative for Support Services Ltd (hereinafter referred to as Support) asked if there were any objections to the formation of the Board being similar to the one at the previous hearing.

The Chairman mentioned that none of the parties in this case had raised this point in their letters of reply. There were no objections to the Board as constituted, proceeding to hear this case. Appellant was invited to submit its grievances.

Dr Aquilina said that the point of this appeal is that this is the second time that this matter is before this Board when there was already a decision on the 12<sup>th</sup> December 2022 when the BPQR evaluation was investigated and a decision thereon made. No objections or appeals were raised on that decision and therefore the matter became *res judicata*. Appellant trusted that the submissions of that first hearing will be available to this Board and he requested their inclusion in this hearing.

Dr Ryan Pace Legal Representative for Agenzija Support said that this appeal is not as stated by Appellant. This is the second hearing that Support is appealing. This is not a reflection that at the first hearing the Contracting Authority did not fulfill its duties correctly. The relevance of the decision in the first case is marginal as there was a second thorough evaluation which looked at the submission completely from the start.

Dr Alessandro Lia Legal Representative for Executive Care JV (hereinafter referred to as Executive) said that the preferred bidder had no objection to including the submission in the first case (Case 1818) but it must be pointed out that that case dealt only with the allocation of points by the Tender Evaluation Committee (TEC) and the re-evaluation was ordered on that basis and it does not bind the Board in regard to today's hearing.

The Chairman stated that the Board recognises that this is a new appeal and will deal with it accordingly.

Dr Aquilina requested that witnesses be heard.

Mr Stephen Vella (513466M) called to testify by the Appellant stated on oath that he was the Chairperson of the TEC and detailed the names of the rest of the Committee. His role as Chairman was non-voting and he could not reply to questions on the evaluation itself.

Mr George Sultana (293859M) called to testify by Appellant stated on oath that he was a member of the TEC and was a retired career civil servant who had in the past evaluated a number of tenders. He was not a member of the TEC which evaluated the tender the first time. He explained that the submissions were first individually assessed by each member of the TEC and marks awarded accordingly; a comparative analysis was then made to reflect the combined decision. The TEC members were aware of the 12<sup>th</sup> December 2022 decision and that a range of marks could be awarded under the BPQR system. Witness confirmed that full marks were awarded to both parties in this case as they satisfied the tender requirements – both offered fully detailed submissions with little difference in the two replies. The required criteria were satisfactorily reached. Questioned if Executive offered a biometric clock for timekeeping in their offer witness stated that he did not have detailed submissions to hand to enable him to answer the question.

Dr Pace and Dr Lia objected to this type of questioning on minutiae and said that this was not what the appeal was about and replies to this type of question infringed the confidentiality of bidders' offers.

The Chairman said that the Board upheld the objections.

Dr Aquilina therefore asked that the following note be recorded verbatim:

“Dr Aquilina on behalf of Support Services Ltd asked witness if Appellant had offered a biometric punch clock which was not requested in the tender and whether same item was offered by Executive Care JV”.

The Chairman pointed out that it was necessary to keep a balance between all parties and not to ask detailed questions.

Dr Lia said that the decision referred to by Dr Aquilina was on the technical aspect. The offer by the preferred bidder has to be looked at as a whole and one cannot go into, refer to or ask questions on specific individual items.

Dr Aquilina said that unless he is allowed to find out about individual items there is no point in contesting this award.

The Chairman re-iterated that the offer by the preferred bidder cannot be divulged through trying to break it down into individual items and questions have to be based on whole entity not on parts.

The testimony of Mr Sultana was continued. Witness stated that both submissions merited full marks. Executive went into very detailed submissions and the marks awarded reflected this.

Dr Aquilina again insisted that he does not want generic answers but details on each item offered by both parties.

At this stage Dr Pace asked the Chairman if there could be a short recess to enable the legal representatives to confer with the Board with a view to resolving this impasse.

On resumption the Chairman directed that the evaluation report can be made accessible but witness' replies must be based solely on the general criteria in the tender not on individual items.

Resuming his testimony Mr Sultana, asked to point out examples of submissions in the offers, cited as examples the Level of Service where Executive had submitted 64 propositions and Support 38 – Executive therefore was more detailed. In regard to another item – Timekeeping - Executive had submitted 28 propositions to 8 filed by Support which submissions however were more streamlined. Apart from the requisites in the tender any items offered over and above were also considered. Holistically both bids met the tender requirements and were fully valid and the TEC felt that full marks were merited by both.

Referred back to Timekeeping witness said that Executive's 28 propositions and Support's 8 propositions had different emphasis on the technical aspect but both deserved full marks. On Rostering, Executive had put forward 21 propositions to Support's 9 the latter being more detailed. On the Contingency Plan, Executive had submitted 23 propositions and Support 21. Every submission had aspects over and above what the tender requested and the tender had finally to be decided on price due to the equality of technical marks.

In reply to a question by the Chairman witness stated that Executive was offering different aspects to Support with equivalence offered on the Contingency Plan.

Dr Lia said that it must be borne in mind that according to Clause 4.2.6 of the Terms of Reference the tender only requested write-ups not replies to specific points.

Following further questioning by Dr Aquilina, Mr Sultana stated that the bids were assessed and marked individually but then a collective decision was taken by the TEC. Regarding the Collective Agreements, Executive had it in place with a commitment to allow workers to have such agreement whilst the preferred bidder submitted the necessary document. Executive had committed themselves to provide the number of care workers necessary round the clock. The number of care workers required was not requested in the tender.

In reply to a question from Dr Pace witness confirmed that the offer of both parties exceeded the standard required and were 'way above the rest' of all other bids. As the two bids were equivalent on the technical points the tender award had to be decided on price.

Mr Oliver Scicluna (334586M) called to testify by the Appellant stated on oath that this was the first time that the tender was issued on the Qrendi premises and there was currently no existing contract.

This concluded the testimonies.

Dr Aquilina said that contrary to what has been claimed this was not a transfer of business as this was a new contract and there was no obligation to assume workers. This was confirmed by a witness. The Board has in the past put down guidelines on how a BPQR tender is to be evaluated. It cannot be decided on price whilst ignoring all the differences between the respective offers. This defeats the whole point of obtaining value for money and frustrated the intention of submitting an offer above the minimum requirements. The testimony of Mr Sultana was immensely vague – although he claims that comparative analysis were made yet the marks awarded were the same. Although witness stated that the different aspects between the bidders were considered this was not reflected in the marking. It is extremely strange that there was not even a 1% difference in the marking. Support have a long history in this field with 2,400 care workers on its books – this alone should have been reflected in the award of the marks when compared to a newcomer, which with no experience could not possibly offer the same service. The methodology favours the Appellant on those points. Referring to the previous hearing Dr Aquilina said that there were certain points, like one hour replacement of workers, a standby driver and full time trainer, where Support offered better terms but were not awarded more points.

Dr Lia referred to the decision in the previous case (Case No 1818) and noted that there was this time no mention of page 14 of the tender in regard to the allocation of points as two of those points are binary requiring a simple 'yes' or 'no'. These can be disregarded. Mr Sultana testified that the criteria were met and well above what was expected and thus full points were awarded. As to the graded criteria Mr Sultana explained that the offers were well above what was expected. This was a matter of submitting a write-up and both bidders impressed and were awarded maximum marks. The offers were obviously different but not substantially or qualitatively different and were awarded full marks. As to the point regarding the care workers, Dr Lia said that the number required was not specified in the tender and the point regarding the level of experience is purely hypothetical. The matter of care workers is a post-award criteria and it suffices that Executive said that they will provide care workers. On the question of Appellant's rebuttal of the transfer of business requirement same Appellant's attention is drawn to clause 39.2 (page 18) of the tender which advises bidders that they are obliged to comply with the transfer of business regulations and that they have to cater for it.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that the Department relies on their written submissions. According to the testimony of Mr Sultana there is no difference in the technical submissions and it is correct that the award is based on price.

Dr Pace stated that the TEC members in this evaluation are totally different to those of the first tender, therefore all references to the first tender are irrelevant and out of place. One cannot try to infer that this hearing is a repetition of the first case. It is very unfair to refer to the testimony of Mr Sultana as very vague. Appellant was very selective on the points of testimony of Mr Sultana who stated that the bids were way above the rest. Witness clearly explained how after the individual assessments a comparative assessment was made by the whole TEC to ensure a fair and equitable decision. Witness explained how detailed the evaluation was and how the TEC concluded that both offers were of a high standard leading to a decision having to be taken on price. It is very unfair to claim that the TEC did not do a proper job. It is claimed that the Appellant has 2,400 workers – the TEC should not be expected to be influenced by this claim since the tender is silent on this point. This silence was not attacked prior to the submissions and no remedy was sought. The aim of a BPQR tender is to obtain value for money. Both offers on the technical side were very good and deserved full marks and therefore the award had to revert to the price for a decision. If there was no difference on the technical side it is obvious the decision has to be on the money side. The whole ultimate point of the tender is the housing of needy people and all these unnecessary games have been preventing this happening.

Dr Aquilina said that the BPQR is a comparative exercise and it is impossible that the parties could not be separated. The whole point of BPQR is to find out if one side is better than the other and the number of employees should have been reflected in the evaluation. Witness Mr Sultana did not provide the information requested of him.

Dr Pace concluded by saying that the failure on the part of the Appellant to seek a remedy earlier has now placed it in a position of trying to correct it through an appeal.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of 30<sup>th</sup> March 2023 and 26<sup>th</sup> September 2023.

Having noted the objection filed by Support Services Limited (hereinafter referred to as the Appellant) on 27<sup>th</sup> February 2023, refers to the claims made by the same Appellant with regards to the tender of reference CT2074/2022 as case No. 1859 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Ronald Aquilina

Appearing for the Contracting Authority:

Dr Paul Borg, Dr Clint Tabone,

Dr Yvette Tonna Borg, Dr Ryan Pace &



Dr Miguel Cauchi

Appearing for the DoC:

Dr Mark Anthony Debono

Appearing for the Preferred Bidder:

Dr Alessandro Lia

Whereby the Appellant contends that:

- a) The Appellant's First Ground Of Appeal relates to the ineligibility of Executive Care to participate in this tender and the invalidity of its tender bid. The Tender document expressly states that *"the Contracting Authority is seeking the service of a care workers company or consortium for the provision of care worker services"*. Executive Care is a consortium made up of two companies - Executive Group Limited (C80156) and Executive Security Services Limited (C45125).

At the closing time for the submission of tenders and up till the time of writing, Executive Security Services Limited had as its main object *"to provide security services at places of entertainment, night clubs, outside events, bar and restaurants. To employ people and provide management services to third parties and to provide static guarding services as well as high profile security services."* Its objects clause preclude it, therefore, from providing care worker services and as such it was and remains ineligible to participate in this tender since it is not a care worker company as expressly required by the tender document.

At the closing time for the submission of tenders, Executive Group Limited had as its objects *"to provide human resources support services to any types of companies and entities providing services or operating establishments in relation to catering, hospitality, cleaning, construction and restoration services."* At the relevant time, namely the closing time for the submission of tenders, its Memorandum of Association's objects clause precluded it from providing care-worker services and hence it was ineligible to participate in this tender as it was not a care-worker company as expressly required by the tender document.

Indeed, it is respectfully submitted that the submission of a bid by Executive Group Limited and Executive Services Limited in respect of this tender falls foul of the ultra-vires doctrine in company law. Companies can only act strictly within the powers and objectives set out in the objects clause of their Memorandum of Association. Anything done by a company not covered by the said powers and objectives is null and void and without effect.

It is pertinent to point out at this stage that the relevant moment in time in determining whether the bid submitted by Executive Care is valid or not is the closing time for the submissions of tenders. Any changes to either company's Memorandum of Association after the closing time for the submission of tenders should, therefore, be disregarded as it cannot have the effect of rendering valid an offer invalidly submitted in the first place. The Appellant is indeed aware that very recently, (10th January, 2023) Executive Group Limited did change its object clause to cover the provision

of care worker services. As already stated, however, this change so late in the day, is irrelevant and does not remedy the fatal flaw in Executive Care's bid. If at all, it serves as further evidence in the sense that, at closing time for the submission of tenders, Executive Group Limited was not authorised to provide care worker services.

It is respectfully submitted, therefore, that Executive Care's bid is not valid and that Executive Care were not eligible to participate in this tender which was open only to a "care-worker company or consortium"

b) Second grievance -

Without prejudice to the foregoing, the appellant's Second Ground Of Appeal stems once again from an overall improper evaluation which does not satisfy the requirements of an evaluation on the basis of the best price quality ratio.

This ground of appeal concerns the manner in which the technical scores were awarded. The Tender is very clear that the award is to be effected on the basis of the best price/quality ratio "BPQR" and not on the basis of the cheapest technically compliant offer / price only. Over the last years, the PCRB and the Court of Appeal have had ample opportunity to express themselves on BPQR (previously also called MEAT - Most Economically Advantageous Tender) as the criterion for award.

The foregoing submissions are also in line with the findings of this Hon. Board in case 1818 concerning this very same tender. During the hearing, it clearly transpired that the evaluation committee had opted to allocate full marks to any bidder who offered the bare minimum required, even in those instances when the tender itself clearly established that certain aspects of tender submissions were subject to spectrum or range marking. In the words of this Board itself, *"what the Evaluation Committee did, is render this BPQR tender into a cheapest compliant bidder winning tender. This goes totally contrary to the purposes and objectives of a BPQR tender, whereby economic operators are encouraged to submit offers with a higher technical value and quality."*

In virtue of its decision of the 12 December, 2022, this Hon. Board ordered a fresh evaluation of this tender which takes into account its findings in respect of the application on the BPQR to this tender. It is disappointing to note, however, that notwithstanding the aforementioned decision of this Board, the (presumably new) Evaluation Committee proceeded, once again, to afford full marks on the technical score to both the Appellants and Executive Care. It is not known to the Appellant, at this stage, whether other bidders were likewise accorded full marks in respect of the technical score.

The Appellant is, once again, forced to respectfully submit that, in view of the foregoing considerations as applied to this present appeal, the decision to award an equal points technical

score to the Appellant and Executive Care is incorrect and betrays a flawed adjudication which should not be allowed to stand by this honourable Board. This is especially so when one considers that our client was allotted full marks in respect of each and every one of the evaluation criteria and therefore, presumably, so was Executive Care (on the basis that they were also awarded identical marks on the technical score).

It is further respectfully submitted that had the individual, comparative exercise required by the BPQR in respect of each evaluation criterion been effected, it would be humanly impossible for all individual members of the adjudication committee to find that both our client's and Executive Care's respective offers were perfectly equivalent in respect of each and every one of the said evaluation criteria.

Indeed, an examination of our client's tender submission would show that on a number of items, our client's submission exceeds and is technically superior to the minimum requirements set out in the tender document. Yet, surprisingly, our clients were allocated the same technical score as Executive Care even in respect of those items where our client's offer exceeded the minimum technical specifications. For that to happen, presumably, Executive Care had to submit the exact same superior specification/submission in respect of (and only in respect of) those evaluation criteria where our client submitted a superior specification/submission. The chances of that happening are next to nothing.

It is pertinent to point out at this respect, that the Contracting Authority itself acknowledges that the offers of the Appellant and of Executive Care are not identical. Indeed, in its reasoned letter of reply dated 19th October, 2022, the Contracting Authority itself expressly stated and declared that *"the Evaluation Committee has conducted its assessment of the tender in accordance with the BPQR criteria in fact on some aspects the appellant provided more than the minimum expected on other aspects it was Executive Care which provided additional add-ons to the minimum."* Although that letter was filed in response to a previous appeal in connection with this tender, the statement of the Contracting Authority remains valid and binding upon it as the tender requirements and criteria as well as the tender submissions of the parties have not changed since then.

Taken to a logical conclusion, once according to the same Contracting Authority the Appellant's offer provided more than the minimum in certain aspects, the Appellant should have scored better points than Executive Care in respect of those aspects. Likewise, once the Contracting Authority declared that, in its opinion, Executive Care provided additional add-ons on other aspects, Executive Care should have scored better points than the Appellant in respect of those aspects. The end result is that, on the basis of the Contracting Authority's own express aforementioned declaration, neither the Appellant nor Executive Care could have scored full marks in respect of the technical score.

The fact that, even after a second evaluation, both Appellant and Executive Care (and possibly other bidders) were accorded full marks in respect of the technical score demonstrates that the evaluation was not properly effected as required by the tender document. It is indeed once again clear that the (presumably new) Evaluation Committee has once again resorted to according full marks whenever, in its opinion, the bare minimum required by the Tender document was offered by bidders and did not carry out, on an individual basis, a comparative exercise, in respect of each of the evaluation criteria to determine, in respect of each criterion, which offer / submission is the superior one. That is the only logical explanation possible to the full marks once again being granted to both our client and Executive Care. Thus, even this second adjudication cannot be said to have been validly effected on the basis of BPQR and hence should not be allowed to stand.

It is respectfully submitted that the Evaluation Committee's decision to ignore the tender's BPQR evaluation requirements and instead adjudge it substantially on the basis of the cheapest technically compliant model violates the principle of Self-Limitation which is at the heart of public procurement.

c) Third grievance -

During the hearing of Case 1818 in connection with this tender, it transpired that both Executive Care and the Appellant were given only 1 point out of a possible three in respective (sic) of the Collective Agreement add-on.

During the first evaluation, in fact, the then Evaluation Committee had decided not to award the full 3 points to the Appellant notwithstanding that the Appellant had filed a copy of a valid collective agreement and a letter dated 14 December, 2020 from the Director of the Department for Industrial and Employment Relations stating that the said Collective Agreement was still valid and in force. This Board, in virtue of its decision of the 12th December, 2022, upheld Appellant's first appeal in this regard and thus full marks should have been (and were) accorded by the second Evaluation Committee in this regard. It is pertinent to point out that decision of this Board of the 12th December, 2022 was not appealed and is therefore now final and not subject to any other appeal.

The Second Evaluation Committee's decision to accord Executive Care full marks in respect of the technical score implies necessarily that Executive Care were accorded full marks also in respect of the Collective Agreement Add-On.

In view of the fact, that as transpired during the hearing of the first appeal (Case 1818) in connection with this tender, Executive Care did not submit a valid collective agreement in respect of care workers as part of its tender submission, Executive Care should not have been accorded the full 3 marks in respect of the Collective Agreement Add-On but only the minimum prescribed by the Tender document, i.e. 1% of 3 marks.

d) Fourth grievance -

It is pertinent to point out that both companies forming part of the Executive Care consortium do not have any track record and history in the provision of care workers. Indeed, Executive Security Services Limited is not even authorised, in virtue of its own Memorandum and Articles of Association to provide care workers to third parties whereas Executive Group Limited became so authorised only as of the 10th January, 2023, coincidentally around the time the second evaluation committee was presumably evaluating the tender or thereabouts. It is not clear whether, since the 10th January, 2023, Executive Group Limited has any care-workers employed on its books at all.

The Appellant, on the contrary, is an established provider of care-worker services with in excess of 2400 of care-workers on its books. It regularly provides care workers to government and private hospitals, homes for the elderly, mental health hospital, including care workers to Agenzija Sapport, the Contracting Authority in this tender.

In the circumstances, in view of the great disparity in the experience and human resources between the Appellant and Executive Group, one cannot understand how the Evaluation Committee placed the respective bids on the same par and accorded them the same points. The Tender, inter alia, called for submissions as to (a) Methodology demonstrating assurance that the care workers provide the expected objectives, responsibilities and duties, (b) contingency plans and (c) Adequate Level of Service as per Article 4.2.5(a) of the TOR. It is respectfully submitted that when evaluating such write-ups/reports/methodologies/plans, the evaluation committee should have not have stopped at what was written but should also have examined and evaluated the experience and capabilities of the bidders. Not to do so would reduce the evaluation into a prose correction exercise, where points are given on the language used rather than on the substance of the submission.

The Evaluation Committee's manifest failure to take into account the substantial disparities in experience and capabilities between the Appellant and Executive Care as well as the human resources available to them to carry out the tender, renders the evaluation an unsafe one which, in the Appellant's humble opinion, should not be allowed to stand.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8<sup>th</sup> March 2023, its verbal submission during the hearings held on the 30<sup>th</sup> March 2023 and 26<sup>th</sup> September 2023, in that:

- a) The evaluation committee has conducted its assessment in line with the Best Price / Quality Ratio (BPQR) whereby the evaluators have assessed the selection criterion found and set out in the tender document.

- b) In assessing the eligibility criteria for the award of the contract, the Evaluation Committee has assessed that each and every economic operator provided the required documentation as to enable them to be eligible to participate in the tendering process and thus, file their respective bid.
- c) The Evaluation Committee has assessed the submissions put forward by the economic operators and evaluated each and every submission thoroughly by adopting a comparative analysis of the offers.
- d) Therefore the Evaluation Committee has evaluated the tender submissions fairly and objectively in line with the BPQR, consequently adopting the 60/40 ratio as set out in the tender document itself.

This Board also noted the DoC's Reasoned Letter of Reply filed on 6<sup>th</sup> March 2023, its verbal submission during the hearings held on the 30<sup>th</sup> March 2023 and 26<sup>th</sup> September 2023, in that:

- a) First Ground of Appeal - In accordance with Regulation 56 of the Public Procurement Regulations, 2016, a tenderer can be either a natural or a legal person or a public entity or group of such persons and, or entities. In accordance with Rule 2.4 of the general rules governing tenders where joint ventures are concerned, the tender evaluation committee is to consider the same joint venture by itself when satisfying the criteria established in the tender document. Therefore, the DoC submits that the submissions concerning economic operators and the presentation of evidence consisting in documentation pertaining to economic operators which have not submitted a tender offer is irrelevant in the present proceedings. It is consequently being submitted that the Public Contracts Review Board should in accordance with Regulation 90(4) of the Public Procurement Regulations, 2016 order that the submissions and the documentation are removed from the acts of the proceedings. Without prejudice, in accordance with regulation 39(3) of the Public Procurement Regulations, 2016 tender specifications in procurement documents are not designed to exclude or restrict economic operators from participating in procurement procedures.
- b) Third Ground - With respect to the third ground of appeal, the DoC submits that the decision of the Public Contracts Review Board dated 12th December 2022 is to be upheld in accordance with Regulation 93(4) of the Public Procurement Regulations, 2016.
- c) Fourth Ground - In accordance with Regulation 222 of the Public Procurement Regulations, 2016, the DoC submits that economic operators should have the necessary experience to perform the contract to an appropriate quality standard. In this respect, the Tender Evaluation Committee will be called upon to provide its submissions regarding its assessment of the tender offer.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 9<sup>th</sup> March 2023, its verbal submission during the hearings held on the 30<sup>th</sup> March 2023 and 26<sup>th</sup> September 2023, in that:

- a) First grievance –
  - i. This issue should be decided as a preliminary point and before the merits of the case
  - ii. The M&A of the company is wide enough to cater for this scope of this tender
  - iii. None-the-less it is the JV who is participating in this tender procedure and not the individual companies
- b) Second grievance – all that the appellant is doing is showing its non-acceptance of the points obtained. Evaluation committees have 'leeway' to operate.
- c) Third grievance – this has already been dealt with in the first original hearing.
- d) Fourth grievance – points mentioned by appellant are in their majority irrelevant.

This Board, after having examined the relevant documentation to this appeal, heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, and having taken consideration of the Court of Appeal judgement of 12<sup>th</sup> July 2023, will now consider the Appellant's grievances and deliver its decision in full.

- a) First grievance – (as issued on 4<sup>th</sup> April 2023)
  - i. Initially, this Board agrees with appellant's argumentation that what is relevant for evaluation and eventual award of the tender, is that documentation which was submitted as part of the economic operators' bids. Therefore, if relevant at all, it would be the Memorandum & Articles of Association as they were submitted and in their form as at the closing date of the call for tenders which would need to be taken into consideration. Any subsequent changes to these M&As post the closing date of the call for tenders are to be considered irrelevant. However, one needs to analyse if the M&As of the companies forming the Joint Venture are relevant to proceedings.
  - ii. To analyse this, reference is initially made to the testimony under oath of Dr Claudette Fenech whereby she confirmed that Joint Ventures are not registerable at law. Therefore, they do not need to register with the Malta Business Registry (MBR) and as a consequence their objects and objectives are not 'public' knowledge. This is not however to say, that their objects would be identical to the company's forming it.
  - iii. It is this Board's view that in relation to Procurement Law, Joint Ventures are to be regarded as separate entities. As such, it is their specific objects which should be considered for evaluation. In reference to this, the Board agrees with the Evaluation Committee's decision that the Joint Venture agreement of the Preferred Bidder duly satisfies the requirements of article 4.2.1 of Section 3 of the tender dossier. This article states that *"The Contracting Authority is seeking the service of a care workers company or*

***consortium** for the provision of care worker services.....*” (bold & underline emphasis added)  
Since the ‘consortium’ / joint venture meets this requirement, in relation to this specific requirement, it is to be deemed compliant.

b) 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grievance –

- i. Due to the similarities in the arguments brought forward, this Board will now consider the other grievances of the appellant in their entirety.
- ii. Initially it is noted that the Contracting Authority did in fact adhere to the order given to it by this Board by performing a re-evaluation through a newly constituted Evaluation Committee (‘2<sup>nd</sup> evaluation committee’) composed of members which were not involved in the original Evaluation Committee (‘1<sup>st</sup> evaluation committee’). This was also confirmed from the testimony under oath of Mr Stephen Vella who listed the composition of the new evaluation committee.
- iii. This Board had also ordered that the 2<sup>nd</sup> evaluation committee had to take into consideration the Board’s findings. In a nutshell, the main finding was that the Criteria For Award was the Best Price Quality Ratio (BPQR) but the 1<sup>st</sup> evaluation committee had basically reduced their evaluation to a cheapest compliant tender to be awarded the contract.
- iv. The 2<sup>nd</sup> evaluation committee, in their concluding evaluation report, came up with the same ‘ranking’ as the 1<sup>st</sup> evaluation committee did. Therefore, Appellant has now once again lodged another appeal with the main bone of contention being that the BPQR elements have again not been duly assessed by the 2<sup>nd</sup> evaluation committee as well.
- v. In order to properly assess how the 2<sup>nd</sup> evaluation committee proceeded during their evaluation, reference is made to the testimony under oath of Mr George Sultana whereby on separate occasions he stated that:

A. *“.....was not a member of the TEC which evaluated the tender the first time”*

B. *“.....the submissions were first individually assessed by each member of the TEC and marks awarded accordingly.....”*

C. *“.....a comparative analysis was then made to reflect the combined decision”.*

D. *“The TEC members were aware of the 12th December 2022 decision and that a range of marks could be awarded under the BPQR system”*

E. *“both offered fully detailed submissions with little difference in the two replies”*

F. *“Holistically both bids met the tender requirements and were fully valid and the TEC felt that full marks were merited by both.”*

G. *“Executive was offering different aspects to Support with equivalence offered on the Contingency Plan”*

H. *“....the offer of both parties exceeded the standard required and were ‘way above the rest’ of all other bids. As the two bids were equivalent on the technical points the tender award had to be decided on price.”*



- vi. From such testimony it results that a proper evaluation has been conducted. Whilst it is comprehensible to come to a conclusion as the appellant did, it is surely not impossible. This Board, in order to ascertain the statements made by Mr George Sultana, has analysed in detail the submissions on the Contingency Plan as well as those on Timekeeping of both economic operators. Moreover, this Board has also referred to the evaluation report which includes details of the comparative analysis performed during technical evaluation. This Board is in agreement with the Contracting Authority when it states that the offer of both parties exceeded the standard required and were ‘way above the rest’ of all other bids. Even though they are certainly not similar to the exact point, it is not incomprehensible that in general they both offer the same level of ‘added value’.
- vii. With regards to the collective agreement finding in the decision of 12<sup>th</sup> December 2022, this Board is confident that the 2<sup>nd</sup> evaluation committee duly respected such order. Nothing was presented during these proceedings to prove otherwise.

Therefore, this Board does not uphold Appellant’s grievances.

**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 recommendation for the award of the tender to Executive Care JV,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Ms Stephanie Scicluna Laiviera**  
Member

**Mr Lawrence Ancilleri**  
Member