

PUBLIC CONTRACTS REVIEW BOARD

Case 2076 – IMT021/2023 – Health and Safety Project Supervision and Traffic Management Supervision

11th February 2025

The Board,

Having noted the letter of objection filed by Dr Alexander Schembri acting for and on behalf of **JK Services Limited**, (hereinafter referred to as the appellant) filed on the 31st May, 2024;

Having also noted the reasoned letter of reply filed by Dr Steve Decesare, Dr Ron Galea Cavalazzi and Dr Stefan Cutajar acting for and on behalf of the **Agency for Infrastructure in Malta** (hereinafter referred to as the Contracting Authority) filed on the 10th June, 2024;

Having heard and evaluated the testimony of the witness Mr Mario Lanzon (Representative of JK Services Limited) as summoned by Dr Alexander Schembri, legal counsel of the Appellant;

Having heard and evaluated the testimony of the witness Mr Kevin Borg (Director of JK Services Limited) as summoned by Dr Alexander Schembri, legal counsel of the Appellant;

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 5th February 2025 hereunder-reproduced.

Minutes

Case 2076 – IMT021/2023 – Tender for Procuring the Services of: Health and Safety Project

Supervision and Traffic Management Supervision

The tender was published on the 6th October 2023 and the closing date of the call for tenders was the 6th November 2023.

The estimated value of this tender, excluding VAT, was € 510,000.

On the 31st May 2024 JK Services Ltd filed an appeal against the decision of Infrastructure Malta to disqualify their offer on the grounds that it was technically not compliant.

A deposit of € 2,550 was paid.

There were four bids.

On the 5th February 2025 the Public Contracts Review Board composed of Dr Vincent Micallef as Chairman, Mr Keith Grech and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – JK Services Ltd

Dr Alexander Schembri

Mr Kevin Borg

Mr Mario Lanzon

Legal Representative

Representative

Representative

Contracting Authority – Infrastructure Malta

Dr Stefan Cutajar

Dr Steve Decesare

Mr Josef Mercieca

Ms Melanie Portelli

Ms Rebecca Grech

Mr Daniel Micallef

Ms Christine Friggieri

Legal Representative

Legal Representative

Chairperson of the Evaluation Committee

Secretary of the Evaluation Committee

Evaluator

Evaluator

Representative

Dr Vincent Micallef Vice-Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Alexander Schembri Legal Representative for JK Services Ltd, the appellant, said that this hearing is surreal due to the evidence recently emerged. The directors of the recommended bidder, AME Health and Safety Services Ltd, have been found guilty of fraud on a charge originated by the Contracting Authority itself, at the same time defending this case when it was fully aware of the offences. Appellant wishes to know what the position of Infrastructure Malta is in this situation.

Dr Stefan Cutajar Legal Representative for the Contracting Authority said that the Tender Evaluation Committee (TEC) took its decision prior to the Court case being heard. The facts have been verified and it transpires that the three individuals concerned in the Case have entered an appeal which is still ongoing – the matter is therefore *sub judice*. The Authority could not exclude the recommended bidder as there are no legal basis for such action. The Authority has no interest to defend the individuals and the situation has not changed.

Dr Schembri wanted to know what the situation of the Authority will be once the appeal is decided bearing in mind that it was not just the individuals who have been charged but also the Company.

Dr Cutajar said that he was not prepared to give a view on matter that has not yet been decided. The Company now has a different structure as the indicted individuals are no longer involved with the entity. The Company will regulate the position once all the facts are known.

Dr Schembri again queried the position down the line if the appeal is lost as the preferred bidder could still be excluded.

Dr Steve Decesare Legal Representative for Infrastructure Malta said that the decision of the Authority would still be correct whatever the outcome of the appeal and it can only act according to the Regulations.

Dr Schembri, at his stage, requested that the hearing be deferred until this matter becomes *res judicata*.

The Chairman requested that the following Minute be recorded:

“The Board after having heard the submissions raised by the appellant in relation to the exhibited Court judgement Case 224/20/22 in the name Republic of Malta vs Aldo Busuttil, Josè Bajada

and Charisse Law and after having heard legal counsel representing Infrastructure Malta and given that the judgement is still pending and given that the nature of these proceedings are at this juncture extraneous to the development and outcome of the criminal case, the Board will proceed to hear the merits of the appeal filed before it and this strictly without prejudice to the rights of the appellant available to him in due course.”

The Chairman then directed that the merits of the Case be heard.

Dr Schembri stated that the appellants offer was cheaper but stated to be non-compliant. The CV presented had all the necessary dates shown and although the value of the contracts were not stated these were easily available through the works locations indicated. This is public information and surely did not need to be indicated.

Dr Cutajar said that the appeal was based on incorrect facts and appellant was expecting the Authority to save this bid at all costs. The principles of equal treatment and transparency have to be followed. Being the cheapest bid is not enough if other factors not met. The TEC is there to decide the evaluation of facts before it and they cannot assume or discover missing facts – they are evaluators not auditors. The missing document is essential as it ascertains availability which is crucial. The TEC followed the instructions in the tender and did its utmost to help the appellant within the limits imposed upon it by law.

Mr Mario Lanzon (425571M) called to testify by the appellant stated on oath that he was an appointed key expert in this tender. The values on contracts he had worked on in the past were self-indicative and included overall H&S responsibility at the Malta Freeport Terminal (value € 104m over an area of 30,000m²), 8 years at the Foundation for Medical Services (at sights like SAMOC, Mount Carmel Hospital and Paola Hub), Smart City (3 years, value several million Euro). The value requested in the tender was well exceeded in every case above.

In reply to questions from Dr Cutajar, witness replied that at the time of the tender he was employed as the H&S officer by the JK Group, which he no longer is. Witness could not recall if he had been requested to provide a different CV for submission with the tender to the one he had offered when he joined the organisation. He recalled that he had indicated the jobs he had been involved in but could not recall if he had mentioned that he had a role as leading project supervisor.

In reply to further questions, witness mentioned that he had submitted a professional profile indicating SAMOC and Smart City as the most substantial jobs he had been involved in.

Mr Kevin Borg (192679M) called to testify by the appellant stated on oath that he is a Director of JK Services Ltd and confirmed that Mr Lanzon was employed by his firm at the time of this tender but had since left as he had received a more competitive offer. The Company has since found a replacement.

Questioned by Dr Cutajar, witness said that he was aware that rectifications had been sought but does not recall details as these were rather extensive. He confirmed that Mr Lanzon had been employed on a fulltime basis whilst Mr Gili was only prepared to work as a freelancer.

The change of H&S officer in the tender was not triggered by the rectification request but by the possibility of offering a better service.

This concluded the testimonies.

Dr Schembri said that it is a fact that the price was the criterion in this case. In his testimony Mr Lanzon had said that dates of works had been indicated in his CV whilst in his professional profile he had indicated two major jobs including one running over eight years with values being self-indicative as they were major projects.

Mr Borg confirmed that the key expert was replaced. Since this matter was regulated by Note 2 the Authority could easily have asked for clarification.

Dr Cutajar said that there are seven key expert specifications in the tender, the third one of which requests three years cumulative professional experience in a leading role including roads infrastructural works and marine infrastructural works. Later on, the specifications cite examples and clarifications on this requirement. Later still Note 5 makes it clear that requests for clarifications and/or rectifications concerning a previous request dealing with the same shortcoming will not be entertained.

Dr Cutajar further referred to various requisites in the tender dealing with compliance being ahead of price and with key expert requirements. The General Rules specify that all documentation has to be directed through the ePPS as otherwise it cannot be considered and failure to comply leads to disqualification. By sending a rectification request running to over four pages the appellant was being spoon fed to satisfy the tender requirements whilst being reminded that further rectification could not be entertained.

The change of key expert gave no reference to marine experience and this only came out in testimony today -however no further clarification or rectification could be sought. This is clearly enunciated in the *Nexans France vs European Joint Undertaking Case (T-415/10)* and further cited in PCRB Case 1688.

It is not the right spirit, continued Dr Cutajar, to expect the TEC to go searching other entities to seek further information and they are not obliged to go out of their way to try to save a bid – the self-limitation principle is limited in scope (PCRB Case 595). The TEC was fair, transparent and proportional in evaluating this case and the appeal should not be met. The lack of certificate indicating availability was vital in the decision reached.

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 sitting of the 5th February 2025.

Having noted the objection filed by Dr Alexander Schembri for and on behalf of JK Services Limited (hereinafter referred to as the Appellant) on 31st May, 2024, refers to the claims made by the same Appellant with regard to the tender of reference *IMT021/2023 – Health and Safety Project Supervision and Traffic Management Supervision* listed as case No. 2076 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Alexander Schembri

Appearing for the Contracting Authority:

Dr Stefan Cutajar and Dr Steve Decesare

Whereby, the Appellant contends that:

- a) The Contracting Authority issued the tender in caption for the provision of Health and Safety Project Supervision and Traffic Management Supervision wherein, in terms of clause 6.1 of the tender document: "The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria";
- b) AME Health and Safety Services Ltd. ["Preferred Bidder"] submitted a bid of €214,600, excluding €38,628 in Value Added Tax, whereas our Client submitted a bid of €160,000, excluding €28,800 in Value Added Tax;
- c) Clearly, therefore, our Client's bid was a total of €64,428 cheaper than that of the Preferred Bidder;
- d) Notwithstanding the above, our Client was not awarded the tender in caption since the Contracting Authority deemed our Client's bid to be technically non-compliant on the basis of two (2) reasons, both relating to our Client's proposed Key Expert A - Health and Safety Project Supervisor, as outlined in the extract of the Evaluation Report which was attached to the Contracting Authority's decision;

The Appellant's Grievances are, in brief, the following:

- a. The first reason why our Client's proposed Key Expert A - Health and Safety Project Supervisor was deemed technically non-compliant was described in the Evaluation Report as follows:

"For Mr. Mario Lanzon, the bidder did not provide the required Month and Year of the start date and the end date of such required projects, and did not submit their value in Euro. The bidder did not demonstrate that Mr. Mario Lanzon, possesses the required minimum of three (3) years cumulative professional experience in a leading role in health and safety project supervision of projects of a similar nature in roads infrastructure works AND marine infrastructural works as required for this Key Expert role by the tender requirements under Section 1 - Instructions to Tenderers, Article 5 (C) (i) a.i". Thus, this constitutes technical disqualification under Section 1 - Instruction to Tenderers, Article 5 (C) (i) a. i."

In our Client's opinion, the above reason is manifestly unfounded, both as a matter of fact and as matter of law, for the following main reasons:

- (i) Our Client submitted the following documentation, amongst others, in connection with Key Expert A - Health and Safety Project Supervisor, Mr. Mario Lanzon:

1. Curriculum Vitae - which included, amongst others, the following experience:

- Baystreet Hotel Complex from the 5th November 2000 till the 19th July 2007, as Head of Security & Health and Safety;
- Attard Bros. Group from the 21st February 2011 till the 28th March 2014, as Environmental Health and Safety Coordinator;
- Foundation for Medical Services (FMS) from the 3rd March 2014 till the 4th August 2022, as Environmental, Health and Safety Officer;
- Malta Freeport Terminal from the 8th August 2022 till present day, as Environment, Health, and Safety Officer;

2. Professional Profile - which included, amongst others, the following declaration relative to his experience:

*"I Mario Lanzon, dedicated occupational health and safety officer with over 15 years of extensive experience across diverse industries, specialising in construction projects. Proven track record of ensuring compliance with regulatory standards and fostering a culture of safety excellence. Demonstrated ability to oversee complex projects, **including high profile initiatives such as the Sir Anthony Mamo Oncology project and the Smart City project, with a focus on road works and infrastructural development**", and: **"Served as the project supervisor for high-profile construction projects, including the Sir Anthony Mamo Oncology project and the Smart City project, overseeing safety protocols for infrastructure development and the surrounding road works"**:"*

Clearly, therefore, the Contracting Authority is incorrect in its decision in so far as it was stated that our Client had failed to indicate: **"the required Month and Year of the start date and the end date of such required projects" since all such dates were duly indicated in Mr. Lanzon's Curriculum Vitae:**

Furthermore, our Client is of the opinion that the Contracting Authority was also incorrect in its decision in so far as it was stated that our Client "did not submit their value in Euro" of such projects, since:

1. The values required by the tender document were €500,000 for infrastructural projects, and €250,000 for marine projects, and therefore values which are quite minimal;

2. Our client relied on Mr. Lanzon's extensive experience working on large, complex, and high-profile projects, including the Sir Anthony Mamo Oncology Centre and the Smart City Project, the values of which are in the public domain and run into tens of millions of Euros; Clearly, therefore, there should have been no material doubt as to whether the value of the projects undertaken by Mr. Lanzon were within the required parameters established in the tender document, since information on such projects - in which the Government of Malta was heavily involved - was, at all times, available in the public domain; In our opinion, a declaration that, for example, the Sir Anthony Mamo Oncology Centre and the Smart City Project exceeded €500,000 in value would have been purely superfluous in the circumstances;

Lastly, our Client is also of the opinion that the Contracting Authority was also incorrect in its decision in so far as it was stated that our Client: ***"did not demonstrate that Mr. Mario Lanzon, possesses the required minimum of three (3) years cumulative professional experience in a leading role in health and safety project supervision of projects of a similar nature in roads infrastructure works AND marine infrastructural works"***, since Mr. Lanzon's Profession Profile and Curriculum Vitae clearly show that Mr. Lanzon has vast experience, ***clearly exceeding the required cumulative three (3) years, in both roads infrastructure (obtained, amongst others, during his time at the Smart City Project) and also in marine infrastructure (obtained, amongst others, during his time at the Malta Freeport Terminal)***;

- (ii) Without prejudice to the above, the requirements of Clause 5 (C) (i) a. i. are a Note 2 situation, and therefore, and in line with existing case law, the Contracting Authority had the right to request, and could easily have requested, a clarification or a correction of the information submitted by our Client, including a clarification and/or a correction in relation to the above, particularly in the abovementioned circumstances;

Our client humbly feels that the Contracting Authority was wrong in its decision, and did not act in the public interest, when it decided to pay an additional sixty-four thousand four hundred and twenty-eight Euros (€64,428) to the Preferred Bidder, rather than request the aforementioned simple clarification and/or correction from our Client, and this to the detriment of all tax payers;

b. The second reason why our Client's proposed Key Expert A - Health and Safety Project Supervisor was deemed technically non-compliant was described in the Evaluation Report as follows:

"...J. for Mr Mario Lanzon, the bidder did not submit the required Statement of Availability Form filled-in and signed by Mr. Mario Lanzon. This was required by the tender requirements under Section 1 - Instructions to Tenderers, Article 5 (C) (i) a.i."

In our Client's opinion, the abovementioned reason is manifestly unfounded, both as a matter of fact and as a matter of law, for the following main reasons:

(i) Initially, our Client had proposed Mr. Joseph Gili as Key Expert A - Health and Safety Project Supervisor, and a Statement of Availability was duly submitted;

Subsequently, our Client substituted Mr. Joseph Gili with Mr. Mario Lanzon since, as will be explained hereunder, a company forming part of our Client's group of companies employed Mr Lanzon directly on a full-time basis as an Environmental Health and Safety Manager;

Our Client submitted all the required documentation with regards to Mr. Lanzon's experience, and also prepared a Statement of Availability, a copy of which is being herewith attached as DOC: C;

Although the Contracting Authority is claiming that this Statement of Availability was not duly uploaded, our Client is of the firm opinion that, even if this is the case - which would be due to a mere lapsus - our Client had already committed itself to having a Key Expert A - Health and Safety Project Supervisor available when it submitted the Statement of Availability of Mr. Joseph Gili.

(ii) Without prejudice to the above, Mr. Lanzon was, in fact, employed on a full-time basis as an Environment Health and Safety Manager with effect from the 25th March 2024 - as shown on the attached DOC: D - with JK Consulting Limited (C 94564), a company forming part of our Client's group of companies, having the same sole shareholder and sole director, namely Mr. Kevin Borg, as shown in attached DOC: E and DOC: F respectively;

Therefore Mr. Lanzon will not only be available to our Client for the services required in connection with the tender in caption, but is already actually available on a full-time basis by virtue of direct employment;

(iii) Without prejudice to the above, the requirements of Clause 5 (C) (i) a. i. are a Note 2 situation, and therefore, and in line with existing case law, the Contracting Authority had the right to request, and could easily have requested, a clarification or a correction of the information submitted by our Client, including a clarification and/or a correction in relation to the above, particularly in the abovementioned circumstances;

Our client humbly feels that the Contracting Authority was wrong in its decision, and did not act in the public interest, when it decided to pay an additional **sixty-four thousand four hundred and twenty-eight Euros (€64,428)** to the Preferred Bidder, rather than request the aforementioned simple clarification and/or correction from our Client, and this to the detriment of all tax payers;

c. Without prejudice to the above, the Contracting Authority's decision of the 21st May 2024 is totally unfounded, both as a matter of fact and as a matter of law, as will further result during the course of these proceedings.

For the above reasons, Our Client humbly requests that the Contracting Authority's decision of the 21st May, 2024 is revoked in its entirety for all intents and purposes of law, thus enabling the Contracting Authority to award the tender in caption to the cheapest technically compliant bidder in accordance with law.

This Board also noted the **Contracting Authority's Reasoned Letter of Reply** filed on 10th June 2024 and its verbal submission during the hearing held on 5th February 2025, in that following its preliminaries in point 1, the Contracting Authority proceeded with a statement of the facts in point 2 onwards:

2. Facts

2.1 The tender document governing the Tender Procedure (the "Tender Document") in Section 1 - Instructions to Tenderers, sub-heading (C) entitled 'Specifications' of sub-section 5 entitled 'Selection and Award Requirements' required the tenderers to submit two (2) separate sets of documents in the prescribed templates relating to key experts, namely: (i) the Key Experts Form, (ii) the Statement of Availability Form, (iii) the Self-declaration form for Key Experts (relating to public employees) as well as the Curriculum Vitae ("CVs") for:

- i. The Health and Safety Project Supervisor; and
- ii. The Traffic Management Supervisor.

In both instances, the Tender Document specifies that these documents are subject to Note 2.

2.2 The Tender Document then goes on to list the requirements that must be fulfilled for each of the two Key Experts described in sub-heading (i) (a) thereof, and for the sake of this reply, only the requirements for the Health and Safety Project Supervisor shall be fully reproduced as follows **[emphasis added]**:

i. "Key Expert - Health and Safety Project Supervisor, who shall be in possession of the following requirements: (Note 2)

- Must be registered with the Occupational Health & Safety Authority (OHSA) of Malta as a 'Competent Person' or the equivalent authority/institution in any other member state;
- Must in minimum possess qualification at MQF level 5 or equivalent in occupational health and safety;
- Must possess **a minimum of three (3) years cumulative professional experience in a leading role in health and safety project supervision of projects of a similar nature in road infrastructural works AND marine infrastructural works.**

For road infrastructural works, such project/s must in minimum have a value of Euro 500,000 per project and one such road project must have had a duration of 6 months.

Roads infrastructural projects having a value smaller than Euro 500,000 shall not be considered acceptable and should not be submitted.

For marine infrastructural works, such project/s must in minimum have a value of Euro 250,000 per project and one such marine project must in minimum have had a duration of 6 months. Marine infrastructural projects having a value smaller than Euro 250,000 shall not be considered acceptable and should not be submitted.

The Key Expert must provide the month and the year of the start date and the end date of his/her involvement for each of such listed projects together with their value in Euro;

[By way of example and clarification: A key expert having 2 years' experience under the indicated role on roads infrastructural projects and 1 year experience under the indicated role on marine infrastructural projects would add up to 3 years cumulative experience and thus would be acceptable, **subject that all the above criteria are also complied with**].

- Shall have good communication skills in both spoken and written English."

Following the publication of the tender and prior to the deadline for submission of tenders, the Contracting Authority issued two (2) clarifications on the 10 October 2023 and on the 13 October 2023 and both clarification requests related to the Key Experts, specifically the qualification or certification required and any potential alternatives to a 'Diploma in Construction - MQF Level 4'.

The Complainant, as part of its tender submission, initially submitted a Key Experts Form with the details of Mr. Joseph Gili as 'Health and Safety Project Supervisor' and Mr. Ayzer Sitki Silahdaroglu as 'Traffic

Management Supervisor', accompanied by the respective Statements of Availability, Public Employees Declaration forms, and CVs for both key experts.

The Evaluation Committee (the "EC") sent a rectification request dated the 04 April 2024 to the Complainant and gave the Complainant five (5) working days to submit a rectification reply. In said request for rectification, the shortcomings noted by the EC were mostly focused on the submission of Key Expert A - Health and Safety Project Supervisor Mr. Joseph Gill, since the EC could not determine, from the Curriculum Vitae submitted by the Complainant, whether Mr. Joseph Gili's experience satisfied the compulsory requirements "under the third bullet point" (reproduced and emphasized in paragraph 2.2 above).

2.6 The EC requested the Complainant to rectify its submission and requested a listed description of the projects from Mr. Joseph Gili's past professional experience that clearly indicate the requirements listed in the Tender Document.

2.7 Further to the request by the EC to rectify the submission, the EC also provided an alternative to the Complainant in the form of the opportunity to rectify and change the proposed key expert in order to ensure that the tender requirements were met. The EC also noted that if the Complainant opted for the alternative route, it was expected to submit an updated Key Experts Form for the new proposed key expert, together with the complete documentation to satisfy the tender requirements.

2.8 The EC also enclosed, as part of the rectification request, the template forms for the Complainant's ease of reference and reminded that following the Complainant's prospective rectification reply "no further rectifications would be allowed on your proposed Key Expert for this Key Expert role." (these words were emphasised through use of red font colour).

2.9 In the same request for rectification, the EC also noted shortcomings in the submissions made by the Complainant relative to the experience and qualifications of its Key Expert B - Traffic Management Supervisor Mr. Ayzer Sitki Silahdaroglu and provided the same deadline for rectifications and the same alternative route as described in the foregoing paragraphs.

2.10 In the Complainant's reply to the rectification request, the Complainant opted to replace the original Key Expert A - Health and Safety Project Supervisor Mr. Joseph Gili with Mr. Mario Lanzon. The Complainant stipulated: "all pertinent documents related to this change attached to this PDF for your reference and records".

2.11 In the reply to the rectification request, the Complainant enclosed the following documents:

- i. A professional profile with a generic description of Mr. Mario Lanzon's "Key Skills and Expertise" that briefly cited Mr. Lanzon's involvement in the "Sir Anthony Mamo Oncology project" and "the smart city project" without a description of his involvement therein, without the dates of the involvement and without the estimated value of the projects;
- ii. A brief description of Mr. Mario Lanzon's "Professional Experience" with a brief citation of Mr. Lanzon's involvement in the Sir Anthony Mamo Oncology project in his capacity as project supervisor (but again no indication of the duties attached with this role, the time-period of the involvement and the value of the project) and a short paragraph describing Mr. Lanzon's "Education";
- iii. A CV detailing Mr. Lanzon's personal information, work experience, education and training, references, personal skills and competences and an annex with a list of the study units pursued in terms of the Bachelor in Occupational Health and Safety (Honours) awarded by the University of Malta;
- iv. A copy of the Europass Diploma Supplement issued by the University of Malta regarding the Bachelor in Occupational Health and Safety (Honours); and
- v. The acceptance letter issued by the Occupational Health and Safety Authority ("OHSA") dated the 23 October 2023 that confirms Mr. Lanzon's inclusion in the Register for Competent Persons.

2.12 In the documents enclosed with the reply to the request for rectification, the Complainant indicated that there were two (2) projects undertaken, in some capacity, by the new proposed Key Expert A, however did not clearly indicate the dates of the proposed Key Expert's involvement for each of the indicated projects, as well as the actual value of the roads infrastructural works or marine infrastructural works involved in the course of said projects. In the CV enclosed with the reply, Mr. Mario Lanzon's section on his work experience was limited to listing the company names of his current and previous employers, the dates of each respective engagement and the name of each position held. Again, there was no reference to, or description of, individual projects fitting the requirements in the Tender Document, the date of commencement and termination of the Key Expert's involvement in said projects, and the value of the projects.

2.13 Furthermore, the Complainant failed to fill-in the template Key Experts Form with the rectified details of the Key Experts (specifically the inclusion of Mr. Lanzon instead of Mr. Gili), the Statement of Availability of the new proposed Key Expert Mr. Mario Lanzon, and the Public Employees Declaration Form relating to Mr. Lanzon.

2.14 The template Key Experts Form, made available to the Complainant on the ePPS online platform and also enclosed in the request for rectification, instructs bidders to "substantiate their claims, in respect to the proposed Key Experts, by compiling and submitting for each KEY EXPERT proposed:" the following compulsory documents:

1. *Curriculum Vitae (CV) (relevant and up-to-date)*
2. *Statement of Availability Form (duly filled-in and signed)*
3. *Self-declaration form for Key Experts (relating to public employees) (duly filled-in and signed)"*

2.15 The EC analysed the submissions received from the Complainant but could not determine whether Mr. Lanzon had the sufficient experience in both roads and marine infrastructural works from the information provided therein. The EC also could not trace the Statement of Availability of Mr. Lanzon, being a compulsory document. These considerations led the EC to conclude that the replacement Key Expert A - Mr. Mario Lanzon, fell short of the requisite level of experience specified in the Tender Documents and the Complainant was deemed to be technically non-compliant.

2.16 Therefore, said omissions of the Complainant to substantiate, through explicit, clear and unambiguous details in the CV, the required level of experience of Mr. Lanzon in specific health and safety project supervision in both roads infrastructural works and marine infrastructural works, and the missing form described in the previous paragraphs, formed the basis of the letter issued by the EC dated the 21 May 2024 wherein the EC declared the Complainant's bid as being non-compliant.

2.17 The EC made no reference to the deficiencies related to Key Expert B - Mr. Ayzer Sitki Silahdaroglu since these deficiencies were sufficiently rectified by the Complainant.

3 No rectifications can be made in relation to the same shortcoming

3.1 The Complainant, both in grievance "a." and "b." of its Objections, alleges that the Contracting Authority disqualified the Complainant "rather than request the aforementioned simple clarification and/or correction from our Client" and argues that the Contracting Authority "could easily have requested, a clarification or a correction of the information submitted by our Client, including a clarification and/or a correction in relation to the above".

3.2 Both claims made in the Complainant's grievances must be examined in terms of the Notes to Clause 5 (the last paragraph of the 'Selection and Award Requirements' sub-heading of Section 1), where it is clearly stipulated that "Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained."

3.3 The spirit and wording of the above note was reproduced in clear and unequivocal terms in the letter containing the request for rectification dated the 04 April 2024.

3.4 The EC could not therefore request an additional rectification and had an obligation to proceed with rejecting the tender in accordance with the principle of self-limitation. In this respect, reference is made to the Court of Justice of the European Union ("CJEU")'s decision in Nexans France v. European Joint Undertaking for ITER and Development of Fusion Energy wherein the CJEU held [emphasis added]:

"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."

3.5 This principle has been confirmed in various judgements of the Maltese 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, socjeta estera v. (i) Agenzija ghal Infrastruttura Malta (ii) EXCEL SiS ENERJI RETIM CONSTRUCTION konsorzju kompost minn (i) Excel Investments Limited (C81721) u (il) Sis Enerji Uretim Anonim Sirketi (Reg. No 642964), socjeta estera* (Appeal Nr. 35/22/1) ("*NQUAYMT Case*").

4 The Contracting Authority cannot be expected to 'save' a bid

4.1 The Court of Appeal in the *NQUAYMT* case made it clear that a Contracting Authority should never be expected to go out of its way to save a non-compliant bid, especially if it has already provided an opportunity to the tenderer to rectify his submissions. The Court reasoned as follows [emphasis added]:

*"Jekk oblatur ikun inghata opportunita' ta' rettifika imma xorta wabda jibga amministrativly non-compliant, il-bord ta' evalwazzjoni ma jistax isalva dak l-offerta billi joggbod jigri wara dak l-oblatur sakemm dan, forsi, jirregola l-pozizzjoni tieghu. F'dan il-kaz, il-konsorzju appellat inghata kull cans jissottometti ruhu ghat-talbiet tal-awtorita kontraenti, u 'imputet sibi' jekk baqa' jitraskura dak li kellu jaghmel. **L-eccess fil-manjamina u fit-tfittix sabiex jigu salvati offerti akkost ta' kollox mhux espressioni ta' proporzjonalita imma huwa sproporzion kontra min kien "compliant" mill-bidu nett. Din il-Qorti mhux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tieghu, isegwi rigorozimament dak li trid issejha ghall-offerti u m'ghandux jippretendi li jigi mitlub "jirrange" l-offerta biex ikun kompatibbli ma dak mitlub."***

4.2 The Complainant, in its notice of objection, makes several remarks that try to place some form of onus on the EC to investigate and find details that: (i) are missing from the submissions made by the Complainant; (ii) fall outside of the scope of the EC's remit; and (iii) are largely immaterial to the evaluation process.

4.3 For instance, the Complainant argued that the EC had to extrapolate specific projects from the dates indicated in Mr. Lanzon's CV, which dates referred limitedly to the work experience of the Key Expert insofar as they only mention the name of the employer and not the specific projects undertaken by the Key Expert when he was in the employ of such third parties. The EC of the Contracting Authority can only verify information provided in the submissions and cannot be expected to supplement any incomplete or vague information with investigations of its own into any past activities.

4.4 The Complainant goes as far as stating that the omission of the inclusion of the values of the projects undertaken by the Key Expert was justified on the basis that *"the values of which are in the public domain and run into tens of millions of Euros"* and *"information on such projects - in which the Government of Malta was heavily involved - was, at all times, available in the public domain"*. The Complainant also remarks that a declaration that the value exceeds the amounts stipulated in the tender document "would have been purely superfluous in the circumstances".

4.5 These statements imply that the Complainant: (i) felt that the EC should have made its own evaluations of the costs of projects that were very briefly and superficially mentioned in the covering pages of the replacement Key Expert's submissions, (ii) assumed that since the Contracting Authority is a Government entity, it should have reached out to other Government entities including the Foundation for Medical Services to supplement missing information about the Complainant's Key Expert; and (iii) the Contracting Authority should then have evaluated the Complainant's offer on the basis of information it sourced from third parties and which did not form part of the Complainant's offer.

4.6 It stands to reason that any such acts would be flagrantly ultra vires and in breach of the principles of self-limitation, transparency and equal treatment. The statement that a clear indication of the value of a project - a compulsory requirement spelt out in clear terms in the Tender Document and repeated in the request for rectification - is *"purely superfluous"* goes contrary to the fundamental principles underpinning the PPR.

4.7 The Complainant also repeatedly, in both grievance "a." and "b.", underlines the fact that the EC should have made more of an effort to accept its bid since it was the cheapest offer in a competitive process that based itself on price as the "sole award criterion". In its Objection however, the Complainant itself quotes

(without adding an emphasis this time) the second leg of sub-clause 6.1 of Section 1 of the Tender Document (under the heading "6. Criteria for Award") that stipulates that **[emphasis added]**:

*"The contract will be awarded to the tenderer submitting the cheapest priced offer **satisfying the administrative and technical criteria.**"*

4.8 The Contracting Authority was precluded from doing what the Complainant alleges it should have done, and this both in terms of the Tender Document and the PPR, and the case-law of the Board, the Court of Appeal and the CJEU.

4.9 Furthermore, the Complainant also argues that the EC "did not act in the public interest" when it awarded the public contract to a technically compliant tender which was higher in price. This argument completely overlooks the existence of shortcomings that would render a tender non-compliant and goes against established case-law on this subject-matter.

4.10 In fact, the Court of Appeal in the NQUAYMT case, citing once again the principle of proportionality, prior to rejecting the economic operator's appeal states as follows **[emphasis added]**:

*"Il-fatt li kellha tintgħażel l-orbos offerta, **ma jfissirx li din kellha tigi accettata akkost ta' kollox.** Jekk offerta mhix konformi mat-tender dossier jew ma **tissodisfax ir-rekwiziti tal-istess, għandha tities non-compliant u tibqa' monka, u mhux imhollija għax tista' tigi rrangata.** Dan certament mhux l-ispirtu tal-proporzjonalità.*

5 Missing information can only be rectified in 'limited and specific' circumstances

5.1 Sub-article (3) of Article 56 of the Directive and sub-regulation (2) of regulation 62 of the Public Procurement Regulations? ("PPRs") allow contracting authorities to request economic operators to submit, supplement, clarify or complete the relevant information or documentation that is missing from the initial bid subject to the following conditions:

- (i) The tenderer must be ab initio valid - that is, eligible to qualify for the tender and be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of same;
- (ii) Rectifications are made in accordance with the terms of the Tender Document;
- (iii) Rectifications are filed within an appropriate time limit; and
- (iv) Rectifications are in full compliance with the principles of equal treatment and transparency.

5.2 The EC was well aware of the faculty afforded to it by the Directive and the PPRs, as expressly stipulated in the Tender Document, and thus requested the Complainant to rectify its missing information. The EC also sought to assist tenderers further, by expressly affording the opportunity to replace a key expert and furthermore attaching documentation required to be submitted in relation to such replacement key expert (it had no obligation to do so given that such documentation was already published with the Tender Document).

5.3 Notwithstanding the aforementioned rectification opportunity, the Complainant still fell short of the requirements in the Tender Document and failed to submit compulsory documents such as the Statement of Availability of the replacement Key Expert.

5.4 In its Objection, the Complainant concedes that it only *"prepared a Statement of Availability"* and that the failure to submit this document was probably "due to a mere lapsus". The Complainant also argues that it had already committed itself to having a Key Expert A (Health and Safety Project Supervisor) available when it submitted the Statement of Availability of Mr. Joseph Gili. In the same Objection, the Complainant then also goes on to present new evidence that the replacement Key Expert Mr. Lanzon was already employed with its group of companies at the time of the rectification request (not the date of the submission of the initial tender bid) and that therefore he was *"already actually available... by virtue of direct employment"*.

5.5 Firstly, the fact that one person (Mr. Joseph Gili) - who presumably did not have the necessary expertise since the Complainant elected to replace him - submitted a Statement of Availability and was therefore available does not mean that a completely different person (Mr. Lanzon) was also available and therefore there was no need to submit a Statement of Availability for Mr. Lanzon. This argument is completely unfounded.

5.6 Secondly, the latter statement - that Mr. Lanzon was *"already actually available... by virtue of direct employment"* - is a gross misinterpretation of the purpose of a 'Statement of Availability Form', which is a compulsory document that declares that a specific key expert (whether employed or engaged as an independent contractor) is available to perform his or her obligations in terms of the specific public contract. Therefore, even if the EC was provided with evidence (as part of the rectification request) that Mr. Lanzon was employed with a subsidiary of the Complainant (which, for the record, it was not provided with), this does not in any manner substitute the requirement for a Statement of Availability duly signed by Mr. Lanzon.

5.7 The Complainant concludes his argument on the lack of the 'Statement of Availability Form' by citing the fact that this is a Note 2 document, and therefore rectifiable, and that by extension the EC should have requested a "simple clarification and/or correction" from the Complainant.

5.8 Without prejudice to the legal arguments already put forward in this Reasoned Reply as to why the EC was obliged to declare the tender non-compliant, one must also refer to ample case law which delineates the limits to a Contracting Authority's right to request clarifications.

5.9 The CJEU, in the Manova case, confirms that the correction or amplification of details of a tender is not precluded as long as such rectifications occur:

"... on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors... To this end, the contracting authority must ensure, in particular, that the request for clarification does not lead to the submission, by a tenderer, of what would appear in reality to be a new tender"

5.10 The omission, by the Complainant, of submitting the 'Statement of Availability Form' relative to the replacement Key Expert A cannot be described as something which can be rectified through a 'mere clarification'. Nor can it be argued that it is an 'obvious material error', especially since the Complainant was informed in a clear and unequivocal manner in the request for rectification that it needed to submit such a document.

5.11 Furthermore, if the EC were to issue another request for rectification to the Complainant, asking it to submit the missing documentation, it would breach the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom. In the Slovensko cases, the CJEU argues that the aforementioned principles:

".. preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers... To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that the tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment."

5.12 The 'specific and limited' nature of rectifications was also confirmed in other CJEU decisions including the 'Partner Apelski Dariusz' and 'Esaprojekt' cases.

5.13 The EC could not have issued another rectification request to the Complainant, as this would have effectively given it a third opportunity (after the initial submission and submission following rectification request). As explained in the Tender Document (final paragraph of the Notes section) and the rectification request, **"no further rectifications would be allowed on your proposed Key Expert for this Key**

Expert role". The EC was therefore expressly precluded from requesting further rectifications of the key expert.

5.14 It is also clear that the rectification of the omission of the Statement of Availability, at that stage of the competitive procedure, would have materially altered the procurement process in such a way as to create a disproportionate disadvantage to any other bidder that did its utmost to comply with the instructions laid out in the Tender Document or in their applicable request for rectification within the time frames given therein.

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 as follows in their entirety.

Judgement delivered by the Courts of Magistrates as a Court of Criminal Judicature

The Appellant ignited his submissions by referring to a recent Court judgement pronounced by the Court of Magistrates as a Court of Criminal Judicature, in the names *Ir-Repubblika ta' Malta vs Aldo Busuttill, Jose Bajada and Charise Law* [Kumpilazzjoni Nru. 224/2022], decided on the 12th December 2024.

The judgement, which was exhibited in the acts of these proceedings, declared the accused guilty and consequently sentenced them for two (2) years imprisonment suspended for four (4) years in terms of Article 28A of the Criminal Code, Chapter 9 of the Laws of Malta. Appellant pleaded that this situation is surreal given that the complainant in these proceedings was the same Contracting Authority before the Public Contracts Review Board who had, in the past, filed a criminal complaint against all the accused who, incidentally, formed part of the preferred bidder [AME Health & Safety Services C44347] in the tendering process. Appellant argued that the company in question should, following such judgement, be declared black listed and ought not be conceded the tender in question.

The Contracting Authority on the other hand rebutted by stating that the case in question is still *sub judice* given that such Authority is informed that the judgment of the Courts of Magistrates is pending appeal. To this effect, the Appellant requested an adjournment of the PCR's proceedings until the Criminal appeal becomes *res judicata*.

The PCRB, as composed, rejected the Appellant's request on the basis of the fact that primarily the judgement is still *sub judice* as at the date of the hearing. Secondly, and without prejudice, it is the opinion of this Board that the issue raised before it does not fall within its remit. The Board is seized to treat the grievances as presented to it in the objection application in line with Regulation 270 of the Public Procurement Regulations (hereinafter referred to as the 'PPR'). Secondly, and strictly without prejudice to the above, the PPR delineates, in Regulations 191 *et sequitur* that it is "the duty of the Authority responsible for the tendering process to exclude an economic operator from participation in a procurement procedure where it has established or is otherwise made aware that such an economic operator has been the subject of a conviction by final judgement [emphasis of the Board] having the nature of a res judicata" [added emphasis] for a list of reasons established under Regulation 192(1).

It is, therefore, for the aforementioned reasons that the request for adjournment was rejected *ab initio* and ordered that the proceedings before this Board should proceed on the merits.

Declaration of Bid as Technically Non-Compliant

One of the bone of contentions in the Appellant's objection is that Appellant disagreed with the Evaluation Committee's conclusions that the bid was technically non-compliant. Appellant argues that the bidder had supplied all information requested in the tender document in relation to the role of Key Expert A. To this effect, the Appellant summoned Mr Mario Lanzon who testified under oath and proceeded to confirm that he has been involved as Key Expert in similar high value tenders. Mr Lanzon testified by stating that the values on contracts he had worked on in the past were 'self-indicative' and included overall H&S responsibility at the Malta Freeport Terminal (value € 104m over an area of 30,000m²), 8 years at the Foundation for Medical Services (at sites like SAMOC, Mount Carmel Hospital and Paola Hub), Smart City (3 years, value several million Euro). The value requested in the tender was well exceeded in every case above.

Having heard the testimony of Mr Lanzon, this Board will be examining the *punctum temporis* of such information that is to say whether, what had been confirmed on oath during the stages of the Appeal's proceedings, was or was not at the disposition of the Evaluation Committee during the evaluation stages of the tender.

It transpired that the bidder originally proposed Mr Joseph Gili, and then through rectification, replaced Mr Joseph Gili with Mr Mario Lanzon for reasons substantiated by Mr Kevin Borg (Director of the

Appellant company). From the tenderer's submitted documentation and rectification replies, the bidder failed to demonstrate possessing the required three (3) years cumulative professional experience in a leading role in health and safety project supervision in roads and marine infrastructure in projects of a similar nature. Albeit the testimony of Mr Lanzon clarified various aspects of such absence, (such as when mentioning the massive project of the Malta Freeport Terminal) the question remains: was this information available to the Evaluation Committee at that very stage?

The tender document clearly required the tenderer to provide information relating to the start and end dates of the Key Expert for each of such listed projects together with the value in Euro. For Mr Joseph Gili, the bidder did not provide a list of projects in which the proposed person was involved in a leading role in health and safety project supervision of projects of a similar nature in road infrastructural and marine infrastructural works. The months and years required and the value in Euro remained missing.

The objection seems to imply that no clarification requests were made. It results amply clear that the bidder was requested to rectify these shortcomings and was asked to clearly submit the missing information. Furthermore, and for clarity's sake, the bidder was also alerted that **following his rectification reply, no further rectifications would be allowed on his proposed Key Expert for this Key Expert role.**

The same apply to Mr Joseph Gili's replacement by Mr Mario Lanzon. The bidder did not provide the required months and years of the start dates and the end dates of such required projects and also failed to submit the value in Euro at the time of the evaluation process leaving the Evaluation Committee in a state of limbo and requiring the same Evaluation Committee to dig deep and rely on the assumptions, and thereby expecting the Evaluation Committee to make its own inferences and expects same to deduce that the projects therein referred to in the documentation provided carried the values and timelines as requested in the tender documentation.

During the technical rectification stages, when the bidder replaced the proposed Key Expert, Mr Joseph Gili with Mr Mario Lanzon, the bidder failed to submit a rectified Key Expert Form together with his reply, despite being requested to do so in the rectification request letter and with the Key Expert's Form template being provided annexed with the request letter for the bidder's ease of reference.

Statement of Availability

The tender document *inter alia* required the following:

- Curriculum Vitae (CV)(relevant and up-to-date)
- Statement of Availability Form (duly filled in and signed)
- Self-Declaration Form

The Evaluation Committee could not trace the statement of availability of Mr Mario Lanzon. Nor was any reference made to this document during the appeal before this Board. The Appellant seemed to have replied to this shortcoming by stating that Mr Mario Lanzon, was back then, a full-time employee of JK Services Limited. Whilst this statement was confirmed on oath by both Mr Mario Lanzon and Mr Kevin Borg, such confirmation shall not be construed to have fulfilled the obligation of providing the actual statement of availability as required by the tender document.

This situation runs fully counter to adhering to the principle of self-limitation in public procurement. The Contracting Authority cannot be expected to save a bid albeit being the cheapest one. This principle has been confirmed in numerous judgements, *inter alia*, Projecte Global Limited vs Kunsill Lokali Marsaskala¹ u NQUAYMT² case. These judgements made it amply clear that a Contracting Authority should not be expected to go out of its way to save a particular bid to the detriment of other bidders who followed scrupulously the letter and spirit of the tender document and its requirements.

*“Jekk oblatur inghata opportunita’ ta’ rettifika imma xorta wabda jibqa amministratively non-compliant, **il-bord ta’ evalwazzjoni ma jistax isalva dik l-offerta billi joqghod jigrri wara dak l-oblatur sakemm dan, forsi, jirregola l-posizzjoni tieghu.** F’ dan il-każ, il-konsorzju appellat inghata kull cans jissottometti ruhu għat-talbiet tal-awtorita’ kontraenti, u imputet sibi, hekk baqa jittraskura dak li kellu jagħmel. L-eccess fil-manjamentu fit-tfittix sabiex jigu salvati offerti akkost ta’ kollox, mhux espressjoni ta’ proporzjonalita imma huwa spoporzjon kontra min kien compliant mill-bidu nett. Din il-Qorti mhux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tieghu isegwi rigorozament dak li trid is-sejha għall-offerti u m’għandux jippretendi li jigi mitlub jirrange’ l-offerta biex ikun kompatibbli ma dak mitlub”.*

It is the opinion of this Board that the Contracting Authority was right in stating in its reasoned letter of reply that the Evaluation Committee *“had to extrapolate specific projects from the dates indicated in Mr Lanzon’s CV...”*.

¹ Appell Nru 253/2014/1

² Appell Nru 35/22/1

This line of reasoning is also embraced in the text of Directive 2014/24/EU of the European Parliament and of the Council of the 26th February 2014 on Public Procurement³. Contracting Authorities do not enjoy an unfettered discretion to act as they deem expedient in the circumstances. Contracting Authorities may request economic operators to submit, supplement, clarify or complete relevant information or documentation PROVIDED THAT:

- (i) The tender must be valid ab initio – that is, eligible to qualify for the tender and be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of same;
- (ii) Rectifications are made in accordance with the terms of the Tender Document;
- (iii) Rectifications are filed within an appropriate time limit; and
- (iv) Rectifications are in full compliance with the principles of equal treatment and transparency.

The Appellant reiterated that the Statement of Availability's absence was probably due to a mere *lapsus* and such absence could have been deduced by the fact that Mr Mario Lanzon was a full-time employee of the company back then. Relying on such premise, would translate the whole process into reducing public procurement into a state of total disorder violating the established public procurement principles of self-limitation, proportionality, and respect for equal treatment and transparency.

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

³ Repealing Directive 2004/18/EC

The Board,

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

- a. Not to uphold the Appellant's Letter of Objection and contentions;
- b. Confirms the decision of the Evaluation Committee in its entirety;
- c. Directs that the deposit paid by Appellant not to be reimbursed.

Dr Vincent Micallef
Chairman

Mr Lawrence Ancilleri
Member

Mr Keith Victor Grech
Member