

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1825 – CT2314/2021 – Tender for the Provision of Services for Municipal Waste Collection for All Health Entities using Environmentally Transportation Services – Lot 1**

**19<sup>th</sup> December 2022**

The Board,

Having noted the letter of objection filed by Dr Martin Fenech acting for and on behalf of Mr Joseph Cassar Agius and Mr Kevin Farrugia, (hereinafter referred to as the appellant) filed on the 21<sup>st</sup> November 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 24<sup>th</sup> November 2022;

Having heard and evaluated the testimony of the witness Mr Hristov Hristo Ivanov (Representative of the Central Procurement and Supplies Unit) as summoned by Dr Martin Fenech acting for Mr Joseph Cassar Agius and Mr Kevin Farrugia;

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 14<sup>th</sup> December 2022 hereunder-reproduced.

### **Minutes**

**Case 1825 – CT 2314/2021 – Tender for the Provision of Services for Municipal Waste Collection for all Health Entities using Environmentally Friendly Transportation Services.**

#### **LOT 1**

The tender was issued on the 4<sup>th</sup> February 2022 and the closing date was the 8<sup>th</sup> March 2022. The estimated value of the tender excluding VAT, on Lot 1 was € 91,934.40.

On the 21<sup>st</sup> November 2022 Joseph Cassar Agius and Kevin Farrugia filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer on Lot 1 was not financially compliant.

A deposit of € 459 was paid on Lot 1.

There were four (4) bids.

On the 14<sup>th</sup> December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Joseph Cassar Agius & Kevin Farrugia**

Dr Martin Fenech Legal Representative

**Contracting Authority – Central Procurement and Supplies Unit**

Dr Leon Camilleri Legal Representative  
Dr Alexia Farrugia Zrinzo Legal Representative  
Mr Ramon Debattista Chairperson Evaluation Committee  
Mr Hristov Hristo Ivanov Representative

**Preferred Bidder – WM Environmental Ltd**

Dr John Bonello Legal Representative

**Director of Contracts**

Dr Mark Anthony Debono Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Martin Fenech Legal Representative for Joseph Cassar Agius & Kevin Farrugia stated that the bid placed by these individuals was cancelled due to their failure to reply to a rectification request. This was a harsh decision as their bid was two-thirds cheaper than the winning bid. Further, no hard copy was sent of the rectification request and his clients were only advised by email which is totally unacceptable. The Contracting Authority should have tried harder to contact the Appellant.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit referred to Regulation 48 of the PPR which stated that all communications shall be performed using electronic means. Maintaining equal treatment between bidders does not allow individual contact. It is up to the bidder to follow the ePPS process. The principle of self-limitation dictates that if a request is not replied to, there is no alternative except to disqualify. The clarification on an abnormally low bid was not replied to.

Dr John Bonello Legal Representative for WM Environmental Ltd said that the preferred bidder does not see the point of this appeal as there was a failure to reply to a rectification request – this can only mean automatic disqualification.

Mr Hristov Hristo Ivanov (690120L) called as a witness by the Appellant testified on oath that every communication is sent on line and there is no record that there was a reply by the Appellant. Requests for clarification in this case would be sent by the witness and the system notifies participants automatically through an e-mail.

This concluded the testimony.

Dr Fenech re-iterated that there is no proof that the e-mail referred to was received by the bidder. Since Appellant's bid was cheaper it should have been considered further and his failure to reply should not mean disqualification.

Dr Bonello noted that the bidder is obliged to check the ePPS system which is transparent and open to all bidders.

Dr Camilleri stated that the fact that the bid was cheaper cannot be part of the appeal as the offer is abnormally low. The request for clarification was ignored and the regulations on this point are clear – if the request is not acted upon then there is no alternative except to disqualify. There is no avenue in the system for alternative communication except through the system established by law.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 14<sup>th</sup> December 2022.

Having noted the objection filed by Mr Joseph Cassar Agius and Mr Kevin Farrugia (hereinafter referred to as the Appellant) on 21<sup>st</sup> November 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2314/2022 listed as case No. 1825 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Martin Fenech

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia J Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr John Bonello

Whereby, the Appellant contends that:

- a) The Appellant was disqualified because they did not reply to a rectification request. However, the department does have the telephone number of the Appellant to communicate with bidders and this did not happen. The email notification is not an official way of communicating as this should have been done through registered mail.
- b) The bid of the appellant is cheaper to the tune of €24,000, therefore more effort should have been made to save the tender in the interest of the state.
- c) The request was computer generated and therefore it could have easily been sent to the junk mail folder.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24<sup>th</sup> November 2022 and its verbal submission during the hearing held on 14<sup>th</sup> December 2022, in that:

- a) The first grievance of the objector provides that the reason that an offer was rejected on the basis that a request for clarification was not replied is null and void. Regulation 243 clearly stated that in the case of no response for a request for clarification with regards to potentially abnormally low offers shall mean an acceptance that the offer is abnormally low, hence not financially compliant. Regulation 243(4) provides that: *"(4) The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in sub-regulation (2)."*

In line with the above quoted, if no reply to a request for explanations means an admission of abnormally low offer, then the evaluation committee was law bound to reject the objector's offer. The objector goes on to state that the Department had the telephone number of bidders to communicate with bidders and did not. One of the fundamental principles of Public Procurement is the equal treatment of all bidders. The Department of Contracts and Contracting Authorities use the electronic system to communicate with bidders which is fair transparent and ensures that this fundamental principle is respected. This obligation emanates from regulation 48 of the Public Procurement Regulations (PPR) which provides that: *"48.(1) All communication and information exchange under these regulations, including electronic submission, shall be performed using electronic means of communication in accordance with the requirements of this regulation. (2) The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure."*

The method used in this case an (sic) in all other case (sic) is that through the Electronic Public Procurement System which is non-discriminatory, and used by all economic operators in Malta. The objector in this case is trying to reinvent the wheel and suggesting the use of an untransparent (sic) method of communication, when this honourable Board is well aware that there is a system which works in place which is far more transparent and is standard practice and in line with the Public Procurement Regulations which provides for this system in regulation 2: *"government's e-procurement platform" means the electronic platform for procurement as established by the Director*" Moreover the Objector goes on to say that notifications have to be formally done by registered Mail. This grievance lacks legal basis as the public procurement regulations never mentions registered mail and to the contrary requires that communication has to be done electronically.

- b) Second Grievance - In its second grievance the objector argues that since their offer was cheaper than the recommended offer, the evaluation committee should have put 'an extra effort'. This grievance departs from all fundamental principles of public procurement and is legally unfounded if not dangerous. The evaluation committee, as is well established, is bound by the principles of self limitation, equal treatment and proportionality. If the PPR provide that if a request for

clarification/explanation is not addressed, the offer shall be deemed as abnormally low and therefore to be rejected, then the evaluation committee had no other option than to disqualify the tender. Anything more than that would have been illegal. Moreover, the objector is filing the present appeal with the line of thought that a cheapest offer is always a more advantageous one and shall be recommended for award 'at all costs' (with extra efforts). As this Honourable Board is well aware the notion of abnormally low tenders and the principles which regulate this ground for rejection are now well established with a number of decisions pronounced by this Honourable Board and by the Honourable Court of Appeal.

- c) Third Grievance - The third grievance states that since the email is computer generated it could easily find itself in the junk section of the email system. This third grievance is also unfounded and does not in any way serve as a justifiable excuse or reason to reconsider the offer of the objector. In case 1742 which dealt with a situation where emails were being stopped by a spam filter in the economic operator's email system, this honourable board decided that: *“This Board opines that such issue rests on the IT infrastructure of the appellant company. Given that there were other means by which the appellant could have confirmed the existence of such clarification notes, such as directly logging into the website / system of ePPS, arguments brought about by appellant regarding natural justice are deemed to be irrelevant.”* The email system is not the primary method of notification as notifications are published on the e-PPS system. The email serves as a notification that a new communication has been uploaded on the e-PPS system. Moreover, it is expected that an economic operator who has a pending tender, regular (sic) logs on the e-pps system in order to keep updated with the evaluation process are made (sic).

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 witness duly summoned, will now consider Appellant's grievances.

- a) As from the outset this Board declares that it agrees with the procedure as adopted by the evaluation committee when it requested the economic operator, now appellant, to clarify his financial offer in line with regulation 243 (1) of the Public Procurement Regulations (“PPR”) which states *“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.”* (bold & underline emphasis added). The sole fact that the bid, as submitted by the appellant, was more than 29% lower than the estimated procurement value, does in the opinion of this Board, *prima facie*, appear to be abnormally low.
- b) It is an undisputed fact that the clarification request was issued by the Evaluation Committee. It was issued, in the Board's opinion, using the correct medium, i.e. through the ePPS platform which then again sends an email notification to the economic operators participating in the tendering procedure. This as per Regulation 48 (1) of the PPR which states *“All communication and information*

*exchange under these regulations, including electronic submission, shall be performed using electronic means of communication in accordance with the requirements of this regulation. (2) The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure.”*

- c) It is also an undisputed fact that the appellant did not provide a response to the clarification note as issued.
- d) Therefore, all argumentation as brought forward by Appellant that the Contracting Authority and / or the Evaluation Committee should have put in more effort in order to ‘save’ the offer or that registered mail was to be used, are totally rejected by this Board. This, among others, in order to safeguard major public procurement principles on transparency and equal treatment of all economic operators. It is after all, the duty of the Appellant to act as a diligent economic operator as per pre-established rules and procedures.
- e) The fact that the bid as submitted by the Appellant is much cheaper than other participants was exactly the reason why the evaluation committee had to follow the procedure as listed in regulation 243(1). Once a bid is deemed as non-compliant, due to failure of reply by the economic operator as per the General Rules Governing Tenders, the fact that it’s bid is cheaper is deemed to be irrelevant to proceedings.

Hence, this Board does not uphold the Appellant’s grievances.

**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 Richard Matrenza**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member