

PUBLIC CONTRACTS REVIEW BOARD

Case 1525– CT 2262/2020 – Service Tender for the Management of Asbestos containing Waste (including the provision of Asbestos Containers and Air Monitoring) from Wasteserv Sites

The tender was published on the 15th July 2020 and the closing date of the tender was the 25th August 2020. The estimated value of the tender (exclusive of VAT) was € 469,440.

On the 30th November 2020 PT Matic Environmental Services Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds of not being the cheapest priced bid.

A deposit of € 2,347 was paid.

There were three (3) bidders.

On 6th January 2021 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – PT Matic Environmental Services Ltd

Dr Ryan Pace	Legal Representative
Eng. Oliver Fenech	Representative
Ms Liz Barbaro Sant	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Gavin Gulia	Legal Representative
Eng Andrea Brincat	Chairperson Evaluation Committee
Mr Domenico Savio Barbara	Member Evaluation Committee
Ms Fabiola Andrea Useche Sanchez	Member Evaluation Committee
Ms Stephanie Scicluna Laiviera	Representative

Recommended Bidder – M Stream Ltd

Mr Zsolt Tuske	Representative
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Department of Contracts

Mr Nicholas Aquilina	Representative
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Dr Anthony Cassar 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. He then invited submissions.

Dr Ryan Pace Legal Representative for PT Matic Environmental Services Ltd (PT Matic) stated that this appeal revolves on the decisions of the Evaluation Committee. For a start the preferred bidders offer was not the cheapest and therefore the tender hinges on which bidder met the three cumulative criteria i.e. being the cheapest, administratively compliant and technically compliant. The Contracting Authority contends that the offer cannot be judged cumulatively; however one must look at the end result of the contract. It appears as if the evaluation committee chose the successful bidder from the start of the process.

Dr Gavin Gulia Legal Representative for Wasteserv Malta Ltd said that Appellants were claiming that the selection process was not rigorous and whether the evaluation process was a cumulative or sequential one, therefore the Authority waits for the Appellants to prove these claims. The contract specifies that it follows the Standard Operating Procedures (SoP) which mentions a sequential process and Appellants do not appear to have any conflict with this.

Engineer Oliver Fenech (464982M) called as a witness by Appellants testified on oath that for the last twelve years he has been the General Manager of PT Matic a company which has been providing environmental services for 25 years, including focussing on the collection of hazardous waste. The tender requested regular collection of asbestos waste and its eventual disposal abroad involving special vehicles to collect the waste and its essential storage in special sites authorised by the Environment and Resources Authority (ERA) until exported. Due to the hazardous nature of asbestos waste there are serious legal aspects to be considered and proper documents to be submitted. The offer is based on collection from sites, loading on vehicles, storage, packing of the material (restricted to night time hours) loading of vehicles (at set times in early morning), tracking of vehicle movements and storage in special sites. Material is accumulated until there is enough to fill a container for export. To fulfil these stages a series of permits is necessary, namely a Waste Broker Permit, a Waste Carrier Permit (specific for hazardous waste), an Export Permit (to authorised processing plants abroad) which is the end result imposed by the tender.

The tender requested a broker permit and a waste carrier permit or a declaration committing bidder to obtain them on being awarded the tender. Witness stated that the export permit was lengthy to obtain and difficult to find shipping companies and acceptors of the waste – one is conservatively looking at about five or six months – the tender makes no mention of the need of an export permit. With regard to storage facilities witness stated that there are only two private economic operators in Malta that have this facility and the preferred bidder is not one of them.

Insurance is also a very pertinent point, as normal insurance policies generally exclude any cover for asbestos. Appellants offered asbestos specific policies covering all aspects of the envisaged operation and included employers' liability, which due to the nature of asbestos, are very difficult to obtain and have very high premia. All the above elements have been taken into account in the case of PT Matic offer and are reflected in the higher priced bid.

Dr Gavin Gulia Legal Representative for Wasteserv Ltd said that points have been raised which were not detailed in the letter of appeal. He therefore wished to consult with his clients and asked for a deferment.

The Chairman said that whilst he agreed with Dr Gulia's request it was up to Dr Pace to decide if prior to any deferments he wished to hear all his witnesses.

Dr Gulia objected to the suggested procedure since members of the evaluation committee would not be aware of the likely questions they would face.

The Chairman pointed out that it was normal procedure for members of the evaluation committee to be called to testify and it was in order for the Appellants to proceed with hearing the testimony of witnesses.

Engineer Andrea Brincat (461784M) called as a witness by Appellants testified on oath that he was the Chairperson of the Evaluation Committee. His qualification was as a Mechanical Engineer. He stated that the tender was written by technical persons not necessarily members of the evaluation committee, but in his case he was only involved in the adjudication. The tender permits which could be obtained after the award of the tender were as laid down by the ERA. Witness could not recall what permits the preferred bidder had offered but he undertook to have this information at a subsequent hearing. Witness also could not recall what insurance policies the preferred bidder had offered but undertook to check the terms offered as different procedures might entail different policies. When asked what options were offered by the preferred bidder for the storage of asbestos, witness stated that the offer might not involve storage if one can dispose of it in an alternative way.

The Chairman adjourned the hearing to the 14th January 2021 at 9.00am. He then thanked the parties for their submissions and declared the hearing closed.

SECOND HEARING

On the 20th January 2021 the Public Contracts Review board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a second public virtual hearing to further discuss the objections.

The Attendance for this public hearing was as follows:

Appellants – PT Matic Environmental Services Ltd

Dr Ryan Pace	Legal Representative
Eng. Oliver Fenech	Representative
Ms Liz Barbaro Sant	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Gavin Gulia	Legal Representative
Mr Domenico Savio Barbara	Member Evaluation Committee
Ms Fabiola Andrea Useche Sanchez	Member Evaluation Committee
Ms Stephanie Scicluna Laiviera	Representative
Ms Branika Xuereb	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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After welcoming the parties the Chairman noted that Engineer Andrea Muscat who at the last hearing had undertaken to produce information on matters that he could not recall in his testimony has forwarded an affidavit as he was unable to attend the hearing.

Dr Ryan Pace expressed his disappointment at this. Today’s meeting had been fixed for some time and witness had ample time to make alternative arrangements to enable him to attend this hearing. It was unfair on Appellants as this prevented witness from being questioned directly. Dr Pace deplored witness’s absence which was not acceptable, but in the circumstances had no alternative except to accept the situation.

Dr Gulia said that Engineer Brincat had a private commitment which he could not change and so had offered an affidavit as an alternative and asked another evaluator to answer any questions the Appellants might have. .

The Chairman said that Engineer Brincat’s action was not excusable. The Board could not be expected to keep deferring cases to suit personal requirements.

Mr Domenico Savio Barbara (55567M) called as a witness by Appellants testified on oath that he was one of the evaluators as well as occupying the position of Waste Manager. He was part involved in the writing of the tender. He confirmed that PT Matic’s offer included the collection, storage and export of the asbestos waste whilst M Stream did not offer any storage of materials as they planned to export the waste straight after collection. This tallied with the Authority’s proposal to change the system of exporting without storage, in line with clause 4.2.d.5 of the tender.

Witness confirmed that the objective of the tender was to export the collected waste for eventual disposal abroad. He agreed that the tender did not request bidders to have an export permit, although reading between the lines this had to be assumed since export was envisaged in the tender, since clause 4.2.d.18 requested the Movement Tracking Form if direct export was to be resorted to.

In reply to a question from the Chairman witness stated that the practicability of directly exporting small quantities of waste was not considered by the evaluators as this was a matter for the bidder.

Proceeding with his testimony witness stated that since the objective of the tender was the export of asbestos waste the evaluation committee took it for granted that although the export permit was not

submitted in the tender documents it would be applied for once the tender was awarded. The evaluators were not aware of the lengthy process necessary to obtain an export permit and this point was not considered during evaluation since they did not consider the time frame of the tender – they merely followed what the tender requested. Witness agreed that this might depart from the tender objectives but they were satisfied that what the tender requested had been fulfilled. Should it be the case that obtaining an export permit was unduly lengthy it would be up to Wasteserv to decide what to do with the waste. In relation to insurance policies witness stated that the tender did not specify asbestos risks, and did not seek any specific cover.

Questioned by Dr Gulia witness said that the committee followed the tender documents requirements and all information sought was supplied. The Broker Permit provided by the preferred bidder was required for all processes, and they did not need a Waste Carrier permit for export. With regard to insurance the tender did not ask for asbestos risks cover and no other bidder had raised any of these points.

Mr Oliver Fenech (464982M) recalled to give further testimony stated on oath that the Waste Broker permit was not sufficient to enable exportation to take place but a further Movement permit was not necessary. A Tracking permit can only be issued once an export permit was in hand. The latter took minimum three months and maximum six months to obtain as it had to follow strict European Union regulations – it could not be obtained any earlier than three months from applying for it.

Dr Pace made reference to the case *Alberta vs Water Service Corporation* where the Board made it very clear that the tender documents must reflect the objectives of the Authority and that the specifications must be made very clear to reach the real objectives. This case relates to the collection, storage and exporting of hazardous waste with Wasteserv's final objective being the exportation of the waste material – it stands to reason that to reach such objective an export permit is necessary. Mr Barbara in his testimony claimed that the final objective had not been considered; otherwise it would have been impossible to grant the tender to someone ready to wait for permits which could take three to six months to obtain thus holding up the start of the operation. Was the Authority ready for the postponement of the operation whilst the bidder waited for permits for months?

A public entity could not possibly grant a tender to a preferred bidder who did not meet their objectives. The evaluation committee also ignored the onerous and lengthy process necessary to obtain a policy covering asbestos risks and which was impossible to obtain in twenty days. In this case the Authority had chosen a bidder who was going to create problems for them. The objective of the tender was export and the lack of consideration of that objective by the evaluation committee is obvious. According to the testimony of Mr Barbara the evaluators were not aware of the insurance requirements and one must ask how adjudication could be carried out ignoring the lack of permits and proper insurance cover. It is evident that the tender objectives were ignored and the evaluation was carried out in isolation. The Board should request a re-evaluation with these points taken into consideration.

Dr Gulia stated that Appellants had ignored taking action on points, such as objectives, that they should have contested prior to the evaluation of the tender. They had not provided one single proof that the evaluation committee did anything wrong. The insurance policies supplied fulfilled what the tender

requested whilst the export permit could be obtained after the award of the tender. The Authority's letter of reply and the witnesses heard could only lead to the approval of the award.

Dr Pace concluded by saying that there is a difference between what the tender requested and its objectives and with regard to export permits it was easy to say that they could be obtained after the grant of the tender but in reality this was a lengthy process which would seriously stall the start of operations.

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

End of Minutes

Decision

This Board,

having noted this objection filed by PT Matic Environmental Services Ltd (hereinafter referred to as the Appellants) on 30th November 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2262/2020 listed as case No.1525 in the records of the Public Contracts Review Board recommended for award by Wasteserv Malta Ltd (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Ryan Pace

Appearing for the Contracting Authority: Dr Gavin Gulia

Appearing for the Department of Contracts: Mr Nicholas Aquilina

Appearing for the Recommended Bidder: Mr Zsolt Tuske

Whereby, the Appellants contend that:

- a) **The Evaluation Committee, in their deliberation, failed to take into consideration the fact that, the transportation and export of ‘Asbestos’ which is classified as a hazardous material, requires special export licence and selective insurance coverage. In this regard, Appellants maintain that, the process for the procurement of such documentation takes a minimum period of three months, so that, there will be a delay in the commencement of the execution of the tendered assignment if the recommended bidder is awarded the tender, since the latter is not in possession of such vital documentation.**
- b) **Appellants also maintain that, although such permits and insurances were not requested in the tender document, the Evaluation Committee were in duty bound to take such issues into consideration, during the evaluation process, knowing full well that the type of material to be disposed of is highly hazardous.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 6th December 2020 and its verbal submissions during the virtual hearings held on 6th and 20th January 2021, in that:

- a) **The Authority insists that, the evaluation process was carried out in accordance with the regulations of Public Procurement. At the same instance, the Evaluation Committee had to abide by the principle of ‘Self -Limitation’**

and the recommended bidder's offer complied with all the regulations as duly stipulated in the tender document.

- b) The Authority also maintains that, Appellants failed to substantiate their alleged claims and in this respect, the Authority contends that the evaluation process was carried out in a just and fair manner.**

This same Board also noted the testimony of the witnesses namely:

Eng. Oliver Fenech duly summoned by PT Matic Environmental Services Ltd

Eng. Andrea Brincat duly summoned by PT Matic Environmental Services Ltd

Mr Domenico Savio Barbara duly summoned by PT Matic Environmental Services Ltd

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the technical witnesses duly summoned, opines that, the issues that deserve consideration are two-fold namely:

- a) The Authority's Objectives and**
- b) The Evaluation Process carried out**

1. Authority's Objectives

1.1. Through an issue of a public tender, the Contracting Authority is officially requesting offers for works or services to be executed in order to attain the Authority's objectives. At the same instance, it must be

emphasized that such objectives are attained through the stipulated technical specifications and conditions stipulated in the tender document.

- 1.2. It must also be borne in mind that the technical specifications and conditions must be formulated so as to reflect what the Contracting Authority is actually requesting, without any ambiguous features and in a simplistic manner to enable potential bidders to submit their offers. In all respects and instances, the specifications and conditions of the tender document should reflect the ultimate objectives of the Contracting Authority's tendered works.**
- 1.3. In this particular case, the Authority's objectives consist of the collection and the disposal of 'Asbestos' containing material through export of same.**
- 1.4. It is being noted that, the material to be disposed of by the Authority consists of hazardous elements so that, to achieve its objective, the Authority must include all the requirements that are necessary to execute such an assignment and these include all transportation and export processes of such hazardous material. It must be said that these necessary requirements must be clearly stipulated in the tender document.**

1.5. From the submissions made during the two hearings held, this Board was made aware that the handling and disposal of ‘Asbestos’ entails the procurement of special permits and insurances to enable the contractor to execute the tendered works. Furthermore, this Board was informed that, to obtain such permits and insurances, there is a minimum timeframe of three months. In this respect, this Board notes that, such important permits and insurances were not required to be submitted with the offer, in the tender document.

1.6. It must be pointed out that, to achieve its ultimate objectives, the Contracting Authority is in duty bound to ascertain and specify the exact requirements which bidders must possess for the proper execution of the tendered works. In this particular case, although the recommended bidder was compliant with what the Authority requested, the latter failed to include existing important issues which, in the opinion of this Board, might delay the commencement of the execution of the tender works, if such issues are not resolved prior to the recommendation of award.

2. The Evaluation Process

2.1. With regard to Appellants’ second contention, this Board after having examined the evaluation report and other relevant documentation, would confirm that, the Evaluation committee abided by the principle

of self-limitation, however, this Board notes from what it was made aware, ,, that there was lack of knowledge of what was specifically required in the handling of such hazardous material among the members.

- 2.2. From the testimony of Mr Domenico Savio Barbara a technical evaluator, this Board noted that, the evaluators were not aware of the lengthy process which is necessary for the procurement of an export permit for this particular disposal of material, neither did the Evaluators consider such timeframe during the evaluation process. At the same instance, the witness confirmed that the non-consideration of such an issue may not meet the Authority's objectives.**
- 2.3. This Board also noted that, the recommended bidders' offer did not include any storage of materials since they planned to export such waste directly after collection. In this regard, this Board opines that, the Evaluation committee should have sought more information from the recommended bidder as to the practicality and financial viability of such a procedure. It is in the interest of the Authority to ensure that such a system is commercially viable for the contractor to safeguard the smooth execution of the tendered works, without any undue interruptions.**

2.4. This Board would respectfully emphasize that, although the tender document did not stipulate the submission of the export licence and the necessary insurance coverage during the handling and exportation of such a hazardous element, the Evaluation Committee had the necessary leeway to enquire and investigate deeply as to what, such a procedure requires and the minimum period for the obtaining of such documentation.

In conclusion, this Board opines that:

- a) The Evaluation Committee adhered to the principle of self-limitation without taking into consideration important issues namely ‘Export Licence’ and ‘Special Insurance’ requirements in order to handle and dispose of this hazardous material. Through the testimony of the technical evaluator, it was established that the Evaluation Committee were not aware of the fact that, the procurement of such important documentation takes a minimum period of three months and such a delay might hamper the ultimate objectives of the tender.**
- b) The ultimate objective of the Contracting Authority is to dispose of ‘Asbestos Containing Material’, so that the Evaluation Committee should apply certain leeway in investigating further and establish whether the attainment of the necessary permits and insurances, will**

hamper the commencement of the execution of the tendered works, after the award of the tender.

- c) The Evaluation Committee should also obtain assurances from the recommended bidder that, since no storage of the material was taken into consideration, in their offer, a direct export handling procedure is feasible in practical and commercial terms.**

In view of the above, this Board,

- i. cancels the award of the tender,**
- ii. directs that a re-evaluation process be carried out, taking into consideration this Board's findings,**
- iii. directs that Appellants' offer be reintegrated in the re-evaluation process,**
- iv. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
26th January 2021

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member