

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1704 – KLMsd/TDR/01/2021 – Tender for the Collection of Residential Bulky Refuse and Fly Tipping from Msida and Part of Swatar, in an Environmentally Friendly Manner.**

**25<sup>th</sup> April 2022**

The Board,

Having noted the letter of objection filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates Advocates acting for and on behalf of Mr Alfred Galea, (hereinafter referred to as the appellant) filed on the 11<sup>th</sup> February 2022;

Having also noted the letter of reply filed by Dr Daniela Azzopardi Bonanno on behalf of Lex Group acting for the Msida Local Councils (hereinafter referred to as the Contracting Authority) filed on the 22<sup>nd</sup> February 2022;

Having also noted the letter of reply filed by Dr Franco Galea on behalf of Saga Juris Advocates acting for Mr Melchior Dimech (hereinafter referred to as the Preferred Bidder) filed on the 8<sup>th</sup> March 2022;

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

Having noted and evaluated the minutes of the Board sitting of the 12<sup>th</sup> April 2022 hereunder-reproduced;

#### **Minutes**

#### **Case 1704 – KLMsd/TDR/01/2021 – Tender for the Collection of Residential Bulky Refuse and Fly Tipping from Msida and parts of Swatar in an Environmentally Friendly Manner**

The tender was issued on the 12<sup>th</sup> June 2021 and the closing date was the 12<sup>th</sup> July 2021. The value of the tender, excluding VAT, was € 138,600.

On the 11<sup>th</sup> February 2022 Mr Alfred Galea filed an appeal against the Msida Local Council as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be best priced bid.

A deposit of € 693 was paid.

There were three (3) bidders.

On the 12<sup>th</sup> April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Mr Alfred Galea**

Dr John Gauci	Legal Representative
Mr Alfred Galea	Representative

**Contracting Authority – Msida Local Council**

Dr Daniela Azzopardi Bonanno	Legal Representative
Mr Alan Vella	Representative
Ms Adreana Zammit	Representative

**Recommended Bidder – Mr Melchior Dimech**

Dr Franco Galea	Legal Representative
Mr Melchior Dimech	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 invited submissions.

Dr John Gauci Legal Representative for Mr Alfred Galea said that Appellant’s grievance is that the recommended bidder does not have the necessary vehicles to fulfill the contract. The facts as stated in the appeal letter have not been contradicted but confirmed both by the bidder and the Contracting Authority. The preferred bidder had ample opportunity to indicate that he was using the vehicles of a third party but nowhere was this indication given. There was a distinction between an individual and a legal entity. Under Note 3 no clarification could be sought to ascertain the ownership of vehicles. Regulation 235 of the PPRs allows the capacities of others to be used but again no indication was given that this was going to happen. This was not an oversight but done intentionally since even the possibility of using a subcontractor was ignored with total disregard to the PPRs.

Dr Daniela Azzopardi Bonanno Legal Representative for Msida Local Council stated that the Evaluation Committee’s reason for selecting the preferred bidder was that it was a cheaper offer – the ownership of the vehicles was not part of the tender which merely required vehicles of a certain standard to be available by a few days before the start of the contract. Documents submitted indicated that Melchior Dimech had control on the vehicles. The principle of proportionality had been observed and PCR Case 1617 was quoted in support.

Dr Franco Galea Legal Representative for Mr Melchior Dimech said that the offer regarding the vehicles was transparent – what was of real concern is that the Appellant feels entitled to be awarded this tender.

A bidder is entitled to present an offer as it wishes and the tender did not specify ownership of vehicles and all the Evaluation Committee had to do was to ensure that proper vehicles were offered to satisfy the tender requirements. The Appeal should be denied.

Dr Gauci stated that the facts of the appeal are not frivolous – the bidder was offering vehicles that are not part of the tender since a simple shareholding in a company does not provide overall control of an asset. The basis of the appeal is that this offer was by an individual not by a corporate entity.

There being no further submission's the Chairman thanked the parties and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 12<sup>th</sup> April 2022.

Having noted the objection filed by Mr Alfred Galea (hereinafter referred to as the Appellant) on 11<sup>th</sup> February 2022, refers to the claims made by the same Appellant with regards to the tender of reference KLMsd/TDR/01/2021 as case No. 1704 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L Gauci

Appearing for the Contracting Authority: Dr Daniela Azzopardi Bonanno

Appearing for the Preferred Bidder: Dr Franco Galea

Whereby, the Appellant contends that:

- a) ***Recommended bidder is not technically compliant in that he does not own the necessary vehicles requested in the tender***

That Section 3 Terms of Reference of the reference which is comprehensively denoted as Note 3, stipulates the following:

*“4.2.3. - Vehicle Type and GPP*

*The Contractor shall at all times during the operation of the contract make use of those vehicles approved by the Local Council as mentioned in the following clause, and have been duly registered by the Malta Environment and Planning Authority, by virtue of Legal Notice 106 of 2007 and any other further legal notices published. The Contractor shall only make use of vehicles which have been approved by the Council's Representative at least 7 days before the commencement date of the Contract. Any vehicle obtained thereafter will be subject to the approval of the Council's Representative. Any vehicle not falling under these criteria will not be permitted to operate under this contract. The Contractor will be obliged to submit a copy of the registration document issued by MEPA together with a copy of the vehicle log book and a photograph of the vehicle. Failing to submit such documents within the above-mentioned stipulated time, may constitute grounds for the annulment of the decision to award the contract. In such case, the Local Council shall award the tender to the second successful tenderer. All vehicles used in this tender should have an emission level not less than euro IV (4) according to E Directive 2005/55/EC. Where vehicles are not certified as EURO IV, but technical after-treatment has achieved the same standard, this should be documented in the tender application. The bidder must present the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO IV standard the measures must be documented and included in the tender application, and this must be approved by a credible third party.”*

That although that the law envisages a scenario where a bidder would rely on the capacity of another entity, the law stipulates a very precise methodology and requirements how such relying is to take place.

Indeed regulation 235.(1) of the Public Procurement Regulations stipulates the following:

*“With regard to criteria relating to economic and financial standing as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in regulation 232(f), or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect”*

That therefore, given that the recommended bidder does not himself own suitable vehicles to be utilised for the execution of this particular contract, and since presumably, the recommended bidder intends to utilise the technical capacity of other entities, the recommended bidder should have submitted with its tender the necessary declaration of undertaking / commitment by those other entities to that effect. Indeed the Tenderer's Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided" is also denoted as a Note 3 requirement (i.e. 3. No rectification shall

be allowed. Only clarifications on the submitted information may be Requested). Otherwise, the bidder could have opted for subcontracting by declaring same as per the relevant tender clause:

*“Any subcontractor proposed and disclosed at this stage shall be evaluated in line with the Exclusion and Blacklisting Criteria as per these instructions to Tenderers. Furthermore, if the sub-contractor is relied upon by the Contractor to meet the standards established in the selection criteria, apart from submitting the relevant commitments in writing, such reliance will be evaluated to verify its correctness and whether in effect these criteria are satisfied. It is being understood that if the information being requested regarding sub- contracting is left empty, it will be assumed that no sub-contracting will take place (0% subcontracting).”*

Therefore, unless the recommended bidder submitted the necessary declarations by third parties and/or fully declared the subcontracting proportion (subject to technical and administrative compliance, including lack of blacklisting), the recommended bidder's bid should have been discarded *ab initio*.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22<sup>nd</sup> February 2022 and its verbal submission during the virtual hearing held on 12<sup>th</sup> April 2022, in that:

*“That H-Imsida Local Council is in disagreement with the Objection filed by Alfred Galea for Tender for the Collection of Residential Bulky Refuse & Fly Tipping from Msida and part of Swatar, in an Environmentally Friendly Manner, for reasons provided hereunder;”*

- a) That the recommended bidder was deemed technically compliant by the Evaluation Committee since all Note 3 requirements were provided by the recommended bidder and any requests for clarification were answered by the recommended bidder, within the established deadline and to the satisfaction of the Evaluation Committee;
- b) That, the Tender does not specifically require for the vehicle or vehicles to be owned by the tendered.
- c) That, Section 3 Terms of Reference, denoted as Note 3, states;

*“4.2.3 The Contractor is required at all times to perform the Service in accordance with the highest standard of efficiency, courtesy and cleanliness. He shall, in particular; avoid causing any nuisance to the householder and the general public and shall ensure that no damage is caused to the householder's property in the execution of the service.*

#### *Vehicle Type and GPP*

*The Contractor shall at all times during the operation of the contract make use of those vehicles approved by the Local Council as mentioned in the following clause, and have been duly registered by the Malta Environment and Planning Authority, by virtue of Legal Notice 106 of 2007 and any other further legal notices published.*

*The Contractor shall only make use of vehicles which have been approved by the Council's Representative at least 7 days before the commencement date of the Contract. Any vehicle obtained thereafter will be subject to the approval of the Council's Representative.*

*Any vehicle not falling under these criteria will not be permitted to operate under this contract. The Contractor will be obliged to submit a copy of the registration document issued by MEPA together with a copy of the vehicle logbook and a photograph of the vehicle. Failing to submit such documents within the above-mentioned stipulated time, may constitute grounds for the annulment of the decision to award the contract. In such case, the Local Council shall award the tender to the second successful tenderer.*

*All vehicles used in this tender should have an emission level not less than euro IV (4) according to EC Directive 2005/55/EC. Where vehicles are not certified as EURO IV, but technical after-treatment has achieved the same standard, this should be documented in the tender application. The bidder must present the technical sheets of the vehicles where emission standards are defined. For those vehicles where technical upgrade has achieved EURO IV standard the measures must be documented and included in the tender application, and this must be approved by a credible third party.”*

Hence Clause 4.2.3. of Section 3 requires that vehicles used must be approved by the Council's Representative at least 7 days before the start of the Contract, whereas the ownership of the vehicle is not a requirement according to this section, as part of Note 3.

- d) That, Regulation 252 (1) of the Public Procurement Regulations (SI. 601.03) provide for the reliance of the economic operator on the capacities of other entities.

*“235. (1) With regard to criteria relating to economic and financial standing as set out pursuant to regulations 218 to 221, and to criteria relating to technical and professional ability as set out pursuant to regulations 222 and 223, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in regulation 232(f), or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.”*

- e) That, in the case of the recommended bidder, Melchior Dimech, the Evaluation Committee noted the bidder had submitted the documentation for four different vehicles. The Registered vehicle owner on the logbooks of all vehicles states "DIMBROS LTD";
- f) That, in accordance with the terms of Regulation 252(1) of S.I. 601.03, a bidder may rely on the capacities of other entities provided that it is proved to the contracting authority that the resources are in the bidder's disposal by producing a commitment by those entities to that effect;
- g) That, the Evaluation Committee noted that the bidder Melchior Dimech is in fact a shareholder of the Company "DIMBROS LTD" as confirmed by the Malta Business Registry and deemed it necessary to send a request for clarification to the bidder on this matter to confirm whether the

Company Director confirms the commitment to the bidder to rely on the Company's capacities i.e. the use of the vehicles.

- h) That, in accordance with Regulation 62 (2) of S.L. 601.03; *“(2) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit: Provided that such requests are made in full compliance with the principles of equal treatment and transparency.”* Hence, given that "Administrative Compliance" does not fall within the remits of "Note 3", the Evaluation Committee had the power to request clarifications on the matter;
- i) That, on 28/09/2021 at 12:55 hrs, the Chairperson of the Evaluation Committee submitted a Request for Clarification to the bidder Melchior Dimech, requiring that the bidder submits "a Board Resolution or Letter of Authorisation signed by the registered owner of the vehicle/ vehicles, authorizing the bidder to utilize the vehicle/ vehicles proposed in the bid for the collection of residential bulky refuse and fly tipping from Msida and part of Swatar", within five working days from the request. This Request for Clarification was answered by the bidder on the same day, providing a letter of authorization signed by Ms Josephine Dimech, Director of Dimbros Ltd;
- j) That, the Evaluation Committee was satisfied with the reply provided by the bidder Melchior Dimech including the Letter of Authorization signed by the Company Director, proving to the satisfaction of the contracting authority that it will have at its disposal the resources necessary to perform the Services required;
- k) That, the Evaluation Committee acted in a proportionate manner, as required by general principles emerging from the EU Treaties, Directive 2014/24 and specifically Regulation 39 (1) of S.L. 601.03 which states: *“39. (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”*

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 8<sup>th</sup> March 2022 and its verbal submission during the virtual hearing held on 12<sup>th</sup> April 2022, in that:

- a) That the objector basis his objection on Article 235(1) of the Public Procurement Regulations which allows an economic operator to rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. This Article stipulates that in such cases, the economic operator is to prove to the contracting authority that it will have at its disposal the necessary resources. The objector claims that the respondent failed to do so.
- b) That the respondent is one of the shareholders of the company Dimbros Limited (C32506), which is the company which shall provide the necessary resources for the respondent to be able to satisfy the requirements of the tender in question. Therefore there is no doubt that such vehicles will be provided since the respondent has absolute control over the company which will provide him with the resources necessary, and thus over the mentioned vehicles.

- c) That the objector alleges that the respondent is not technically compliant since he does not own the necessary vehicles requested in the tender. That with all due respect, the objector is not correct in stating so, and this in light of the above-mentioned Article of the Regulations which specifically allows economic operators to rely on the capacities of other entities.
- d) That it is a well-known fact that the respondent is a shareholder in the company Dimbros Limited and such information is available publicly, when one accesses the Malta Business Registry. Article 235(1) of the above-mentioned Regulation holds that the economic operator needs to prove that the resources will be at his disposal. The respondent needs no better proof than his shareholding in the above-mentioned company for the contracting authority to be satisfied that the respondent will have at his disposal, the vehicles in question.

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

- a) This Board will initially list out what matters it is considering as relevant to this case:
  - i. Firstly, this Board will delve into the argument as put forward by the Preferred Bidder whereby it was stated: *“ That it is a well-known fact that the respondent is a shareholder in the company Dimbros Limited and such information is available publicly, when one accesses the Malta Business Registry. Article 235(1) of the above-mentioned Regulation holds that the economic operator needs to prove that the resources will be at his disposal. The respondent needs no better proof than his shareholding in the above-mentioned company for the contracting authority to be satisfied that the respondent will have at his disposal, the vehicles in question.”* This Board opines that the Appellant, by just having 25% shareholding in Dimbros Limited, while at the same time not being a director of the aforementioned company, is in no way proof enough that the Appellant will have at its disposal the vehicles in question. 25% shareholding is a minority holding, while the executive powers of the company rests with the directors appointed by the shareholders.
  - ii. Secondly, clause 4.2.3 of Section 3 of the Tender Document did not enter the merits of the ownership of the vehicles. Amongst other points, it stated, *“The Contractor shall only make use of vehicles which have been approved by the Council's Representatives.....”*
- b) The Evaluation Committee, whilst reviewing the bid of the Appellant, noted that no photographs of the vehicles were provided, whilst also noting that the vehicle logbooks provided are all registered on the owner Dimbros Limited/ Joseph Dimech. At this point the Evaluation Committee requested the photographs to be duly provided and for the submission of a Board Resolution or Letter of Authorisation duly signed by the registered owner of the vehicle/s, authorising the bidder to utilise the vehicle/s proposed in the bid. This Board notes that these requests were immediately provided by the Appellant, in turn making his bid technically compliant.



Therefore, when considering all of the above, this Board does not uphold the grievances brought forward by the Appellant.

**The 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

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member