

PUBLIC CONTRACTS REVIEW BOARD

Case 1927 – CPSU1396/19 – Negotiated Procedure for the Leasing of Non-Emergency Ambulances plus Drivers and Porters for the Non-Emergency Ambulance Garage

5th January 2024

The Board,

Having noted the letter of objection filed Dr Matthew Paris and Dr Adrian Delia acting for and on behalf of Cardona Engineering Works, (hereinafter referred to as the appellant) filed on the 29th September 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 9th October 2023;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Malta Red Cross (hereinafter referred to as the Preferred Bidder) filed on the 9th October 2023;

Having heard and evaluated the testimony of the witness Ms Bernice Gauci (Chairperson of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ms Bernice Gauci (Chairperson of the Evaluation Committee) as summoned by Dr Paris acting for Cardona Engineering Works;

Having heard and evaluated the testimony of the witness Mr Philip Cardona (Representative of Cardona Engineering Works) as summoned by Dr Clement Mifsud Bonnici acting for Malta Red Cross;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Director General Department of Contracts) as summoned by Dr Matthew Paris acting for Cardona Engineering Works;

Having heard and evaluated the testimony of the witness Mr Mark Grima (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cardona Engineering Works;

Having heard and evaluated the testimony of the witness Mr Ramon DeBattista (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Cardona Engineering Works;

Having heard and evaluated the testimony of the witness Mr Kurt Balzan O’Dea (Representative of the Ministry for Finance) as summoned by Dr Matthew Paris acting for Cardona Engineering Works;

Having heard and evaluated the testimony of the witness Ms Paulette Fenech (Representative of the Malta Red Cross Society) as summoned by Dr Matthew Paris acting for Cardona Engineering Works;

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 19th October 2023 and 23rd November 2023 hereunder-reproduced.

Minutes

Case 1927– CPSU 1396/19 – Negotiated Procedure for the Leasing of Non-Emergency Ambulances plus Drivers and Porters for the Non-Emergency Ambulance Garage

The call was issued on the 8th August 2023 and the closing date was the 16th August 2023. The estimated value of this call, excluding VAT, was € 1,161,580.

On the 29th September 2023 Cardona Engineering Works filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that the price of the recommended bidder was too low.

A deposit of € 5,807.90 was paid.

There were two bids.

On the 19th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Cardona Engineering Works

Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative
Mr Kevin Gauci	Representative
Mr Philip Cardona	Representative
Mr Mario Cardona	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leone Camilleri	Legal Representative
Ms Alexia Farrugia Zrinzo	Legal Representative
Ms Bernice Gauci	Chairperson Evaluation Committee
Mr Mark Grima	Evaluator
Mr Rosario Attard	Evaluator
Mr Ramon DeBattista	Evaluator
Dr Alison Anastasi	Representative

Preferred Bidder – Malta Red Cross Society.

Dr Clement Mifsud Bonnici	Legal Representative
Ms Paulette Fenech	Representative
Mr Robert Brincau	Representative

Interested Parties

Mr Adrian Dalli	Department of Contracts Dir. Gen. Designate
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Mr Leo Grech
Mr Kevin Vella

Paramount Garage
Paramount Garage

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions stated that he wishes it to be recorded that he declares that in his private capacity as owner of a firm of auditors he was a past auditor for the Malta Red Cross Society. The last audit report signed on the 28th October 2021 covered the financial year ending 31st December 2020. He asked if there were any objections to him proceeding to chair the hearing.

There were no objections to continue with the proceedings.

The Chairman then went on to make the following statement:

“This is Case 1927 in the records of the PCRB.

The Appellant is Cordina Engineering Works represented here by Dr Delia and Dr Paris, the Contracting Authority is the CPSU represented by Dr Camilleri and Dr Farrugia Zrinzo and also in attendance is the Malta Red Cross Society represented by Ganado Advocates.

In this introduction by the Board I will give a short resume of the letters and applications submitted by the diverse parties.

The first letter and the principal reason we are all here today was the letter of objection submitted by the Appellant Cardona Engineering Works, dated 28th September 2023 and filed at the PCRB on the 29th September 2023.

Subsequently two letters of reply were submitted from the CPSU and the Malta Red Cross respectively, both of which reached the Board on the 9th October 2023. Certain preliminary pleas were raised which the Board will commence to hear.

The Malta Red Cross subsequently filed an urgent application received by the Board on the 13th October comprising two requests which in substance asked that at today’s hearing only the preliminary pleas be heard and decided on by the Board.

In their reply Cardona Engineering Works requested that the above request should be denied and the CPSU replied that they submit themselves to the decision of the Board.

At this stage the Board has the following observations to make:

1. Regulation 90(2) clearly states that the Board has to hear all the parties concerned before any form of decision is taken. Therefore the Board was obliged, and did, await the replies from the other parties.
2. Reference is now made to the very recent decision of the Court of Appeal of the 12th July 2023, Rikors Number 191/23/1 in the names Support Services Ltd vs Agenzija Sapport, Direttur Generali tal-Kuntratti u Executive Security Ltd/Executive Group Ltd wherein, despite the fact that the Regulations gives this Board the exclusive discretion to regulate its own procedures the Court of Appeal interpreted this Regulation differently as they affect preliminary pleas and decisions thereon.

Paragraphs 23,24 and 25 state the following:

23. Imkien fir-Regolamenti dwar l-Akkwist Pubbliku, ma jinghad li l-Bord ta' Revizjoni jista jaghti sentenza parzjali. Anzi mill-mod ta' kif inhuma miktuba dawn ir-regoli, wiehed jifhem li l-Bord huwa marbut li jaghti d-decizjoni finali tieghu, wara li jkun sema' dak kollu li jkunu ressuq l-partijiet għall-attenzjoni tieghu.

24. Toqghod hafna hawnhekk il-massima legali: *ubi lex voluit, dixit; ubi noluit, tacuit*, li tfisser li jekk tkun trid il-ligi titkellem u meta ma tkunx trid il-ligi tibqa siekta. Ladarba r-Regolamenti dwar l-Akkwist Pubbliku ma jtkellmu xejn dwar il-possibilita ta sentenza parzjali, kuntrarjament għal dak li nsibu fil Kodici ta Organizazzjoni ta Procedura Civili, allura wiehed ma jistax hlief jikkonkludi li mhux permessibli li jinghataw sentenzi parzjali f'dan il-qasam tal-kuntratti pubblici.

25. Għalhekk din il-Qorti tittama li l-Bord ta Revizjoni b'harsien mal-ispirtu tar-regolamenti li jridu li l-appelli għandhom jigu decizi b'certu heffa, għandu jieqaf milli jordna jew jaccetta li jaqsam l-appell f'sentenzi separati, imma għandu jezigi li l-appell jigi trattat kollu f'daqqa u wara jaghti sentenza finali.

In conclusion, therefore:

- Regulation 276(c) of the Public Procurement Regulations makes it clear that the written replies have to be filed within ten days
- More so even can this Board not agree to the request when one takes into consideration the Court of Appeal decision above quoted.

Therefore, time permitting the Case will be heard in full today and it will be then that the Board will give its decision.

The Chairman then invited submissions.

Dr Adrian Delia Legal Representative for Cardona Engineering Works (hereafter referred to as CEW) asked that it is recorded verbatim that:

“Additional to the unequivocal statement just made and the judgement of the Court and the request to split the hearing between the preliminary point and the merits they request that the decision on their application is heard prior to the main hearing and therefore, for the same reason which we shall deal with later they request that that there is no hearing for part of the decision contrary to the provisions of the law.”

Dr Clement Mifsud Bonnici Legal Representative for the Malta Red Cross Society (hereinafter referred to as MRCS) said that the Board understood that it was not requested to decide the preliminary pleas without a hearing but it was an offer of case management direction. After seeing all the submissions they offered a virtual hearing similar to what happened in the recent Saint Vincent de Paule case where there was a decision after a full debate. The Board has powers to issue a decree without holding a hearing (Reg.90(6)) and has the same powers as the First Hall of the Civil Court. MRCS accepts the Board's decision but refers to past cases for future reference, namely the *Support Services*, the *Mica Med vs Cauchi* and the *Regjun Tramuntana* cases. The Court of Appeal referred to the *Support* case decision and stated that the Board in certain circumstances can decide to give a sentence 'in partem'. This could well apply to this case as it deals with the same rapid character and effective character of remedy. This side submits that not only was this appeal filed after the statutory term but that the Board allowed it and hence the request for case management and it is therefore proposed that the case is all heard at one go as in certain past cases.

The Chairman stated that the Board found no objection to this, although it will make the process lengthy and directed that the *fuori termini* plea be heard first and then go on to hear the merits.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the first preliminary objection, as detailed in the written submissions, is that the appeal is *fuori termini* as it was filed over ten days after the Appellant was informed by e-mail of the award to a more compliant offer. Appellant will claim that the usual letter was not received but the Authority will claim that the Public Procurement Regulations (PPR) were observed and satisfied as the information was issued by electronic means, and received by the Appellant to enable it to submit an appeal. All the elements of Regulation 271 were thus satisfied. The term of ten days is peremptory, cannot be derogated and is a matter of public order. There are various cases supporting this decision. The Board should follow jurisprudence and accept this claim on the basis of public order. The Authority will provide evidence that Appellant was notified.

Ms Bernice Gauci (476186M) called to testify by the Contracting Authority stated on oath that she was the Chairperson of the Tender Evaluation Committee (TEC) and the tender co-ordinator. Witness said that the Appellant requested an update on the outcome of the bid on the 4th September 2023 and was advised that the contract was awarded to a cheaper bidder. Requested to give further details witness said that this was done by e-mail dated 5th September from Bernice Gauci to Kevin Gauci who had sent an e-mail on the 4th September from e-mail address info@emergencymalta.com. This e-mail address was the one that Kevin Gauci usually used in communicating with CPSU.

In reply to questions from Dr Delia, witness said that no prior decision had been sent to CEW before the email of the 5th September. This was normal since in this case there was only one supplier involved and in such instances no rejection letters are sent. In this case a blank document on the outcome had been uploaded on the website. Witness agreed that CEW would not have known the outcome of the bid had it not enquired. The Department of Contracts had given its approval of the tender decision on 23rd August. Neither one of the bidders had been notified. Up to date the website information was still blank as the system does not allow changes. Witness was aware of the requirement in Regulation 272 to communicate decisions to parties - in the case of CEW this was not done.

Questioned by Dr Mifsud Bonnici witness stated that after the 5th September e-mail the CPSU received no further communication from CEW. On the 25th September Emergency Malta was informed that a new economic operator was starting to provide the service on the 2nd October. On the 22nd September Emergency Malta sent an e-mail to CPSU to the effect that they were aware that MRCS was trying to purchase ambulances from UK which CEW was sceptical about but if it was true it made the MRCS bid ineligible. On the negotiated procedure according to the witness, two offers were received – from MRCS and CEW. All communications with CEW were always with either Philip Cardona or Kevin Gauci. Witness was not aware of CEW legal status and whether it was a limited liability company and was also not aware if Emergency Malta is a limited liability company separate from CEW, but confirmed that CPSU has had a long standing business relationship with CEW over at least three or four years. The negotiated procedure was a stop gap. Witness was not aware of the connection between Emergency Malta and CEW.

Mr Philip Cardona (366875M) called to testify by MRCS stated on oath that he was one of the owners of CEW but mainly the sole owner. He had access to the e-mail address PHCardona@gmail.com. According to the witness CEW is a self employed business.

Mr Anthony Cachia (142658M) called to testify by the Appellant confirmed on oath the replies of the Department of Contracts in the letter of the 16th October to the five points raised by Dr Paris. According to the witness the information in the reply to question 2 in the above document was that

provided by the CPSU as it was them who should have uploaded the document on the system by providing details of the award instead of a blank document. The period for filing appeals was usually stated on issued documents.

Dr Camilleri stated that witness had confirmed that on the 5th September an e-mail had been sent to the Appellant's address used normally – this fulfilled and respected the requirements of Regulations 271 and 272 which state that a summary of reasons has to be given for refusal or acceptance. It was stated clearly in this case that the award was made to a cheaper compliant bid. What happened cannot be changed and Appellant was not contesting that the letter was not sent but that a blank document was uploaded – however what the law required was respected. The preliminary point should be respected as the peremptory period of ten days should still apply.

Dr Mifsud Bonnici agreed with what was stated by the Authority. This was a matter of substance over form as the process had been carried out and the communication required under Regulation 272 followed. Mr Cardona confirmed that he is the owner of CEW and that PH Cardona e-mail address is his and the e-mail was sent to this address and therefore the ten days should start from then. Under Regulation 242 (2) Appellant could write to request further information from the Authority and subparagraph 2(c) could have been used if there was an issue of communications. The moment the 5th September e-mail was sent it satisfied Regulation 272. CEW have been providing this service contract since 2015 and the CPSU confirmed that CEW is an operator familiar with the system and yet despite this no appeal was filed. This is important as the relationship is not only between CEW and the CPSU but CEW is also an outside contractor. The CPSU witness stated that the parties were treated equally. No party was informed of the decision prior to the 5th September and therefore the minute the ten days elapsed the decision of the Authority became *res judicata* – straightaway all parties knew that there is legal certainty.

Citing Court of Appeal Case 115/2013/1 Dr Mifsud Bonnici stated that the decision of the Board binds the parties and those parties cannot reopen the case whether they agreed with the decision or not and the Court cannot alter the decision. The door is closed and cannot be reopened and all parties' hands are tied. The Appellant is experienced in tendering and is no novice. The general principle of EU Community law and the European Courts of Justice recognise that a sentence by local courts have to be honoured as *res judicata* even if in breach of Community law. There is also the principle of legitimate expectation. For these reasons the need for a quick and effective outcome and legal certainty go by the board if CEW's request is upheld.

Dr Delia said this hearing is to consider the second part of Regulation 272 regarding the standstill period and the need to follow it – a requirement that has not been fulfilled. The facts are that a mistake was made, a blank document uploaded and an admission made that what was supposed to be carried out was not. Appellant agrees that there is a peremptory time limit but the point is when does it start? The decision was not on the 5th September but on the 23rd August according to the witness – in between nothing happened.

The Chairman directed that that particular point was now closed and the Board will hear arguments on the merits of the case.

Dr Paris on behalf of the Appellant said that the estimated contract value was € 1,161,580. There was a massive variance between the offer of the Appellant and the awarded bid and a 50% variance on the estimated contract value – this is abnormally low by the established yardsticks. Have questions been asked by the TEC especially if there is any indication of State Aid? The doctrine of self-limitation must follow the tender to the letter and obliges both parties. The mandatory requisites have not been

met and MRCS should not have been given the award. It is clear that log books have not been presented with their submission and this has not been denied. It is mandatory that the log books had to be submitted with the offer; the CPSU confirmed that log books were only required after the offers were submitted. The only technically compliant offer is that of CEW – the Red Cross offer is not compliant with the tender specifications and is abnormally low.

Dr Camilleri said that in regard to the claim that the MRCS bid was abnormally low, the TEC is satisfied that the preferred offer was financially viable and this will be confirmed in the evidence to be given by members of the TEC. On the self-limitation grievance on the log books all one can say is that the tender specifications asked for the submission of log books and it stops there. Appellant elaborated on this point but self-limitation, by its very nature, is intended to limit not elaborate on the specifications. The requirements have been respected as the principle has been strictly observed and the TEC was correct in its conclusions.

Dr Mifsud Bonnici stated that this is a case of the incumbent operator not being willing to relinquish his long held service contract, is merely an attempt to hold the Authority hostage by his tactics and is an attempt not to open the market. The abnormally low claim must be seen from the aspect that the Appellant has operated for a long time with no competition. The Authority used the previous contract value to set the estimated value in this tender and the Appellant now claims that the bid is abnormally low; a claim that cannot be met and should be discarded. The Board is not in a position to say that a bid is abnormally low until the bidder has had the chance to explain the financial offer, and therefore the request by the Appellant that the offer is abnormally low cannot be considered. The argument on log books is such that it can only be made by the incumbent operator claiming that the ambulances are not available and therefore bidder could not tender. This is the ultimate barrier to entry.

Ms Bernice Gauci was recalled by the Appellant to give further testimony.

Ms Bernice Gauci still under oath detailed the make-up of the TEC as made up of three evaluators namely Mr Mark Grima, Mr Rosario Attard and Mr Ramon DeBattista plus the Chairperson and Secretary. According to the witness the negotiated procedure document requested log books for vehicles registered from 2014 onwards. This was according to clarification article 9.13. This was simply a request for log books with no additional specifications. It is the TEC's view that what was presented met the requisite.

At this stage Dr Mifsud Bonnici intervened to say that Appellant must adhere to the original grievance and the grievance on the log books was a fresh claim which cannot be raised.

Dr Delia countered that this was not a fresh grievance.

The Chairman ruled that the position of the Appellant was that the preferred bidder did not produce what the tender requested and therefore was not in breach.

Ms Bernice Gauci resumed her testimony. In reply to questions from Dr Paris she gave details of registration number and date of vehicles of the eight foreign log books and one Malta registration log book submitted by MRCS. Witness could not see any specific reference to a country on the foreign log books. She further stated that she was fully aware that the value of the tender was well in excess of € 1 million and read out the two bids i.e. € 674,284 by MRCS and € 1,133,748 by CEW and confirmed that there was no query on the price difference between the bids.

In reply to questions by Dr Camilleri, witness said that the TEC did not feel the need to query the price as they were satisfied with the detailed information submitted and confirmed that a clarification had

been sent to all bidders that vehicles had to be Euro5 and log books to be presented. Witness confirmed that the tender estimated value was based on the last contract awarded to CWE.

Questioned by Dr Mifsud Bonnici, witness replied that the Financial Bid Form requested a breakdown of the offer which detailed the different requirements requested. The TEC was satisfied that the MRCS Financial Bid Form had a more detailed explanation of their offer.

Dr Delia asked the witness if log books had been submitted with the offer and referred her to the MRCS reply to Article 9.13 in the clarification request particularly the paragraph starting 'To bridge the gap.....'. Witness stated that in that paragraph MRCS was stating that a number of ambulances older than 2014 were available if the new ambulances were not available at the start of the contract. Asked if the log books presented referred to the earlier vehicles witness said that she was not able to answer technical questions. Witness had not asked if MRCS received any State Aid and she was unable to answer this points on this subject as she had no knowledge of the subject.

Mr Mark Grima (407465M) called to testify by the Appellant stated on oath that he is a Medical Health Department employee at the ambulance garage and that MRCS presented by e-mail photocopies of one logbook of a vehicle registered in Malta and others from the UK. Transport Malta advised the witness that the UK log books were acceptable as transfer of the vehicle registration can be done. The tender only asks for log book without requesting any further details. The owner is stated on one of these log books whilst on eight others it is not. According to the witness he was not personally made aware during the evaluation process of the reply to the clarification, neither was he aware if MRCS will be using any sub-contractors or relying on any third parties to provide the service. In reply to a clarification the MRCS had sent a letter dated 18th August 2023 stating that the log books were UK vehicle log books for vehicles registered post 2014 and could be verified through a UK Government website. Witness had originally objected to the acceptance of UK registered vehicles being offered in the bid but the Chairperson of the TEC had assured him that this matter had been clarified through a clarification note. This triggered the 18th August letter.

Ms Bernice Gauci intervened to point out that the 18th August letter was in reply to an earlier clarification, number 2, sent on the 10th August.

Resuming his testimony Mr Grima, in reply to questions from Dr Camilleri, said that the questions about the origin of the vehicles were posed after the close of bids but during the evaluation stage. All vehicles offered had log books with full vehicle identification details.

[In](#) reply to questions by Dr Mifsud Bonnici, witness confirmed that the letter above mentioned of the 18th August from the MRCS was in reply to a clarification requested by the CPSU and that the clarification on Article 9.13 [which clarification was read out] was posted before the deadline of the tender offers. This request for clarification was raised by the witness himself as originally he had expected the log books to have been issued by Transport Malta but confirmed that nowhere does the tender state that the log books had to be so issued. Witness does not recall when he received a copy of the subject letter as he did not participate in the evaluation after the receipt of the letter and is not aware if he was still a member of the TEC on the 18th August 2023.

Dr Mifsud Bonnici requested the suspension of the testimony of the witness to enable him to prepare himself properly to give evidence.

The Chairman reminded all of the need for witnesses to be prepared to reply to questions put to them and said that the Board agrees that the testimony of Mr Grima is suspended till another hearing.

Ms Bernice Gauci recalled by the Appellant to give further evidence, stated that the tender did nowhere request the submission of Transport Malta log books in lieu of UK certificates. The deadline for replies to the 10th August clarification was the 18th August at 11.00am.

In reply to a question from Dr Camilleri, witness confirmed that the clarification just referred to was purely a request for clarification of certain points on submitted bids.

Questioned by Dr Mifsud Bonnici, witness said that the clarification was issued after an objection raised by Mr Grima who eventually accepted the situation after the 18th August letter. The UK Government website domain indicated by MRCS was not used or visited by the TEC. Witness stated that she was not aware of the principle of proportionality nor was she familiar with Regulation 39 of the PPR.

In reply to a further question from Dr Paris witness said that the request and expectation of the TEC was that MRCS would submit Transport Malta log books in their name.

Mr Ramon DeBattista (287976M) called to testify by the Appellant declared on oath that he is a Senior Economic Officer and Accountant and was one of three evaluators and stated that the estimated value of the tender was determined by the CPSU and could have been the market value or a value judgement. The amount is usually declared publicly in the case of tenders – in this call the figure was published on the ePPS. On the 16th August two offers were received - from MRCS and CEW with financial values of €674,284 and € 1,133,748 respectively. Witness agreed that there is a wide discrepancy between the two bids and with the estimated value of the tender. He stated that since there was complete and fully detailed information in the financial bid on hours, man hours, usage, there was no need to ask for further information. The TEC did not see the need to query the submission as a full breakdown of all aspects was given. Witness explained that the MRCS is a voluntary organisation probably eligible for Government grants and the nature of the organisation had been checked on the Google site, from which it was established that it was a long established entity and an important player in the health sector. He had not checked if the organisation was registered with the Malta Business Registry or the Voluntary Organisations Register. Witness did not know if MRCS is receiving public funding as this was not relevant to the evaluation as the award of the contract is not a matter for the TEC which relied entirely on the information provided. The role of the TEC is to look for the cheapest price after checking that all submissions met. Without considering if any form of subsidies were received the figures were computed to see if they made sense and feasible in market value terms. Witness agreed that the bid was low but accepted that the figures made sense – it could be that MRCS had pared costs or carried out brainstorming to arrive at the price they did.

At this stage the Chairman noted that certain participants had indicated that they had other commitments and would have to leave. He therefore adjourned the hearing to the 23rd November 2023 at 10.30am.

End of Minutes of the hearing of the 19th October 2023

SECOND HEARING

On the 23rd November 2023 the Public Contracts Review Board consisting of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to resume considering this appeal.

The attendance for this public hearing was as follows:

Appellant – Cardona Engineering Works

Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative
Mr Kevin Gauci	Representative
Mr Philip Cardona	Representative
Mr Mario Cardona	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leone Camilleri	Legal Representative
Ms Alexia Farrugia Zrinzo	Legal Representative
Ms Bernice Gauci	Chairperson Evaluation Committee
Mr Mark Grima	Evaluator
Mr Rosario Attard	Evaluator
Mr Ramon DeBattista	Evaluator
Dr Alison Anastasi	Representative

Preferred Bidder – Malta Red Cross Society.

Dr Clement Mifsud Bonnici	Legal Representative
Ms Paulette Fenech	Representative
Mr Robert Brincau	Representative

The Chairman Mr Kenneth Swain welcomed the parties and noted that at the deferment of the last session Mr DeBattista was testifying when the hearing was adjourned. He was recalled to proceed with his testimony.

Mr Ramon DeBattista, reminded that he was still under oath, confirmed that he had the necessary financial expertise and hence was competent to deal with the financial aspect of the tender although he had been involved in all aspects of the evaluation. According to the witness the MRCS offered eight ambulances bearing UK registration numbers and one vehicle bearing Maltese registration. He listed the registration number of the eight vehicles and confirmed that the ninth vehicles was registered in the name of MRCS. As there were no name details on some of the UK registered vehicles the TEC sought clarification. The procurement procedure allowed clarification according to the witness, but when requested to find the provision for this in the tender he could not trace it. The reply to the clarification was filed in time with two documents submitted and confirmation that the vehicles were of UK origin. There were no further clarifications thereafter and no new documents submitted. The TEC did not establish the ownership of certain of the vehicles and they had no details if there was any affiliation between the UK owners and Malta. The tender, stated the witness, was on negotiated procedure basis. After evaluation MRCS bid was declared successful and this information was submitted to the CPSU.

In reply to questions from Dr Mifsud Bonnici, witness said that no further documents were submitted after the clarification and there were no negotiations with the bidders. The log books enabled the TEC to assess the tenders.

In reply to a question from Dr Camilleri, witness said that the TEC was satisfied that there were no anomalies and that all was correct.

Mr Kurt Balzan O'Dea (116983M) called to testify on line by the Appellant on behalf of the Ministry of Finance stated on oath that according to the Budget Affairs Division of the Ministry no grants or donations were granted to MRCS in the last five years. Various Government bodies had been contacted for information. Asked on the tax position of the MRCS witness stated that that was not in his sphere and he was therefore not competent to comment. The same applied to questions on matters concerning land and properties.

Mr Gilbert Agius the representative of Transport Malta who had been duly summoned as a witness was not available when called.

Dr Mifsud Bonnici requested that in the absence of the witness from Transport Malta the following note be entered verbatim:

“Dr Clement Mifsud Bonnici on behalf of the Malta Red Cross Society can confirm that at the time of bidding the eight (8) ambulances registered in the UK were not registered in the name of the Malta Red Cross Society”

Dr Delia asked for the following note to also be recorded verbatim:

“Dr Adrian Delia on behalf of Cardona Engineering Works renouncing to the testing of Transport Malta”.

Ms Paulette Fenech (040867M) called to testify by the Appellant stated on oath that she is the Director General of the MRCS which is a voluntary organisation established in Malta for some 30 years. Its objects as stated in its statute is humanitarian help.

DR Mifsud Bonnici objected to this line of questioning as according to him the objects of the organisation are not part or relevant to the appeal.

The Chairman said that the Board does not see the relevance of questions on the objects in the light of the appeal and will not allow questions thereon but will reconsider if shown otherwise.

Dr Delia said that the relevance of the questions were intrinsic to the appeal.

Resuming her testimony, witness stated that the aim of MRCS was to assist generally in matters like first aid training, assistance at events and to alleviate suffering. Funds come from different sources such as the ambulances. A Government grant of € 18,000 annually is used to pay the subscription fees for membership of the foreign Red Cross Society. Premises are occupied on lease at a nominal rent. The last audited accounts were for the year 2021 with 2022 being in the course of completion. The Society is no longer receiving donations from the International Red Cross and witness could not recall when these were last received. There are around 70 employees on the staff with the Director General being paid by the Government and one other person receiving Government benefits. No Government

benefits are received by the Society except the one time when there was a natural disaster. Applications for occasional voluntary grants are submitted and these account for some € 40,000 over three years. Witness confirmed that the Society is income tax exempt.

According to the reply to a question by Dr Mifsud Bonnici, MRCS is exempt from income tax but liable for VAT.

Ms Bernice Gauci (476186M) called to testify by the Contracting Authority stated on oath that on completion of the evaluation, financial approval was requested, the contract signed and approval from the CPSU obtained. The contract award notice was published after the contract was signed.

This concluded the testimonies.

Dr Mifsud Bonnici stated that the first point to address was the irregularity of this procedure and the impact the decision on it may have. Citing from pages 56 and 57 of CJEU Case C448/01 he referred to equal treatment and transparency and that the criteria had to be easy to interpret. In this case the tender requested log books. In Court of Appeal case 66/20/3 it was held that at the time of the bids ambulances were not in Malta but available – the clarification did not change the substance of the offer. The claim that the bid was abnormally low is null since if there is doubt about an offer it is the Contracting Authority which must be asked to investigate this. In Case C367/19 it was held that a zero (0) offer can be abnormally low but it cannot be excluded without giving the bidder a chance to explain. The Board can stop here and go no further. The Appellant has to prove that the standard of the evaluation was clearly at fault and no such indication was given. Quoting from a sentence of the UK Courts *SRCL vs National Health Commission Board* (EWHC 1985), Dr Mifsud Bonnici said that the contracting authority has the discretion to decide what is a low bid and that there is nothing wrong in going for the lowest price and nothing wrong in principle in a bid at a low price. This line of thought is followed in Court of Appeal case 162/2014/1 *Kerber Securities vs Wasteserv* in that the question of profit is irrelevant.

Dr Mifsud Bonnici continued by stating that the claim regarding State Aid has to be proven and one has to show if there was discrimination and a positive impact plus the effect it had on the market. In this case only the internal market is involved and therefore the idea of State Aid is not a starter. Directive 147/2018 states that grants in the last three years below € 20,000 will not be considered as State Aid. In the case of MRCS grants were *de minimis* and this is not contested.

Dr Camilleri said that Appellant's first grievance on *fuori termini* has already been decided and he will not be dealing with it. The second preliminary plea has not been raised. Requests at appeal stage cannot be met – the objector is aware that the contract has already been concluded and is aware that the award notice has been issued after the signing of the contract. This makes it impossible for the Authority to re-integrate Appellant's bid in the award cycle once the contract is concluded. These requests cannot be met. Appellant did not ask for the cancellation of the contract. PPR 277 limits the level of appeals and the request is unsustainable as the contract is awarded and all claims on these grounds are denied.

The evidence of the TEC made it clear that the offer of MRCS was very detailed and correct and therefore there was no point in asking them to confirm that it was not an abnormally low offer. Basically there was nothing to clarify. The successful bidder received a minimum amount of grants and therefore the question of State Aid does not come into it as their financial offer was not affected

and did not influence the bid. Self-limitation was fully observed by the TEC – log books were requested and log books were actually presented. That is all that Clause 9.13 in the tender requested and there were no other conditions. The TEC were satisfied by the reply to the clarification. Once the second preliminary request is not met then the award should not be met.

Dr Paris started by saying that the *Jobplus* case was different as in that case there was the facility to present log books at a later stage – in this case no period was stated and therefore this was not possible. The decision in the *Truevo* case in respect of Regulation 262 is that if one did not raise the point when one had the opportunity then it cannot be raised at a later stage. The value of the bid was established by the Contracting Authority and once a bid 50% lower than that figure was received the Authority was obliged to query it and to seek answers why it was so low. The TEC has the responsibility to investigate a bid that is apparently low. The request made was for the revocation of the contract of award notice and no reference was made to Regulation 270. Regulation 277 indicates what is mandatory but the criteria were not reached and therefore Regulation 270 is the only effective remedy.

Dr Mifsud Bonnici in a final summary said that there was transparency in the financial bid form for every line item. State Aid was not used in this contract and therefore the point is irrelevant. Appellant chose to appeal on Regulation 270 and a declaration of ineffectiveness was not touched upon.

Dr Camilleri concluded by saying that Appellant left open the matter of which article he was claiming on then stated that it was clear that it was under Regulation 270 but Regulation 277 was not touched upon. The request was for the revocation of the contract award notice but did not ask for ineffectiveness of the contract – this legal provision is there for all to use.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 19th October 2023 and 23rd November 2023.

Having noted the objection filed by Cardona Engineering Works (hereinafter referred to as the Appellant) on 29th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference CPSU1396/19 listed as case No. 1927 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris & Dr Adrian Delia

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant contends that:

a) ***1st grievance - The price of the recommended bidder is abnormally low -***

In accordance with article 234(1) of the Public Procurement Regulations (PPR), contracting authorities are required to investigate wheresoever, an economic operator has submitted an abnormally low tender “*Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*” Whilst it is unclear if any investigation has been undertaken by the contracting authority, failure shall render it to be in breach of article 234 of the PPR, and as confirmed in the PCRb case 1614 [dated 6th August 2021] it shall lead to the cancellation of the award and the revaluation of the offers. It is hereby additionally imperative to investigate further provision 243[2]f] of the PPR, which specifically deals with ‘the possibility of the tenderer obtaining State aid’, since this would automatically distort competition. The recommended tenderer, which is a voluntary organization setup through its Statute, but acknowledged as such through Chapter 359 of the Laws Malta - which status renders it eligible for public funding - a matter which should have been investigated by the evaluation committee in accordance with article 234 of the PPR.

b) ***2nd grievance - The Doctrine of self-limitation -***

The tender document in provision 9.13, the contracting authority requested that the economic operators submit a copy of logbooks, as per hereunder. *‘Copy of logbooks are to be presented at tendering stage’*. To satisfy the requirement, the economic operators must: a) EITHER *‘Be the owner of the vehicles requested and thereby submit a copy of their logbooks’* OR *‘In accordance with article 235 of the PPR, rely on the capacities of third parties, and in the process submit confirmation that the resources shall be available to the economic operator throughout the duration of the agreement’*. For clarities(sic) sake, sub-contracting is not permissible in the context under review, since it would exceed the permitted percentage of sub-contracting. It is the position of the appellant, that the recommended bidder did not produce any of the above, and thereby the award is in breach of the technical specifications.

c) ***3rd grievance - Procedural faults***

As will be shown throughout the PCRb sitting, the evaluation process is marred by breaches of the PPR. The evaluation procedural faults include:

- i. Failure to provide a recommendation notice, instead a contract award notice has been published [a contract award can only be confirmed after the lapse of the appeal period]
- ii. An email communication received from CPSU that the economic operator shall commence operations on the 2nd October 2023
- iii. A recommendation which is included in the ePPS, which recommendation is dated 23rd August 2023, however the document is blank.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9th October 2023 and its verbal submission during the hearings held on 19th October 2023 and 23rd November 2023, in that:

a) ***First Preliminary Plea – Application is Fuori Termine -***

From the drafting of the application, but especially from the requests, it is amply clear that the objector's application is one in terms of regulation 270 of the Public Procurement Regulations. Regulation 270 in fact states: “..... *by any decision taken including a proposed award in obtaining a contract, a rejection of a tender*” From a reading of the requests of the objector, it is clear that these are being made on the basis of the above highlighted legal motives.[Note – no part highlighted]

Regulation 271 furthermore states that: “*The objection shall be filed within ten calendar days*”

Although the VEAT notice and notification period was not part of the Department of Contract's Authorisation, the objector was still informed by means of an email dated 5th September 2023, that the contract was recommended for award to a cheaper compliant offer. The email was sent by a representative of the contracting authority to the email address used by the objector and therefore in terms of regulation 271 of the PPR, the appeal period should have started to run from that particular day, ending on the 15th of September 2023. The time frame set in regulation 271 of the PPR is a clear time frame and in the opinion of CPSU a peremptory period and inherently linked to the preservation of public order.

Now that it is clearly proven that the rules of procedure, particularly that relating to appeal periods are of a peremptory nature, therefore cannot be extended in anyway, CPSU will proceed to dissect Regulation 271 to prove its applicability to the case in question.

The first criteria is that ‘*the objection shall be filed within ten calendar days*’. This is clear and not subject to any other interpretation.

According to regulation 271 the 10 days shall run from “*the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means*” gives the information. The medium of communication thus is only specifies (sic) in the sense that it should be an electronic means. In the case at hand this information was given by means of an email, which is surely an electronic means, therefore this element was clearly satisfied.

The third element is the information given. According to regulation 271 this should be “*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.*” It is hereby being emphasized that the word 'or' is used, thus the information that is to be communicated electronically is either their “*proposed award decision*” or “*the rejection of a tender*” or “*the cancellation of the call for tenders*”. By informing the contractor that the contract was recommended for award to a cheaper compliant offer, the objector was clearly informed that his offer was rejected, thus this element is also satisfied.

What was not satisfied was the filing of the objection within the peremptory period of 10 days, from when the rejection was communicated electronically. Regulation 271, and the following

regulations, do not provide for any exceptions to the 10 day rule and thus the appeal should be declared null and void since it is *fuori termine*.

b) ***Second Preliminary Plea - Unsustainable Requests -***

The objector was well aware that the contract was already concluded between CPSU and the Malta Red Cross Society for two reasons. The first reason is that CPSU informed the objector that the new operator was starting its operations on the 2nd of October 2023, and this by means of an email dated 25th September 2023. The second reason is the very fact that a contract award notice has been issued and sent to the objector on the 27th of September 2023. As its name clearly states, this is issued when the contract has been awarded. The objector is not new to public procurement procedures and thus is well aware that the contract award notice is issued after a contract has been concluded. Moreover it is also established by law that the contract award notice is issued after the contract is concluded, as regulation 43 (1) of the PPR provides that: “(1) *Not later than thirty days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, the authority responsible for the tendering process shall send a contract award notice on the results of the procurement procedure.*”. For the above reasons and since the requests to this Honourable Board are unsustainable, this Honourable Board should abstain from giving a decision on the merits.

c) ***First Grievance of the Objector: Abnormally Low Offer -***

CPSU, without prejudice to its preliminary pleas to which it holds firm, is presenting a reply on the merits of the Objector's Grievances, the first one being the claim of an abnormally low offer. CPSU submits that the estimated contract value was calculated on previous contracts values and the incumbent operator happens to be the objector who was giving the service on the basis of a direct order, and thus comparing the objector's offer to the estimates contract value would be comparing the objector's price with the objector's price. Although the Red Cross Society is a voluntary organisation, and the price submitted was a very competitive price, they provided detailed costings which to the satisfaction of the evaluation committee were sufficient to justify the price by which they were bidding. CPSU submits that the primary aim of the public procurement legislation regime in Malta and throughout the European Union is that the State and ultimately, the general public obtains a service or supplies which are up to the required standards and specifications and at the best price possible. This general principle is fine tuned with other safeguards such as that against abnormally low tenders, however such safeguards should only be triggered in the general public interest, and where the price is low without justification. The evaluation committee also confirms that the costings provided by Red Cross Society did not factor in any state aid.

d) ***Second Grievance of the Objector: The Doctrine of Self Limitation -***

The objector in this part of the objection claims that the evaluation committee did not abide with the principle of self limitation, since according to the objector, Red Cross Society did not produce a copy of the log books. The claims in paragraph 2.3 of the objection letter are merely suppositions or an extended interpretation of the objector, intended only to further this grievance which does

not exist. The principle of self limitation is that the evaluation committee should limit its discretion to the conditions written in the call, only. The conditions simply requested a copy of the log book at tendering stage, with no additional condition or qualification at all. The log books were presented to the satisfaction of the evaluation committee and thus this condition has been satisfied and the evaluation committee strictly adhered to the principle of self limitation.

e) ***Third Grievance of the Objector - Procedural Faults -***

This third grievance has been addressed and justified in the preliminary pleas and exposition of facts.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 9th October 2023 and its verbal submission during the hearings held on 19th October 2023 and 23rd November 2023, in that:

a) ***First Preliminary Plea: Appellant's Second Demand is Inadmissible -***

The Appellant's first part of its second demand is inadmissible at law and must be rejected by this Board. This is without prejudice to the Contracting Authority's first 2 preliminary pleas. The Appellant is requesting the Board to: *"NOW THEREFORE, whilst reserving the right to put forward further submissions, the Appellants hereby requests [...] ii. To declare that the offer by Malta Red Cross Society is [...] a. Abnormally low [...]."* This Honourable Board can never make a finding and declare that Malta Red Cross's financial offer is abnormally low. At most, and upon an aggrieved bidder's specific and express request, this Honourable Board may decide whether Malta Red Cross's financial offer appears to be abnormally low, and if so, decide whether the Contracting Authority should give Malta Red Cross an opportunity to explain in further detail the economic rationale of its purportedly abnormally low tender in line with Regulation 243 of the Public Procurement Regulations.

The Courts of Justice of the European Union have consistently held that a bidder, whose financial offer appears to be abnormally low, cannot be automatically excluded from the competitive tender process before it is given the opportunity of explaining the economic rationale of its tender. This Honourable Board has conformed to this position in past decisions. Therefore, the Appellant's grievance on Malta Red Cross's purportedly abnormally low offer and its consequent demand are simply inadmissible and cannot be considered by this Honourable Board. Given the inadmissibility of the Appellant's third demand is inadmissible, this Honourable Board is barred from considering the first ground of appeal. If this Honourable Board considers and decides this first ground of appeal it would issue a decision which exceeds the Appellant's demands *extra* and, or *ultra petita*.

b) ***First Ground: Malta Red Cross's financial offer is not abnormally low -***

Without prejudice to the first preliminary plea, Malta Red Cross's financial offer is not abnormally low, but simply one which was more competitive than the Appellant's. The burden of proof rests with the Appellant to prove that Malta Red Cross's financial offer is abnormally low. The

Appellant's exorbitantly high financial offer is certainly not a relevant metric for this exercise. Malta Red Cross can attest that the financial offer can be explained in further detail, confidentially to the Contracting Authority, with reference to the economics of the services provided, and that Malta Red Cross complies and will continue to comply with all relevant labour, social and environmental laws in terms of Regulations 13(m) and 16(k) of the PPR. Malta Red Cross can also attest that the only financial support it receives from the Government of Malta is a yearly grant with which Malta Red Cross pays the annual contribution fees to: • International Committee of the Red Cross; and • International Federation of Red Cross and Red Crescent Societies (including EU Office Membership contribution).

In 2022, this yearly grant did not exceed €20,000 and it was all utilised to cover these contribution fees. Malta Red Cross's Director General is also seconded from the Government of Malta. However, the Director General will have no tangible role in the management and performance of the contract resulting from the Negotiated Procedure.

c) **Second Ground: Malta Red Cross complied with all tender conditions -**

Malta Red Cross refutes the Appellant's allegation that its offer was not compliant with the technical specifications of the Negotiated Procedure. The Negotiated Procedure, on this specific issue, simply requested that "copy of logbooks is to be presented at tendering stage"-with which Malta Red Cross complied. Malta Red Cross submits that the deployment of the ambulances remains a performance condition and it would have been disproportionate and contrary to genuine competition to interpret it otherwise. The logbooks were expressly required by the Contracting Authority to verify that the proposed ambulances comply with the technical specifications, in particular, that the year of manufacture was 2014 or after and that the classification was EURO 5 or better. As a matter of fact, the ambulances offered by Malta Red Cross did comply with the technical specifications. As at present, and pursuant to the public contract resulting from the Second RfQ, Malta Red Cross has, amongst other resources, deployed 4 ambulances which are under its ownership. Therefore, Malta Red Cross submits that this second ground of appeal ought to be rejected for these reasons and others that might be brought in due course.

d) **Third Ground: The alleged "procedural faults" do not render the Contracting Authority's decision illegal –**

Malta Red Cross submits that it is for the Contracting Authority to address this last final ground for it has conducted the evaluation of the offers submitted. Malta Red Cross reserves the right to make further submissions in writing after it is in receipt of the Contracting Authority's reply. Having said that, the alleged procedural faults cited in the appeal are not related to the evaluation process but the publication of the conclusion of the evaluation process. These procedural faults would typically have an impact on an aggrieved bidder's right to a rapid and effective remedy in terms of the Remedies Directive (Directive 1989/665/EEC, as amended). In this case, these

alleged "procedural faults" did not harm the Appellant and its right to an effective judicial remedy before this Board.

e) ***Second Preliminary Plea: Appellant's Fourth Demand is Inadmissible -***

The Appellant's fourth demand is inadmissible at law and must be rejected by this Board. The Appellant is requesting this Board to: *"NOW THEREFORE, whilst reserving the right to put forward further submissions, the Appellants hereby requests: [...] iv. If appropriate, to order that the offer of the appellants is fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender [...]."*

This demand cannot be upheld by this Honourable Board since it exceeds its competence and powers. This Honourable Board, as its name implies, is a review board which reviews whether decisions taken by a contracting authority are legal or otherwise. This Honourable Board considers "appeals" made by aggrieved bidders in terms of Regulation 270 of the PR against a specific decision taken by a contracting authority, such as the rejection of a bid or a recommended award. This Honourable Board's assessment is limited to "accede or reject the appeal which has to be strictly an application for the review of the contracting authority's decision after closing of bids-see Regulation 276(h) of the PPR-and it cannot evaluate bids and award public contracts since the responsibility of evaluation of bids, and quite frankly, the expertise and competence, lies with the evaluation committee and not with this Honourable Board.

Exceptionally, this Board may cancel a procurement procedure if it is *"the best solution in the circumstances of the case"*. However, that power is expressly and statutorily provided for in the law, specifically, Regulation 90(3) of the PPR. Incidentally, the same power is reserved to the Court of Appeal when reviewing decisions of this Honourable Board--the Court of Appeal similarly cannot evaluate bids or award public contracts.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances. It is noted that the appellant has raised three (3) separate and distinct grievances in relation to this appeal. On the other hand, the contracting authority and preferred bidder have both submitted arguments on the merits of these grievances. However, on the grievance entitled 'Procedural faults', the Contracting Authority has also submitted two (2) preliminary pleas and another has been submitted by the preferred bidder. On the grievance entitled 'The price of the recommended bidder is abnormally low', another preliminary plea has been submitted by the preferred bidder. The Board will now proceed to analyse and decide on these.

a) ***1st grievance - The price of the recommended bidder is abnormally low***

On the preliminary plea of the preferred bidder

This Board makes reference to the request of the appellant being, “*To declare that the offer by Malta Red Cross Society is: a. Abnormally low*”

The Board, without delving too much into the matter, agrees *in toto* with the comments of the first preliminary plea of the preferred bidder in that this Board can never, itself, declare a bid to be abnormally low. None-the-less, this Board will analyse and decide on the merit of the grievance of the appellant, but limited to whether the bid of the preferred bidder **appears** to be abnormally low.

On the merits

At the outset it must be stated that there is a material difference between the two (2) bids received by the economic operators participating in this procedure. The bid submitted by the appellant resonates more with the published estimated procurement value whilst that of the preferred bidder is *prima facie* substantially lower.

The appellant is arguing that the contracting authorities are required to investigate wheresoever, an economic operator has submitted an abnormally low tender. This as per regulation 234(1) [sic] of the Public Procurement Regulations (“PPR”).

Regulation 243(1) of the PPR states the following:

“*Contracting authorities **shall require** economic operators to explain the price or costs proposed in the tender **where tenders appear** to be abnormally low in relation to the works, supplies or services.*” (bold & underline emphasis added)

Therefore, this Board opines that the ‘obligation’ to investigate, whilst it is there and the law uses the word ‘shall’, such obligation is ONLY to be imposed where tenders **appear** to be abnormally low. Therefore, since there are no mathematical hard and fast rules on what constitutes an abnormally low offer, this Board must analyse how and why the offer as submitted by MRCS did not appear to be abnormally low to the Evaluation Committee.

As already mentioned, *prima facie*, the bid of MRCS does appear to be abnormally low. This due to the material percentage difference when compared to the estimated procurement value.

However, reference is made to the testimony under oath of Mr Ramon DeBattista who amongst many statements, stated “*.....that since there was complete and fully detailed information in the financial bid on hours, man hours, usage, there was no need to ask for further information. The TEC did not see the need to query the submission as a full breakdown of all aspects was given*”.

When this information is correlated to the testimony under oath of Ms Bernice Gauci who confirmed that the tender estimated value was based on the last contract awarded to the appellant,

one can understand that the reliance that can be made on the estimated procurement value is limited at best. Even though the estimated procurement value is the main tool that is to be used to ascertain if a bid appears to be abnormally low or not, it certainly isn't the only tool available and that must be used! At this point, this Board points out to all Contracting Authorities that when the criteria of a present tender procedure are materially different to the past issues of a similar service which is being acquired (in this specific procedure being that the tender was now open to two economic operators rather than one as used to happen in the past), more research and due diligence need to be done on publishing a more reasonable estimated procurement value.

Bearing in mind, that the offer of MRCS was already submitted in thorough detail, such explanation of Mr Ramon DeBattista, does suffice to provide comfort that the contracting authority did have enough information at its disposal to determine that the financial bid, as submitted, did not **appear** to be abnormally low, or that the Evaluation Committee has enough information at its discretion to determine that the bid was financially compliant.

Therefore, this Board does not uphold the first grievance of the appellant.

b) ***2nd grievance - The Doctrine of Self Limitation***

On the preliminary plea of the preferred bidder

This Board makes reference to the request of the appellant being, *"If appropriate, to order that the offer of the appellants is fully compliant with the tender specifications and thus order, instruct or in any other manner that the appellant company should be awarded the tender;"*

The Board, again without delving too much into the matter, agrees *in toto* with the comments of the second preliminary plea of the preferred bidder in that if this Board would uphold such a request, it would exceed its competences and powers. This Board can never award public contracts as it would be acting *ultra vires*. None-the-less, and in the interest of expediency, it will delve into the merits and ascertain if any conditions have been breached and decide accordingly within its powers as emanating from the PPR.

On the merits

Pertinent to this grievance is specification 9.13 which was requested from economic operators. It only stated *"Copy of logbooks are to be presented at tendering stage."*

There was no specific requirement of the economic operators to be the owner of the vehicles *a priori*.

Therefore, the principle of self-limitation would have to be considered 'breached' only if the evaluation committee proceeded to act as is being requested by the appellant.

It is clear to this Board that this was and remains a performance condition.

From testimony and submissions made, this Board is more than comfortable that the evaluation committee duly assessed such requirements as it was obliged to do.

Therefore, this Board does not uphold the second grievance of the appellant.

c) **3rd grievance – Procedural faults**

Reference is made to the testimony under oath of Ms Bernice Gauci who clearly and unequivocally stated that:

- i. *“In this case a blank document on the outcome had been uploaded on the website.....”*
- ii. *“CEW would not have known the outcome of the bid had it not enquired.....”*
- iii. *“Neither one of the bidders had been notified”* (of the award decision).
- iv. *“Up to date the website information was still blank as the system does not allow changes”*
- v. *“.....aware of the requirement in Regulation 272 to communicate decisions to parties - in the case of CEW this was not done”*

Even though, it was only on the 25th September that Emergency Malta wrote back to CPSU, after the 5th September email, this Board cannot by any means treat this appeal of the appellant as being *fuori termini*, considering that it was the same Contracting Authority that grossly erred in the procedures it had to follow to adhere to regulations 271 and 272 of the PPR.

Considering that the appellant was provided with the opportunity to present its case, before this Board, as decreed verbally in the initial stages of the first hearing and therefore proceeded to make its case on the other two grievances, namely the one on abnormally low and the second on the doctrine of self-limitation, which have not been upheld by this Board (see above), it is to be considered that even though the appellant is right in that there were procedural faults, once it has been granted the opportunity to present its case, no prejudice can be considered suffered by the same appellant.

In line with the principle of proportionality (also as confirmed recently by the court of appeal on 30th November 2023 in the case *Mr Melchior Dimech v Ministeru għall-Finanzi u Xogħol, Floorpul Co. Limited and Direttur Generali tal-Kuntratti Rikors number 431/23/1*), the most opportune decision is to declare this grievance upheld with deposit paid to be refunded to the appellant, but once the other two grievances having not been upheld, this Board confirms the decision of the award to the preferred bidder.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's first and second grievances and;
- b) Upholds in part Appellant's third grievance but only in so far as the refund of the deposit since no prejudice has been suffered by said appellant;
- c) Upholds the Contracting Authority's decision to award the procedure to the Malta Red Cross Society;
- d) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member