

PUBLIC CONTRACTS REVIEW BOARD

Appeal Reference Number 2117
Tender Reference Number MGP eQ 88/2024
Tender Name **‘Quotation for the Hiring, Installation, Testing, Operation and Dismantling of a Public Address (PA) System for the Christmas Parade 2024 in Gozo’.**

The Public Contracts Review Board (hereinafter the ‘Board’ or the ‘PCRB’) convened a public hearing on the 2nd June, 2025 to hear the appeal as filed by the appellant Arnold Sammut (hereinafter the ‘Appellant’) on the 9th December, 2024, and after taking cognisance of:

The e-procurement document for the ‘Quotation for the Hiring, Installation, Testing, Operation and Dismantling of a Public Address (PA) System for the Christmas Parade 2024 in Gozo’ (hereinafter referred to as the “Tender Document”);

The minutes of the proceedings dated 2nd June, 2025 which are being reproduced hereunder:

‘PUBLIC CONTRACTS REVIEW BOARD

Case No 2117

523 Objection - Quotation for the Hiring, Installation, Testing, Operation and Dismantling of a Public Address (PA) System for the Christmas Parade 2024 Gozo

The tender was issued 24th October 2024, The estimated value of the tender, excluding VAT was 9,950 euro. The Closing Date of the Call for Tenders was 7th November 2024. On 9th December 2024 Dr Jonathan Mintoff on behalf of Arnold Sammut trading as Audio System lodged an appeal and a deposit of €400 euro was paid. There were 2 bids.

On the 2nd June 2025, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas acting as Chairperson, Mr Keith Victor 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 – Arnold Sammut trading as Audio System

Dr Jonathan Mintoff – Legal representative.

Contracting Authority – Ministry for Gozo and Planning

Mr Jeffry Muscat – Chairperson of the Evaluation Board.

Ms Marvic Vella – Secretary of the Board.

Mr Mario Cauchi – Evaluator.

Mr Michael Piscopo – Evaluator.
Mr Jason Sultana – Evaluator.
Mr Daniel Sultana – Procurement Unit Representative

Recommended Bidder – Pro Stage Sound

Dr Joshua Grech – Legal representative
Mr Antoine Grech – Company Representative

Minutes

The Chairperson Dr Ana Thomas welcomed the parties and immediately invited Dr Jonathan Mintoff to start with his submissions.

Dr Mintoff declared that together with the objection letter he filed a copy of an e-mail which was sent to the Contracting Authority. In this e-mail he had asked for information but the Contracting Authority never answered it.

Dr Tatiane Scicluna Cassar explained that the appellant filed his objection before the Contracting Authority could give its answer. She continued that the Authority is regulated by Article 40 and the information solicited is considered as confidential. As regards subcontracting Dr Scicluna Cassar confirmed that there were none.

Dr Mintoff declared that he preferred to start with the witnesses and would decide later if there was need to withdraw grievance in case the PCRB decides if the information solicited would be adhered to.

Dr Mintoff insisted that the board minutes that some of the information that was asked for was duly given but the email sent on 4th December 2024 by the appellant is still unanswered. The requested information in the 4th December email was read out. As another item under letter G was again requested in another subsequent email, the Chairperson decided that this was not to be taken notice of as it is not included in the letter of objection.

The requests for information/documentation mentioned in the 4th December 2024 email were read out. These were:

- a. The name of the bidders and the individual names of the members of any group of economic operators who submitted a particular tender
- b. The name of the sub-contractors and if there is any reliance on whom the preferred bidder shall rely
- c. Documentation submitted by the economic operators attesting to their compliance with the selection criteria
- d. Technical information
- e. Technical Offer and Literature

f. All other information and documentation that is not deemed confidential

Dr Scicluna Cassar stated that the PCRB did not notify the Contracting Authority with this email.

At this stage all the parties agreed how the procedure of this hearing was to be done and the Chairperson invited Dr Mintoff to proceed with the witnesses.

Dr Mintoff asked Mr Jeffrey Muscat (ID No 512594 M), the Chairperson of the Adjudication Board to take stand

Answering questions to Dr Mintoff, Mr Muscat stated that in the Technical Offer Form under the Mandatory Compliance with Specifications the preferred bidder submitted in the columns on the right hand side in some cases just one Brand and various other models. He also stated that the literature submitted with these items also one brand and various models were submitted. He emphasized that the winning bidder submitted the literature according to the Technical Offer Form for each of the seven (7) items.

Mr Muscat explained that the winning bidder submitted the following for different items:

In the First item – three (3) models were submitted in the literature corresponding to the P.A. System Parade

In the Second item - one (1) Brand and two (2) models and two (2) literatures

In the Third item - one (1) Brand and one (1) model

The Chairperson intervened and asked what where the doubts raised by Dr Mintoff as regards the third item.

Dr Mintoff stated that if he doesn't have the name of the model he would not be in a position to comment on the Sample notes of hrz found of page 13.

Mr Muscat answered that the quotation document on page 13 elicited 48 kilo hrz Or 96 kilo hrz sampling rate and the literature of the model presented by the preferred bidder 48 kilo hrz or 96 kilo hrz. To the question by Dr Mintoff regarding the literature of the Digital Mixing Desk presented by the preferred Bidder and whether it was one desk with one component or multiple components or one desk having the ability to reach all parameters Mr Muscat answered that it was one mixing desk with 156 input and 72 output and with 5 connectivities.

At this stage Dr Mintoff wanted to know whether the adjudication committee verified if the personal monitoring is either through mobile phones tablet or personal mixers.

The Chairperson also asked Mr Muscat whether the adjudication committee had made any ulterior verifications besides relying on the presented technical literature.

Mr Muscat replied that if everything is included they rely on the information in the Data Sheet and if anything is missing they check through internet information. He confirmed that in the case of this tender the Data Sheet was in order and also included iPad control which means that the equipment can be controlled by a tablet.

At this stage Dr Mintoff referred to Item No 4 regarding wired-ear monitor which is found on page 13 of the Tender Document and to his questions Mr Muscat replied that item one finds one (1) Brand and one (1) model and included each individual volume control. As regards item 5 i.e. wireless in ear monitors Mr Muscat confirmed that these are regionally and dependent and this means that if Malta accepts this frequency i.e. between 470 to 952 manufacturers need a certificate from Malta to operate within that range otherwise the equipment will be stopped at the customs. Mr Muscat confirmed that the preferred bidder was technically compliant in this matter.

At this stage the Chairperson urged the appellant to shift his questions as he was scrutinizing spec by spec in order to find some fault and the technical specifications cannot be challenged any further.

When Dr Mintoff argued that he does not have the technical sheet at his disposal the Chairperson intervened and stated that these cannot be divulged otherwise we would be writing a new tender.

At this stage Dr Mintoff turned his attention to the technical offers. Answering questions put to him Mr Muscat answered that there were 2 bidders and the budget for this quotation was 9950 euro. He explained that the preferred bidder's offer was 6200 euro while the objector's bid was that of 9999 euro.

Mr Muscat also stated that there were not investigations why the preferred bidder's bid was low and no clarifications were sent in this regard. He continued that clarifications were sent regarding administrative and technical aspects.

As regards the preferred bidder a clarification was sent to name all partners, the lead partnership identification and the partnership agreement. As regards the literature, on the technical level he was asked to submit the SPL prediction heat map because the one he submitted did not show the distance.

Cross examination by Dr Joshua Grech

Answering questions by Dr Joshua Grech, Mr Jeffrey Muscat confirmed that the winning bidder was technically compliant in all fields. To further questions he

replied that he was not aware of what happened to the Tender after the adjudication Board ended the adjudication and closed the report.

Final Submissions:

Dr Jonathan Mintoff:

Referring to Page 12 of the Tender Document Dr Mintoff pointed out Section 3 Specification Terms of reference Note 3 and insisted that all references here under Note 3 determine that there cannot be any clarifications or rectifications. This he continued can also found on Page 5 of the same document of the Tender Dossier where it is stated that no rectification shall be allowed.

He reiterated that the witness has confirmed that a clarification was asked about the heat map.

The Heat map is listed under section 3 and eventually as Note 3 a clarification could have never been asked on this point. It is the preferred bidder who should have presented the Heat Map and since he gave the clarification it couldn't have be correct or changed.

Dr Mintoff also referred to a European Court of Justice Case No C131- (Polish Case) decided on 11th May 2017 decision which stated that the moment that there is a change this means that there is a new offer. He continued that as regards the technical aspect this is what happened in the present Tender although the appellant has become aware of this only during this hearing.

Referring to the abnormally low bid issue Dr Mintoff emphasized that according to regulation 243 the Contracting authority has an obligation that it SHALL verify and analyze why there was a low bid in relation to the supplies. This he contended does not necessarily mean that there should be a cancellation but in this case the preferred bidder's offer was roughly one third of the envisaged budget. Hence he concluded that the Contracting Authority had the duty to investigate and not to simply exclude this low bid.

Dr Mintoff ended by saying that as regards the information asked for once the objector does not have access to the clarification in question he is at the mercy of the Contracting Authority to try and have access to this information.

At this point after being asked by the Chairperson Dr Mintoff declared that the appellant was withdrawing the first grievance.

Dr Tatiane Scicluna Cassar

Dr Tatiane Scicluna Cassar declared that Dr Mintoff is wrong in his assumption that the information solicited by the Evaluating Board is regulated by Note 3 and

that one finds the words in brackets referring to Note 2 in the quotation document under the literature list. This solicited information by the Evaluation Board was legal and is also confirmed by the Chairman of the EB when was summoned as a witness.

Dr Scicluna Cassar reaffirmed that one finds written under the Literature List with a reference to Note 2 on page 5 of the Quotation Document Specification 2'

Dr Scicluna Cassar reiterated that the appellant is on a fishing expedition and has nothing to substantiate his arguments but is simply making an appeal to obstruct the other bidder from winning the tender.

Dr Tatiane Scicluna Cassar explained that the Law demands confidentiality in order to have a balanced bargaining power for equality between all bidders and one cannot create a situation where a bidder could be in an advantageous situation. The law precludes the giving of certain information and in this case even so, proof of such allegations was wanting. In fact, she continued that the attempts to have access to information was just an excuse.

Dr Scicluna Cassar continued that the third grievance is based on suppositions while the second grievance regarding the Time Frame showed that the main aim of the appellant was that if he does not take the tender no one would.

As regards the reference to the abnormally low bid, Dr Scicluna Cassar explained that the Tender required services and not supplies of material and hence the price of the preferred bidder was legitimate. In fact, she reiterated that the Adjudicating Board decided that the service required could be done with that particular price within the parameters of the law, hence the preferred bidder was compliant Administratively, Technically and financially compliant.

Dr Joshua Grech

Dr Grech stated that this appeal is just a fishing expedition and it is an attempt to find something to base a grievance upon. He continued that appellants must not give a different interpretation of what results from the Tender Document i.e. whether the call for information falls under Note 2 or Note 3. He continued that is clear that what was asked for by the Adjudicating Board dealt with the literature and did not involve any changes in the offer, so much so that the original offer remained the same.

Dr Grech explained that the real issue is that there were two bidders and while the preferred bidder was within the required budget the appellant exceeded it. He continued that the scope of the appellant was not to be disqualified. Following this the appellant went through the process of a direct order but the competitor was the same one who had been preferred by the Adjudication

Board. Dr Grech insisted that appeals should not be used as a weapon to castigate other bidders especially those who become preferred bidders.

Dr Grech made reference to the grievance regarding the abnormally low bid issue and insisted that adjudication boards cannot be expected to be so stringent as to continually seek justifications for little amounts which happen to be over or below estimated values.

Dr Grech finished off his intervention by inviting the PRCB to make use of Regulation Article 288 and penalize the appellant the sum between 1000 and 5000 euros due to the frivolous appeal presented in the hearing.

Dr Mintoff in his final statement reminded everyone that the preferred bidder had an opportunity to address this appeal, an opportunity he never utilized. He insisted that the preferred bidder's lawyer did not address the merit of this case through his allegations and he neither presented any proof in this regard. Dr Mintoff emphasized that this is not the place to throw insults in order to justify his lack of participation throughout the hearing.

The Chairperson thanked all parties.

End of Minutes'

The written pleadings as filed by Arnold Sammut on the 9th December, 2024, together with proof of payment of a deposit in the amount of €400.00, wherein it held as follows:

"Letter of objection by Arnold Sammut, of Natvan Flats, Fl 3, Triq l-Ghadira, Santa Lucija, Kercem, and holder of identity card number 0442481M,

Humbly submits:-

Mr. Arnold Sammut (hereinafter referred to either as the "Objector" or "Appellant"), (Quotation ID 217958) trading as Audio System - from Triq il-Konservatorju, Bormla, Malta, whilst making reference to the above captioned call for Quotation, is hereby submitting a formal objection in relation to the same call for Quotations. Thus, he is availing of the right granted to him in virtue of Regulation 270 et. seq. of the Public Procurement Regulations (Subsidiary Legislation 601.03 of the Laws of Malta) - Public Procurement Regulations "PPR", this following the objection lodged

Facts of the Case:

- *Whereas the above-captioned procurement was published by the Ministry for Gozo and Planning, and on page 1 of the procurement document the email address of the same contracting authority is outlined as follows procurement.mgp@gov.mt;*
- *Whereas the Criteria for Award (Para. 6.1) was the price (i.e. the bidder submitting the cheapest priced offer satisfying the administrative and technical criteria;*

- *Whereas the closing date for the submission of offers was on 07/11/2024 09:30AM;*
- *Whereas the Objector has submitted his offer within the period for submissions.*
- *Whereas the Objector's offer is the cheapest offer that satisfies the Award Criteria and the Public Procurement Legislation and Regulations;*
- *Whereas by means of a communication dated 29th November 2024, (a copy of which is attached hereto and marked as Doc. "A"), the Objector was notified by the Contracting Authority the Evaluation Board has recommended the award of this Quotation to Pro Stage Sound (P 2089);*
- *Whereas, by means of an email sent on the 4th December 2024 to outlined email address of the Contracting authority, the objector requested further information in accordance with Regulation 40 the Public Procurement Regulations, and in line with recent decision of the Court of Appeal and of this Honourable Board (a copy of which is attached hereto and marked as Doc. "B");*
- *Whereas, at the time of lodging this objection with the Public Contracts Review Board, the Contracting Authority had not replied to the Objector's request;*
- *Whereas Mr. Sammut feels aggrieved by such decision of the Contracting Authority and is availing himself of the right granted to him in terms of the law and consequently is filing an objection regarding the aforementioned decision. This within the established time-frame, and together with the required deposit of four hundred Euro (€400). A copy of confirmation of the payment is attached hereto and marked as Doc. "C");*

OBJECTION

The Objector humbly submits to this Honourable Board, that the abovecaptioned call for Quotations was not evaluated according to Law and the evaluation was in breach of principles of natural justice. This, as will be further outlined during the hearing of the said objection. Moreover, the call for Quotations dossier clearly stated that the Award Criteria quoted above however, the Contracting Authority and/ or Evaluation Committee unilaterally decided to ignore this criterion and awarded the Quotation to a bidder whose bid was not (administratively, technically, financially) compliant and failed to verify and adhere to its duties and obligations in terms of the Public Procurement Regulations together with the Directive 2014/24/EU.

Lastly, the Contracting Authority and/ or Evaluation Board did not adopt a consistent approach when evaluating the offers submitted nor did they abide with the quotation documentation;

In view of the above, the following grievances are being raised by the appellant in this Objection:

1. Failure to Provide information

This grievance is of a preliminary nature.

Whilst the Contracting Authority may argue that such is not a grievance per se, the Objector want to express his concern and disappointment to the lack of information provided by the Contracting Authority to this request for information (as outlined further above).

This has prejudiced the Objector's right to a fair hearing. Therefore, in view of the above, the Objector is as of now, hereby reserving his rights to the fullest extent possible, including but not limited to submit additional grievances and/or to file judicial procedures for the safeguard of their rights and interests which have been hitherto breached and jeopardized.

By virtue of one request, dated 4th December 2024, the Objector requested further information in accordance with Regulation 40 of the Public Procurement Regulations, and referring to a decision of the Court of Appeal. In the said request the Objector requested the following information:

"... I refer to Regulations of the Public Procurement Regulations, recent judgements of the Court of Appeal (namely "South Lease Limited vs Central Procurement and Supplies Unit" decided on the 22/06/2022) and, in virtue of the same, my client is hereby requesting the following information/ documentation from the Contracting Authority in relation to the preferred bidder:

- (a) The name of the bidders and the individual names of the members of any group of economic operators who submitted a particular tender;*
- (b) The name of the sub-contractors, and if there is any reliance, on whom the preferred bidder shall rely;*
- (c) Documentation submitted by the economic operators attesting to their compliance with the selection criteria;*
- (d) Technical information; and*
- (e) Technical Offer & Literature;*
- (f) All other information and documentation that is not deemed confidential."*

Please note that my client is considering appealing the decision of the Contracting Authority/evaluation board and such appeal shall be lodged Page 3 of 8 by not later than the 9th December 2024, and the requested information is crucial for my client prior to the appeal deadline. Therefore, you are kindly requested to treat this request with urgency."

The Contracting Authority did not reply to the said request to provide information about the preferred bidder, all the information requested was not provided.

Under the Directive 2014/24/EU, contracting authorities must adhere to principles of transparency and equal treatment. They must provide adequate information to ensure that all bidders can exercise their rights effectively.

In view of the above, reference is being made to the decision of the Court of Appeal (Superior Jurisdiction) in the names "South Lease Limited vs Central Procurement and Supplies Unit" decided on the 22/06/2022, where the said Court of Appeal stated the following:

"7. Dwar il-mertu tal-appell, din il-Qorti tara li, għallanqas f'uhud mill- aggrarji, is-soċjeta rikorrenti għandha raġun. L-ewwelnett, jidber li l- Bord ma ppermettix li s-

soġjeta rikorrenti tippreżenta dokumenti u ssaqsi domandi biex turi li l-vetturi tal-offerta tal-obblatur preferut u taġġha huma tal-istess għamla. Il-Bord irrifjuta din it-talba peress li l-informazzjoni kienet, skont hu, "of a commercially sensitive nature." Din il-Qorti ma taqbilx ma' dan l-argument peress illi kull parti fi kwistjoni quddiem Tribunal kwazi gudiżzarju (kif inhu l-Bord in kwistjoni) għandu dritt għal kull informazzjoni rilevanti għall-każ tiegħu, u l-parti l-obra, speċjalment fejn ikun hemm dettalji teknici, trid tipprovi dik l-informazzjoni u mhux tinbeba wara n-natura kummerċjali kunfidenzjali tal-informazzjoni. Speċjalment f'każijiet ta' din ix-xorta fejn, hafna drabi, l-għażla ddrur fuq 1- istruttura teknika tal-offerta, kull parti għandha obbligu li tikkaxx dak kollu li hu rilevanti u relatat mal-offerta taġġha. Jekk l-informazzjoni li tkun se tingħata tkun sensitiva, il-Bord jista' jordna li l-informazzjoni tkun accessibli biss għalibha u għall-partijiet fil-kwistjoni, u li ma jinbargux kopji tad-dokumenti relattivi, iżda jibqgħu isigillatijf' envelop għall-użu biss kifingħad. L-avversarju, pero' għandu dritt jitolb mill-parti l-obra kull informazzjoni marbuta mal-każ u rilevanti għallmaterja quddiem il-Bord. Wara kollox, is-soġjeta appellanti tgħid li hi riedet informazzjoni dwar l-għamla tal-vetturi li l-konsorzju Health JV taspira li jkunu fit-toroq Maltin, u allura din l-informazzjoni ma' tista' qatt tkun meqjusa ta' natura kunfidenzjali."

The Objector in this case is requesting various documentation regarding the Preferred Bidder's bid, including the Technical Offer Form, which required the bidder to provide only the brand name and model of the requested equipment. Therefore, the Objector's request falls strictly within the parameters of the Court of Appeal's above-cited decision, where the make and model of a vehicle were not considered confidential information.

Similarly, the Objector refers to a recent decision of this Honourable Board, (Case No. 2036 decided 28th November 2024), in which this Honourable Board did provide the Objector with all technical data (including the Literature) prior to the hearing of this case.

In view of the aforesaid, the Objector is hereby requesting this Honourable Board, through an interim measure in accordance with reg. 90 (4) of Public Procurement Regulations, and in any case prior to the scheduled hearing, to order the Contracting Authority, to release the information requested as per the second request and also to provide copies of all documentation that this Honourable Board deems relevant and ancillary;

2. Concerns regarding the entire procurement procedure

This grievance is of a preliminary nature.

Without prejudice to the other grievances.

3. Concerns regarding the preferred Bidder's Compliance

Without prejudice to the other grievances

The Objector wishes to emphasize, based on a considered opinion (from the information available to the Objector thus far), that the preferred bidder's offer lacks compliance for the following reasons:

- i. *The bidder does not possess the required Specifications (as outlined in Section 3 and in the Technical Offer Form) stipulated in the Quotation dossier, which raises questions about its ability to fulfil the contract obligations.*
- ii. *There are serious doubts as to whether subcontracting and/or reliance on third parties were appropriately declared, in accordance with applicable legislation.*
- iii. *A previous decision by this Honourable Board articulated that "A prospective bidder must be administratively and technically compliant at the time of submission of the Quotation and not only be 'fully compliant' should the Quotation be awarded to them." This principle is also highlighted in Procurement Policy Note ("PPN") #40, which states, "Economic Operators must initially possess all the requirements laid out in the Procurement/Concession Documents." This aligns with European Court of Justice (ECJ) case law.*
- iv. *Amongst other reasons*

4. The Preferred Bidder's bid is abnormally low

Without prejudice to the other grievances

The Objector humbly submits that the Preferred Bidder's bid is abnormally low. The price submitted by the preferred bidder is significantly below the industry standard, raising substantial concerns about their ability to fulfill the contractual obligations without compromising on quality, compliance with regulations, or the long-term viability of the project. An abnormally low bid not only distorts fair competition but also poses risks regarding the financial sustainability and performance of the contract. The Objector respectfully requests this Honourable Board to conduct a thorough review of the preferred bidder's submission to ensure it complies with the required standards and does not compromise the integrity of the procurement process.

Needless to say, the treatment of abnormally low tenders is an important issue related to the application of award criteria and the treatment of non-fully compliant bids.

To do so, contracting authorities shall request in writing¹ details of the constituent elements of the tenders which are considered relevant for the appraisal or verification of their apparent anomaly, such as (Vide Case T-495/04 Belfass [2008] ECR II-781): the economics of the products, processes and methods used; technical solutions chosen and/or exceptionally favourable conditions available to the tenderer; originality of the work; compliance with applicable labour and risk prevention legislation; and the possibility of the tenderer obtaining State aid. In view of the evidence supplied by the tenderer upon such consultation, the contracting authority shall verify the constituent elements of the apparently abnormally low tender and reach a final decision.

Ultimately, the Contracting Authority is under a duty to identify suspect tenders/ bids that are abnormally.

Thus, in this very case, the contracting authority had an unequivocal obligation to determine whether the preferred bidder's offer of €6,200.00 excluding VAT constituted an abnormally low bid, given the significant deviation from the established budget of €9,950.00 and the second bidder's offer of €9,999.00. This discrepancy of nearly 38% below the budget and the stark contrast to the only other bid raises serious questions about the feasibility and sustainability of the preferred bidder's price. Regulation 243 of the PPR, mandates contracting authorities to scrutinize tenders that appear abnormally low in order to safeguard the principles of transparency, equal treatment, and nondiscrimination. Moreover, the Court of Justice of the European Union has consistently

emphasized the duty of contracting authorities to evaluate potential risks associated with abnormally low bids to ensure that the tenderer's price aligns with legal and technical requirements and does not compromise quality or compliance with labor standards. Failure to assess such a bid could lead to legal and practical repercussions, including an unsustainable execution of the contract and undermining the fairness of the procurement process.

CONCLUSION:

The Objector respectfully requests this Honourable Board to conduct a thorough review of the preferred bidder's submission to ensure it complies with the required standards, ensure that factual declarations were submitted by the Preferred Bidder, ensure that there are not grounds of exclusion of the preferred bidder, and which compromise the integrity of the procurement process.

In view of the above, and whilst reserving the right to make further submissions and present further evidence (especially in view of the fact that Objector has requested further information), the appellant humbly requests this Honourable Board:

- 1. Preliminary: In accordance with reg. 90(4), to order the defendants, the Contracting Authority, or whosoever of them, to disclose any and all the information requested by the Objector in the first request and in the second request and to provide the Objector with copies of all the documents referred to by them, and this in compliance with their obligations in accordance with Regulation 40 of Subsidiary Legislation 601.03 and the recent decisions of the Court of Appeal and of this Honourable Board;*
- 2. to order the Contracting Authority not proceed with the contract execution until a final decision is given to this Objection;*
- 3. to order the fresh evaluation, through a newly appointed evaluation committee;*
- 4. to order the full reimbursement of the deposit paid by the objector; and*
- 5. Alternatively, issue any other declarations, orders, or directives deemed pertinent to the procurement process related to the tender in question.”*

The written reply as filed by the Ministry for Gozo and Planning on the 12th December, 2024 with a stamp dated 19th December, 2024 (hereinafter the ‘Contracting Authority’) wherein it held as follows:

“The Contracting Authority respectfully submits that:

First and foremost, it is to be outlined, that during this stage of the proceedings, the Public Procurement Regulations does not permit the Technical Evaluation Committee nor the Contracting Authority to disclose any direct administrative or/and technical information on the particular offer submitted by the recommended bidder other than that permitted by Article 40 of the said regulations.

a. On this basis, with regards to the first grievance presented by the Appellant, that is, failure to provide information on behalf of the Contracting Authority; the Contracting Authority respectfully submits that the Appellant did not allow sufficient time for a response before submitting the appeal. The appellant proceeded to submit the application of the appeal immediately without waiting for the Contracting Authority's response.

With regards to this point the Contracting Authority wishes to note that while it strives to respond promptly to all inquiries, it is important to acknowledge that certain processes and communications require time to ensure accuracy and completeness. The Appellant could have reasonably waited for the reply before proceeding with the objection.

The Contracting Authority would also like to clarify that, despite such request, certain parts of the requested information could not have been disclosed, as they fall outside the parameters outlined in Article 40 of the Public Procurement Regulations. These are specifically points (e) and (f) that are not explicitly mentioned in Article 40 and pertain to matters treated as confidential under the applicable legal framework. Due to this, the Contracting Authority is unable to disclose this information in order to comply with its duty to maintain confidentiality and protect sensitive information.

The Contracting Authority would like to refer to a decision of this Honourable Board (Case No. 1946-SPD3/2023/059, decided on the 5th of December, 2023) in which this Honourable Board stated the following:

“As regards the South Lease vs CPSU et al case, this Board wishes to record and clarify that in paragraph 7, the Court of Appeal stated the following “L-avversarju pero ghandu dritt jitolb mill-parti l-obra kull informazzjoni marbuta mal-kaz u rilevanti ghal materja quddiem il Board”. This Board strongly emphasises the word “rilevanti”.

Despite the fact that the Appellant filed a grievance headed “Concerns regarding the preferred Bidder’s compliance” the Board notes that this grievance lacks the specific reasons mentioned in Regulation 270 of the PPR which states “may file an appeal by means of an objection before the PCRB which shall contain in a very clear manner the reasons for their complaints”. At this stage the Board also refers to the case Varec SA vs Etat Belgie where in paragraph 51 the following is stated:

“It follows that in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.”

“Finally, reference is also made to Regulation 40(2) of the PPR which refers to information that is not considered of a confidential nature. At this stage the Board feels and directs that the information requested by the Appellant is of no relevance to his case and if given will be merely in answer to the quest of a fishing expedition and would be prejudicial to the preferred bidder.”

Given the striking similarities between this present case and the decision cited above, the Contracting Authority believes that the Honourable Board’s reasoning is directly applicable to the present case. It also follows that the Contracting Authority is outrightly objecting to the Appellant’s request where it is requesting access to a number of documents pertaining to the preferred bidder.

b) As regards to the second grievance raised by the Appellant, the Contracting Authority respectfully contends that this grievance does not constitute a valid legal basis for challenge. The Contracting Authority respectfully notes that the timeline for the objection and reply process is governed by the procedures set out in the law. The process allows ten (10) days to file an objection and grants ten (10) days to provide a reply. If these timelines result in the review process extending to or overlapping with the date of the event i.e. 19th December, this is a natural consequence of the procedural framework and not a result of any fault or delay on the part of the Contracting Authority. The

Contracting Authority adhered strictly to the prescribed timeline, fulfilling its obligations within the limits established by the process, and thus cannot bear any tort or responsibility for any overlap with the event date.

The Contracting Authority further contends that it cannot understand how this issue can form part of the objection to this appeal when the merits of the case relate to the issue of whether the Contracting Authority has adjudicated the tender correctly or not.

Moreover, the alleged procedural faults in the procurement procedure, cited in the appeal are not relevant to the core evaluation process, nor do they have any bearing on the final outcome of the tender evaluation. Thus, this grievance cannot serve as a legitimate basis for invalidating the Technical Evaluation Committee's decision.

c) This third grievance of the Appellant is unfounded, since, it on mere assumptions regarding the preferred's bidder ability to meet the required specifications without providing any concrete evidence to support these claims. The appellant's claims regarding the preferred's bidder compliance with specifications and declarations on sub-contracting and reliance on third parties are based solely on assumptions and conjecture, as acknowledged in their own statement; "based on a considered opinion" and "there are serious doubts". Such assertions, without substantiating evidence, do not constitute valid grounds for challenging the Contracting Authority's decision. The evaluation process was conducted in full compliance with the applicable laws and procedures, ensuring that all requirements, including specifications and proper declarations, were met by the preferred bidder. The Technical Evaluation Committee determined that the preferred bidder satisfied all the necessary criteria. Thus, the appellant cannot carry out assumptions on such bidder when it does not have any information about it. If the Appellant has concrete evidence to support their claims, it should be presented for consideration. Absent such evidence, these allegations remain speculative and unsubstantiated.

The Contracting Authority would like to refer to a recent decision of this Honourable Board (Case No. 2036- MGP EQ 41/2024, decided on the 28th of November, 2024) whereby several grievances were not considered due to the Appellant's failure to provide any supporting proof. As a matter of fact, the board contended;

- a. **Fibre Connections - the preferred bidder duly included these in its offer. Once no proof was provided by the appellant to support his own claim that the preferred bidder 'does not have the requested fibre connection', this Board opines that it is not to consider this grievance any further.***
- b. **Microphones -this Board notes that the preferred bidder duly submitted what was requested in this procurement procedure. Again, this Board also approved the circulation of details such as the brand and model of the microphone offered by the preferred bidder and no arguments were made to substantiate the claims made.***

This precedent highlights the importance of substantiating claims with evidence, which is equally relevant in the present matter. The Contracting Authority would like to clarify and asserts once again that the preferred bidder fully met all the required specifications outlined in the quotation document and found that the preferred bidder adhered to all the requirements set forth in the tender process.

Therefore, in light of the speculative and unsubstantiated nature of these allegations, the Contracting Authority respectfully requests the Honourable Board to dismiss the appellant's point as unfounded.

d) As regards to the fourth grievance, the preferred bidder's offer was the lowest from all bids, and the Technical Evaluation Committee was satisfied as it was financially viable. The preferred bidder's requirements were all met, and the principles of the procurement process were strictly adhered to from the preferred bidder's end. The Committee's conclusions were accurate and in line with the established criteria and according to technical specifications.

While the bid was lower than that of the appellant, it is important to consider that this tender pertains to the provision of a service rather than the supply of materials. Service pricing can vary significantly, as different providers may charge different rates for their service and delivery. The Contracting Authority reviewed the proposed price and found that such figures were deemed reasonable and feasible, acceptable for the service that will be provided, within budget and according to the Procurement Regulations.

Also, the role of the Technical Evaluation Committee is to seek the most economical price, provided that all submission criteria are met. In CJEU Case C-367/19, it was held that an offer, even one as low as zero (0), can be considered abnormally low but cannot be excluded without giving the bidder a chance to justify it. In CJEU Cases C568/13 and C-285/99 decree that even if the offer appears abnormally low the result is not disqualification but a request to justify the offer.

Furthermore, as stated in 'SRCL vs. National Health Commission Board (EWHC 1985)', the Contracting Authority has the discretion to decide what constitutes a low bid. There is nothing inherently wrong with accepting a bid at the lowest price, as long as it meets the required standards. This principle was upheld in "Court of Appeal Case 162/2014/1 (Kerber Securities vs. Wasteserv)", where it was ruled that the question of profit is irrelevant and stated the following:

"Inoltre, l-osservazzjoni tal-Bord li r-rati baxxi offruti setghu jwasslu ghal prekarjat sabiex jigu implimentati l-kundizzjonijiet tat-tender, mhijiex sostnuta anzi hija kontradetti mill-provi, stante li l-Bord stess irrikonoxxa li, ghalkemm marginali, birrati offruti setgha jsir profitt albejt marginali, u kif fuq gja` spjega, il-profitt mhux necessarjament l-uniku fattur wara l-offerti."

"Dan ifisser li, jekk il-kriterji amministrattivi u tekniċi jigu sodisfatti mid-diversi offerenti, allura dak li jirbah huwa l-irbas tender, u la l-Kumitat tal-Evalwazzjoni u lanqas il-Bord ta' Reviżjoni ma jistgħu jinjoraw jew jiddipartixxu minn din il-kundizzjoni tassattiva tat-tender. Għalhekk ladarba jirriżulta li s-soġjeta appellanti u s-soġjeta appellata Signal issodisfaw il-kundizzjonijiet amministrattivi u tekniċi, allura kellha bilfors ["shall"] tipprevali l-irbas offerta, u cioè dik tas-soġjeta appellanti."

Furthermore, the primary goal of public procurement legislation is to ensure that the public receives services or supplies that meet the required standards and specifications, at the best possible price. In this case, the bid is not abnormally low; it is simply more competitive than that of the appellant. In fact, it is within a reasonable range that suggests a competitive and efficient approach rather than

an unsustainable or unrealistic one. Also, it is the appellant's burden to prove that the financial offer was abnormally low.

In view of the above, the Technical Evaluation Committee and the Contracting Authority confirms once again that the financially cheapest offer by Pro Stage Sound is considered to be fully administrative, technically and financially compliant to the published terms and conditions.

Therefore, for the reasons mentioned above, the respondent Contracting Authority humbly requests that this Honourable Board should reject and dismiss all arguments submitted by the Appellant, thereby dismissing the objection in toto and to re-confirm the decision of the Evaluation Committee for the reasons given.”

The oral submissions made by the Appellant, the Contracting Authority and the Preferred Bidder as delivered by their legal representatives;

The witness as brought forward by the Appellant;

Considers;

This Board notes that the Appellant has brought forward four (4) grievances, the first of a preliminary nature with respect to disclosure of information and which grievance was withdrawn during the hearing of the appeal, the second with respect to the concerns regarding entire procurement process, the third with respect to the Preferred Bidder's compliance or lack thereof, and the fourth with respect to the Preferred Bidder's financial offer.

This Board shall not consider the Appellant's first grievance in view of the fact that his legal representative Dr Mintoff declared that he is withdrawing said grievance.

With respect to the second grievance, this Board must underline the fact that the present appeal as filed before this Board may serve as nothing more than a 'post-mortem' evaluation of this procurement process, and the evaluation carried on by the relevant committee as appointed. This more so when the event in question passed.

This Board, is composed and regulated in terms of the Public Procurement Regulations, Subsidiary Legislation 601.03 of the Laws of Malta (the 'PPR') and as such is bound to observe the regulations as stipulated therein. This Board refers to Regulations 271 and 276 of the PPR, which state as follows:

“271. The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period.”

“276. The procedure to be followed in submitting and determining appeals as well as the conditions under which such appeals may be filed shall be the following:

- (a) any decision by the General Contracts Committee, the Sectoral Procurement Directorate or the Special Contracts Committee or by the contracting authority, shall be made public by affixing it to the notice-board of the Department of Contracts, the Sectoral Procurement Directorate or of the office of the contracting authority, as the case*

may be, or by uploading it on government's e-procurement platform prior to the award of the contract if the call for tenders is administered by the Department of Contracts;

- (b) *the appeal of the complainant shall also be affixed to the notice-board of the Public Contracts Review Board and shall be communicated by fax or by other electronic means to all participating tenderers;*
- (c) **the contracting authority and any interested party may, within ten calendar days** *from the day on which the appeal is affixed to the notice board of the Review Board and uploaded where applicable on the government's e-procurement platform, **file a written reply to the appeal**. These replies shall also be affixed to the notice board of the Review Board and where applicable they shall also be uploaded on the government's e-procurement platform;*
- (d) **the authority responsible for the tendering process shall within ten days forward to the chairman of the Public Contracts Review Board all documentation pertaining to the call for tenders in question including files and tenders submitted;**
- (e) *the secretary of the Review Board shall inform all the participants of the call for tenders, the Department of Contracts, the Sectoral Procurement Directorate and the contracting authority of the date or dates, as the case may be, when the appeal will be heard;*
- (f) *when the oral hearing is concluded, the Public Contracts Review Board, if it does not deliver the decision on the same day, shall reserve decision for the earliest possible date to be fixed for the purpose, but not later than six weeks from the day of the oral hearing."*

For the benefit of all the Parties the Board is hereby summarising the timeline of events relative to this procurement process hereunder:

- Letter of Award – 29.11.2024
- Letter of Rejection – 29.11.2024
- Dates of Event – 21.12.2024
- Letter of Appeal – 09.12.2024
- Reply to the Appeal – PCRb stamp reads 19.12.2024

In view thereof, it was impossible for this Board to schedule this appeal, hear it and decide it before the event took place. This Board is further bound to hear, evaluate and decide upon appeals before it by relying not only on the evidence as brought forward during the public hearing held for such a purpose, but this Board must decide on an appeal based on the grievances brought forward by an appellant which are and should be intrinsically read and decided upon together with the requests (*talbiet*) of the appellant. In this case in particular, apart from the preliminary request, the request related to the deposit and the vague all-encompassing fifth and final request, the Appellant is requesting this Board to:

"to order Contracting Authority not proceed with the contract execution until a final decision is given to this Objection,"; and

"to order the fresh evaluation, through a newly appointed evaluation committee".

This Board, whilst having considered the grievances proper and the merits of this appeal, finds that it is precluded from ordering the Contracting Authority not to proceed with the contract execution until a final decision is given because the event in question took place on the 21st December, 2024 and further that it would be wholly futile and a waste of resources to order a fresh evaluation of the bids for an event which took place approximately seven (7) months ago.

Due to the temporal circumstances of this case, this Board's hands are tied, and to address the Appellant's second grievance, this Board agrees that it would have been more fitting of the Contracting Authority to organise the tendering process in such a way to afford at least enough time for an appeal to be appointed, heard and decided.

Considers furthers;

With respect to the third grievance, this Board finds that nothing from the acts of the proceedings or from the witnesses produced indicates that the Preferred Bidder was lacking in terms of technical compliance, on the contrary the Chairperson of the Evaluation Committee testified that the Preferred Bidder complied with all the technical requirements and when they sent for a rectification of the technical literature per Note 2, the Preferred Bidder complied. The Appellant contends that this was required under Note 3. The Board agrees with the Contracting Authority on this point, that the Tender Evaluation Committee was well within its right to request a rectification of the technical literature because this fell within Note 2.

It is of note that the Appellant bases his third grievance on several assumptions, speculations and suppositions made by the Appellant and/or legal counsel to the Appellant which seem not to be concrete and well-founded complaints as this Board is accustomed to dealing with. By way of example, the Board refers to the following excerpts from the Appellant's written pleadings in this case:

"The bidder does not possess the required Specifications" – without saying which;
"There are serious doubts as to whether subcontracting and/or reliance on third parties were appropriately declared" – without saying why;

This may be construed to be a fishing-expedition akin to a fisherman placing a very wide net in the sea hoping to catch anything that may come his way. In this present appeal, it results that the Appellant went on a fishing expedition to try find a fault in the technical offer and technical literature as provided by the Preferred Bidder but did not manage.

This Board, therefore, determines that this third grievance is wholly unfounded.

With respect to the Appellant's fourth grievance, regarding an abnormally low bid, this Board finds nothing untoward or abnormal in the value of the bid as preferred. No proof substantiating this grievance was submitted by the Appellant.

Considers further;

In his legal submissions the Preferred Bidder invited this Board to use its powers as outlined in Regulation 288 of the PPR, however this Board must underline that the power as found within Regulation 288 of the PPR is a power reserved for the Court of Appeal in its Superior Jurisdiction which hears and decides appeals from decisions of this present Board.

DECIDE

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to abstain from taking further cognisance of the 1st request, rejects the 2nd, 3rd and 5th requests made by the Appellant Arnold Sammut, however in view of the particular circumstances of this process, particularly the timeline, this Board is hereby acceding to the Appellant's 4th request and hereby orders the full and immediate re-imburement of the deposit paid by the appellant Arnold Sammut in the amount of four hundred Euro (€400.00).

Dr Ana Thomas
Chairperson

Mr Keith Victor Grech
Member

Mr Lawrence Ancilleri
Member