

PUBLIC CONTRACTS REVIEW BOARD

Case 1606 – CT 2524/2020 – Works - Restoration of Internal Painted Walls and Ceilings in National Book Council Baroque Palazzo in Valletta

10th August 2021

The Board,

Having noted the letter of objection filed by Dr Carl Grech on behalf of Fenech & Fenech Advocates acting for Atelier del Restauro Ltd, (hereinafter referred to as the appellant) on the 3rd May 2021;

Having also noted the letter of reply filed by Dr Joseph Mizzi and Dr Timothy Spiteri on behalf of Muscat Mizzi Advocates on behalf of National Book Council (hereinafter referred to as the Contracting Authority) on the 11th May 2021;

Having heard and evaluated the testimony of the witness Ms Maria Grazia Zenzani (Director of Atelier del Restauro Ltd) as summoned by Dr Carl Grech acting for Atelier del Restauro Ltd.

Having heard and evaluated the testimony of the witness Ms Valentina Lupo (Director of Atelier del Restauro Ltd) as summoned by Dr Carl Grech acting for Atelier del Restauro Ltd.

Having heard and evaluated the testimony of the witness Ms Charlene Darmanin (Architect at AP Valletta) as summoned by Dr Timothy Spiteri acting for National Book Council.

Having heard and evaluated the testimony of the witness Mr Mark Camilleri (Chairperson of Evaluation Committee) as summoned by Dr Timothy Spiteri acting for National Book Council.

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

Having noted and evaluated the minutes of the Board sitting of the 22nd July 2021 hereunder-reproduced.

Minutes

Case 1606 – CT 2524/2020. Works - Restoration of Internal Painted Walls and Ceilings in National Book Council Baroque Palazzo in Valletta

The tender was published on the 22nd January 2021 and the closing date was the 2nd March 2021. The value of the tender was € 266,522.80.

On the 3rd May 2021 Atelier del Restauro Ltd filed an appeal against the Director of Contracts and the National Book Council as the Contracting Authority objecting to the cancellation of the award on the grounds that the offer was not technically compliant.

A deposit of € 1,333 was paid.

There were four (4) bidders.

On 22nd July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Atelier del Restauro Ltd

Dr Carl Grech Legal Representative

Contracting Authority – National Book Council

| | |
|---------------------|----------------------------------|
| Dr Timothy Spiteri | Legal Representative |
| Dr Joseph Mizzi | Legal Representative |
| Mr Mark Camilleri | Chairperson Evaluation Committee |
| Mr Andrew Ricca | Secretary Evaluation Committee |
| Ms Simona Cassano | Member Evaluation Committee |
| Mr Matthew Borg | Member Evaluation Committee |
| Mr Michael Mercieca | Member Evaluation Committee |

Preferred Bidder – ReCoop Ltd

| | |
|-----------------|----------------------|
| Dr John L Gauci | Legal Representative |
| Mr Paul Muscat | Representative |

Department of Contracts

| | |
|----------------|----------------|
| Dr Lara Attard | Representative |
|----------------|----------------|

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then asked Appellant's representative to make his submissions.

Dr Carl Grech Legal Representative for Atelier del Restauro Ltd (Atelier) stated that there are three grievances on which this appeal is based. The key expert declaration form for one particular person is not required, as the Authority claims, since the individual involved was never a public service employee. A request for rectification was sent to Appellant requesting submission but since the form was not required, as could easily have been clearly ascertained from the individual's C.V., the form was not submitted and Appellant should not have been excluded on that basis.

The second grievance is in respect of the fact that the preferred bidder ReCoop Ltd was involved in the preparation of the procurement procedure and hence there is a clear conflict of interest which excludes them under Regulation 194.3 of the Public Procurement Regulations (PPR). Personnel of ReCoop had the opportunity to carry out analysis and tests on the work required to be carried out in the tender giving them an anti-competitive advantage as certain vital details were not known to other bidders.

The third grievance, said Dr Grech is that ReCoop offer is abnormally low when one considers that their offer is 50% lower than the estimated procurement value set by the Authority themselves and gives one reason to doubt if they can carry out these works at these prices.

Dr Timothy Spiteri Legal Representative for the National Book Council stated that the key expert declaration was required to ensure that there was no conflict of interest in a wider context. It is requested of all tenderers and it is not up to a prospective bidder to decide whether to submit it. CJEU Case 599/10 and a Court of Appeal case both support the principle that if a form is requested it has to be submitted – simply referring to a C.V. is not an indication that there might not be a conflict of interest. Although not obliged to, the Authority sent a clarification, but the necessary form was still not submitted. In PCRB Case 1551 it was held that failure to respond with a request deemed a bid not compliant and if there was any doubt bidder should have clarified the point prior to submitting the offer. As a point of fact even if the form had been sent Appellant's offer would not have affected the outcome of the tender.

On the matter of the conflict of interest the Authority does not agree with the claim as only the technical advisers AP Valletta and the Authority itself were involved in the preparation of the tender. Recoop were only requested to carry out certain preliminary tests as envisaged in Regulation 47 of the PPR which allows preliminary market consultation prior to a procurement procedure provided it did not distort competition as also outlined in Regulation 59. Appellants agree that that the preliminary test report is part of the tender specifications and therefore it satisfies the requirements of the two regulations just referred to.

Dr Spiteri further said that the Authority took measures over and above this such as organising meetings and site visits to clarify their requirements and thus all bidders were given the same opportunities. In the *Fabricom* case paragraphs 34, 35 and 36 it was held that exclusion has to go beyond mere preparation in the tender. The obligation on the Authority is to make sure measures taken do not distort competition. No evidence has been presented by Appellant that there is a conflict of interest and without even explaining what type of conflict existed. According to CJEU Case 538/13 whoever alleges conflict must prove it.

With regard to the claim of abnormally low offer the law does not envisage automatic disqualification since according to PPR Regulation 243 explanation is required if the offer appears to be abnormally low. In CJEU Case 198/16 it was held that it is up to the Authority to determine the method to establish if a tender is abnormally low whilst CJEU Cases 568/13 and 285/99 decree that even if the offer appears abnormally low the result is not disqualification but a request to justify the offer. In CJEU Case 367/19 it is further stated that even if there is a zero offer the Authority is still obliged to ask for explanations to establish that the tender is not impaired. In this Case the Authority sought the advice of the technical consultants regarding the price offered and received a satisfactory reply that the offer was feasible thus ensuring that the evaluation decision was justified.

Ms Maria Grazia Zenzani (654048M) called as a witness by the Appellant testified on oath that she is a Director of the Atelier del Restauro and has never been involved in public employment or worked for the Government. She has been involved in conservation work since 2005 and has been entrusted with some important projects in Malta. She confirmed that she had seen the report on this project and went on to explain the preconsolidation and the consolidation process in uncovering paintings hidden beneath various coats of paint with the object of preventing further loss. In the paintings covered in the tender there are several layers of paint and there have been several attempts at restoration and it was necessary to ensure that layers were removed without damaging and subsequently consolidating the original works. Witness explained in detail the process and the

different time frames and materials required, the variety in prices on materials to be used and suggested that it would be very helpful in reaching such conclusions if the works were to be tested first. The key factors that affect price in processes that vary greatly are the time required, whether the cleaning is to be done chemically or mechanically and the materials to be used.

The report submitted by the Authority, according to witness, was confusing and the indication of materials to be used was not clear; also whether cleaning was a preconsolidation or a consolidation process whilst the time indicated was merely stated as 'lengthy'. Witness confirmed that she was present for the site visit but was not permitted to carry out tests by the technical advisors. The tender stated that the works were to be completed in nine months without any reference to the number of people required. ReCoop low offer could be likely explained by the fact that they were familiar with the project and the cleaning carried out beforehand. In her view the project required quite a number of people for a long period to deal with the work on the ceiling and the walls and surmised that ReCoop's price probably covered only work on the walls.

In reply to questions from Dr Spiteri witness said that she was aware that the key expert declaration was required and was also aware of the request for clarification – however, she stated that in a previous tender a responsible person in Government employ had told her that there was no need to submit the form in her case. Witness agreed that her Company had the opportunity to seek a clarification but also noted that her firm was refused the request to be allowed to carry out tests after the site visit; on the other hand ReCoop had carried out a number of tests sufficient to understand the type of work involved on the walls in the two rooms. There were contradictory details in the tender and insufficient information. Finally witness said that her Company had not been selected to do the preliminary tests as the price quoted to do this work had been higher than the competition.

Ms Valentina Lupo (555884M) called as a witness by Appellant testified on oath that in January 2020 the Atelier had been contacted by AP Valletta regarding the rehabilitation of certain frescoes. Two rooms were viewed showing certain bits of wall where the over paint had been removed and were asked to quote for cleaning to uncover the original paintings which they did that same month offering different cleaning tests with daily rates. The plans and quotations did not include any tests or samples.

Questioned by Dr John Gauci Legal Representative for ReCoop Ltd witness stated that when entities were asked to quote for the tests they were not aware of the tender which had not been issued at that stage. The quotation by ReCoop was cheaper than that of the Appellant but the latter's quote was for different work.

Ms Charlene Darmanin (290390M) called as a witness by the Contracting Authority testified on oath that that she in an Architect specialising in conservation work and works for AP Valletta. Her role in the preparation of the tender was to draw up the Bill of Quantities and the tender specifications. At an early stage it was realised that some line paintings existed on the walls in certain rooms but they did not know the extent and they set out to identify the whereabouts and how many there were. Witness said that her firm requested three quotations from three restoration entities – on receipt they checked that the quotes covered what was requested and forwarded them to the Book Council. The preliminary tests result indicated the existence of line paintings with different paint layers. The information on two rooms where the paintings were already exposed was used to produce the tender package. The report on the investigative work plus a site visit to enable viewing was provided. After the visit certain clarification were sought with replies sent to all bidders.

Witness stated that her firm was hesitant to estimate the cost of the work involved in the tender as it was highly specialised work and as such difficult to estimate. There is no direct connection between

AP Valletta and ReCoop and her firm has worked with most contractors. On receipt of the bids the Authority sent them to AP Valletta to check if the requirements were met and to check the lowest financial offer. On this last offer they provided feedback and gave their views on three aspects of the work, compared the bids to market rates, commented on certain items where prices were lower than the market but their final verdict was that the offer was feasible.

Questioned by Dr Grech witness confirmed that her specialisation was on conservation on masonry buildings but her studies covered also paintings on wooden surfaces and although not a specialist in this area she was able to define what interventions were needed. For the preliminary tests three firms were chosen and were invited to a site inspection and asked to quote on the same requirements – eventually advising the client on the cheapest one. There were no tests permitted at that stage only visual inspection – these tests were carried out later by the firm offering the cheapest quotation to discover what was under the paint layers. Witness agreed that whoever carried out the trial tests could identify what was required and the likely time it would take but no paint layers were removed. The report by ReCoop although of a general nature formed part of the tender dossier with an analysis by the technical experts to determine requirements. With regard to the estimated value of the tender although hesitant the technical experts estimated the procurement value at € 266,000 before the tender was issued. ReCoop's offer of € 104,000 odd was the only one sent by the Authority to AP Valletta to compare price with market rates. When they queried the price it was suggested by the Authority that since the tender was dealing with a larger area when compared to the test area the overall price could work out cheaper. Witness's firm was not requested by the Authority to check submitted prices with ReCoop.

Mr Mark Camilleri (0088088M) called as a witness by the Contracting Authority testified under oath that he is the Executive Chairman of the National Book Council and was the Chairperson of the Evaluation Committee. He explained how the evaluation process had been carried out and how prior to that one restoration company had been invited to carry out certain tests. There were subsequent site visits in conjunction with the technical consultants prior to the issuing of the tender. There was no involvement with any of the bidders and in his view it was normal that the estimated price is higher than the tendered one. The winning bid price had been confirmed with the technical people to ensure that the bid was fully compliant.

Questioned by Dr Grech witness confirmed that only the lowest bid was sent to the technical consultants but that the Authority had not requested any clarification or verification of prices on the ReCoop offer.

In his closing submissions Dr Gauci said that it has been alleged that ReCoop had an interest in the tender procedure as defined in Regulation 194 of the PPR. The tests carried out by ReCoop were evident to all and even the Appellant quoted for this work. If there were any doubts on the terms of the tender document a pre-contract remedy before closing date should have been sought. In respect of the claim that the offer was abnormally low the PPRs provide quite clearly that the Contracting Authority has discretion and he referred to a 2015 Appeal Court case *Clentec vs Director of Contracts* supporting the discretionary right of the Authority to challenge an abnormally low bid. The Appeal should not be upheld.

Dr Grech dealt first with the failure to submit the declaration form. He said that the Authority claims that it is not up to the bidder to decide whether to submit the form. The Form must only be submitted if the key expert is a public employee – in this case there was no need to submit as was obvious from the C.V. provided. The Authority should ask for a rectification only if there is a mistake; there is no mistake here and once the Authority did not need that Form it does not mean that the Appellant is

wrong and they should have practised proportionality to try to save the offer. The Authority themselves admit in their reply that there was no need for a rectification but rather of clarification. The PPRs are clear on this; if the Authority had any doubts why did they not ask for clarification and therefore they cannot exclude the bid on this point.

On the point regarding the conflict of interest, according to Dr Grech there was self-admittance by ReCoop that there was involvement prior to the issue of the tender but they claim that Appellant should have taken action before tendering. This was not possible as Appellant only found out that ReCoop were participating in the tender when the results were made known and could not therefore have appealed before then. PPR 194.3 makes it clear that there is no discretion if there is a conflict of interest – it states that the contract ‘shall not’ be awarded meaning there is automatic exclusion. The aim is to avoid distortion of competition. The opportunity given to ReCoop to carry out tests and samples enabled them to identify the use of materials, methodology, timelines and whether it needed consolidation or pre-consolidation. It was confirmed by the technical experts that these were all factors determining and impacting on the price – hence there was clear gross distortion evidenced by the prices submitted to the extent that ReCoop’s offer was less than half the estimated tender price and should not have been considered. Dr Spiteri on behalf of the Authority claims that they had the right to carry out market consultation which is fine as long as no market distortion results from that exercise.

Dr Grech further stated that two witnesses had testified that the site visits did not involve tests but merely visual inspections and since only ReCoop were given the benefit of tests they were placed in an advantageous position. Once the Authority published their own estimated price for the tender it was up to them to explain how they were ready to accept a price 39% lower than the next bid. Why was only one offer - and not all – sent to the consultants and why were they only asked if the offer made sense rather than a request for analysis, and why did they not request price clarification which would have been indicative if the bid was abnormally low.

Dr Spiteri said that in line with the PPRs the Authority observed equal treatment, transparency and proportionality to try to save Atelier’s offer. The claim that Appellant submitted the C.V. in the case of the key expert is not conclusive that there was no public involvement and instead of seeking to clarify this point with the Authority instead sought information from outside sources and even when the Authority sought clarification the declaration was still not submitted. However, even had it been submitted it would not have affected the final tender result.

Just because tests were carried out, said Dr Spiteri, this did not give rise to a conflict of interest as the rest of the work was not similar – all parties agreed that this was a ‘closed box’ and the Authority took measures to ensure all bidders were treated equally by laying on site visits, clarification meetings and publishing the test results; hence maintaining a level playing field and ensuring there were no distortions.

As regard the abnormally low price claim the Authority has discretion in this respect and CJEU Case 568/13 states that the test of abnormality is related to the services to be provided – in this case specialised services where one cannot decide beforehand the cost of works. It is the prerogative of the Authority to decide and even if the offer was abnormally low there is no right to exclude. Everything has been done in conformity with the tender and European Court jurisprudence. Two of the offers received were higher than the Appellant’s and even if the appeal is upheld they would not be awarded the contract. The appeal should be denied.

The Chairman thanked the parties for their participation and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 22nd July 2021.

Having noted the objection filed by Atelier del Restauro Ltd (hereinafter referred to as the Appellant) on 3rd May 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2524/2020 listed as case No. 1606 in the records of the Public Contracts Review Board.

| | |
|------------------------------------------|--------------------------------------|
| Appearing for the Appellant: | Dr Carl Grech |
| Appearing for the Contracting Authority: | Dr Joseph Mizzi & Dr Timothy Spiteri |
| Appearing for the Preferred Bidder: | Dr John L Gauci |

Whereby, the Appellant contends that:

- a) **No declaration form was required to be submitted for Key Expert 1 – Wall Painting Conservator** – this form is to be completed by the individual key expert/personnel who is employed with the Public Administration. Through this declaration, “the Key Expert would be expected to declare that as a **public employee** that he shall avoid any financial or other interest.....” it should therefore be self evident that this form would only be required where the Key Expert is employed with the public administration. In this case, Ms Maria Grazia Zenzani, the appointed Key Expert 1 is not and never was employed with the Public Administration. This as per Curriculum Vitae submitted to Evaluation Committee. Ms Zenzani is currently employed by Appellant and has been so employed since 2012.
- b) **The tenderer recommended for award, ReCoop Ltd had been involved in the preparation of the procurement procedure and therefore had a clear conflict of interest that should have disqualified it from participating in this bid** – ReCoop Limited had been involved in the preparation of this procurement procedure, so much so that it appears they have carried out some preliminary investigations into the work that needed to be carried out as part of this contract, and

provided a report that was then made available to other bidders. This is evident from the footnote of Annex 1 where on almost every page of the section entitled ‘Investigations’, the report is marked as having been carried out by ReCoop Limited. Awarding the tender to ReCoop Limited would be in clear breach of regulation 194(3) of SL 601.03

- c) **ReCoop Limited’s offer was abnormally low and should therefore be excluded accordingly** – in this particular procurement procedure, there were four offers. The estimate procurement value for this call was of €266,522.80. This means therefore that ReCoop’s offer was merely 39% of the Estimated Procurement Value. When taking note of the great disparity between the offers, it is evident that either ReCoop Ltd has taken some particular advantage through its participation in the preparation for this tender, or else it somehow misconstrued entirely the requirements of this Tender.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 3rd May 2021 and its verbal submission during the virtual hearing held on 22nd July 2021, in that:

- a) **No declaration form was required to be submitted for Key Expert 1 – Wall Painting Conservator** – the declaration form in question constituted an integral part of the documentation which bidders were required to submit. Pursuant to the Appellant’s observation that “every effort should be made to save an offer in a tender”, the Contracting Authority respectfully submits that it has adhered to its obligations as arising from regulation 62(2) SL 601.03 and gave the Appellant sufficient opportunity to rectify its failure to submit the form in question by according the Appellant a reasonable time limit within which to rectify this shortcoming. So much so, that the Appellant responded to such request communicated by the Contracting Authority within the time limit, however failing yet again to submit the requested documentation.
- b) **The tenderer recommended for award, ReCoop Ltd had been involved in the preparation of the procurement procedure and therefore had a clear conflict of interest that should have disqualified it from participating in this bid** – the Contracting Authority contests the Appellant’s statement that the selected Tenderer was involved in the preparation of the procurement procedure. For all intents and purposes, the entity which the Contracting Authority consulted on the technical aspects related to the Tender – including technical aspects relating to the preparation of the procurement procedure in dispute – was the architecture firm, AP Valletta (the “Technical Consultant”) – which has no connection whatsoever with the Selected Tenderer. For all intents and purposes, the Technical Consultant also served as the technical expert which assisted the Contracting Authority to evaluate the Tender bids, their viability and compliance with the Tender specifications. The Subject matter of the Tender in dispute was a highly-specialised job

involving the restoration of internal painted walls and ceilings in the National Book Council's Baroque Palazzo located at 8, Old Mint Street, Valletta (the "Tender Location").

At a preliminary stage in the preparation of the procurement procedure – upon discovering evidence of paintings of historical and cultural value on the walls of the Tender Location – which paintings were covered by layers of paint subsequently applied over the years – the Technical Consultant advised the Contracting Authority to carry out limited tests in order to determine which rooms within the Tender Location contained such paintings, to be able to better outline the nature and extent of the works which were required.

Pursuant to such advice, the Contracting Authority issued a request for quotations in relation to such tests and received three quotations, including one from the selected Tenderer and another from the Appellant.

At this preliminary stage, the Selected Tenderer's quotations had also been lower than that submitted by the Appellant – by a significant margin. Consequently, the Contracting Authority had contracted the Selected Bidder to carry out the preliminary tests which had been suggested by the Technical Consultant.

The Selected Tenderer's involvement in the preparation of the Tender was thus at most limited to preliminary market consultation in relation to the walls of the Tender Location, in terms of regulation 47 of SL 601.03.

By virtue of regulation 59 of SL. 601.03, even in instances where persons are involved in preliminary market consultation in relating to a given procurement procedure, exclusion of that person from participating in that procurement procedure is only resorted to in exceptional circumstances.

It is also worth pointing out that beyond the work related to the walls, the Tender also involves works related to the ceilings of the Tender Location and the Selected Tenderer's tests did not extend to this aspect of the Tender.

The information and experience that the Selected Tenderer could have obtained during this preliminary stage was not conducive to it obtaining any foreseeable advantage in relation to the Tender in question such that it could distort competition between the bidders for the Tender.

In fact, as admitted by the Appellant itself in its objection, the information obtained through such tests which is relevant to the Tender was made available to all applicants for the Tender, since it "was annexed to the Tender Document that was made available to bidders." If anything, this factor contradicts the Appellant's allegation that the Contracting Authority violated the principle of transparency.

To alleviate all concerns in this respect, the Contracting Authority submits that the sections of the report prepared by Selected Bidder which were not included within the Tender document did not relate to the Tender – since they related to rooms within the Tender Location which did not form part of the scope of the Tender, as confirmed by the full report. As such the exclusion of the missing sections could not serve so as to grant the Selected Tenderer any form of advantage over the other bidders for the Tender.

Moreover, in view of the Selected Tenderer's limited involvement through the tests conducted, the Contracting Authority took additional measures in order to ensure a level playing field between all bidders for the Tender – specifically by fixing a clarification meeting and site visit at the Tender Location on the 4th February 2021, which was open to all bidders, and for which the Appellant's representatives were present.

Such meeting ensured, inter alia, that all bidders had the same experience vis-à-vis the Tender Location – specifically access to the site in question in order to determine first – hand all specifications relating to the Tender Location and the nature of the works involved – thereby ensuring conformity with the principle of non-discrimination and that all tenderers had an equal opportunity when formulating their tenders.

Contrary to what has been alleged by the Appellant, even in instances where an economic operator has participated in the preparation stage of a procurement procedure, disqualification from applying for that procurement procedure is only resorted to in extremely exceptional cases, where there exists a distortion of competition which cannot be remedied by other less intrusive measures – such as the measures implemented by the Contracting Authority, as described above.

The facts of the case at hand are highly distinct from the abovementioned cases, in that the selected Tenderer was only very limitedly involved in the preliminary tests carried out to determine what work would be required in relation to certain aspects of the Tender in question. The information obtained through such tests and its conclusion have been made available to all bidders, with the result that no advantage could reasonably be implied to be present.

Moreover, the Contracting Authority contests the assertion that the three elements for conflict of interest indicating in Case 1206 – TM 003/2018 are present in the case in hand.

Specifically, the selected Tenderer was not involved in the procurement process and was merely very limitedly in preliminary tests. Moreover, its involvement during this preliminary stage did not allow it to produce any unfair advantage over the other bidders through additional information or experience; this as has been amply elaborated above.

The Appellant has furthermore failed to demonstrate that there exists any direct or indirect personal interest on the part of the persons involved in the conduct or outcome of the Tender procedure vis-à-vis the Selected Tender.

- c) **ReCoop Limited's offer was abnormally low and should therefore be excluded accordingly** – with specific reference to regulation 243 of SL 601.03, which deals with such instances, the wording of the same regulation does not necessitate the disqualification or exclusion of abnormally low offers, as the Appellant seems to be implying in its letter of objection, but rather that in instances where a Contracting Authority is faced with tenders which appear to be abnormally low in relation to the works, supplies or services, it shall require economic operators to explain the price or costs proposed. Once the Contracting Authority received the bidders' offers relative to the Tender, it sought further information relative to the Selected Tenderer's bid from the Technical Consultant in its capacity as technical expert – specifically so as to establish whether the selected tenderer's offer was technically compliant and viable, albeit being substantially lower than envisaged estimate. The Technical Consultant had given the Contracting Authority sufficient assurance that the price offered by the Selected Tenderer was not in fact abnormally low and was indeed commercially viable.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant's grievances, as follows:

- a) **No declaration form was required to be submitted for Key Expert 1 – Wall Painting Conservator** – The Board notes the following:
- i. A rectification request was sent to the Appellant for Key Expert 1.
 - ii. This Board opines that regulation 16.1 of the General Rules Governing Tenders is amply clear in that, when a rectification is requested by the Contracting Authority, the bidder is to reply within 5 days and failure to comply shall result in the tender offer not being considered any further.
 - iii. Ms Maria Grazia Zenzani stated under oath that she was aware of the rectification request. However, she did not abide by it because a responsible person, in Government employ, had told her that there was no need to submit the form in her case.
 - iv. This Board is of the opinion that once a rectification request is made by the Contracting Authority, the prospective bidders are to take note of it. Once the prospective bidders are aware of such a request, they are to make sure that they respect and adhere to the deadline

set by the General Rules Governing Tenders to submit their replies. If anything is not clear they should ask for clarification from the Contracting Authority.

Hence, this Board does not uphold Appellant's first grievance.

b) **The tenderer recommended for award, ReCoop Ltd had been involved in the preparation of the procurement procedure and therefore had a clear conflict of interest that should have disqualified it from participating in this bid** – The Board notes the following:

- i. It is a fact that ReCoop Limited were requested to carry out certain preliminary tests as envisaged in Regulation 47 of the PPR for the eventual preparation of the drafting of this tender document.
- ii. The main point of contention is therefore whether ReCoop Limited have had an unfair competitive advantage on the other prospective bidders and hence whether there is a conflict of interest in them being considered for the eventual award of their tender bid.
- iii. It must be stated that their findings were included in the eventual publication of the tender dossier; hence they were available to all prospective bidders.
- iv. Witness Ms Maria Grazia Zenzani stated that the report submitted by the Authority was confusing and the indication of materials to be used was not clear. No indication was provided whether cleaning was a pre-consolidation or a consolidation process. Finally, the time indicated was merely stated as 'lengthy'.
- v. This Board opines that if the Appellant felt that the information within the tender dossier was unclear, ambiguous and did not leave room for a level playing field between all the prospective bidders, than they should have made use of Regulation 262, being "Remedies before closing date of a call for competition".
- vi. It is also being noted that onsite visits were also organised by the Contracting Authority, albeit the Appellant and all prospective bidders were not permitted to carry out tests by the technical advisors.
- vii. When considering all the above, this Board opines that the necessary safeguards have been applied by the Contracting Authority to ascertain that equal treatment has been provided to all prospective bidders. The 'risk' of conflict of interest, whereby no tests were permitted during the onsite visits to all prospective bidders has been 'managed' with the inclusion within the tender dossier of the findings of ReCoop's preliminary testing. The fact that Appellants did not seek a pre contractual remedy according to Regulation 262 indicates that they were satisfied to bid within the terms of the tender dossier and its entire contents.

Hence, when considering all the above, this Board does not uphold Appellant's second grievance.

c) **ReCoop Limited's offer was abnormally low and should therefore be excluded accordingly**

– The Board notes the following:

- i. Estimated Value of Tender amounts to €266,522.80, whilst Recommended Contract Value amounts to €104,850.94. The Recommended Contract Value is only 39% of the Estimated Value of Tender.
- ii. Regulation 243 (1) of S.L. 601.03 Public Procurement Regulations states that “*Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*” (emphasis added). Hence the bone of contention in this particular grievance is whether the bid by ReCoop Limited “appears” to be abnormally low or not and what did the Contracting Authority do to ensure complete adherence to this specific regulation.
- iii. It is important to note that even if a bid ‘appears’ to be abnormally low, the regulation does not envisage automatic disqualification. This has been amply discussed in past case law. An obligation is put on the Contracting Authority which shall require economic operators to explain the price. However, this only applies if the bid ‘appears’ to be abnormally low.
- iv. It must be noted that the Contracting Authority obtained the advice of AP Valletta, being technical people on the subject matter, on the lowest financial offer received, being that of ReCoop Limited. This to assure themselves whether the bid proposed by ReCoop Limited of €104,850.94, was in fact abnormally low or not. It did not transpire to AP Valletta that this bid appeared to be abnormally low. This as per statements under oath by both Ms Charlene Darmanin and Mr Mark Camilleri.
- v. Hence this Board opines that the Contracting Authority did in fact observe the letter of the law whereby it did not require the economic operator (ReCoop Limited) to explain the price as per Regulation 243(1), but this only after having obtained the advice of the technical people it entrusted, AP Valletta.

Finally, this Board does not uphold Appellant’s third grievance.

In conclusion this Board;

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Lawrence Ancilleri
Member