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The Secretary  
Public Contracts Review Board  
Notre Dame Ditch  
Floriana

Reasoned Letter of Reply

**Re: SPDB/2023/149**

***Tender for the provision of Consultancy Services to undertake a Study to assess the feasibility of expanding Extended Procedure Responsibility (EPR) obligations to additional waste streams for the Environment and Resources Authority (the "Tender Procedure")***

Dear Sir, Madam,

**1. Introduction**

1.1 We are instructed by PricewaterhouseCoopers ("PWC") to file this written reply in accordance with the provisions of regulation 276(c) of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the "PPR"), in reply to the objection filed on 4<sup>th</sup> March 2024 by PKF Malta Ltd (the "Complainant") before the Public Contracts Review Board (the "Board") in connection with the Tender Procedure (the "Objection").

1.2 PWC notes that, whilst it is the Department of Contracts on behalf of the Environment and Resource Authority (the "Contracting Authority") which is best placed to reply to the Complainant's objections – since it is the Contracting Authority which undertook the evaluation – the documentation regulating the Tender Procedure is sufficiently clear on the matters raised for PWC to be in a position to set out hereunder its preliminary replies on the Objection, based on the information available to it at this stage.

**2. Facts**

2.1 The tender document governing the Tender Procedure (the "Tender Document") required the tenderers to submit a financial bid form. The Financial Bid Form attached to the Tender Document contained three (3) separate schedules as follows:

- 2.1.1 Schedule A – this required the tenderers to insert amount in Euro (€) for three (3) items, together with a Grand Total.
- 2.1.2 Schedule B – this required the tenderers to insert the rate for one additional hour. No grand total was required.
- 2.1.3 Schedule A + Schedule B – this required tenderers to insert amount in Euro (€) for two items together with a Grand Total.

2.2 The Complainant submitted the following as part of its Financial Bid Form:

- 2.2.1 Schedule A – each item was priced at €9,500 with a Grand Total of €28,500.
- 2.2.2 Schedule B – the item was priced at €95.00.



- 2.2.3 Schedule A + Schedule B – the first item was priced at €28,500 and the second item was priced at €95.00. The item “Grand Total ....” was left blank.
- 2.3 The Contracting Authority sent a clarification note pursuant to which it noted that the Grand Total submitted in the XML tender response format and the Grand total value in the Financial Bid Schedule A + Schedule B (which, as explained above, was left blank) did not corroborate. The Evaluation Committee therefore requested a confirmation that (a) the Grand Total for Financial Bid Form Schedule A + Schedule B, and (b) the Grand Total in the XML response, should read €28,595, reflecting the corrections it intended to make in the Financial Bid Form and XML response.
- 2.4 On 2<sup>nd</sup> February 2024, the Complainant replied rejecting the corrections.
- 2.5 On 21<sup>st</sup> February 2024, the Complainant was informed by the Contracting Authority that its offer was non-compliant due to the fact that it had refused to revise the grand total in Schedule A + Schedule B and the XML response. A similar letter was sent again on 27<sup>th</sup> February 2024.
- 2.6 On 4<sup>th</sup> March 2024, the Complainant filed the Objection claiming its financial offer was compliant.
- 3 *Absurda sunt vitanda: absurdities should be avoided***
- 3.1 The Complainant claims that, in terms of the Tender Document, the tenderers had to submit two separate financial offers in the Financial Bid Form – the first ‘cell’ (in Schedule A) was the lump sum amount to carry out the feasibility assessment on the introduction of extended EPR obligations; and the second ‘cell’ (Schedule B) in the Financial Bid Form requested an hourly rate.
- 3.2 It is submitted, with respect, that this is not entirely correct. The Financial Bid Form published with the Tender Document contained three (3) schedules, and Schedule A required four (4) amounts, not simply a lump sum.
- 3.3 The Complainant then states as follows:
- “From the decision received, it seems that the Contracting Authority expected the bidders to add together the ‘final contract price’ in Schedule A, together with the hourly rate for modification in Schedule B to provide a grand total.*
- This makes absolutely no sense.”*
- 3.4 The purpose of the third (3<sup>rd</sup>) schedule forming part of the Financial Bid Form was exactly that – that is, Schedule A + [in bold for emphasis] Schedule B, required the tenderers to insert the Grand Total for Schedule A, the Grand Total for Schedule B, and the Grand Total for both together.
- 3.5 The spreadsheet Schedule A + Schedule B left no room for interpretation.



- 3.6 Tenderers are not, at submission stage, entitled to decide what makes sense or does not.
- 3.7 If tenderers have an issue with the manner in which a Tender Document is drafted, this must necessarily be raised either at clarification stage or through a remedy before closing.

*Clarification Meeting*

- 3.8 In terms of the Tender Document, a clarification meeting was held on 22<sup>nd</sup> November 2023.
- 3.9 If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so as can be seen from the minutes of meeting (Clarification Note No. 1 – Meeting Minutes).

*Clarifications*

- 3.10 In addition to the Clarification Meeting, tenderers were afforded the right to submit requests for clarifications up until 23<sup>rd</sup> November 2023.
- 3.11 If the Complainant had any concerns with the manner in which the Tender Document was drafted, it should have raised these at this stage. It failed to do so, as can be seen from the clarifications published (Clarification Note No. 2).

*Remedy before Closing*

- 3.12 In terms of Regulation 262 of the PPR, tenderers had the right to file a reasoned application before the Board, within the first two thirds (2/3) of the time period allocated for submission of offer, challenging (amongst other things) the content of the Tender Document.
- 3.13 Indeed, Regulation 262(1)(b) allows for requests to be made [emphasis added]:

*“to determine issues relating to the submission of an offer through the government’s e-procurement platform”*

and

*“to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure”.*

- 3.14 If the Complainant had any concerns with the content of the Tender Document, this was the time when it had to exercise its final remedy in relation to the Tender Document.
- 3.15 The Complainant, for the third (3<sup>rd</sup>) time as explained above, failed to exercise the remedies available to it.



- 3.16 The Complainant, upon submission of its tender, accepted in full and in its entirety the content of the Tender Document and it cannot, at this stage, raise discrepancies or issues with the manner in which the Tender Document was drafted.

*Case-law of the Board and Court of Appeal*

- 3.17 The Board, and the Court of Appeal, have been very consistent in their approach on this matter. In a nutshell, if a grievance relates to the content of the Tender Document, the grievance could have only been raised (at the latest) in a remedy before closing in terms of Regulation 262.
- 3.18 Any grievances relating to the Tender Document raised at a later stage have, rightly so, been discarded by the Board and Court of Appeal.
- 3.19 Reference in this reply shall be made to only a few of the recent decisions and judgments on this point:

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

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

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

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

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

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



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

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

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

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

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

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

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



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

*9. Jidher ċar mill-premess illi darba li, anke f'dan il-każ, il-kuntratt ġie rakkomandat u s-soċjeta' Credorox Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-għeluq tat-terminu għall-preżentata tal offerta, ma tistax aktar tappella biex tressaq l-aqaravji taqñha.<sup>3</sup>"*

- 3.20 In view of the above, it is submitted with respect that any reference in the Objection to issues with the Tender Document should be discarded at this stage.
- 4 Grievance: Misinterpretation of Tender Document by Evaluation Committee**
- 4.1 The Complainant claims that the Evaluation Committee has misinterpreted the Tender Document.
- 4.2 The main reason for this argument appears to be the Complainant's view that it is illogical to add the Grand Total of Schedule A with the Grand Total of Schedule B.
- 4.3 As explained above, it is irrelevant (at this stage) whether it makes sense, mathematically or logically, to add the two together for evaluation purposes. If this is what the Tender Document provided (which it did in a clear and unequivocal manner), then tenderers had two options:
- 4.3.1 Firstly, to clarify or challenge the manner in which it was drafted through questions in the Clarification Meeting, clarification requests and, or a remedy before closing.
- 4.3.2 Secondly, to submit Schedule A + Schedule B as requested in the Tender Document and to include in said schedule and the XML response the total price for Schedules A and B.
- 4.4 The Complainant failed to do any of the above. Instead, it chose to submit Schedule A + Schedule B, without the Grand Total, and to include only the Grand Total of Schedule A in the XML response.
- 4.5 The Contracting Authority gave the Complainant an opportunity to rectify this error, notwithstanding that it was marked as Note 3 – that is, that no rectifications are permitted – on the basis that there was an error in the Grand Total which qualified as an arithmetical error.
- 4.6 The Complainant however refused to accept the rectification and continued to argue that it made no sense to add the two together. If the Contracting Authority did not want the two to be added together, it would have not published the third schedule – Schedule A + Schedule B – as this third schedule served no other purpose than to obtain the total financial offer for evaluation purposes. Indeed, the Contracting Authority could not simply leave Schedule A and Schedule B separate without adding this third schedule since, if it did so, it would not have been in a position to compare the offers (unless, for example, the Tender Document provided for a different manner in which to do so, such as by giving a weighting

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



to each of the values in Schedule A and Schedule B to arrive at the total score for each financial offer).

- 4.7 In any event, it is submitted with respect that at this stage the Board is not required to establish whether or not it makes sense to add the two together – that was the Contracting Authority’s prerogative, since it is the Contracting Authority which had to establish the manner in which the total contract price for evaluation purposes would be arrived at and any tenderer who was not satisfied with this had to challenge it prior to submission of offers – but to establish whether or not the disqualification is justified due to the Complainant’s failure to accept the rectification.
- 4.8 In terms of the Tender Document (and the relevant rules incorporated by reference therein), if a tenderer does not accept the adjustment within five (5) working days, its tender will be rejected. The Contracting Authority has no discretion – it must disqualify.
- 4.9 In addition, in terms of the Notes to Clause 5 (the last paragraph of Note 3), no clarifications and/or rectifications can be made in relation to the same shortcoming.
- 4.10 The Contracting Authority could not therefore request an additional rectification and had an obligation to proceeding with rejecting the tender in accordance with principle of self-limitation. In this respect, reference is made to the Court of Justice of European Union decision in *Nexans France v. European Joint Undertaking for ITER and Development of Fusion Energy*<sup>4</sup> wherein the Court held:
- “It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications.”*
- 4.11 The principle has been confirmed in various judgments of the Court of Appeal, including *Projekte Global Limited v. Kunsill Lokali Marsaskala* (Appeal Nr. 253/2014/1) and *NQUAYMT konsorzju kompost minn (i) Bonnici Bros. Services Limited (C57464) u (ii) Korfezdeniz ins Taah. San. Ve Tic. Ltd. Sti, soċjeta` estera v. (i) Aġenzija għal Infrastruttura Malta (ii) EXCEL SIS ENERĠI ÜRETİM CONSTRUCTION konsorzju kompost minn (i) Excel Investments Limited (C81721) u (ii) Sis Enerji Uretim Anonim Sirketi (Reg. No 642964), soċjeta` estera* (Appeal Nr. 35/22/1).
- 4.12 The Contracting Authority was obliged to act in this manner, in accordance with the Tender Document and the principles of equal treatment, non-discrimination and self-limitation.

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<sup>4</sup> Case T-415/10, paragraph 80.



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ADVOCATES

**5 Conclusion**

- 5.1 In view of the above, PWC respectfully requests the Board to find against the Complainant and reject the Objection.
- 5.2 This reply is without prejudice to any further submissions that PWC may be allowed to make during the proceedings relating to the appeal forming the subject-matter of the Objection.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Steve Decesare', is written over a horizontal line.

Steve Decesare