

PUBLIC CONTRACTS REVIEW BOARD

Case 1661 – CT5000/2021 – MFED 473/2021 – Negotiated Procedure for the Provision of Environmental Cleaning Services in State Schools and Educational Facilities (including Summer)

27th December 2021

The Board,

Having noted the application for ineffectiveness filed by Dr Clement Mifsud-Bonnici, Dr Antoine Cremona and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Management Consulting Service Industry (MCSI) Ltd, (hereinafter referred to as the appellant) filed on the 10th September 2021;

Having also noted the letter of reply filed by Dr Kristina Busutil and Dr Daniel Inguanez acting for the Ministry for Education (hereinafter referred to as the Contracting Authority) filed on the 29th September 2021;

Having also noted the letter of reply filed by Dr Marycien Vassallo on behalf of 8 Point Law acting for and on behalf of Brightness Joint Venture (hereinafter referred to as the Contract Beneficiary) filed on the 30th September 2021;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Director General of the Department of Contracts) as summoned by Dr Clement Mifsud-Bonnici acting for the appellant.

Having heard and evaluated the testimony of the witness Ms Maria Galea (Director General for Strategy and Support at the Ministry for Education) as summoned by Dr Clement Mifsud-Bonnici acting for the appellant.

Having heard and evaluated the testimony of the witness Dr Kenneth Grech (Consultant in Public Health) as summoned by Dr Daniel Inguanez acting for the Contracting Authority.

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 30th November 2021 hereunder-reproduced.

Minutes

Case 1661–CT5000/21 and MFED 473/2021. Negotiated Procedure for the Provision of Environmental Cleaning Services in State Schools and Educational Facilities (including Summer)

Application for Declaration of Ineffectiveness of a Contract (PPReg. 277)

procedure was that the allocated hours were used more quickly and exhausted earlier than anticipated due to the need of enhanced cleaning.

Dr Marycien Vassallo Legal Representative for Brightness JV said that she relies on the statement made by Dr Inguanez and the policies which had been submitted regarding COVID requirements.

Mr Anthony Cachia (142658M) called as a witness by Claimant stated on oath that he is the Director General of the Department of Contracts (DoC). In this Case the Department received a request for a negotiated procedure through the General Contracts Committee (GCC). If approved the Authority is advised accordingly to proceed with the negotiations taking place directly between the Authority and the economic operator. There are various types of negotiated procedures and for different reasons and occasionally instances where after approval and negotiations the matter is again referred for final approval to the DoC. In this case there was a request on the 5th April 2021 and it was approved by him on the 2nd July. Each request is different as regard the length of time required for approval. Witness stated that he was not aware why it took three months to approve this application. The DoC and the GCC rely on what the Authority requests.

Asked to state the number of hours required for extra COVID cleaning, witness said that he cannot say how many of the extra hours requested were due to the pandemic. Questions raised with an Authority were either verbal or written but he could not recall what happened in this case as no minutes of meetings are kept: the decisions were simply implemented after discussions. Occasionally a written request for a negotiated procedure was discussed at the GCC to see if it was justified with the odd request for further information or even a meeting to decide it. It is likely that the 5th April request needed further information but witness was unable to confirm this as no minutes are kept and the procedure is not recorded in writing, nor could he recall if he had requested copies of the COVID protocols. Mr Cachia continuing his testimony stated that he approved in his 2nd July letter what had been requested but he could not recall what had been requested. He confirmed that the procedure had not been published in the European Journal.

Questioned by Dr Inguanez regarding a letter signed by Ms Graziella Calleja, witness stated that that person's role was to present requests from Contracting Authorities to the GCC – she acted on behalf of the DoC to notify decisions to applicants. Funds have to be available for a negotiated procedure to be approved and sometimes the GCC takes several sessions to approve a request. Witness confirmed that he had followed the COVID emergency information notices from the European Commission on using the public procurement framework through negotiated procedures which meant that the GCC had to take this into consideration regarding the effect on schools in the pandemic crises.

In request to further questions from Dr Mifsud Bonnici, witness agreed that the EU communication was issued on the 1st April 2020 a full one year before the request for the negotiated procedure and that in the Regulations before the negotiated procedure section there is another section referring to accelerated procedure and that negotiations should only be used if accelerated procedure is not possible. Finally witness agreed that in Section 2.3 there is no reference to schools but to hospitals and health institutions.

Ms Maria Galea (80081M) called as a witness by Claimant testified on oath that for four years she has been the Director General for Strategy and Support at the Ministry for Education. She is responsible for the procurement process and cleaning processes in schools. She stated that the contract was signed on the 26th September 2019 active till January 2020. The spike in cases in March 2020 led to the schools closure. In September 2020 the schools protocol was introduced imposing guidelines on cleaning measures accentuated by the groupings in classrooms in secondary schools needing cleaning

Dr Kenneth Grech (47667M) called as a witness by the Contracting Authority testified on oath that he is a Consultant in Public Health with responsibility for COVID co-ordination crisis measures. He tabled details of the number of cases in the pandemic and indicated spikes in the number of cases in 2020 and 2021 by month. In March 2021 cases were at their highest but decreased thereafter. What happened in the schools, according to the witness, was a reflection of what happens in the community. As time went by the Health Authorities gained experience how to deal with cases and to take the appropriate measures. There was no need to close the schools again following original closure as the measures in place were adequate with enhanced protocols for cleaning of premises to control the risk of transmission by touch.

Questioned by Dr Mifsud Bonnici witness stated that after March 2021 the number of cases reduced as a result of additional measures in the public sector but not in schools – in general cases starting declining from April onwards then in July there was a spike due to the English Language schools and the tourist season-this is reflected in the schools figures.

This is the conclusion of testimonies of witnesses for both parties.

Dr Mifsud Bonnici stated that one must consider whether this was a case of extreme urgency or not. If it is not as, Claimant maintains, then one must consider whether there are overriding reasons. The case for extreme urgency derives from EU Directive 2014/24 which in Recital 50, further influenced by CJEU decisions, states that negotiated procedure is to be used in very exceptional circumstances or otherwise a free for all with no control in public procurement would ensue. The application for ineffectiveness is therefore there to examine the grounds chosen. There are three principles in cases of extreme urgency and all factors have to be present: interpretation, factors all present and Contracting Authority to prove their case. The EU Directive goes beyond cases and deals with the principle of proportionality and hence it has to be strictly necessary and the grounds have to relate to events brought about by matters beyond the control of and which cannot be attributable to the Authority, and must be unforeseeable and independent.

The law must be interpreted by EU law on the limits on tenders – the time period is not the start and end date but the time taken to produce a tender – the essential is the time available to issue a tender and evaluate it not to external factors. What is the unforeseeable event that the Authority is relying on; if credible was urgency due to the Authority and can other procedures have been used asked Dr Mifsud Bonnici? The parameters of extreme urgency have not been met in this Case as the Authority is relying on the protocols as events to apply for a negotiated procedure when the protocols were first issued in 2020 in August and September and not changed in 2021. In October 2020 it was already known what was required to clean schools under COVID conditions. The 5th April 2021 application had to be substantiated on what existed at the time not on later events. If the matter was really urgent why did the Authority wait three months for approval with neither the DoC nor the Authority appearing to know the reason for the delay? A gap of three months does not indicate urgency and there was time enough to issue a tender and evaluate it. The request for a negotiated procedure cancels the claim of extreme urgency with a further month's delay to publish the procedure on the ePPS – enough time to issue an accelerated procedure. The need to open schools in September has been claimed as the reason for the urgency when a tender could have been completed during the holidays. COVID was present since March 2020 and it was inevitable and foreseeable that spikes would occur. Dr Grech in his testimony confirmed that from April cases started to decline and this does not tally with the arguments regarding the claim of urgency.

Contrary to what has been claimed the contract does not end in December as the two years start when the contract was signed on 26th September 2019 and is therefore already expired and the Ministry

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 30th November 2021.

Having noted the application filed by Management Consulting Service Industry (MCSI) Ltd (hereinafter referred to as the Appellant) on 10th September 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT5000/2021 – MFED 473/2021 listed as case No. 1661 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Clement Mifsud Bonnici & Dr Calvin Calleja
Appearing for the Contracting Authority:	Dr Kristina Busuttil & Dr Daniel Inguanez
Appearing for the Preferred Bidder:	Dr Marycien Vassallo

Whereby, the Appellant contends that:

a) **The Declaration of Ineffectiveness**

- i. That, for the Claimant to succeed in its application, it must show that the Contracting Authority awarded this contract without prior publication of a contract notice in the OJEU without this being permissible at law. This is the permitted ground under Regulation 277(2) of the PPR. The Claimant has not located a “contract notice in the OJEU” in connection with the Negotiated Procedure, and therefore, the only question that remains is whether the award of the Negotiated Procedure without prior publication was permissible at law.
- ii. That the Negotiated Procedure could have been awarded without prior publication in terms of Regulations 150 et seq. of the PPR which require: a) The Director General (Contracts)'s prior approval to use the negotiated procedure without prior publication. This approval must be requested and provided in writing in advance. The Contracting Authority must have sent a duly substantiated request to substantiate the need to use this procedure; and b) that one of

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29th September 2021 and its verbal submission during the virtual hearing held on 30th November 2021, in that:

a) **Facts** – Due to the re-opening of schools and the adoption of enhanced cleaning practices in conformity with the above-mentioned Guidelines the value of the 2018 Tender contract, representative of cleaning hours awarded, was being used up earlier than had been expected in early 2018 when the 2018 Tender was drafted and issued. At that time in early 2018 nobody could have envisaged the Covid-19 health crisis. The value of the 2018 Tender contract was depleted even before the period of execution is to end on the 31st December 2021. Given this state of affairs, on the 5th of April 2021 the Respondent Ministry reacted quickly by seeking the approval of the General Contracts Committee for the issue of a negotiated procedure without prior publication. Approval was given by the General Contract Committee on the 2nd July 2021 on the basis of Regulation 154(1c) of the Public Procurement Regulations (S.L. 601.06) - that is, “for reasons of extreme urgency brought about by events unforeseeable by the contracting authority”. While approval for the negotiated procedure was being obtained the Respondent Ministry had already started with the drafting of a new tender for the conclusion of a public contract for the provision of cleaning services in schools. Given that this new tender could not be issued in time for the provision of cleaning services to be uninterrupted, the negotiated procedure with reference 473/2021 was concluded with Brightness JV and the Contract was signed on the 27th of August 2021. The Contract shall terminate on the 31st of December 2021, therefore, together with the 2018 Tender contract. The tender which is currently being drafted is therefore envisaged to cover a period beginning from 1st January 2022.

b) **Regarding the lack of existing grounds for ineffectiveness** –

- i. It must first be stated at the outset that, contrary to what the Claimant seems to suggest, the Respondent has used the negotiated procedure without prior publication for the Contract in question, after having obtained the approval of the General Contracts Committee, and on the basis of extreme urgency in terms of Regulation 154(1c) of the Public Procurement Regulations. The Court of Justice of the European Union (CJEU) has stated that the use of the negotiated procedure on the basis of extreme urgency is subject to three conditions: (1) an unforeseeable event; (2) extreme urgency rendering impossible the observance of time-limits laid down for calls of tenders; and (3) a causal link between the unforeseeable event and the extreme urgency.

An unforeseeable event

The emergence of the Covid-19 health crisis could sure not have been foreseen when the 2018 Tender was being prepared. Even the European Commission has issued guidance classifying as an unforeseeable event the need for medical equipment and facilities during the pandemic. The ‘Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis’ (2020/C 108 W01) states in

to ensure that schools remain open in safe conditions for the students and staff. In particular, the 2018 Tender contract is to end on 31st December 2021 but due to the Covid-19 health crisis the value awarded will be used up before that date. Also, since requesting approval for the issue of the negotiated procedure in April 2021 the Respondent Ministry has attempted to draft and issue a call for tenders before the value of the 2018 Tender contract is used up but this has not been possible.

For the above reasons, the remark by the Claimant that the urgency has been caused by the contracting authority's negligence or delay to issue a new tender is unfounded. It is the unforeseen circumstances which have been brought about by the Covid-19 health crisis and the urgent need to continue operating schools with a higher sanitary standard than is ordinarily required that bring about the applicability of Regulation 154(1)c).

A causal link between the unforeseen circumstances and the extreme urgency

In the case at issue there also exists a causal link between the unforeseen circumstances, that is(sic) the increasingly burdensome cleaning measures which were not needed at the time when the 2018 Tender was drafted, and the extreme urgency resulting from the need to ensure safety of school pupils and staff during the continued operation of primary and secondary schools. The Respondent Ministry could not meet this need with urgency had it resorted to a call for tenders precisely because, even while arrangements were being made to obtain approval for and proceed with a negotiated procedure, the enhanced cleaning standards had to be adopted.

- c) **The existence of overriding reasons relating to a general interest** – In line with Regulation 280(2) of the Public Procurement Regulations, the Public Contract Reviews Board may find that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained and therefore cannot consider the contract ineffective. Even if, for the sake of the argument, the Board were to find that the reason of extreme urgency is not justified (something which the Respondent contests), the Respondent Ministry submits that there exist overriding reasons of general interest which require that the Contract be maintained. Specifically, the need for the Contract has resulted from the public interest need to adopt enhanced cleaning measure to mitigate the risk of Covid-19 infections in State schools.
- d) **Regarding the request for penalties** – According to Regulation 280(1) of the Public Procurement Regulations: “If the Public Contracts Review Board declares a contract to be ineffective, it shall impose penalties on the authority responsible for the tendering process and the contracting authority after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities.” Given that the Contract has been legitimately issued through a negotiated procedure for reasons of extreme urgency there is no ground for the ineffectiveness of the ground and, in consequence, no ground for the imposition of penalties.

least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

This Board, after having examined the relevant documentation to this application and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider, as follows.

- a) The Board opines that the first issue to be tackled is regulation 150 of the Public Procurement Regulations (“PPR”) which administers ‘Negotiated procedures without prior publication’;
 - i. Whereby in 150 (1) it is stated *“Upon being requested in writing by the contracting authority the Director may, subject to any conditions he may deem appropriate to impose, approve the use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts as specified in the following regulations.”*
 - ii. Regulation 150 (2) continues to state, *“The request made by the contracting authority must duly substantiate the need for the negotiated procedure”*.
 - iii. The Board notes that the Contracting Authority wrote to the Director General of the Department of Contracts on the 5th April 2021 requesting the use of a ‘Negotiated procedure without prior publication’ in terms of Regulation 154(1)(c) of the PPR. An approval by the Department of Contracts (DoC) was issued on the 2nd July 2021.
 - iv. Hence the Board opines that the requirement of regulation 150 (1), i.e. the request in writing by the Contracting Authority to the Director, was met. Moreover, the requirement of regulation 150 (2), i.e. the request to be duly substantiated, was also met with the reference to regulation 154(1)(c).
- b) The second issue that the Board will now consider is whether the parameters of 154(1)(c) were duly observed or otherwise.
 - i. 154(1)(c) states: *“The negotiated procedure without prior publication may be used for public service contracts in the following instances: where in so far as is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority;”*

Therefore, this Board opines that the 'requirements' listed in regulation 154(1)(c) have all been met.

In conclusion this Board;

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

- a) That the Contracting Authority acted in terms of the Public Procurement Regulations and disposes of the application as brought forward by the Appellant / Claimant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Dr Charles Cassar
Member