

PUBLIC CONTRACTS REVIEW BOARD

Case 1968 – CT3039/2022 – Services - Tender for the Mapping, Re-engineering and Documenting the Business Processes of the Justice Entities within the Ministry for Justice

5th April 2024

The Board,

Having noted the letter of objection filed Dr Steve Decesare on behalf of Camilleri Preziosi Advocates acting for and on behalf of Deloitte Advisory and Technology Limited, (hereinafter referred to as the appellant) filed on the 6th November 2023;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for Ministry for Justice (hereinafter referred to as the Contracting Authority) filed on the 16th November 2023;

Having noted the letter of objection filed Dr Lorna Mifsud Cachia on behalf of Dingli & Dingli Advocates acting for and on behalf of Grant Thornton, (hereinafter referred to as the Preferred Bidder) filed on the 16th November 2023;

Having heard and evaluated the testimony of the witness Ms Mariella Pulis (Chairperson of the Evaluation Committee) as summoned by Dr Steve Decesare acting for Deloitte Advisory and Technology Limited;

Having heard and evaluated the testimony of the witness Mr Frank Attard (Member of the Evaluation Committee) as summoned by Dr Steve Decesare acting for Deloitte Advisory and Technology Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 29th February 2024 and 21st March hereunder-reproduced.

Minutes

Case 1968 – CT 3039/2022 – Services – Tender for the Mapping, Re-Engineering and Documenting the Business Processes of the Justice Entities within the Ministry for Justice

The tender was issued in on the 23rd March 2023 and the closing date was the 11th May 2023

The estimated value of this tender, excluding VAT, was € 1,400,000.

On the 6th November 2023 Deloitte Advisory and Technology Ltd filed an appeal against the Ministry for Justice objecting to their bid being rejected because it was not the Best Price Quality Ratio offer.

A deposit of € 7,000 was paid.

There were ten bids.

On the 29th February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Deloitte Advisory and Technology Ltd

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| Dr Steve Decesare | Legal Representative |
| Mr Ian Coppini | Representative |
| Mr Spyros Apostolou | Representative |

Contracting Authority – Ministry for Justice

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| Dr Chris Mizzi | Legal Representative |
| Ms Mariella Pulis | Chairperson Evaluation Committee |
| Ms Joanne Battistino | Representative |

Preferred Bidder – Grant Thornton

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| Dr Lorna Mifsud Cachia | Legal Representative |
| Dr Wayne Pisani | Representative |
| Dr Robert Vella Baldacchino | Representative |
| Mr Bernard Micallef | Representative |
| Mr Conrad Aquilina | Representative |
| Ms Victoria Darmanin | Representative |

Department of Contracts

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| 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 Steve Decesare Legal Representative for Deloitte Advisory and Technology Ltd (Deloitte) said that on Appellant's request for certain further information it had been advised that this will be dealt with in the course of the testimonies to be heard. Ms Lorna Mifsud Cachia on behalf of the preferred bidder said that it had not been served with the application for further information just referred to. She went on to state that the Contracting Authority had admitted that there had been an error in the adjudication at first stage and asked why Appellant had not raised the objection at the first juncture. Regulation 270 makes it clear that objection cannot be raised once the time has expired and any objection should have been raised in the time period stated in the law.

Dr Decesare said that non-compliance is not limited to the instant. Any reference to Regulation 270 is out of place as this applies only after the submission of the tender and the only decision taken at that time was to disqualify Grant Thornton – it was imply a process of objection and reply. The Authority adjusted an incorrect evaluation of the grid without providing any details. At that stage no decision was made and no award was made. The Appellant requested an explanation and the Board decided on the withdrawal of the initial decision and has made no further decision and therefore the statement made by Grant Thornton that an award has been made should be ignored. This is the first time that Deloitte have a chance to object.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts said that in regard to the preliminary plea there are ten days to raise a complaint and it was now out of time.

Dr Chris Mizzi Legal Representative for the Ministry of Justice said that the issues just raised are not part of the current objections. The Ministry admitted to the pleas raised.

The Chairman proposed a short recess to enable the Board to consider the points raised.

On resumption the Chairman stated that this Board has today heard oral submissions on the preliminary plea filed by the preferred bidder on the 16th November 2023.

The preferred bidder, in summary, states that the appeal subject matter of today's hearing is *four* *termine* as the 10 days stipulated in Regulation 271 commenced to run as from the 21st September 2023.

It must be noted that the original decision of the PCRB was issued on the 28th September 2023, i.e. a full 7 days after the date quoted by Grant Thornton. Once the bids were sent for re-evaluation a fresh decision had to be taken by the Contracting Authority, as in fact happened. This would in turn 'revive' the 10 day stand still period as mentioned in the Rejection Letter sent to Deloitte on 27th October 2023 advising them that if they wished to file an appeal they had the chance to do so by noon of the 6th November 2023. This in full observance of the Public Procurement Regulations *in toto*.

Once the appeal was filed on the 6th November 2023, this Board deems that this appeal was filed within the stipulated time frame and therefore this Preliminary Plea of the Preferred Bidder is hereby rejected.

Hearing will now proceed on the merits and grievances as raised by the Appellant.

Dr Decesare stated that there are two grievances being appealed on – the non-compliance of Grant Thornton and the manner the evaluation of the BPQR was carried out. On the non-compliance grievance the Appellant would be dealing with any missing information in the technical offer form and changes which can be permitted through the rectification process, and evidence will be heard.

Dr Debono said that in a BPQR tender the Tender Evaluation Committee (TEC) has certain discretion as confirmed in PCRB Case 1577. Appellant has to prove his case in line with the Code of Organisation and Civil Procedure.

Dr Mifsud Cachia rejected the suggestion that the preferred bidder's offer was not compliant as it conforms fully as all information has been provided and any rectifications or clarifications have not changed anything. There is no evidence that the BPQR evaluation was outside the parameters of the TEC powers. There is a certain leeway but the fact that the marking was very close is evidence of the high quality of the submissions. It is a mere assumption that there is something irregular in the evaluation.

Dr Decesare pointed out that he was not alleging any bad faith. He wished members of the TEC to testify, but was advised that only the Chairperson was present.

At this stage the Chairman intervened to say that the Board regrets that only the Chairperson of the TEC was present when in fact all the evaluators had been requested to attend and were expected to be present. It is a rule of the PCRB that evaluators have to attend hearings.

Dr Decesare said that under the circumstances he will try to proceed with the testimony of the Chairperson.

Ms Mariella Pulis (224281M) called to testify by the Appellant stated on oath that she was the Chairperson of the TEC and that she has experience of serving on various evaluation boards having attended procurement courses. There were three evaluators on the committee with herself and the secretary as non-voting members. The same committee had evaluated both tenders. Witness explained that Note 2 allows clarification and rectification on specific points but was not aware how many rectifications and/or clarifications had been sought, and from which bidders, in the case of this tender. The format in the eSPD received from one of the bidders was not correct so a Note 2 rectification was sent. The eSPD form was re-sent as the wrong form was sent in the first place. A technical rectification was sent, according to the witness, on the key experts as the persons offered did not meet the tender requirements. This was sent to a number of bidders but witness did not recall how many were not compliant. The possibility of changing the key expert if it was originally incorrect came under Note 2. The 14th June rectification was on the issue of the eSPD format; the second request on the 3rd July was to rectify the second eSPD whilst the 17th July request was on the offer to propose another key expert as there was no record of the qualifications of the business analyst who was therefore replaced and subsequently included as a quality assurance partner.

The Chairman, at this stage, noted that there was a certain lack of necessary documents to enable the witness to give proper replies and directed that at the next hearing all the evaluators must be present with all the necessary and relevant documents to enable full and detailed answers to questions put to them.

Resuming her testimony Ms Pulis, stated that she was familiar with the BPQR award criteria as against a cheapest compliant tender and that in the former case the quality of the offer had to be judged.

Dr Decesare reserved the right to question further witnesses on the points already covered.

In reply to a question from Dr Mizzi witness confirmed that three rectifications were issued to Grant Thornton but no clarifications were issued to Deloitte.

Dr Mizzi reserved the right to further questions.

Questioned by Dr Mifsud Cachia, witness was referred to Rectification Request no. 1 and stated that the online eSPD form did not match the one on the contract website so a second rectification request was submitted providing a form. There was then a further rectification correctly filled in. On the key expert the TEC could not determine the MQF level of the business analyst as there was no information provided.

Dr Mifsud Cachia reserved the right to further questions.

The Chairman thanked the parties and adjourned the hearing to the 21st March 2023 at 9.00am.

End of Minutes of first hearing

SECOND HEARING

On the 21st March 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider further this appeal.

The attendance for this hearing was as follows:

Appellant – Deloitte Advisory and Technology Ltd

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| Dr Steve Decesare | Legal Representative |
| Mr Edward Mizzi | Representative |
| Mr Spyros Apostolou | Representative |
| Mr Damien Heath | Representative |
| Dr Stefan Cutajar | Representative |

Contracting Authority – Ministry for Justice

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| Dr Chris Mizzi | Legal Representative |
| Ms Mariella Pulis | Chairperson Evaluation Committee |
| Ms Maria Grech | Secretary Evaluation Committee |
| Mr Frank Attard | Evaluator |
| Mr Jeremy Alamango | Evaluator (Online) |
| Ms Joanne Battistino | Representative (Online) |

Preferred Bidder – Grant Thornton

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| Dr Lorna Mifsud Cachia | Legal Representative |
| Dr Wayne Pisani | Representative |
| Dr Robert Vella Baldacchino | Representative |
| Mr Conrad Aquilina | Representative |

Department of Contracts

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| Dr Mark Anthony Debono | Legal Representative |
| Dr Audrey Marlene Buttigieg Vella | Legal Representative |

Mr Kenneth Swain welcomed the parties and before inviting submissions said that Dr Charles Cassar a member of the Board wished to make a statement.

Dr Cassar stated that with regard to this tender it transpires that through some of his personal contacts a situation could arise whereby there could be a conflict of interest with one party or another contesting this appeal. Justice must not only be done but be seen to be done as well and his primary interest in his role is to ensure that the decision on this appeal is the right one and totally impartial. He is convinced, therefore, that the wisest course on his part is to reclude himself from hearing this appeal any further.

Dr Cassar, at this stage left the sitting and was replaced on the Board by Mr Lawrence Ancilleri.

The Chairman said there are two avenues on which this appeal can now proceed – either continue to hear the case, bearing in mind that Mr Ancilleri has brought himself up to date with proceedings so far or else start the hearing of the appeal from scratch.

There were no objections by the legal representatives of all the parties to continue with hearing the case from where it was left off.

The Chairman noted that when the hearing was adjourned Ms Pulis was concluding her testimony and the parties had reserved their right to question her.

Dr Decesare agreed to close off the testimony of Ms Pulis and requested further witnesses be called.

Mr Frank Attard (441692M) called to testify by the Appellant stated on oath that he was one of the Evaluators, had evaluated the bids in both evaluations and that the Tender Evaluation Committee (TEC) at both evaluations had been composed of the same persons. He stated that Note 2 allows clarifications or requests for further information on matters as indicated. He was not familiar with Public Procurement Regulation 62 (2) and not aware if this was different from Note 2 requirements. There was quite a number of clarifications sought, likely seven in number, and were mostly regarding missing information on key experts. The TEC's only requests were to clarify not to change submissions. Grant Thornton (GT) were the only bidder which changed its key experts – the original key expert nominated by them was replaced as he did not meet the qualifications requirement. No transcript was requested and the new key expert was nominated after he had been nominated for another role. Witness could not recall if information was incomplete or incorrect. So the option was given to allow bidder to offer a new key expert or to provide information as allowed in Note 2.

Witness stated further that GT met requirements in technical offer form as Article 2.3 and 4.2 were addressed in A1 and Article 14.3 was addressed in A4 and answered the criteria in full. The TEC took the decision to take into consideration the overall tender replies in all sections – this decision may have been discussed with the Department of Contracts (DoC) at the beginning of the evaluation and maximum marks were given for information that was provided in the wrong section in the case of the winning bid. The TEC only took note of the key expert changes but in the case of GT the change was not a technical one as it was only a swop of functions in the core group according to the documents submitted. Mr George Vella was not a new key member as he was already included in the original core team. Witness could not recall if any of the other bidders replaced the key experts, however he could confirm that GT had changed the key expert. He also confirmed that he is aware of the distinction between a best price offer and a BPQR tender. The range of points in the tender (0 to 100) were allocated according to the submissions over and above the minimum requirements – items like extra information, graphical format, quality assurance reporting earned more points and was a reflection of the high quality of the top submissions.

Referred to Article D, C2 and F on page 11 of the tender dossier witness stated that the requirements on experience and qualifications of the key experts were set in stone and some bidders went beyond this. The TEC assessed bids on the basis of who would be doing particular jobs and there was no comparative analysis made of the bids. Justification for a 100% mark indicated how and why the TEC assessed the bid; compliant to the TEC means that bidder at least met or exceeded expectation.

In reply to a question by Dr Mizzi, witness said that the replies he gave in his testimony were mainly generic and not specific to GT and the same approach had been used throughout.

Witness replied to question from Dr Debono by saying that marks were awarded individually and then the average result calculated thereon.

Questioned by Dr Mifsud Cachia witness explained that the evaluation was done in the usual three stages and if compliant it meant that the bidder had passed all three stages. In respect of marks awarded, bidders were dealt with differently depending on the answers provided and if they were over and above that expected; specific answers to the articles title only was not enough for the TEC – explanations and details were expected and this was subsequently provided by GT. In substance the change of key expert was cosmetic as it did not change bid as the key experts were all senior team members. The TEC took approach that if the information was included somewhere in the submission it was considered as being met.

In reply to a further question from Dr Decesare, witness said that there was no need to send any clarifications to Deloitte on their submission.

This concluded the testimonies.

Dr Decesare stated that the general principle is that no amendments to the offer are allowed once submitted. Regulation 62 provides that that the tender must be valid *ab initio* and must be complete in all requirements. Regulation 62(2) offers limited occasions where tenders can be changed – the contracting authority can then request additional documentation. Note 2 is based on this Regulation. Replacement of key expert does not fall within the parameters of these Regulations. The replacement of a key expert is not a case of erroneous, incomplete or missing information. In the tender the business analyst position required certain qualifications. If these are not there in the person nominated by GT then the bid is *ab initio* not valid and changing that expert falls foul of Regulation 62(2) and Note 2. CJEU Cases were cited in support, namely C 599/10 (para 37) – making an imprecise tender compliant after clarification gives the appearance that the contracting authority have negotiated with the bidder to the detriment of the other bidders, and C 131/16 – equal treatment precludes invitations to submit documents after the original submission. C 336/12 – equal treatment does not preclude fresh documents being presented provided they predate the tender and also cited was Court of Appeal case 329/23/1.

Dr Decesare continued by stating that in this Case the expert offered by GT was changed and clearly did not meet the eligibility criteria, as otherwise the bidder would have simply submitted a transcript. The change does not fall within Note 2. The key expert was an award criterion and a fundamental part of the award and replacement does not fall within Regulation 62 (2) or Note 2. Even if the change of the key expert is considered as erroneous then there is a further hurdle to overcome, namely that the technical offer falls under Note 3 and thus not only considered for selection criteria but also award criteria. Reference was made to Case 1410 *MITA* where the financial offer form was amended by the contracting authority to give more information but the PCRB held that Note 3 was sacrosanct and no changes could be accepted as this was tantamount to amendments. The Court of Appeal in several cases has confirmed that Note 3 does not allow amendments.

Testimony has been given, said Dr Decesare, that the TEC did not follow the requirement for the technical information to be in a structured form and in same sequence requested. Once it was not followed the bid should have been rejected. The BPQR demands scoring on a range of points. In this case the marks awarded were very close to each other and there was an obvious loose interpretation of the word ‘compliant’ by the TEC. Reference was made to Procurement Policy Note number 8 which requires each evaluator to award a score and to evaluate the strengths and weaknesses of each bidder for each criterion. The DoC letter or reply, para 16, states that comparison between bids are not acceptable; this goes against the PP Note 8 above and against the spirit of the law because compliance

falls within the cheapest compliant offer not BPQR. PCRB Cases 1290 – a form of comparison must be made to determine best offer; Case 1616 – the Board concluded that the evaluation was flawed as full marks given simply because the bidder was compliant and Case 1818 – rendered BPQR into a winning tender simply because it was the cheapest bid. Testimony was given that no comparison was made between the bids and the evaluation was not made in line with the tender documents. The Appellant requests that the tender is re-evaluated by a fresh evaluation committee.

Dr Mizzi stated that Regulation 62 refers to the eligibility part of the bid and requires that it is eligible in the administrative part to proceed to the technical part. The technical eligibility claims regarding the key expert are Note 2 which has a wide spectrum regarding rectification and ineligibility falls within the remit of Note 2 to rectify. This was correctly applied by GT and could be rectified and re-assessed after rectification. On the point of information being provided in different parts in the bid this was a clear case of substance over form. The presentation of information might not be the most desirable but if it is there it cannot be disregarded. The Authority relies on its letter of replies for further points made and on case law in the *Cateressence* case regarding the leeway allowed in a BPQR evaluation. The principles of proportionality demand equal treatment and non-discrimination and the TEC was not in breach of these principles.

Dr Debono said that the main grievance by the Appellant is the matter of compliance by GT and that the TEC could not review the information submitted by seeking further information. General Rule 16 encourages saving tenders and not discarding offers. There is a distinction to be made between compliance and the award criteria and the principle of proportionality must be observed in accepting information provided in other sections of the tender. The decision in CJEU Case T 415/2010 lays down that the evaluation committee is bound by the tender document but there is a discretionary right to ask for rectifications or clarifications. Policy Note 8 confirms that in evaluating a BPQR tender the TEC is afforded an amount of leeway and in this case they have acted accordingly. This was confirmed in PCRB Case 1577 and Court of Appeal case 97/2020. It has not been proven that the TEC acted outside the terms of the tender and the appeal should be dismissed.

Dr Mifsud Cachia said that all rules and regulations ensure that all bidders are treated with proportionality. Policy Note number 40 in reference to Note 2 states that rectification and clarifications shall not substantially change the requirements of the offer. Regulation 62(2) allows a request for supplementary information and the key word in this clause is the word 'erroneous' and one must ask what needs to be submitted to correct something that is erroneous? The reply should be considered in the light of proportionality. The law gives options as long as they are proportional with equal treatment and transparency. GT in accepting to rectify was acting within the parameters of Note 2 and Regulation 62(2) and whilst it was necessary it does not mean that it was unlawful. Has this rectification, as has been claimed, changed anything in the bid? Witness Mr Attard has stated that there was no change in substance by a change in the key expert. One must maintain the need for proportionality. It is a fact that the points of the bidders are close but this is due to the high quality of the bids and the limit in the number of points per section which leave little room for great differences in grading. As the Court of Appeal said in the *Cateressence* case, the Court is not there to decide on the awarding of one or two points, whilst PCRB Case 1577 emphasised the element of leeway. The CJEU in Case 252/10 directed that the evaluation committee has to structure its work in examining a tender. No evidence has been provided that the TEC did not carry out the evaluation professionally.

Dr Decesare in his closing points stated that he objects to additional case law being cited. Proportionality applies when there are many available options but there is also the need for self-

limitation on the part of the TEC. Paragraph 4.25 of the letter of objection mentioned that bidders have to abide by the tender terms and cannot look for other sections. It is not correct to claim that evaluators are limited in the number of marks that they can award as the tender (para 6.2 page 8) allows each evaluator a score out of a 100 and not 5 or 4.95 as stated. It is not a presumption on the part of the Appellant whether it is compliant or not as the TEC confirmed this by awarding it full marks. Regarding the claim that changes under Regulation 62(2) apply across the board and not limited to the administrative stage this is clearly incorrect as it would mean that the tender can be changed at will at the technical or financial stage. The change of role of the key expert is not cosmetic but fundamental.

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 29th February 2024 and 21st March 2024.

Having noted the objection filed by Deloitte Advisory and Technology Limited (hereinafter referred to as the Appellant) on 6th November 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT3039/2022 listed as case No. 1968 in the records of the Public Contracts Review Board.

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| Appearing for the Appellant: | Dr Steve Decesare |
| Appearing for the Contracting Authority: | Dr Chris Mizzi |
| Appearing for the Preferred Bidder: | Dr Lorna Mifsud Cachia |
| Appearing for the Department of Contracts: | Dr Mark Anthony Debono |

Whereby, the Appellant contends that:

a) ***First Grievance – Best Price Quality Ratio***

It is submitted, with respect, that it is inconceivable that a number of tenderers obtain full or close to full marks in several criteria, even more so in a tender of this nature - this would imply that technical offers of multiple tenders offer a higher quality than what is required, which higher quality is equivalent in all tenders and exceeds the minimum requirements to the same extent, therefore

having identical strengths and weaknesses. In this case, it is evident that the evaluation committee misunderstood the requirements of the Tender Document - simply assessing compliance but not technical merit and quality - rendering the decision of the Contracting Authority to opt for the BPQR as opposed to the cheapest technically compliant offer absolutely futile. The Board has, on several occasions, had the opportunity to assess the manner in which tenders which were awarded on the basis of BPQR were evaluated. In particular, the Board has highlighted the need for a proper evaluation of each criterion with scoring varying depending on the qualitative features of the tender in question. However, notwithstanding the above, the evaluation committee awarded essentially the same technical score (difference between them is negligible) to most (at least four (4)) tenderers, in breach of the principles of equal treatment, non-discrimination and transparency, as well as the principle of self-limitation. Each evaluator had to identify and list the strengths and weaknesses of each tenderer for each criterion. In this case, the evaluators simply assessed compliance and proceeded to award full marks. Most of the criteria required write-ups from each tenderer on its understanding of the requirements of the Project, its risk analysis and mitigation, the Intended Implementation of the Project, its strategy, its quality control procedures and the timing of its activities. These are all tailor-made by each tenderer for the Project and require an element of discernment and judgement from the evaluation committee in scoring which of the tenderers exceeded the requirements set out therein. Marks would then need to be awarded depending on the extent to which such requirements were exceeded (including level of effort made by the tenderer in this respect, appropriateness and relevance of the proposed approach, conciseness, internal coherence and level of detail of proposal).

b) ***Second Grievance: Technical Non-Compliance of Grant Thornton***

A. Failure to comply with minimum requirements

Firstly, in the GT Disqualification Letter, the attachment thereto provides as follows in relation to A.4. in the column "Justifications": *"Bidder ignored the 1st part of the question regarding Section 3 - Terms of Reference Article 2.3 (Deliverables Expected) and 4.2 (Specific Activities) and only answered the part about Section 2 Article 14.3 (Intellectual Property Rights)."*

Section A.4., as clearly set out in the Evaluation Grid and Technical Offer form, covers the information gathered in *"fulfilment of the contract obligations as specified in Section 3 - Terms of Reference Articles 2.3 and 4.2 and in Section 2 - Special Conditions Article 14.3"* The response should have therefore addressed all of Section 2 Article 14.3 and Section 3 Articles 2.3 and 4.2, in their entirety. The Contracting Authority clearly stated that Section 3 (Articles 2.3 and 4.2) was not addressed at all.

The Contracting Authority, in accordance with the principles of equal treatment and self-limitation had no option but to allot a score of "0" and disqualify Grant Thornton if it only replied to one (1) of three (3) of the minimum requirements set out in A.4. The wording in

the Tender Document is clear; if a tenderer does not meet "all minimum requirements": score of '0' shall be allotted, and the bid shall be disqualified.

B. Technical offer form

In addition to the above, a technical offer form was attached to the Tender Document. This form provided as follows (below is taken verbatim, including bold and underline): "*A technical offer is to be provided by the Economic Operator in response to Terms of Reference. The submission shall be in a structured form **and is to be in the same sequence as listed hereunder** for ease of reference and evaluation.*"

The form included the same criteria and sub-criteria as set out (in same order) in the Evaluation Grid. Therefore, for example, in A.1. tenderers had to limit themselves to that requested in Evaluation Grid and Technical Offer form for A.1. and Contracting Authority had to allocate, from the marks indicated therein, such number of marks as it considered appropriate, specifying the relevant strengths and weaknesses of each response to A.1.

In paragraph 2.2 of the GT Objection, Grant Thornton claimed that all requested information was provided. Grant Thornton failed to attach the relevant sections of its technical offer which addressed the deficiencies identified. Deloitte is therefore not in a position to address, in this reply, certain matters of fact related thereto.

However, Grant Thornton states (in paragraph 2.2.2 of the GT Objection): "*The Appellant's tender bid submission in this respect clearly fully responded to the Tender Section requirements included and also made reference to other sections of the Tender specifically on page 4 and 5 of the document marked A4 where the information requested in A4 of Articles 2.3 and 4.2 of the Tender document had been provided through text and graphic flowcharts, illustrations and representations*"

As explained above, the Technical Offer required each tenderer to address each section independently in the manner set out therein. This is not simply a formality but is required in order for the Contracting Authority to, in accordance with the principles of equal treatment and transparency, score each section on the basis of the mark set out therefor in the Evaluation Grid. Each section deals with different matters and therefore there should not have been matters relating to one section included in other sections of Grant Thornton's offer. Grant Thornton's statements in this respect are, in and of themselves, evidence of the fact that it failed to demonstrate full understanding of the Tender Document.

C. Clarifications, Rectifications; Principles underlying PPR

In accordance with the principles of equal treatment, non-discrimination, transparency and self-limitation, the Contracting Authority could not request a rectification (whether described as such or disguised as a clarification) in relation to the matters outlined above. The principle

of proportionality would also not permit it to do so in this case. In a nutshell, this principle provides that one 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.'

The key wording underpinning the principle of proportionality is therefore that the contracting authority must have a choice between several appropriate measures. In this case, there was no choice as explained above, and only one measure was contemplated - allocating a score of '0' and disqualifying the tender.

In this case, a clarification could not be made since Grant Thornton simply ignored certain minimum requirements - there was nothing to clarify. Any clarification would have (a) breached the principles of equal treatment, non-discrimination and transparency, and the corollary thereof being the principle of self-limitation, and (b) resulted in a rectification of the technical offer, in breach of Note 3.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 16th November 2023 and its verbal submission during the hearings held on 29th February 2024 and 21st March 2024, in that:

a) ***First Grievance - Best Price Quality Ratio***

The defendant makes reference to the evaluation grid as published in the tender document. This grid includes the scores which can be allotted for each item included in the grid. It also indicates which are the mandatory criteria that needs to be satisfied by each and every bidder. The objector in his objection is trying to build his argument on the marks allotted which seemingly it is alleged that the way the marks have been allotted would have bypassed the award criteria of a BPQR. The defendant humbly rejects this allegation and can prove all the way through testimony which will be given in front of this Board that the marks allotted by the evaluation committee as effectively a true and fair representation of the assessment being done for each bidder.

b) ***Second Grievance - Non-compliance of the recommended bidder***

The defendant humbly submits that bid evaluation is bid specific and comparisons are not acceptable between bids coming from different bidders. The marks allotted and technical evaluation is made solely by comparing compliance between the bid information with the Technical Specifications/Terms of Reference contained in the Tender Document. Any comparison between bids would clearly tantamount to a breach of basic principles of Public Procurement since the only benchmark with which bids are scrutinized is the text and requirements found in the published document. By analogy, the appeal ground under this heading is trying to put scrutiny over the technical submission of the recommended bidder. In the opinion of the defendant this method of defence is not correct and an objection at this stage is intended to scrutinize the evaluation

committee findings with respect to the bid of the objector. It is therefore, out of line and contrary to the principles of public procurement that scrutiny is being placed on a third party to the cause between the objector and the contracting authority. Having said this, the evaluation committee can confirm under oath that the recommended bidder is compliant and the marks allotted to the concerned bidder are justifiable to say the least. In addition to the above, the objector makes reference to the rectification exercise which was carried out with respect to the recommended bidder. The objector argues that this could be symptomatic to a defective bid. For the defendant this argument does not hold and it is humbly submitted that a rectification exercise is a right established in the Tender Document. The fact that a bidder was eligible for a rectification exercise does not make his bid inferior or otherwise. It is the ultimate submission including any rectification/ clarifications that is ranked and allotted marks. Such an exercise for rectification is equally applied to all bidders according to the specifics of the bid itself and it in line with fundamental principles of public procurement.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 16th November 2023 and its verbal submission during the hearing held on 29th February 2024 and 21st March 2024, in that:

a) ***First Grievance:- Best Price/Quality Ratio-Ratio***

The criterion for award in this case was the Best Price/Quality Ratio ("BPQR") with the technical aspect weighing 60%. The essence of what the Objector is claiming in its reasoned objection is by questioning and attacking the way the evaluation committee performed its evaluation duties in evaluating and awarding this Tender. Objector is claiming, succinctly put, that the Evaluation Committee seems to have equated compliance with technical quality and awarded high marks accordingly; hence the only consideration which the Evaluation Committee has made was whether the tender was compliant or otherwise.

First of all, it is interesting to note that no such protestations were made by Objectors on a previous occasion related to this evaluation procedure. On the contrary, Objector extolled the virtues of the Evaluation Committee when it had, erroneously it transpired, awarded the Tender to Objector. Indeed, in its reply of the 18th September, 2023, Objector stated the following:-

5.7 In this case, the evaluation of the Tender Procedure was carried out on the basis of clear and detailed criteria and awarded on the basis of the Best Price/Quality Ratio (BPQR) and the Contracting Authority applied, verbatim, what it was required to apply by the Tender Document and the PPR (as well as applicable case-law, as explained above).

5.8 it is submitted, with respect, that the Contracting Authority complied with the principle of self-limitation by first allocating 'O' and then disqualifying the Complainant, as it was required to do by the Tender Document as explained above.

In its reply of the 18th September, 2023, Objector did not enter into the distinctions that it is now making in its Objection. So, whilst in its reply to Respondent's Objection, the Objector is undoubtedly and clearly equating BPQR with compliance. However, on this occasion the Respondent is conveniently trying to create this distinction because it serves its own interests so to do. This approach implores judicious objectiveness in the face of the importance of certainty and clarity of outcome as shall be expounded upon later. Indeed, in its Objection, Objector is only assuming that the evaluation committee did not evaluate the tenders for their quality. The Evaluation Committee would not have (one supposes) discussed its internal discussions with any of the tenderers. Hence, just because it suits Objectors, Objector is clearly attacking the evaluation committee on the basis of a whimsical assumption. What is "inconceivable" to Objector, as it stated in paragraph 3.6 was not inconceivable to it when it was the Objector (i.e. Deloitte Advisory and Technology Limited) that was awarded the Tender. The question begs, how is this "inconceivable" given that, undoubtedly, the same system of awarding the Tenders was utilised? Furthermore, Objector is also inferring and/or concluding that the fact that the compliant tenderers were all awarded marks in the same range of marks is indicative that the evaluation committee has acted incorrectly or in conflict with the rulings of the PCRB or that the tenderers have identical strengths and weaknesses. This cannot be further from truth. Just because the marks are identical does not necessarily mean that the strengths and weaknesses were identical. By way of analogy, a number of students in any exam may get identical marks and yet get different answers wrong or right. The same applies to a tendering procedure. The fact remains that the identical marks and marks in the same range could very well be the result of all the differing and different strengths and weaknesses of all tenders still adding up to the same marks. We submit that there is nothing inconceivable in this.

b) ***Second Grievance:- Technical Non-Compliance of Respondent***

Preliminary submission - fuori termine.

However, at the outset in this regard, it must be submitted that the objection in this regard is totally *fuori termine* and filed beyond the lapse of the period to file an objection with respect to the declaration that Respondent's bid was non-compliant and if Objector had any objection or grievance in relation to the fact that Respondent's bid stopped being considered as non-compliant, then it should have raised that matter within the prescribed timeframes running from the Public Contracts Review Board decision.

Hence, Objector should have lodged an appeal to the PCRB, if it so wished, at the time when the matter had been resolved, as is also evidenced from the chronology of facts above exposed.

This Objection has been filed on the 6th November, 2023 which is well beyond the timeframe of ten (10) days which commenced to run from the date of the 21st September 2023 when the Contracting Authority has filed its Note of Admission expressly admitting the Respondent's Objection, than then led to the 28th September 2023 Public Contracts Review Board decision

wherein Respondent's bid was no longer considered as "non-compliant". The latter decision expressed the Board's resolve not to further consider Respondent's earlier objection against non-compliance in the context of the declared decision of the Contracting Authority and Department of Justice within the Ministry of Justice to re-evaluate the tender after having filed an admission to Respondent's objection pleas. Hence, it is undoubted that the Objection in question has been filed way too late and well beyond the express deadline for it to be considered at this particular stage. Furthermore, and without any prejudice to the abovementioned, Objector cannot raise this matter at this juncture because it is clear that the Contracting Authority itself had already admitted on 21st September 2023 that Respondent's bid was technically compliant. If the Contracting Authority so admitted that it had made a mistake, Objector was in no position to attack that express note of admission per se without having entered an appeal in due time from the Public Contracts Review Board consequential decision of the 28th September 2023.

a. Failure to comply with minimum requirements

Objector is basing this part of this grievance on the fact that the Respondent disqualification letter states that:- "*Bidder ignored the 1st part of the question regarding Section 3 - Terms of Reference Article 2.3. (Deliverables Expected) and 4.2. (Specific Activities) and only answered the part about Section 2 Article 14.3. (Intellectual Property Rights)*". What Objector conveniently fails to state is that this alleged failure was withdrawn by the evaluation committee and the Contracting Authority itself in its express note of admission of the 21st September, 2023. Indeed, in its reply, the Contracting Authority made it very clear that it had been wrong in the way they had read Respondent's bid and it was, in fact and at law, technically compliant. It is therefore undoubted that Objector is trying to incorrectly found its grievance on a matter which has long been resolved on the basis of 21st September 2023 express note of admission of the Contracting Authority. For the avoidance of any doubt, however, Respondent did not only reply to one (1) of three (3) of the minimum requirements set out in A.4. It replied to all the minimum requirements - as was later expressly admitted by the Contracting Authority itself before tis (sic) Honourable Public Contracts Review Board.

B. Technical Offer Form

Of course, Objector has not seen Respondent's submission but this does not excuse the misleading and false representations made under this heading by Objector. In this subtitle to their grievance, Objector seem to try to create the impression that Respondent did not submit the Technical Offer Form or, indeed, the information contained herein (sic). Respondent did comply with all the requirements of the tender. However, before addressing the points of fact raised by Objector, Respondent must state that Objector, all of a sudden, seems to have remembered that there was another objection procedure preceding this in the Tendering Procedure which has concluded in favour of Respondent. It is very telling how Objector seems to cherry-pick those parts of this whole procedure which, prima facie and out of context substantiate their otherwise-unsubstantiated arguments. Without any prejudice to the abovementioned, however, Objector is

clearly (sic) to create confusion when there is none with respect to Respondent's objective and clear parameters within which Respondent had filed its objection on the 11th September, 2023. For the sake of clarity and for the removal of any doubt, it is hereby unequivocally stated that the order in which all the information was submitted was all present in the bid in the order it should have been presented. Not only that but also that all the information submitted was clearly in line with the Tender and what the Tender submitted. The main issue underpinning the objection raised by Respondent (dated 11th September, 2023) was that in spite of all the information submitted, and despite the bid contents having been submitted in the order as established in the Tender, the Contracting Authority did not initially understand and assess the information submitted.

Where, in the above submissions in relation to this part of their objection, is Respondent admitting to not satisfying the specifications set out in the tender in the order established? What is clear, however, is that the tender did not specify the shape and form of the submission - it only submitted what and in which order. Respondent was clearly disqualified on grounds which were not specified in the tender. It is for this reason that, in that context, Respondent's exclusion was totally disproportionate and unlawful. Indeed, Objector is totally wrong when it submits that:- "Deloitte respectfully submits that all these statements are admissions of non-compliance". There are absolutely NO admissions of non-compliance. On the other hand, the Objection filed by Respondent was showing that the evaluation which the Evaluation Committee had made of its bid was totally erroneous at the time because (they said) that Respondent had failed to give the information required and that the information required was absent. Indeed, not only the information was there but it was clearly marked in the tender offer, and it was also present in its reply to item A.4. Had this not been the case, obviously, the Contracting Authority would not have admitted its wrongdoing. Hence the submissions contained in paragraphs 4.15 till paragraph 4.21 of the Objection are totally unfounded and should be rejected in toto since it is clear that there was no admission of non-compliance.

Clarifications, Rectification, Principles underlying PPR.

This whole section of the Objection is based on the gratuitous allegation that:- in this case, a clarification could not be made since Respondent simply ignored certain minimum requirements - there was nothing to clarify. Any clarification would have (a) breached the principles of equal treatment, non-discrimination and transparency and the corollary thereof being the principle of self-limitation, and (b) resulted in a rectification of the technical offer, in breach of Note 3. This is a false assumption being made by Objector. Respondent ignored absolutely nothing. On the contrary, when the mistake was duly pointed out in the Respondent reasoned objection of the 11th September 2023, the Contracting Authority, of its own accord, understood that it had been wrong in its earlier assessment that Respondent was technically non-compliant. The Contracting Authority was of course entitled to make an express admission of the grounds underlying Respondent's objection once it was convinced about the clarifications adduced on the technical

compliance of Respondent's tender bid. In essence, Respondent merely provided the Contracting Authority the requested clarifications without breaching any of the principles of equal treatment, non-discrimination, transparency and self-limitation or bringing about any rectification as further explained below. Indeed, it is also clear that no rectification was carried out chiefly because none was needed. All the information requested was already contained in the tender as originally submitted. That is why there was the necessity to request for the clarification - because all the information was already there in Respondent's tender submission. It is hereby submitted that a rectification would change the substance of a submitted tender offer. That is why rectifications distort competition and are disproportionate and held to be unlawful. In this case, all that was needed was for Respondent to clarify its submission without, by so making the clarifications, adding anything to it. Indeed, Respondent only needed to submit its objection for the Contracting Authority to realise that its submission was technically compliant. But there was no rectification at any point by Respondent both before as well as after the adjudication the first time round, as specified above.

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.

- a) ***Preliminary plea*** – reference is made to the decision as read out during the hearing, fully transcribed in the minutes above, whereby such plea of the preferred bidder was not upheld.
- b) ***First Grievance:- Best Price/Quality Ratio***
 - i. The Board refers to the lengthy testimony of Mr Frank Attard who under oath described the process undertaken for evaluating the bids received as per the BPQR award criteria. This Board is more than serene to conclude that, on the evidence presented before it, a proper evaluation has been carried out as per Part 6 - Section 1 of the Tender Dossier entitled 'Criteria for Award', (page 7 to 13 of the Tender Dossier). No proof was provided and / or presented to the contrary to support the notion that a professional, detailed and meticulous evaluation has not been carried out.
 - ii. In this specific case, this can also be corroborated with specific reference to the 'Ranking and Scores' table found in the Evaluation Report whereby a range of Technical Scores have been allocated to different economic operators.
 - iii. It is therefore clear that the evaluation grid and 'gradation' of scores has been duly adhered to by the evaluation committee in full respect of the tender document when it states "... *the scoring shall take place across a range of points from '0' to 100%. If the contents of the documentation meets and exceeds all minimum requirements thus, offering a higher quality bid, higher points will be allotted up till*

100% (Full Score). Such points shall be awarded in such a manner to reflect in a proportionate manner the level of effort undertaken to exceed the minimum requirements.”

This Board, therefore, reject appellant’s first grievance.

b) ***Second Grievance: Technical Non-Compliance of Grant Thornton***

i. Failure to comply with minimum requirements & Technical offer form

A. The Board makes reference to the testimony under oath of Mr Frank Attard, whereby it was confirmed that *“Grant Thornton met requirements in technical offer form as Article 2.3 and 4.2 were addressed in A1 and Article 14.3 was address in A4 and answered the criteria in full.”*

B. When the Board corroborates such declaration against the evaluation grid, it is satisfied that all these three (3) sub-articles were duly covered in Grant Thornton’s submission. It is the opinion of this Board that the leeway as exercised by the evaluation committee does not impinge against the principles of proportionality and equal treatment.

ii. Clarifications, Rectifications; Principles underlying PPR

C. Appellant is arguing that the evaluation committee could not request a rectification (for the change of a key expert) since this would run contrary to the principles of equal treatment, non-discrimination, transparency and self-limitation. Regulation 62(2) of the PPR was referenced as part of this line of argumentation.

D. This Board, on the other hand, notes that Regulation 62(2) allows and provides for instances whereby the contracting authority may request economic operators to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. The Regulation continues to state that *“.....such requests are made in full compliance with the principles of equal treatment and transparency.”*

E. Therefore, to decide whether a rectification was allowable or not, reference needs to be made to the tender dossier. In respect of Key Experts, the tender dossier is clearly and unambiguously classifying them as falling under the remit of Note 2. Note 2 clearly allows economic operators the possibility to rectify any incorrect and /or incomplete documentation. In this specific situation, the Board opines that the submission of Grant Thornton would have fallen under the ‘erroneous’ section which would be allowable to be rectified.

Hence, this Board does not uphold the Appellant’s grievances.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection, contentions and grievances raised;
- 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

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member