QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF JOSEPH R. MICALLEF
ONOR. IMĦALLEF TONIO MALLIA

Seduta ta' nhar l-Erbgħa, 22 ta' Ġunju, 2022.

Numru 50

Rikors numru 35/22/1

NQUAYMT konsorzju kompost minn (i) Bonnici Bros. Services Limited (C57464) u (ii) Korfezdeniz ins Taah. San. Ve Tic. Ltd. Sti, soċjeta` estera

v.

(i) Aġenzija għal Infrastruttura Malta

(ii) EXCEL SİS ENERJİ ÜRETİM CONSTRUCTION konsorzju kompost minn (i) Excel Investments Limited (C81721) u (ii) Sis Enerji Uretim Anonim Sirketi (Reg. No 642964), soċjeta` estera

Il-Qorti:

1. Dan hu appell li s-soċjeta` rikorrenti Excel Sis Enerji Üretim Construction ressqet fit-2 ta' Frar, 2022, wara deċiżjoni li ta fl-14 ta'

Jannar, 2022, il-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi (minn hawn 'l quddiem imsejjaħ "il-Bord") fil-każ b'referenza IM 027/2020 (każ numru 1656).

2. Dan il-każ jitratta sejħa għall-offerti "*for the construction of a new cargo facility Ras Hanzir between Laboratory and Fuel Wharves, Corradino, Grand Harbour, Malta",* li għaliha s-soċjeta` rikorrenti u l-NQUAYMT tefgħu l-offerta tagħhom. Ħareġ mill-European Single Procurement Document (ESPD) mitfugħ mal-offerta ta' konsorzju NQUAYMT li s-*subcontractor* magħmul minnha fl-offerta ma kellux l-esperjenza meħtieġa għal-xogħlijiet ta' "*soil consolidation using vertical drains "* kif riedet is-sejħa, u għalhekk, l-awtorita` kontraenti ħarġet *rectification request* lill-imsemmi konsorzju li ngħata ċans jirrettifika l-offerta tiegħu billi jibgħat ukoll ESPD ġdid u jbiddel s-*subcontractor*. Meta saret din it-talba, l-awtorita` kontraenti għamlitha ċara li "*no further clarifications and rectifications can be made*". Il-konsorzju NQUAYMT wieġeb għall-din l-ittra billi bagħat verżjoni emendata tal-ESPD imma żamm l-istess sub-kuntrattur u ndika proġett biex juri li dan għandu esperjenza tax-xogħlijiet f'"*soil consolidation using vertical drains";* qal ukoll li kellu prova li juri li s-sub-kuntrattur kellu esperjenza biex jikkwalifika "*for the wick drain works subcontract",* mingħajr pero`, ma ta informazzjoni ta' meta saru x-xogħlijiet. Pero`, irriżulta li l-ESPD il-ġdida ma tatx l-informazzjoni kollha mitluba rigward ix-xogħlijiet ta' "*soil*

consolidation". Peress illi l-awtorita` kontraenti ma setgħetx issib l-informazzjoni mitluba fuq l-esperjenza tax-xogħlijiet ta' "*soil consolidation using vertical drains*", bagħtet ittra oħra lill-konsorzju NQUAYMT fejn talbet kjarifiki, fosthom dwar fejn kienet issib fid-dokumenti preżentati "*the time frame (start and end dates including month and year*) *for the installation of the wicks project*". Dan il-konsorzju, flok indika fejn kienet l-informazzjoni, qabad u qal li x-xogħlijiet saru f'dati partikolari. Fid-dawl ta' dan, l-awtorita` kontraenti ma aċċettatx l-offerta ta' dan il-konsorzju u pproponiet li l-kuntratt jingħata lill-konsorzju rikorrenti.

3. Il-konsorzju NQUAYMT ressaq appell quddiem il-Bord, li fis-sentenza tiegħu tal-14 ta' Jannar, 2022, ħassar id-deċiżjoni tal-awtorita` kontraenti u ordna li l-offerta ta' dan il-konsorzju tiġi evalwata mill-ġdid, b'membri ġodda li ma kinux involuti fil-bord ta' evalwazzjoni oriġinali.

Is-sentenza tal-Bord hija s-segwenti:

> "the Appellant contends that:
>
> a) ***Exclusion Notice is completely unfounded at fact and at law and should therefore be overturned***
>
> Reference is made to Part 5(c)(i)(c) whereby, it is clear that the tender document required a list of works and this was amply provided. Without prejudice to the fact that Objector did provide the best proof available by means of certification of the works de quo, and this as will be amply expounded in terms of the subsequent grievances, the tender document did not require bidders to provide proof - at least at tendering stage - but simply required a self-declaration by the bidders and this in line with the EU Public Procurement Directives currently in force. It is humbly submitted therefore that the Contracting Authority can never exclude a bidder for failure to submit proof when such

evidence was not requested ab initio. Reference is made to various ECJ pronouncements on the matter wherein it is confirmed that *The contracting authority must comply strictly with the criteria which it has itself laid down' (vide, inter alia, judgement of 10 October 2013, Mantova, C-336/12)*.

b) **Objector provided best evidence available to demonstrate compliance**

That irrespective of the fact that the tender did not require bidders to prove compliance, bidder complied with the Contracting Authority's request and submitted a certificate confirming that that, in relation to the requirement in question, 51,900m Wick Drain works were certified for payment on the 9/9/2015 and therefore well over the 25,000m required by the tender document. Ironically, this is recognized in the Exclusion Notice itself. Indeed the certificate submitted by the Objector was issued by the relevant project end client, duly stamped and confirms that the works, namely 51,900m of Wick Drain Works were certified for payment on the 9/9/2015. Therefore, not only Objector listed the relevant and confirmed that it is in compliance with the experience requirement but even complied with the Contracting Authority's subsequent works. Although the certificate does not indicate the dates when the works were physically carried on site, it is submitted that the fact that these were certified for payment is the best evidence available to Objector that these works were indeed carried out in the relevant period.

c) ***Contracting Authority was empowered to seek direct confirmation itself***

That without prejudice to the previous grievances, it should also be noted that the Contracting Authority could seek confirmation itself about the veracity of the declarations contained in the tender with the end clients themselves. Therefore, it is humbly submitted that if the Contracting Authority had any doubt as to any aspect of the works cited as experience in the Tender, it had the prerogative to contact the end clients and procure any confirmation that the Contracting Authority deemed fit. Indeed, the relevant section contains the following wording; "The Evaluation Committee reserves the right to request contact details of one of more of the project Clients of the above listed experience criteria to seek an attestation regarding the contractor's performance of the respective project(s)."

That it is submitted that the Evaluation Committee when it reserved this right, it was indeed obliging itself to exercise its discretion in a reasonable manner and therefore it could have easily dispelled any doubts by contacting the end project Client in question.

d) ***In any case decision breaches the principle of proportionality which is one of the fundamental tenets of***

European public procurement legislation

Furthermore, given the above considerations, it is submitted that the Evaluation Committee's decision as communicated by the exclusion notice runs counter to the principle of proportionality. The ECJ has repeatedly highlighted the principle of proportionality as 'one of the general principles of EU law' which 'requires that measures implemented through EU provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.' (Vide inter alia *Case No. C491/ 01, The Queen v Secretary of State for Health, ex parte British American Tobacco (lnvestments) Ltd and Imperial Tobacco Ltd [2002] ECR* ('British American Tobacco'.) at paragraph 122). Furthermore, Recital 2 of the Procurement

Directive specifically calls for the award of contracts in the Member States to comply with the principle of proportionality.

This principle, i.e. the principle of proportionality, was also applied by our Courts in relation to public procurement decisions. Particular reference is made to the decision delivered by the Court of Appeal (Superior) on the 31st May 2013 (Civil Appeal Number 440/2012) in the names Ballut Blocks Services Limited v. Onorevoli Ministru ghar-Rizorsi et.

e) ***The exclusion decision fails the test of the basic principles governing administrative law, including reasonableness***

Finally, it has to be submitted, as a further grievance, that the exclusion of Objector who sought to explain why the quoted experience was indeed in conformity with the requisites, even by forwarding an official certificate attesting same (and which certificate was ultimately the basis of Objector's exclusion) fails the basic test of reasonableness which is none of the main tenets of administrative law.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th October 2021 and its verbal submission during the virtual hearing held on 22"' November 2021, in that:

a) In terms of a letter dated 30th September 2021, CA advised Appellant of its disqualification due to administrative non-compliance:

Your replies to rectification and administrative requests did not provide sufficient proof that the proposed project for Wick Drain Works' meets the criteria as published in the tender document, namely the following: Experience of soil consolidation using vertical drains with at least one (1) such project having min. 25,000 liner meters of vertical drains installed in depths exceeding 15m 1i1 the past 5 years

(1 January 2015 - 31 December 2019);

The Board considered that from the proof submitted, that of an invoice / final payment certificate date, it cannot be ascertained that the project was completed within the timeframes stipulated in the tender document. The information as requested in the above criteria and rectification letter was not sufficient. .Furthermore, in your reply to a clarification request on the rectification replies provided, you submitted new information which could not be accepted at this stage.

Appellant lodged an objection relating to the disqualification for administrative non-compliance due to the fact that bidder did not meet the specific criteria of experience of soil consolidation using vertical drains, project completed between 1 January 2015-31 December 2019;

b) As stated by the Courts of Justice of the European Union in Cartiera dell'Adda SpA v CEM Ambiente SpA "the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion (see, to that effect, judgment in Manova, C-336/12, EU:C:2013:647, paragraph 40). That strict requirement on the part of contracting authorities has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle, to which those authorities are subject in accordance with Article 2 of Directive 2004/ 18."

In this case, the CA set a clear, strict and unequivocal criteria of experience of soil consolidation using vertical drains with at least one (1) such project having min. 25,000 liner meters of vertical drains installed in depths exceeding 15m being completed in the past 5 years specifically between the period of 1 January 2015 - 31 December 2019;

The tenderer filled in the start and end dates for all performances of works as required in the ESPD (as requested in the original submission or as allowed through rectification) article 4C.1.2 except for the ESPD for *Alternatif Zemin* on both original submission and rectified submission.

On the ESPD submitted on the original tender submission for Alternatif Zemin, tenderer listed the "Wick Drains Works" for Client Marmaray Projesi CR3 / Istanbul OBRASON HUARTE LAIN S.A,-DIMETRONIC S.A ORT GiRiSiMi (ODJV) DP. Not only did the tenderer not submit the start and end dates for the works listed but the only date submitted was "11/09/2012", which date did not fall within the parameters specified by the CA i.e 1st January 2015 to 31st December 2019.

Upon the reply for the request for rectification by the CA, the tenderer changed the project listed on the ESPD of Alternatif Zemin to list the "Wick Drains Works" for Client SINOP AIRPORT / SINOP, TURKSEVEN INSAAT TURIZM VE TIC A.S, i.e the bidder changed the project. Notwithstanding, once again the tenderer did not provide the start and end dates for the works and simply wrote down the date "09/09/15". In its letter of reply to the request for rectification, the bidder simply stated that *'We are also submitting proof, in in the form of final interim payment certificates, that Alternatif Zemin has the necessary experience to qualify for the wick drain works subcontract. Please refer tothe submitted appendices in Turkish and in English.* "

Without prejudice to the fact that the ESPD requirements are an integral part of the tender documentation upon which adjudication is to be made, had the tenderer strongly believed that the start and end dates were not a critical component for the satisfaction of the experience criterion why would it provide such information for all other works for the experiences listed in article 5[B](c)(ii)(a) and (b), of Section 1 - Instructions to Tenderers, provide the requested start and end dates for (d) and (e) as requested through rectification and not provide the same information requested for the one in (c)?

Thus, upon rectification request, the CA was faced with two concerns:

1. The ESPD as set out by Regulation was not properly filled in;

2. The inconsistency within the bidder's offers where for all other experience dates as requested were quoted, whilst for this project repeatedly the start and end dates were omitted and only one date was listed, which date (being that of a final certified invoice as it resulted from documentation submitted by bidder out of his initiative and not request by CA) falls very close to the start parameters, and on its own could not be considered sufficient information to determine that this project was carried out within the indicated timeframes.

Thus, in order to be able to conduct a proper evaluation as it is obliged to do, in its duty in the principle of good administration and equal treatment, the CA could only resort to ask tenderer, under article 16.2 of the General Rules Governing Tenders v4, through a request for clarification to indicate the name of the document and the exact page where this information can be found, as any further new documentation or new information could not be presented at this stage to supply the start and end dates for the project sustaining experience of soil consolidation using vertical drains as indicated in the tender document.

c) The principle of equal treatment and the corollary transparency requirements establish clear constraints on what the CA can accept by what of tender correction, supplementation or clarification. The CA

had been very clear and specific in the information it requested “the exact start and finish dates of this project“as well as”the linear meter of the vertical drains which were done within the stipulated time period (1st January 2015 to 31st December 2019)." As was the ESPD document where it specifically chose the word "Dates" (plural) not date (singular)!

The bidder had been clearly directed to provide the requested information in the form of a self- declaration of a list of projects carried out within a specified time-frame, and no additional proof was being requested. Notwithstanding, the bidder failed and omitted to provide the exact start and finish dates of the linear meter of the vertical drains as requested through the request for rectification dated 31st May 2021. Effectively, since the bidder's reply simply made reference to the documentation submitted as proof, the CA could not come to the conclusion that the project was completed within the timeframes stipulated, especially since the only date shown on the document submitted by the bidder was 07-09-15 which final progress payment does not indicate that works were carried out in the time-frame stipulated in the tender document but merely that works were approved for payment on 07-09-15, and a subsequent invoice was issued on 09-09-15. Non-submittal of the exact start and finish dates, and thus the omission of the requested information, is also confirmed by the appellant in the objection submitted to this Board. Moreover, the document submitted by the bidder referenced the works as pertaining to the “contract 2014- 002".

Though the CA had every right to seek information directly from the bidder's Client regarding the bidder’s performance on works carried out for the client, in this case, the information which the CA required was not concerning the actual performance of the bidder but the exact start and finish dates of the project in question. If the CA, following obtaining a reply to the rectification sought from the Appellant, moved to seek the information which had been omitted by the bidder directly from the bidder's Client, it would have violated the principle of equal treatment.

d) Appellant fails to mention that rectification on article 5(B) (c) (ii)(c) of Section 1 the Instructions to Tenderer had already been sought and appellant presented a second faulty submission. The Evaluation Committee was unable to assess whether Alternatif Zemin Mekanigi Insaat Ltd Sti's project, listed in its ESPD reference number 4.C.1.2 under the title 'Wick Drain Works' met the criteria required. In its letter dated 31st May 2021, the Evaluation Committee request the Appellant to specifically confirm “*The exact start and finish dates of this project" as well as "the linear meter of the vertical drains which were done within the stipulated time period (1st January 2015 to 31st December 2019)*. "The Committee in its letter also guided the Appellant that "if the above project does not fulfil the requirement under article 5[B](c)(ii)c) of Section 1 - Instructions to Tenderers"

bidder could provide another project to comply, as in fact he submitted. The Committee also specified that "If this criterion is not met by the main economic operator or his subcontractors, you have the opportunity to rely on new subcontractors, however no further clarifications and rectifications can be made. Refer to further explanation of this at the end of this rectification.

.. *To note that no further rectifications would be possible following such a change and thus for your bid to be valid, al/ the required documents and information needs to be submitted compliant as per tender requirements and specifications.*"

On the 9th June 2021, in its reply to the rectification request, the Appellant replied as follows:

We are, also submitting proof, in the form of final interim payment certificates; that Alternatif Zemin has the necessary experience to qualify for the wick drain works subcontract. Please refer to the submitted appendices in Turkish and in English.

The CA then sent a Clarification on reply to Rectification dated 27th August 2021:

2. With regards to your response [...] in the previous administrative rectification the Evaluation1 Committee could not find the information requested. Kindly tell us where we can find the timeframe (start and end dates including months and years) for the Installation of the Wicks Project, because from the invoice/final payment certificate date, it cannot be ascertained that the project was carried out within the timeframe stipulated in the tender document. Kindly indicate the name of the document and the exact page where this information can be found. Please note that no documentation can be presented at this stage.

To note that this is a clarification on a request for rectification, therefore the submission of new documentation, that was not included neither in your offer, nor through your reply to the rectification, is not allowed at this stage. If you submit additional documentation this will result in disqualification of your offer.

The Appellant replied to the Clarification on the 2nd September 2021

With regards to thesecond comment, it is reiterated that the project in question "Technical Block, Tower and Garage Wick Drain Works at Sinop Airport was carried out by our subcontractor Alternatif Zemin Mekanigi Insaat Ltd Sti within the timeframe indicated in the tender document (namely within 1st January 2015 - 31st December 2019). Indeed, the payment certificate (dated 7th September 2015) provided shows the completion of 51,900 linear meters of vertical drains. As is also evident by the timeframe and quantities of the present tender,

such quantities are completed within a very short-frame. In particular,; the relative quantities were carried out between the 7/7/2015 and 7/18/2015.

In other words, the Appellant provided the information requested upon rectification in its reply to the CA's clarification on reply to Rectification on information submitted by the Appellant. Thus, the CA could not legitimately, in the interest of fairness, equal treatment and proportionality, request or accept a re-rectification. The CA cannot request multiple rectifications for the same item, until such time that the appellant gets it right. This would be wrong, disproportionate and unfair.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 21st October 2021 and its verbal submission during the virtual hearing held on 22nd November 2021, in that:

a) ***Preliminary Plea-Second and Third Demands are Inadmissible at Law***

That, on a preliminary basis, the Recommended Bidder submits that the second and third demands requested by the Appellant are inadmissible at law and ought to be rejected. That by means of the second and third demands the Recommended Bidder is requesting this Board to:

2) *Declares that the Objector's bid is fully compliant;*

3) *Orders and directs that the Tender is to be awarded to the Objector being the cheapest compliant tenderer;·*

That these demands cannot be upheld by this Honorable Board since they exceed its competence and powers. This Honorable Board is, as it name implies, a review board which reviews whether decisions taken by a contracting authority are legal or otherwise, This Honorable Board considers "appeals" made by aggrieved bidders in terms of Regulation 270 of the PPR against a specific decision taken by a contracting authority, such as the rejection of a bid or a recommended award. This Honorable Board's assessment is limited to "accede or reject the appeal" which has to be strictly an application for the review of the contracting authority's decision after closing of bids-- see Regulation 276(6) of the PPR-and it cannot evaluate bids and award public contracts since the responsibility of evaluation of bids, and quite frankly, the expertise and competence, lies with the evaluation committee and not with this Honorable Board.

Exceptionally, this Board may cancel a procurement procedure if it is “the best solution in the circumstances of the case". However, that power is expressly and statutorily provided for in the law, specifically, Regulation 90(3) of the PPR. Incidentally, the same power is reserved

to the Court of Appeal when reviewing decisions of this Honorable Board--the Court of Appeal similarly cannot evaluate bids or award public contracts.

The recommended bidder further maintained that the second and third demands of the Appellant, expose its clear strategy to grab the award of the contract without having to comply with the tender specifications and the law.

b) ***First Ground of Objection***

The Information Requested –

The point at issue is not, as the Appellant attempts to portray, whether a "list of works was amply provided" but whether the following was provided by the Appellant:

"*a list of principal works of a similar nature completed between 1 January 2010 and 31 December 2019 and "Experience of soil consolidation using vertical drains with at least one (1) such project having min. 25,000 liner meters of vertical drains installed in depths exceeding 15m in the past 5 years (1 January 2015 -31 December 2019)*".

The Recommended Bidder submits that it is clear and unambiguous that all bidders had, as did the Recommended Bidder, to list “at least one (1)” project involving soil consolidation using vertical drains and that such project must have been “installed”and/or “completed”in the past 5 years (1 January 2015 - 31 December 2019)"

Submission of Additional Documentation

The Tender Dossier and the European Single Procurement Document did not, as a matter of fact, require the submission of any documentary evidence to corroborate satisfaction of the selection criteria. This is evident from the excerpts quoted by the Appellant from the Tender Dossier. The European Single Procurement Document provides clearly as follows:

Should not provide any certificates or supporting documentation as part of the ESP response unless specifically requested during the evaluation process or as detailed in the procurement document;

[...}

Will be required to provide the relevant evidence and certificates prior to awarding the contract, If they are the recommended economic operator;·

That neither the request for rectification nor the request for clarification

required the submission of any documentary evidence and this is evident from the correspondence attached to the respondent Contracting Authority's response.

c) ***Second Ground of Objection***

The fact is that the date of certification of payment cannot be taken to be the “end date” of a project. In construction contracts, the payment can be interim or final and in either case it can never be taken to be evidence of the “end date" of works. As a matter of fact, sectional handing over or completion of work and the issuance of the interim payment certificate (IPC) or final payment certificate (FPC) under most standard form contracts (FIDIC, NEC,JCT) can be weeks, if not months / years apart. The submission of payment certificates for the purpose of this selection criterion added no value whatsoever. In any case, this date can definitely not be taken to have any link with the “start date” of works--which was also requested.

The Recommended Bidder must say that the additional document submitted by the Appellant, subject to the submissions made above on the irregularity of its production, raises more questions rather than confirm satisfaction of the selection criteria. The document entitled “FINAL PC SINOP AIRPORT”leaves out the following information “Contract Date”and “Completion Date of Work according to Contract”-which would have provided the information much coveted by the evaluation committee(!).

d) ***Third Ground of Objection***

In simple words, the Appellant expected that the evaluation committee would make up for its negligence and recklessness in the drafting of the bid and proceed to effectively rectify its subcontractor's ESPD by contacting an external third party. This expectation is not legitimate, but rather, is fundamentally incompatible with the constitutional general principles of public procurement. The burden of compiling a correct bid is on the bidder and not on the evaluation committee. The evaluation committee has its tools, and in this case concerning the Appellant, these tools have been exhausted and the Appellant failed, despite being given a second chance, to get its house in order.

In any case, a plain reading of the clause in question shows that the evaluation committee was entitled to contact external third party clients "to seek an attestation': This must necessarily presume that the project has already been listed in the ESPD correctly and in compliance with the tender instructions and the evaluation committee would be only seeking a corroboration of that self- declaration. If this would not have been the case, and the evaluation committee attempts to gather information, left missing by the bidder, from external third party clients, the evaluation committee would be exceeding the principle of self-limitation and affording preferential treatment to that

bidder by being an accomplice to the procurement of a rectification.

e) ***Fourth Ground of Objection***

This argument is being produced as a general get-out-of-jail card and as a mere spurious allegation intended as a blatant ground for appeal if everything else fails.

The principle of proportionality cannot trump the other constitutional principles of equal treatment, transparency and self-limitation. The fact of the matter is that the evaluation committee did act proportionately and it was the Appellant that has failed to adhere to the tender instructions and to submit a correct ESPD.

As correctly observed by the Contracting Authority in its reply, the Contracting Authority is legally required to uphold to the highest degree the principles of equal treatment, self-limitation and transparency in the public procurement process as explicitly stated in Article 39 of the PPR.

The Contracting Authority had no other route available to it apart from disqualifying the Appellant's bid. If it ignored the missing information, or rather, as the Recommended Bidder submits, this reservation in its bid, it would have breached:

i. the principle of self-limitation since it would have ignored clear and unambiguous tender specifications in the Notes to Clause 5;

ii. the principle of equal treatment since it would have acted with prejudice to the other bidders, such as the Recommended Bidder, who completed the ESPDs correctly and satisfied the selection and eligibility criteria;

iii. the principle of transparency and would have betrayed the very trust that bidders placed in tender procedures conducted by the State,

f) ***Fifth Ground of Objection***

The Recommended Bidder must say that this ground ought to be rejected, without any due consideration by this Honorable Board, since the Appellant has not explained “in a very clear manner ”its reasons for raising this ground as required by Regulation 270 of the PPR:

i. First, the Appellant has failed to articulate what is the "test of the basic principles governing administrative law”•

ii. Second, the Appellant has not explained in any way how reasonableness- whatever that means--is one of the main tenents of administrative law.

iii. Third, the Appellant has not explained how the respondent Contracting Authority has failed this so-called “test” or has acted "unreasonably".

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will initially consider the Preferred Bidder's Preliminary Plea.

a) The Board notes that the second and third demands as requested by the Appellant state as follows *“Declares that the Objector's bid is fully compliant" and "Orders and directs that the Tender is to be awarded to Objector being the cheapest compliant tenderer*” respectively.

b) The Board opines that if it where to accede to these demands, it would be acting ultra vires since these are not powers entrusted to it in terms of the Public Procurement Regulations S.L 601.03 of the Laws of Malta. Specific reference is made in this regard to Regulation 90 which lists the 'Powers' of the Public Contracts Review Board and Regulation 276 which outlines 'Procedure of the appeal', more specifically Regulation 276(h) which states "*after evaluating all the evidence and after considering submissions put forward by the parties, the Public Contracts Review Board shall decide whether to accede or reject the appeal or even cancel the call if it appears to it that this is best in the circumstances of the case*”.

c) Second demand - It is not the remit of this Board to deem the Appellant's (Objector's) bid as fully compliant, when the Evaluation Committee would have only evaluated its administrative compliance. It is to be noted that since the Appellant's bid was deemed administratively non- compliant (by the Evaluation Committee), no·technical and financial evaluation were carried out by the Evaluation Committee.

d) Third demand - again, since no technical and / or financial evaluation was carried out, this Board cannot “*order and direct that the tender is to be awarded to Objector being the cheapest* ***compliant*** *tenderer*" (emphasis added). No technical and / or financial evaluation was carried out, hence at this stage the bid of the Appellant cannot certainly be deemed as fully compliant!

Hence, this Board decides that the second and third demands as requested by the Appellant are inadmissible and are hereby rejected.

The Board will now consider the Appellant's grievances in their entirety.

a) The Board notes the following:

i. The tender dossier states in paragraph 7 of Section 1 as follows: *“The sole award criterion will the price. The contract will be awarded to the tenderer submitting the cheapest price offer satisfying the administrative and technical criteria*"

ii. The exclusion notice stated "*Your replies to rectification and administrative requests* ***did not provide sufficient proof*** *that the proposed project for 'Wick, Drain Works' meets the criteria as published in the tender document*……". (emphasis added). At the outset this Board points out that the Tender dossier, at administrative stage, required a 'Self-Declaration' and not 'proof. The wording used by the Contracting Authority in the exclusion notice can therefore be considered as somewhat misleading!

iii. In Part 5(c)(ii)(c) of Section 1 of the Tender Dossier the Contracting Authority wanted to make sure / ascertain that tenderers had enough "*Experience of soil consolidation using vertical drains with at least one (1) such project having min. 25,000 liner meters of vertical drains installed in depths exceeding 15m in the past 5 years (1 January 2015 - 31 December 2019)". Such requirement falls under 'Note 2'*.

iv. The Appellant provided 'documentation' / 'proof’ that 51,900 meters of Wick Drain works were certified for payment on 9/9/2015. This after a request for rectification from the Contracting Authority.

b) At this point the Board notes that the Appellant's submission, showing payment of works relating to 51,900 meters of Wick Drain works, does exceed the requirement as set out in the tender dossier by more than double. However, it also agrees with the arguments brought forward by the Contracting Authority & Preferred Bidder that no specific start and end dates are specifically listed in such documentation.

c) Reference is hence turned again to Part 5(c)(ii)(c) which states: “*The Evaluation Committee reserves the right to request contact details of one or more of the project Clients of the above listed experience criteria to seek an attestation regarding the contractor's performance of the respective project(s)*. "

d) The Board opines that if one where to keep note of 1) the Award criteria and 2) the amount of 51,900 meters of Wick Drain works which were certified for payment, the Contracting Authority would not have gone against the concept of Self-Limitation had it contacted the (end-user' of the documentation submitted to clarify such information. Such a right/power entrusted to the Evaluation Committee, as listed in the tender dossier, brings with it an obligation to exercise that power if certain factors are met. This as per Tideland Signal Ltd v Commission of the European Communities (Case T0211/02 Judgment of the Court of First Instance (First Chamber] of 27 September 2002) "*In response*

to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power se in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary (see, by analogy, Cases T-22/99 Rose v Commission [2000] ECR-SC I-A-21 and II-115, paragraph 56, T-182/ 99 Carvelis v Parliament [2001] ECR-SC I-A-13 and II-523, paragraphs 32 to 34; see also, more generally, Case T-231 /91 New Europe Consulting and Brown v Commission [1999] ECR II-2403, paragraph 42, and Article 41 of the Charter of fundamental rights of the European Union, OJ 2000 C 364, p. 1, proclaimed in Nice on 7 December 2000). ***While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification****. A decision to reject a tender in such circumstances is liable to be vitiated by a manifest of assessment on the part of the Institution in the exercise of that power*".(bold & underline emphasis added). The Board opines that this issue of the start / end dates would fall within the spectrum of " …….*ambiguity probably has a simple explanation* ....." as referred to above.

e) Finally, the Board refers to the case of Ballut Blocks Services Limited v Onorevoli Ministru ghar- Rizorsi et - Court of Appeal (Superior) Number 440/2012 whereby it was stated:

> "*.... Ballut ma kisbet ebda vantagg kompetitiv bin-nuqqas taghha. La kieku kien possibli li tikseb dan il vantagg, il-qorti kienet tasak biex tghid illi l-iskwalifika hija necessarja biex tithares il-kompetizzjoni gusta, izda ma ntwera ebda mod kif Ballut setghet kisbet xi vantagg b'dak li ghamlet jew, ahjar, b'dak il naqset li tghamel.*
>
> *Fil-fehma tal-qorti, ghalhekk, mhux biss l-iskwalifika ma kinitx mehtiega biex jinkisbu l-ghanjiet tas-sejha ghal offerti, fosthom il-harsien tal-kompetizzjoni gusta, izda anzi wasslet biex jista jintilef il-ghan li l-kuntratt jinghata lil minghamel l-orhos offerta. Ghal dan ir-raguni l-qorti hija tal-fehma illi l-iskwalifika tal-offerta ta' Ballut ma kinitx mizura propozionata*."

The Board opines that the same can be stated for this particular case.

i. The sole criteria for award is the price

ii. The Contracting Authority had a 'tool' / power / right at its disposal (reference to point 'd' above) which it didn't utilize

iii. No competitive advantage was obtained by the Appellant company

iv. 'Proof' was provided in that more than double the Wick Drain works have been completed and certified for payment.

Hence this Board is of the opinion that the principle of proportionality was not observed by the Contracting Authority. The same could not be said, had the Contracting Authority contacted the 'End-user' and confirmed that such start / end dates did not fall within the requirements of the Tender dossier.

Therefore, this Board upholds the grievances of the Appellant and accedes to the first, fourth and fifth demands in its objection letter.

The Board,

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

a) To uphold the Appellant's concerns and grievances in reference to the first, fourth and fifth demands in its objection letter;

b) To cancel the 'Notice of Award' letter dated 30th September 2021;

c) To cancel the Letters of Rejection dated 30"' September 2021 sent to NQuay-MT;

d) To order the contracting authority to re-evaluate the bid received from NQuay-MT in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;

e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant."

4. Is-soċjeta` rikorrenti Excel Sis Enerji Üretim Construction issa qed tappella quddiem din il-Qorti u trid li d-deċiżjoni tal-Bord titħassar u tiġi konfermata d-deċiżjoni li kienet ħadet l-awtorita` kontraenti.

Ikkonsidrat:

5. Trattat l-appell, il-Qorti tinnota li l-Bord sab li kien minnu li l-konsorzju issa appellat, il-NQUAYMT, ma ndikax "*the specific start and end dates*", imma ħass li l-Bord ta' evalwazzjoni messu kkomunika mal-konsorzju appellat u jitlob l-informazzjoni li ried. Mhux kontestat li kwistjonijiet ta' *Technical and Professional ability,* inkluż ix-xogħlijiet ta' "*soil consolidation using vertical drains",* kienu materja li setgħet tiġi permessa rettifika sabiex jinbidel s-*subcontractor* u anke setgħet tintalab kjarifika wara dan fuq l-informazzjoni pprovduta. Hekk ġara f'dan il-każ. Wara li l-konsorzju appellat, fl-offerta oriġinali, indika proġett ħażin tas-sub-kuntrattur minnu magħżul, l-awtorita` kontraenti ppermettiet lill-konsorzju appellat ir-rettifika fuq din il-kwistjoni. Iżda l-konsorzju appellat ma ndikax kif mitlub l-esperjenza li allegatament kellu s-sub-kuntrattur magħżul fuq xogħlijiet ta' "*soil consolidation using vertical drains*". L-awtorita` kontraenti talbet kjarifika sabiex jispjega fejn fl-ESPD tista' tinstab l-informazzjoni mitluba fuq din l-esperjenza. Il-konsorzju appellat ħareġ b'żewġ dati li ma kinux imdaħħla fid-dokumenti. Għalhekk, għamel sew il-bord ta' evalwazzjoni li ma aċċettax l-offerta tal-konsorzju appellat.

Jekk oblatur ikun ingħata opportunita` ta' rettifika imma xorta waħda jibqa' *administratively non-compliant,* il-bord ta' evalwazzjoni ma jistax isalva dik l-offerta billi joqgħod jiġri wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu. F'dan il-każ, il-konsorzju appellat ingħata kull ċans jissottometti ruħu għat-talbiet tal-awtorita` kontraenti, u *imputet sibi* jekk baqa' jitraskura dak li kellu jagħmel. L-eċċess fil-manjaminita` u fit-tfittix sabiex jiġu salvati offerti akkost ta' kollox mhux espressjoni ta' proporzjonalita` imma huwa sproporzjon kontra min kien "*compliant"* mill-bidu nett. Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorożimament dak li trid is-sejħa għall-offerti u m'għandux jippretendi li jiġi mitlub "jirranġa" l-offerta biex ikun kompatibbli ma' dak mitlub.

6. Ir-riferenza li għamel il-Bord għall-każ ta' "Tideland Signal" huwa barra minn loku, għax hawn mhux każ ta' "*tender is ambiguously drafted*", iżda l-każ fejn il-konsorzju appellat kien negliġenti u naqas milli jinkludi informazzjoni mportanti, avolja ngħata żewġ ċansijiet biex jagħmel dan. Il-bord ta' evalwazzjoni ppermetta mhux biss rettifika imma anke kjarifika mingħand oblatur wieħed, u ma kellux obbligu jibqa' jitlob spjegazzjoni mingħandu. Il-bord ta' evalwazzjoni huwa wkoll marbut bit-termini tad-dokumenti tas-sejħa, u kien imur kontra l-prinċipju ta' trattament raġonevoli u trasparenza li kieku ta preferenza ta' trattamenti lill-oblatur wieħed.

7. Il-fatt li kellha tintgħażel l-orħos offerta, ma jfissirx li din kellha tiġi aċċettata akkost ta' kollox. Jekk offerta mhix konformi mat-*tender dossier* jew ma tissodisfax ir-rekwiżiti tal-istess, għandha titqies *non compliant* u tibqa' monka, u mhux imħollija għax tista' tiġi rranġata. Dan ċertament mhux l-ispirtu tal-proporzjonalita`.

8. B'hekk, f'dan il-każ, jirriżulta li l-konsorzju NQUAYMT naqas fl-ewwel lok, li jissottometti offerta *administratively complaint*, fit-tieni lok, li jirrispondi b'mod sodisfaċenti għal-*rectification request*, u fit-tielet lok, li jirrispondi għall-*clarification request*, kif trid il-liġi. Jidher ċar għalhekk, li dan il-konsorzju naqas mid-doveri tiegħu li jkun konformi mar-rekwiżiti tas-sejħa għall-offerti kemm dawk amministrattivi, tekniċi u finanzjarji.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tas-soċjeta` Excel Sis Enerji Üretim Construction billi tilqa' l-istess, tħassar u tirrevoka għal kollox id-deċiżjoni li ta l-Bord dwar Kuntratti Pubbliċi fit-2 ta' Frar, 2022, u tikkonferma d-deċiżjoni li kienet ħadet l-awtorita` kontraenti u b'ordni li s-soċjeta` NQUAYMT titlef id-depożitu li għamlet meta ressqet l-appell tagħha quddiem il-Bord. L-ispejjeż marbuta ma' dan l-appell għandhom jitħallsu kollha mis-soċjeta` appellata NQUAMYT.

Mark Chetcuti Prim Imħallef	Joseph R. Micallef Imħallef	Tonio Mallia Imħallef

Deputat Reġistratur
da