

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1966 – CT3011/2023 – Services - Tender for the Provision of Mystery Shopping Services in the Public Administration**

**2<sup>nd</sup> April 2024**

The Board,

Having noted the letter of objection filed Dr Lorna Mifsud Cachia on behalf of Dingli & Dingli Advocates acting for and on behalf of EMCS Advisory Ltd, (hereinafter referred to as the appellant) filed on the 11<sup>th</sup> December 2023;

Having also noted the letter of joint reply filed by Dr Daniel Inguanez acting for the Department of Contracts and of the People & Standards Division within the Office of the Prime Minister (hereinafter referred to as the Contracting Authority) filed on the 20<sup>th</sup> December 2023;

Having noted the letter of objection filed Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of Price Waterhouse Coopers, (hereinafter referred to as the appellant) filed on the 18<sup>th</sup> December 2023;

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 sitting of the 27<sup>th</sup> February 2024 hereunder-reproduced.

### **Minutes**

#### **Case 1966 – CT 3011/2023 – Services – Tender for the Provision of Mystery Shopping Services in the Public Administration**

The tender was issued in three lots on the 4<sup>th</sup> June 2023 and the closing date was the 4<sup>th</sup> July 2023

The estimated value of this tender, excluding VAT, was as follows: Lot 1 - €306,000; Lot 2 - € 306,000; Lot 3 - € 306,000

On the 11<sup>th</sup> December 2023 EMCS Advisory Ltd filed an appeal on all three lots against the Office of the Prime Minister objecting to their disqualification on the grounds that each of their bids failed to satisfy the criterion for award being the offer with the Best Price Quality Ratio (BPQR).

A deposit of € 1530 was paid on each lot.

There were seven bids on each respective lot.

On the 27<sup>th</sup> February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

### **Appellant – EMCS Advisory Ltd**

Dr Lorna Mifsud Cachia	Legal Representative
Mr Stefano Mallia	Representative
Ms Caroline Pavia Sciortino	Representative

### **Contracting Authority – Office of the Prime Minister**

Dr Daniel Inguanez	Legal Representative
Dr Myrna Azzopardi	Chairperson Evaluation Committee
Ms Dorothy Fenech	Secretary Evaluation Committee
Ms Alexia Pisani	Evaluator
Ms Marion Aquilina	Evaluator
Ms Amanda Sultana	Evaluator
Mr Kyle Vella	Representative

### **Preferred Bidder – Price Waterhouse Coopers (Lot 1)**

Dr Steve Decesare	Legal Representative
Dr Edward Mizzi	Representative
Ms Katya Pirotta	Representative
Ms Claudine Attard	Representative

### **Preferred Bidder – IDEA Advisory Services Ltd (Lot 2)**

Mr Francesco Zerafa	Representative (online)
Mr Luca Nguyen	Representative (online)

### **Preferred Bidder – Powered Knowledge – (Lot 3)**

Invited to attend but declined

### **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.

Dr Lorna Mifsud Cachia Legal Representative for EMCS Advisory Ltd by way of a preliminary point mentioned that any media comments on this case were not engineered by Appellants nor were they attributable to them. She then went on to state that the objections filed on all these three lots is that the tender has limitations regarding the allotment of lots. The concept of a tender is to widen competition and to ensure fairness and there was a need to explain how the lots were determined to ensure that all participants had a chance. There is no claim of bad faith on the outcome of the evaluation committee but a claim that the tender does not indicate the selection process in circumstances where bidders tie.

Dr Daniel Inguanez Legal Representative for the Contracting Authority said that this appeal is not contesting the fairness of the competition but claims that everyone should have a piece of the cake. The Board cannot do a re-evaluation process and if it is the tender terms that are being queried then

the remedy lay in Regulation 262. The Board is not able to decide on the tender clauses or on how the award is decided.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that this was an unusual appeal as this matter should have been dealt with before the tender bid was submitted.

Dr Steve Decesare Legal Representative for Price Waterhouse Coopers agreed that the remedy sought should have been dealt with at an earlier stage and the tender cannot be attacked at this stage. Clause 3.1 of the tender is clear in the order that the tender is to be decided and the evaluation committee acted correctly.

Dr Mifsud Cachia said that Regulation 262 states what prospective bidders may do. There are two concepts here – there is a remedy but it is not mandatory – it says may not must. Regulation 270 allows appeal by interested party or in certain other circumstances and the bidder has the right to appeal. Regulation 262 gives an option in the first  $\frac{2}{3}$  of the stated time. But what if it happens in the last  $\frac{1}{3}$  of the time – then one uses Regulation 270 to appeal. Reference was made to the *Truevo* case where appellant had not bid. Regulations 262 and 270 must be considered jointly and in not using Regulation 262 one is not excluded from using Regulation 270. Reference was made to PCRB Cases 1578, 1690 and 1733 where there is a common thread in the procurement procedure. Although this is an instance of an anomaly it must still be dealt with within the existing regulations. There is no clarity in the tender and adjudicating lot by lot does not mean starting from the first lot as if this is some unchanging law. What the Appellant is claiming is that this tender does not outline the process and, therefore, there is lack of transparency which could not have been foreseen. The Euro Directive also states that lots may be limited provided this is stated and criteria must be non-discriminatory.

Dr Decesare said that the Board has always decided that although the Regulations allow appeals on Regulation 270 Regulation 262 should be used first. There are no rules stipulating that any party is entitled to any lot if it is not placed first. It is normal in an award situation to go down the lots from first onwards.

Dr Inguanez stated that the Authority disagrees with the argument put forward for the reason that the tender is being attacked and therefore the only remedy is Regulation 262. Regulation 270 contests the award. There are various sentences backing the Authority's decision. The *Credorax* case was precisely on Regulation 262 on complaints that already existed. Regulation 262 is a remedy whilst 270 is a remedy after close of tender. Court of Appeal decision in Case 237/2021/1 *AIB Insurance* indicated clearly that 262 remedy was the right course. Appellant expected a comparative analysis which is incorrect as each lot is treated as a separate entity. The tender dossier indicated very clearly that the award will be lot by lot, hence the chronological assessment.

Dr Debono said that it is clear that once the bid was made Appellant had accepted the terms of the tender and had lost the right to contest the terms of the tender as confirmed in CJEU Case C 230/2002. Regulation 39 of the PPR had been applied correctly and the appeal should be refused.

Dr Mifsud Cachia requesting to be allowed to make a final comment said that all that the Appellant asked is for clarification of how the award was made in a situation where this eventuality was not foreseen. All that it is asking is that in the case of a tie the tender is abandoned. The marginal note of a title is not comprehensive. In Case 1578 there were four clarifications sought and it is not similar to today's case.

Mr Stefano Mallia Representative of the Appellant said that lots are not individual and there is no reason why the award should be on chronological basis.

Dr Decesare noted that both Regulations 262 and 270 gave a right to appeal but if the process is not done correctly the right is lost.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 27<sup>th</sup> February 2024.

Having noted the objection filed by EMCS Advisory Ltd (hereinafter referred to as the Appellant) on 11<sup>th</sup> December 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT3011/2023 listed as case No. 1966 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Lorna Mifsud Cachia

Appearing for the Contracting Authority: Dr Daniel Inguanez

Appearing for the Preferred Bidder: Dr Steve Decesare

Whereby, the Appellant contends that:

- a) **Grievance 1:** - The tendering procedure in question did not safeguard and warrant transparency, objectivity and equality of treatment between all the tenderers because the Tender Dossier had no award criteria addressing the situation of a bidder placing highest in more than one Lot but having the same value in all the bids and, consequently, the tendering procedure in question violated and breached the general principles of law namely equality of treatment and transparency and lacked objective award criteria in such a situation and afforded no certainty of outcome in the procedure.

The Call for Tenders was calling for the submission of bids on three lots. The Appellants have won no lot and there is no discernible reason why this is so and, indeed, no explanation can be found in the Tender Dossier. This is exactly the reason why it is clear that the Tender Dossier did not render the tendering and adjudication procedure transparent and, furthermore, created (as shall be submitted hereunder) a situation of inequality between the tenderers. It must be stated that the Tender Dossier made very clear the basis on which adjudication would be made should the same bidder rank highest in the final ranking in more than one lot. However, it is patently missing information and adjudication criteria on how the Evaluation Committee should award Lots should

there be bidders having the same score and/or same bidders placing first and second in all the three lots, as was the case in this tendering procedure. In other words, the lot award criteria were imprecise and that the evaluation process lacked transparency, having the effect of conferring on the contracting authority uncontrolled discretion on how to award the respective lots in the abovementioned case. And in the case at issue this imprecision has lead (sic) to arbitrariness in the tendering and award procedure and to the Appellants' bid being rejected when it could have, with objective and proper award criteria, been awarded the contract for Lot 1. In this case, PWC submitted a bid which was exactly the same price throughout - so when it placed first in the three Lots, the Tender Dossier was absolutely silent on how the Evaluation Committee should award the contract and which lot to award to such bidder and which lots not to award to such bidder. The actual results show how this lack of instruction (and consequently, lack of transparency in the procedure) in the Tender Dossier has been critical in the rejection of the bid of the Appellants and had this eventuality been provided for, then no such rejection would have occurred. The Tender results show that the Appellants, EMCS, have placed as follows:- Lot 1:- Third Place; Lot 2:- Third Place; Lot 3:- Fourth Place. For some non-transparent reason, PWC was awarded the Lot 1 contract - when it had, effectively, submitted one bid per lot at three equal prices and scored the same technical scoring, so it could easily have been allotted Lot 3. No objective criteria was presented in the Tender Dossier as to whether Lot 1 or Lot 3 should be awarded to PWC. The bidder which was then awarded Lot 2, i.e., IDEA, had effectively submitted one bid per lot at different prices but since the price for the second lot was the highest, then, in accordance with the Tender Dossier, IDEA was awarded the contract for Lot 2. The bidder which was then awarded Lot 3, i.e. Powered Knowledge, has placed fourth in Lot 1, fourth in Lot 2 and third in Lot 3 and yet was awarded Lot 3 only because and a direct consequence of the fact that PWC had been awarded Lot 1. Indeed, the Evaluation Committee could have easily awarded Lot 3 to PWC and Lot 1 to the Appellants. There was no discernible, transparent and clear award criteria on which the Contracting Authority could reject the Appellants' tender in the way it did and allot Lot 3 to Powered Knowledge and not Lot 1 to EMCS and Lot 3 to PWC. Yet, for no transparent reason, and based on no transparent procedure, PWC was awarded Lot 1 with Powered Knowledge being allotted Lot 3, i.e., the only Lot in which it did not place fourth, when the Appellants could have just as easily - and far more fairly as shall hereinafter be submitted - been awarded Lot 1 with PWC being awarded Lot 3 where PWC had the same scoring and same price as they had in Lot 1. However, in view of the fact that the Tender Dossier had no clear and transparent award criteria whatsoever on what to do in situations such as the one outlined above, then the Contracting Authority, randomly and inexplicably as shall be submitted hereunder, accepted PWC's bid in Lot 1 instead of Lot 3.

- b) **Grievance 2:** - As a result of the lack of objectivity and transparency in the Tender Dossier and the resultant adjudication procedure, the Bidders were manifestly not treated equally and this inequality of treatment lead to the disqualification of EMCS.

Without prejudice to the aforesaid with respect to the first grievance and to same and without prejudice to what shall be submitted with respect to the third grievance, it also becomes patently clear that the Appellants were not treated equally as Powered Knowledge. When faced with the situation, the Evaluation Committee chose to award Lot 1 to PWC and Lot 3 to Powered Knowledge - when it could have easily done the contrary, i.e. award Lot 3 to PWC and Lot 1 to EMCS. Hence, it is clear that, in this tendering procedure, the Appellants were not treated equally to Powered Knowledge and to PWC. Indeed, equal treatment of all the tenderers in this procedure would have resulted in a tie between Powered Knowledge and the Appellants. This is being submitted because if the Evaluation Committee were to treat both bidders (Power and Appellants) equally, then it would have not been in a position to award the Tender without discriminating against the one or the other. Hence, it becomes amply clear that the Tender Dossier had to stipulate what would happen if one bidder had to rank in the same position throughout lots and having the same value throughout the same lots because only then the procedure in such instances would become transparent, objective and respect the equal (sic) in treatment of the relative bidders (of course if the Tender Dossier would be objective, transparent and with respect to the equal treatment of the tenderers).

- c) **Grievance 3:** - Subsidiarily to the first two grievances and without prejudice thereto, the rejection of EMCS' bid was entirely disproportionate considering the fact that EMCS's bid was better ranked in two out of three lots whilst Powered Knowledge's bid placed only once better than EMCS.

The principle of proportionality is a general principle of European Union Law. This principle lays down the obligation on Member States and the European Institutions not to go beyond what is necessary to achieve the intended objectives and when there are various measures which could attain the same objective, recourse must be had to the least onerous one. The principle of proportionality is also a crucial principle of Maltese and EU Public Procurement Law. The award of lots 1 and 3 goes against the principle of proportionality. Indeed, from the table it becomes manifestly clear that given the fact that EMCS had, in fact, placed third on two of the three lots, rather than in one lot like Powered Knowledge, EMCS should have been better placed to be awarded at least one contract because it was on a much better ranking than Powered Knowledge in two out of three lots. Hence, there is no proportionality in the way in which the Contract was awarded to Powered Knowledge in this procedure and not to EMCS. A proportionate approach would have been to award the bidder with the majority of better-ranked bids in the highest number of lots - as was the case with EMCS. Any other approach or conclusion amounts to a travesty of the observance of the principle of proportionality.

This Board also noted the Department of Contract's and Contracting Authority's Joint Reasoned Letter of Reply filed on 20<sup>th</sup> December 2023 and its verbal submission during the hearing held on 27<sup>th</sup> February 2024, in that:

- a) **First Plea:** the first and second grievances of the Appellant, and the consequential request for the cancellation of the procurement procedure, are inadmissible at this stage.

It is manifestly clear, that these grievances are not permissible under an appeal brought in terms of Reg. 272 of the Public Procurement Regulations (PPRs) but could only have been raised in an application under Reg. 262 of the PPRs before the closing date of the call for tenders. The Appellant did not do so but decided voluntarily to participate in the call for tenders as issued and published. The Appellant has thus acquiesced to the terms and conditions of the tender document and cannot now, at award stage, rely on any ambiguity in the tender documentation to request the cancellation of the call for tenders. After all, the Appellant had every opportunity, just like any other prospective bidder, to attend clarification meetings and to requests clarifications on the tender documentation.

- b) **Second Plea,** being raised without prejudice to the first plea: the first and second grievances of the Appellant are unfounded.

Despite that Clause 3.1 of the Instructions to Tenderers could not be applied *ad litteram*, since PWC ranked first in all three Lots with the same price of Eur261,912.00, the tender documentation still adopted a clear procedure for how the Lots were to be awarded. In particular, Clause 3.3 of the Instructions to Tenderers clearly states that the Lots are to be awarded lot by lot. It is manifestly clear to the reasonably well-informed and diligent tenderer that Clauses 3.1 and 3.3 of the Instructions to Tenderers adopt the following procedure to be followed in the award of the different Lots: - first, in the case where a bidder ranks first in more than one lot, the Evaluation Committee must award that bidder the Lot with the highest value pursuant to Clause 3.1 of the Instructions to Tenderers; - second, in the case where different bidders ranked first in the different lots or where the Lots have equal values (such as in this case), the Evaluation Committee must award the contracts Lot by Lot pursuant to Clause 3.3 of the Instructions to Tenderers. After all, this is the most logical and objective reading of the respective clauses. A reasonably well-informed tenderer would not expect the Lots to be awarded in the inverse order, from Lot 3 to Lot 1. To depart from the lot by lot procedure, as the Appellant is suggesting, would have departed from the tender documentation and would have resulted in the unequal treatment of bidders.

- c) **Third Plea:** the third grievance of the Appellant is unfounded

By its third grievance the Appellant claims that the principle of proportionality would dictate a different outcome to the procurement process. The Appellant suggests more proportional ways in which the Lots should have been awarded. Neither suggestion can be taken seriously, namely for two reasons. First, neither suggestion is envisaged in the tender documentation which establishes, by means of Clause 3.3 of the Instructions to Tenderers, a lot by lot procedure for the award of

the three Lots in numerical order. Secondly, the suggested parameters by the Appellant - i) that the Appellant ranks higher in more Lots than Powered Knowledge; and (ii) that the Appellant has an overall higher financial score than Powered Knowledge - contradict the fact that the award criterion for this procedure is the Best Price Quality Ratio (BPQR). Even if one had to ignore the fact that the relative clauses of the Instructions to Tenderers bound the Evaluation Committee to award the Lots lot by lot, a proportional method to award the Lots in keeping with the purposes of the BPQR criterion would have been to compare the overall BPQR scores not just the financial scores or the respective ranking in each Lot. The average overall BPQR score of Powered Knowledge across three Lots is higher than the Appellant's.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 18<sup>th</sup> December 2023 and its verbal submission during the hearing held on 27<sup>th</sup> February 2024, in that:

a) **Preliminary Plea: Objection is invalid**

The Grievances of the Complainant relate, in their entirety, to the manner in which the Tender Document was drafted. The PPR and the Tender Document provide a number of remedies to tenderers who consider the Tender Document to be drafted in a manner which is unclear or which breaches the PPR.

*Clarification Meeting*

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

*Clarifications*

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

*Remedy before Closing*

In terms of Regulation 262 of the PPR, as also reflected in General Rule 5 of the General Rules Governing Tenders, tenderers had the right to file a reasoned application before the Board, within the first two thirds (2/3) of the time period allocated for submission of offer, challenging (amongst other things) the content of the Tender Document. 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. The Complainant, for the third (3<sup>rd</sup>) time as explained above, failed to exercise the remedies available to it.

- b) **First Grievance:** - Without prejudice to the submissions in Section 3, the First Grievance is unfounded both in fact and at law. The Tender Document stated that:

- *"Tenderers may submit a tender for several lots (one or more lots), however only one (1) Lot can be awarded to any particular tenderer." (Section 3.1)*

- *"In case the same bidder ranks highest (final ranking) in more than one lot, s/he shall be awarded the lot with the highest value." (Section 3.1)*

- *"Contracts will be awarded lot by lot, in accordance with the award criteria at Article 6." (Section 3.3)*

It is therefore clear that the Contracting Authority would award the contracts lot by lot.

PWC scored the most points for Lot 1. The Contracting Authority therefore had to award Lot 1 to PWC, unless two (2) cumulative conditions subsisted:

- Firstly, PWC ranked the highest in more than one Lot - this condition subsisted as PWC ranked first in all three (3) Lots.

- Secondly, the financial offer for the other Lots that PWC was ranked highest for was higher than that of Lot 1 - this condition did not subsist, as PWC's offer for all three (3) Lots was exactly the same.

In view of the fact that PWC ranked first for Lot 1 and had no other Lot for which it (a) ranked first, and (b) offered a higher value, Lot 1 had to be awarded to PWC. The Contracting Authority had to then proceed with awarding Lot 2, excluding therefrom PWC since it had already been awarded Lot 1. Same process had to be followed in relation to Lot 2. The award of Lot 2 to IDEA is therefore also in line with provisions of the Tender Document. Finally, Lot 3 had to be awarded. In this case, given that both PWC and IDEA had already been awarded Lot 1 and Lot 2, respectively, the third ranked tenderer was awarded Lot 3 - that is, PK. The Complainant's first grievance that awarding the contract, lot by lot, in chronological order constitutes a breach of the PPR is therefore entirely unfounded.

- c) **Second Grievance:** - Firstly, the Complainant was not (to our knowledge) disqualified. Indeed, the letter dated 1<sup>st</sup> December 2023 from the Contracting Authority to EMCS does not state that its tender was not deemed to be compliant, but simply that it was not the offer with the Best Price Quality Ratio (BPQR). It is unclear why Lot 2 is not included in this comparison. In any case, the Complainant then claims that if the Contracting Authority respected the principle of equal treatment the evaluation would have resulted in a tie between PK and Complainant and, consequently, it would have not been in a position to award the tender without discriminating against the one or the other. The Complainant then requests that the Board orders the cancellation of the Tender Procedure. In substance, this second grievance is not different from the first grievance. The Complainant seeks to argue that the award of Lot 1 should not have been first, simply because PWC was ranked first for other Lots and had the same financial offer across all

Lots. As explained above, the fact that PWC had the same offer across all lots simply meant that the Contracting Authority did not have to have recourse to the part of Section 3.1 which required it to award PWC the Lot with the highest value. Lot 1 was therefore rightly awarded to PWC and the remaining lots correctly followed the procedure outlined in the Tender Document.

- d) **Third Grievance:** - The substance is once again no different from that of the other Grievances, save that the Complainant is applying a different principle to the same facts. The Complainant claims that, since it scored higher than PK in two out of three Lots, the Complainant should have been awarded one of the Lots. This argumentation is entirely unsupported since the Tender Document did not create a competition between 3rd and 4th ranked tenderers. PWC will avoid repetition of the arguments made in the previous sections and reiterates that the same arguments are applicable to this grievance. The Tender Document required award of contract lot by lot, and this is what the Contracting Authority did. The Principle of Proportionality does not in any manner contemplate awarding a Lot to the Complainant because it came 3<sup>rd</sup> in two lots out of three (3). This argument is entirely unfounded, unsupported and quite frankly absurd. The principle of proportionality would not permit the Contracting Authority to do what the Complainant is suggesting it should have done. In a nutshell, this principle provides that the Contracting Authority should not adopt a measure which exceeds the limits of what is necessary in order to attach the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) ***Preliminary plea - Remedies before closing date of a call for competition –***
- i. This Board initially agrees with the appellant's arguments that economic operators are under no obligation to contest specific tender criteria (in this case - clause 3 'Lots' of Section 1 of the tender dossier) under Regulation 262 of the Public Procurement Regulations ("PPR") because such is not a mandatory requirement. In fact Regulation 262 of the PPR uses the words "...**may..... file a reasoned application** .....". (bold emphasis added)
  - ii. However, it is also true that once tender criteria have not been contested, at the appropriate juncture, no further remedies are from then on available to scrutinize them any further.
  - iii. Moreover, it is important to note that as per the General Rules Governing Tenders paragraph 9.4. "*In submitting a tender ....., the tenderer accepts in full and in its entirety, the content of this tender document, .....Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document.*" By not filing a 'Remedies before closing date of a call for competition' the appellant would have basically acquiesced to the terms and conditions within the tender dossier.

- iv. Once these tender conditions (clause 3 - 'Lots' - Section 1) were known to all economic operators as from the publication date of the tender dossier, this Board cannot comprehend as to why such appeal is being filed at this particular juncture.

This Board, therefore, upholds the preliminary plea as filed by the preferred bidder.

b) ***Grievances raised by the appellant –***

- i. For the sake of transparency and full disclosure, this Board will also comment and decide on the main grievances of the appellant. Bearing that they are similar in nature, this Board will deal with the grievances in their entirety.
- ii. In essence, the appellant is claiming that the way in which the evaluation committee decided to award the three (3) lots lacked transparency, objectivity, did not safeguard equality of treatment and was in conclusion disproportional.
- iii. Clause 3.1 of the tender dossier clearly mentioned that the tender is divided into lots and that *“in case the same bidder ranks highest (final ranking) in more than one lot, s/he shall be awarded the lot with the highest value.”* This Board notes that in actual fact, this did not happen, since PricewaterhouseCoopers had the same identical bid for all three lots.
- iv. Therefore, the evaluation committee, in the Board’s opinion, very simply adhered to what clause 3.3 of the Instructions to Tenderers states in that the Lots are to be awarded lot by lot. By following chronological order, the Evaluation Committee duly and correctly awarded Lot 1 to PricewaterhouseCoopers.
- v. This Board opines that what the appellant is requesting from this Board is to be disproportional. Initially, any other forms of adjudication as are being proposed by the appellant would impinge on the principle of self-limitation, specifically because such award criteria are not listed in the tender document. Moreover, the first request being made in the letter of objection, i.e. to ‘Cancel the Call for Tenders’ would at this point, once all the bids of the economic operators have been published, be completely disproportional.

Therefore, this Board does not uphold the grievances of the appellant.

**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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Mr Richard Matrenza**  
Member