

PUBLIC CONTRACTS REVIEW BOARD

Case 1806 – CT2311/2021 – Tender for the Removal, Packaging and Disposal of Asbestos Containing Material in an Environmentally Friendly manner from Mount Carmel Hospital, Attard

3rd February 2023

The Board,

Having noted the letter of objection filed by Dr Ryan C. Pace acting for and on behalf of PT Matic Environmental Services Limited, (hereinafter referred to as the appellant) filed on the 10th October 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 17th October 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as DoC) filed on the 19th October 2022;

Having also noted the letter of reply filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates acting for M-Stream Limited (hereinafter referred to as the Preferred Bidder) filed on the 20th October 2022;

Having heard and evaluated the testimony of the witness Ing. Oliver Fenech (Representative of PT Matic Environmental Services Limited) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

Having heard and evaluated the testimony of the witness Mr Charles DeBrincat (Representative of Environment and Resources Authority) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

Having heard and evaluated the testimony of the witness Ms Ruth Spiteri (Chairperson of the Evaluation Committee) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

Having heard and evaluated the testimony of the witness Ing Franco Cassar (Member of the Evaluation Committee) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

Having heard and evaluated the testimony of the witness Ing Franco Cassar (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 1st November 2022 hereunder-reproduced;

Minutes

Case 1806 – CT 2311/2021 – Tender for the Removal, Packaging and Disposal of Asbestos containing Material from Mount Carmel Hospital

The tender was issued on the 3rd February 2022 and the closing date was the 8th March 2022. The estimated value of the tender excluding VAT, was € 131,175.

On the 10th October 2022 PT Matic Environmental Services Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not the cheapest priced tender.

A deposit of € 655 was paid.

There were three (3) bids.

On the 1st November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – PT Matic Environmental Services Ltd

Dr Ryan C Pace	Legal Representative
Eng Oliver Fenech	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Ms Ruth Spiteri	Chairperson Evaluation Committee
Eng Franco Cassar	Member Evaluation Committee
Mr Saviour Micallef	Representative
Mr Clifford Farrugia	Representative
Ms Alison Gatt	Representative

Preferred Bidder – M-Stream Ltd

Dr John L Gauci	Legal Representative
Mr Wallace Fino	Representative
Mr Gilbert Bonnici	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Ryan Pace Legal Representative for PT Matic Environmental Services Ltd (PT Matic) requested hearing of witnesses at start of his submissions.

Engineer Oliver Fenech (464982M) called to testify by Appellant stated on oath that he is the General Manager of PT Matic who have provided environmental services focusing on hazardous waste over a period of thirty years. He explained that the tender requested the removal of various quantities of asbestos from Mount Carmel Hospital. After removal the waste had to be exported to authorised companies in Europe. Witness detailed the European Commission regulations on the methods to be employed on this type of waste involving licences, many documents, insurance, details of carriers and transit authorities till final destination. Permit for this lengthy process normally takes between four to eight months. PT Matic is the only holder of an export permit for this type of waste. The usual policy of insurance normally contain certain exclusions including the handling of asbestos. The Contracting Authority specified that it required specific coverage for asbestos and requested this to be submitted with the bid.

In reply to a question from Dr John Gauci Legal Representative for M-Stream Ltd witness stated that he was not *au fait* with the submissions of other bidders and therefore he could not exclude the possibility that the preferred bidder had provided insurance as requested.

Mr Charles Debrincat (17294G) called as a witness by the Appellant testified on oath that he is a Senior Environmental Protection Officer in the export permit unit at ERA with responsibility for issuing export permits. He detailed the lengthy process to be followed for exporting asbestos under EU Regulation 1013 including documents, statutory contract between exporter and consignee and between applicant and waste producer. Other requirements were a financial guarantee, insurance policy and proof of environmental authorisation.

Witness stated that as at this date there is only one active permit (22/000035) issued to PT Matic on 21st October 2022 expiring 31st August 2023. This was not a renewal but a fresh application. Prior to this there was an earlier application to export issued in July 2021 and expiring in July 2022.

In reply to questions from Dr Leon Camilleri Legal Representative for CPSU witness said that at present there are no pending applications to export. Asked to detail past permits he quoted the following:

- Permit issued to Green Skips expired on 14th April 2021
- Permit issued to PT Matic expired on 6th October 2021
- Application by M-Stream Ltd not submitted
- Permit issued to Green Skips expired 7th July 2022
- Application by PT Matic withdrawn.

Witness continued by stating that any application submitted now will take between six to nine months to process depending on the documentation required and the quality of information submitted by applicant. Very rarely would the process take less than three months.

Questioned by Dr Gauci witness said that Green Skips submitted two applications recently. On receipt of the application checks are made on the origin of the waste – immaterial of whether it is related to a tender. Once an application expires there is no renewal process and a new application is required. No application by Green Skips has been refused.

In reply to questions put by Dr Camilleri witness said that Applicant has to declare the origin of the waste – very occasionally a broker could apply without knowing the source of the waste.

Replying to further questions from Dr Gauci witness said that as part of the ITPC Green Skips are allowed to accept asbestos waste for storage. This permit expires on 2nd July 2023 and renewed a previous permit.

Ms Ruth Spiteri (382180M) called to testify by Appellant stated on oath that she is the Senior Manager Procurement at CPSU. She gave a broad outline of the tender requirements and agreed that the tender required disposal of waste by way of export. Permits were asked for at offer stage with the insurance policy submitted later. Referred to Page 17 paragraph 3 of the tender witness agreed that it stated that the 'contractor shall also provide a copy of all necessary insurance' and said that the words could be interpreted in two ways but the use of the word contractor implied that the insurance had to be provided after the award of the tender. The Tender Evaluation committee (TEC) had peace of mind on this point as the preferred bidder supplied a document stating that the insurance policy would be issued. According to the witness she was not aware of the type of policy required in this tender or of the process to obtain one. Referring again to the wording in paragraph 3 mentioned earlier witness said that in article 14.1 of the Special Conditions it is stated that the policy can be delivered after the award. Witness was not aware if the TEC had sought guidance from the Department of Contract (DoC) on this point.

In reply to questions from Dr Gauci witness stated that the TEC made sure that all licences were valid at the time of the tender submission on 8th March 2022 and confirmed that an international company was willing to issue an insurance policy.

Replying to questions from Dr Pace witness said that the TEC had not checked to see if the permits were still valid on the 30th September 2022, the day that the decision letter was sent. Further witness said that the TEC would not have expected Green Skips to apply for a permit without first knowing that they had won the contract and in any case it was not the concern of the TEC if the preferred bidder had a licence or not when the letter of award was sent.

Dr Mark Anthony Debono Legal Representative for the Director of Contracts at this stage pointed out that the DoC disagrees with the Appellant's contention that the Director should have withdrawn the award decision. The guide given by the DoC does not affect the decisions of the TEC as otherwise it would be interfering in the appeal process.

In response the Chairman stated that according to Regulation 72(b) of the PPR the General Contracts Committee (GCC) is there to evaluate reports and recommendations submitted by contracting authorities and to make definite recommendations. The DoC is therefore involved and could also revoke decisions – it is therefore part and parcel of the decision process.

Dr Gauci said that in his view Regulation 72(b) refers to general rather than specific matters and the GCC has a generic role for the overall picture of costs to the state.

Engineer Franco Cassar (485266M) called as a witness by the Appellant stated on oath that he was one of the Evaluators and was involved throughout with the tender process. He confirmed that the TEC did not seek advice on the interpretation of the insurance clause in paragraph 3 (page 17). The TEC decided that insurance was only required on the award of the contract following the direction in condition 14.1 and any reference to insurance in clause 3 was interpreted as being required only after the contract award. Witness agreed there are instances in the tender where the word contractor is stated as 'at tender stage' but not in paragraph 3.

Dr Camilleri referred the witness to the clauses in Article 11 (page 8) of the tender which states that insurance is to be presented after the contract is awarded. Witness replied that this is how the TEC interpreted this requirement.

Engineer Franco Cassar (485266M) was also called to testify by the Authority. Under oath he stated that he was employed as an Engineer Building Services in the Department of Health. On the matter of the permits the witness said that the TEC was guided by the submissions in the EPPS and confirmed that at that point of the offer the preferred bidder had a valid permit expiring on the 7th July 2022. The insurance was eligible as it was required at a later stage and bidder had submitted a letter to confirm that a policy will be obtained as requested in the tender document.

This concluded the testimonies.

Dr Pace said that he will limit his submissions to the need for a permit for asbestos handling and the insurance. It is not contested that a permit was required at tendering stage and that Green Skips supplied one with the bid. It is important to note that no consideration was taken as to what happened afterwards. It was simple for the TEC to consider matters only up to evaluation stage. What happened after then totally neutralised the objective of the tender. Technically that point is correct. Bidders were advised that the objective of the tender was the end-disposal of asbestos. There is a certain seriousness in the material involved. The CPSU on such a serious matter cannot claim that their concern only extends to the end of March. Green Skips does no longer has a permit to export and that fact cannot be ignored. Reference to Special Conditions Article 31 (page 12) states 'performance is to commence immediately...'. Is the Authority prepared to wait three or nine months for ERA to issue a permit? The tender inferred urgency of disposal but the Authority was prepared to wait indefinitely for a permit.

This, continued Dr Pace, is neither legally nor morally right. Can the Board allow that a subcontractor is appointed which could not deliver the service required by the preferred bidder? Neither the preferred bidder nor the subcontractor are any longer authorised to carry out end-disposal work. Green Skips have not even applied for a permit to export. The end objective cannot be achieved without a long delay. The Board knows that factually only one company can offer that end objective of the tender.

On the matter of insurance, Dr Pace said that Appellant is not dealing with a third party generic liability but specific asbestos insurance. The TEC is claiming that this is a post award matter but the tender document contradicts this. As is clear if one referred to clause 3 in the tender. Permits are required at tendering stage and that includes insurance as the clause states '...shall also include...insurance...' The TEC claims that insurance is post award when the same sentence refers to contractor in all instances. The phrasing in the tender may not be too felicitous but how does one answer to the use of the same words twice in the same sentence of the specifications. The TEC claims that it followed the Special Conditions and decided that it took preference over Clause 3 which was totally ignored. Clause 3 covers all contracting requirements. The tender, in this respect, requested a policy not a letter of commitment. The economic operator was required to provide permit and insurance with both documents being the only way of reaching the tender objectives. In PCRB Case 1525 the Board said that it is necessary to see what the end objective is in a tender. No way could the preferred bidder reach the aim of the tender with the lack of documents and therefore the appeal should be met and the bids re-evaluated.

Dr Gauci stated that Appellant had two grievances to be considered. There is no doubt in the mind of the TEC that the preferred bidder was clearly compliant and that permits were fully in place at the time of the bid. No rectifications were sought. Green Skips applications in 2021 and 2022 met with no

problems and the only delay was in the time taken to process by the economic operator who was familiar with the process. There were no changes in the permit – it was merely a question of re-application of the existing permits once a contract is awarded. There is no argument about the meaning of the word contractor and bidder. Insurance would be provided in time for the start of the contract apart from the fact that bidder even provided a letter assuring that the requested cover will be provided – bidder was not obliged to do this but did it simply to reassure. The TEC is certain of what they did and certain of their decision.

Dr Camilleri said that the ERA confirmed that the procedure is to apply for a fresh licence. The preferred bidder is compliant but the renewal of the licence was on an in between date and the situation is similar to the licence expiring in the middle of the execution of a contract. The TEC followed the principle of procurement and accepted a valid licence at submission stage thus following the principle of self-limitation in accepting a valid licence which made the bid valid.

On the points raised regarding the insurance, there are in the tender two instances out of three which state that insurance is to be submitted on the execution of the contract. The PCRB role is limited to procurement procedure – the eventual contract is a matter to be decided by the Courts. The economic operator committed itself to issue an insurance policy. In an Appeal case (decided on 3/10/2017) Cherubino vs Department of Contracts whilst the facts are not identical the decision makes a distinction between selection and contract execution and makes a clear distinction between the two with separate avenues in deciding them. At selection stage the bidder satisfied the two criteria appealed on. There is no point in refusing the bid as offer was fully compliant and the TEC is certain of the facts.

Dr Pace commented that it is not surprising that a licence expires; what is surprising is that it was not renewed or there was no attempt by the subcontractor to renew. It was confirmed by witness Mr Debrincat that no application was made to which Dr Camilleri replied that the economic operator had said that it will not renew until they knew that they had been awarded the tender. The waste can be stored until it is ready to be exported.

The Chairman thanked all the parties for their co-operation in what was a rather lengthy case and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 1st November 2022.

Having noted the objection filed by PT Matic Environmental Services Limited (hereinafter referred to as the Appellant) on 10th October 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2311/2021 listed as case No. 1806 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace
Appearing for the Contracting Authority: Dr Leon Camilleri
Appearing for the DoC: Dr Mark Anthony Debono
Appearing for the Preferred Bidder: Dr John L. Gauci

Whereby, the Appellant contends that:

- a) The appellant company feels highly aggrieved by the above stated decision and is resultantly filing the present objection/appeal for the reasons outlined hereunder. As per the applicable tender dossier, “[t]he subject of this tender is the removal, packaging and disposal of asbestos containing material in an environmentally friendly manner from Mount Carmel Hospital, Attard. To avoid ambiguities and to ensure that the tender's end objective - that is the "disposal of asbestos containing material" - is clearly laid out to all prospective bidders, the tender dossier goes on to state that containers containing the special plastic enclosures within which asbestos containing material is temporarily stored "shall then be exported for eventual disposal at an environmentally authorized landfill site abroad.” The Director General (Contracts) decision to award this tender to the preferred bidder (M-Stream Ltd) - on the basis, hereby vehemently contested, that it has submitted “the cheapest priced offer satisfying the administrative and technical criteria” - attests to an incomplete and inept evaluation process, one in which selected mandatory requirements, specifications and/or conditions were arbitrarily discarded, this leading to an incorrect and erroneous decision.
- b) Reference is made to the Standard Operating Procedures issued by the Department of Contracts whereby it is unequivocally provided that the evaluation of technical offers is ought to be carried out on all technical aspects comprising the said offer such that in the eventuality that a prospective bidder's offer is found to be, following an evaluation of all technical aspects, technically non-compliant, that very same offer should not be considered any further, irrespective of its financial compliance or otherwise.
- c) Evaluation Committees are duty bound to restrict their evaluation to the specifications and conditions of the applicable tender dossier. Regrettably, the decision of the Director General (Contracts) subject of this notice of objection attests to a flawed evaluation process which did not match the level of scrutiny one would reasonably expect when dealing with such a “delicate operation that involves hazardous material”. The appellant humbly, but firmly, submits that as a result of its apathetic evaluation, the Evaluation Committee has now brought about a situation whereby the end objectives set out in the applicable tender dossier, that is the disposal of asbestos containing material ("exported for eventual disposal at an environmentally authorized landfill site abroad"), cannot be attained. This in view of the fact that the preferred bidder does not possess, and is not expected to possess at any time in the foreseeable future, an export permit validly issued by the competent Authority to export the hazardous material to which this tender relates. The appellant

company, which ironically is the only company currently in possession of a valid export permit for asbestos containing material issued by the competent Authority (all permit holders may be viewed on the Environment and Resources Authority's website), fails to comprehend how such a fundamental requisite necessary to attain the objectives set out in the tender document could have ever been overlooked. This compounded further by the fact that the Contracting Authority clearly requested, as a mandatory requirement and prior to the award of the contract, *“a copy of all necessary permits to dismantle, handle and dispose of Asbestos Containing Material at tender stage”* - this was subsequently confirmed by virtue of Clarification Note 2 issued by the Director General (Contracts) on the 15th of February 2021. It remains unexplained, therefore, how the Evaluation Committee, with the information available to it (or lack thereof), proceeded nonetheless to recommend to award a contract for the disposal - by way of export - of asbestos containing material to a bidder which does not possess (nor is expected to possess in the near future) an export permit over another bidder (the appellant company) which is the only company in possession of a valid export permit.

- d) In addition to the foregoing, the tender dossier clearly and explicitly requested that the works subject of the above-captioned tender ought to be covered by "all necessary insurance as required by legal notices. Following a clarification note issued on the 12th of February 2021 (Clarification Note 1), it was further clarified that the insurance cover which is being requested in this tender dossier is not a standard insurance policy - which typically excludes the handling of asbestos related works - but a customised insurance policy (Asbestos Liability Warranty) which covers the dismantling, handling and disposal of asbestos containing material. It transpires that here too, the Evaluation Committee did not attach, at evaluation, the importance to this mandatory and essential requirement that the tender dossier sought to afford -this, therefore, in breach of the principle of self-limitation. As for this mandatory requirement (insurance cover), appellant company firmly holds that it cannot be argued, as will most likely be argued by the Contracting Authority and/or the preferred bidder, that this requirement is a performance condition which is to be satisfied by the preferred bidder upon award. Indeed, as is manifest in the applicable tender dossier, appellant company submits that the insurance cover requirement is a selection criterion which ought to be satisfied at tender stage so much so that the said tender dossier requested the following: *“Contractor shall also submit a copy of all necessary permits to dismantle, handle and dispose of Asbestos Containing Material at tender stage. Contractor shall also provide a copy of all necessary insurance as required by legal notices.”*
- e) Evidently, the Evaluation Committee evaluated the preferred bidder's offer from a strictly monetary perspective, doing away with the mandatory selection criteria which are essential to the attainment of the end objectives of this tender. This arbitrary and unjustified departure from the unequivocal text of the tender document does not only run counter to the core principles in public procurement but also cause significant prejudice to the appellant - more so considering that the

administrative, technical and financial compliance of its offer, as opposed to that of the preferred bidder, is undoubted.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17th October 2022, its verbal submission during the virtual hearing held on 1st November 2022, in that:

a) On the First Part of the Grievance - Permits

The grievance of the objector on this matter is unfounded in fact and at law for the following reasons. The objector does not have access to the documentation and the offer as submitted by the objector and therefore could never be in a position to present such grievance. The preferred bidder is in fact compliant as it has a sub contractor, the details of which were provided as per tender requirements, Green skips Ltd, in possession of a valid license for the export of asbestos to an end disposal facility. This license was presented with the recommended bidder's bid in full satisfaction of all the tender requirements. The evaluation committee has through the evaluation process acted diligently and in utmost observance to the general principles of equal treatment, self limitation and proportionality.

b) On the Second part of the Grievance - Insurances

With regards to the insurance, the clause quoted by the objector states that: *“Contractor shall also provide a copy of all necessary insurance as required by legal notices”*. The fact that the clause is using the word 'contractor' indicates that this should not be submitted at tender stage but post award. This is also evident from Clause 14.1 of the special conditions which provides that *“The insurance policy shall be delivered to the Contracting Authority not later than one (1) week from the communication of the award of the contract and, in any case, before the commencement of the Works.”*

This therefore clearly shows that the insurance is a post award obligation, and CPSU is of the humble opinion that the board should not enter in these merits. In fact in a similar case, which is applicable to both this part and the first part of the grievance, the Court of Appeal gave a very relevant and important ruling in its judgement in the names of Cherubino Limited vs Dipartiment tal-Kuntratti. et delivered on the 3rd of October 2017. Without Prejudice to the above CPSU however still submits that the preferred bidder did in fact provide a proof of commitment, consisting of a letter from a reputable insurance company which stated that the tenderer is a client of their company and is fully committed to immediately acquire a specific insurance policy for the execution of the tender in question.

This Board also noted the DoC's Reasoned Letter of Reply filed on 19th October 2022, its verbal submission during the virtual hearing held on 1st November 2022, in that:

a) Evaluation of Tender Offers

The appellant, in its reasoned letter of objection, makes numerous submissions that the Director General (Contracts) is attributable for the decision-making in the tender evaluation in question: *“Regrettably, the decision of the Director General (Contracts) subject of this notice of objection attests to a flawed evaluation process which did not match the level of scrutiny one would reasonably expect when dealing with such a delicate operation that involves hazardous material.”*

The DoC respectfully disagrees with the submissions of the appellant for the following reasons:

- The evaluation of tender offers and the compliance thereof is a duty vested in the Tender Evaluation Committee appointed by the Contracting Authority, which duty is performed in accordance with the procedure under rule 16 of the General Rules Governing Tenders and Regulation 17 of the Public Procurement Regulations, 2016.
- In accordance with regulation 239(1) of the Public Procurement Regulations, 2016 the decision to award public contracts is one undertaken by Contracting Authorities in accordance with the principle of self-limitation and the award criteria provided in the tender document. This notion is reflected in terms of Section 1.4 of the Tender Document - *‘The final beneficiary of this tender is Central Procurement Supplies Unit’*

b) Tender Document Specifications

With reference to the submission that the appellant company as being the only company currently in possession of a valid export permit, the DoC submits that the specifications in procurement documents are not drawn up and issued by Contracting Authorities to enable a single economic operator to submit a tender offer but on the contrary, in terms of Regulation 39 of the Public Procurement Regulations, 2016, these are drawn up to enable the participation of as much (sic) economic operators as possible.

The Contracting Authority has submitted its reasoned letter of reply dated 17th October^[REDACTED]2022 and has indicated that the recommended tenderer shall be relying on the capacities of third parties to perform the services required in the tender document.

With regard to the grievance related to the submission by the recommended tenderer for an Insurance, the Tender Document specifies that *“The insurance policy shall be delivered to the Contracting Authority not later than one (1) week from the communication of the award of the contract and, in any case, before the commencement of the Works”*

The Contracting Authority has confirmed, in its reasoned letter of reply dated 17th October 2022, that the recommended tenderer has provided commitment to acquire an insurance policy.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 20th October 2022, its verbal submission during the virtual hearing held on 1st November 2022, in that:

- a) Objector bases its objection on an allegation that the Recommended Bidder's bid did not provide the necessary licences. This is simply a baseless allegation since Recommended Bidder is relying on the capacity of its subcontractor namely Green Skips Ltd and this in terms of Regulation 235 of the Public Contracts Regulations. This principle was developed and then repeatedly upheld by the CJEU. Reference is made, inter alia to the decision in the names: Swm Costruzioni 2 and Mannocchi Luigino (C-94/12, EU:C:2013:646) wherein it was emphasised that the EU regime *"permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract"* (para 33). Indeed, the Recommended Bidder submitted a declaration of undertaking in terms of the law and this as can be clearly ascertained by this Board.
- b) As to the second allegation, i.e. the allegation that the Recommended Bidder is not in possession of the necessary insurance cover, it has to be highlighted at the outset that the clause quoted by Objector itself states: *"Contractor shall also provide a copy of all necessary insurance as required by legal notices"*. Furthermore, Clause 14.1 of the special conditions which provides that *"The insurance policy shall be delivered to the Contracting Authority not later than one (1) week from the communication of the award of the contract and, in any case, before the commencement of the Works."* Therefore, it is humbly submitted that the insurance obligation is not a qualification criterion but rather a contractual obligation once the contract is entered into. Therefore the insurance requirement cannot even be the subject of an objection as to the award and/or the qualification of the Recommended Bidder. Without prejudice to the above, however, the Recommended Bidder did indeed provide an undertaking by a reputable insurance provider that it would indeed be issuing the required insurance cover. Furthermore, as a fact, the insurance cover has already been issued and this as can be ascertained should the contracting authority and/or this Tribunal require proof of same at this stage.

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 now consider Appellant's grievances. Initially, this Board will list down points which it deems most relevant to this appeal. Subsequently reference will be made to the testimony under oath of various witnesses and a list made of the most relevant statements. Finally, this Board will provide its conclusions on the two main grievances of the Appellant.

Relevant points

- a) Section 2 – Tender Dossier – Article 11.12, whereby it is stated:

*“The Contractor shall within **one (1) week of receipt of the letter of award of the contract** and in any case prior to the commencement of works, provide the Contracting Authority the following documents: **ALL** necessary **permits**/ approvals, and/or licenses from the statutory authorities for the proper execution of the works as required by Law.” (bold & underline emphasis added)*

b) Section 2 – Tender Dossier – Article 14.1, whereby it is stated:

“the insurance policy shall be delivered to the Contracting Authority not later than one (1) week from the communication of the award of the contract and, in any case, before the commencement of the works”

c) Section 2 – Tender Dossier – Article 31.1, whereby it is stated:

“Performance of the contract is to commence immediately upon the issue of the order to start works issued by the Contracting Authority.”

d) Section 3 – Tender Dossier – Paragraph 3, whereby it is stated:

“Contractor shall also submit a copy of all necessary permits to dismantle, handle and dispose of Asbestos Containing Material at tender stage. Contractor shall also provide a copy of all necessary insurance as required by legal notices.”

Extracts from testimony under oath of Mr Charles Debrincat

a) *“.....as at this date there is only one active permit (22/000035) issued to PT Matic on 21st October 2022 expiring 31st August 2023.”*

b) *“.....at present there are no pending applications to export”*

c) *“...any application submitted now will take between six to nine months to process depending on the documentation required and the quality of information submitted by applicant. Very rarely would the process take less than three months.”*

Extracts from testimony under oath of Ms Ruth Spiteri

a) *“Permits were asked for at offer stage with the insurance policy submitted later.....”*

b) On the term ‘contractor’ of page 17 paragraph 3 *“.....the words could be interpreted in two ways but the use of the word contractor implied that the insurance had to be provided after the award of the tender.”*

c) *“...all licences were valid at the time of the tender submission on 8th March 2022”*

d) *“...the TEC had not checked to see if the permits were still valid on the 30th September 2022, the day that the decision letter was sent.”*

e) *“.....the TEC would not have expected Green Skips to apply for a permit without first knowing that they had won the contract and in any case it was not the concern of the TEC if the preferred bidder had a licence or not when the letter of award was sent”*

Conclusions – 1st grievance – Permits

a) This Board acknowledges that the Evaluation Committee, if one were to follow strictly and solely the principle of Self Limitation, went about its evaluation in a correct manner when the

Chairperson of the Evaluation Committee stated “...all licences were valid at the time of the tender submission on 8th March 2022”

- b) What this Board finds problematic is that the evaluation committee took an inexplicably long time to award the tender. The ‘Period of Validity of Tenders’ as per section 8 of the General Rules Governing Tenders provide clear instructions on the applicable terms. Due to the evaluation process taking a longer timeframe than expected, a situation arose that the permits of the sub-contractor of the preferred bidder expired.
- c) The tender dossier was clear in Section 2 Article 11.12 that it required all necessary permits to be provided within one (1) week of receipt of the letter of award.
- d) This Board also heard the testimony of Mr Charles Debrincat, ERA’s representative, that i) currently the sub-contractor (of the preferred bidder) holds no export license for asbestos containing material ii) there are currently no pending applications before it relating to the subject matter and iii) the process to obtain this type of license is quite lengthy and that it takes a considerable number of months to obtain.
- e) Therefore, this Board does not agree with the Evaluation Committee when Ms Ruth Spiteri stated “.....the TEC would not have expected Green Skips to apply for a permit without first knowing that they had won the contract”. It was clear that the tender objective and work to be done is of a somewhat urgent nature. How can specifications listed in section 2 article 11.12 & 31.1 be satisfied when the application process takes months to be concluded and the tender is allowing only 1 week for the permits to be submitted to the contracting authority?
- f) By not applying for a new license in between July 2022 and September 2022, the sub-contractor (and therefore the preferred bidder) did not exercise the duty of a *bonus pater familias* as this would thwart the objective of the tender for urgency of disposal.
- g) Moreover, reference is made to Article 993 of the Civil Code, Chapter 16 of the Laws of Malta whereby “Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equiti, custom or law, is incidental to the obligation, according to its nature” The Courts have always reflected and applied the common law maxim “*in omnibus quidem, maxime tamen in jure, aequitas spectanda sit*”, i.e. in all matters indeed, but especially in matters of right, equity should be regarded.
- h) This Board, therefore, upholds this first grievance of the Appellant as it is clear that
 - i. through the tardiness of the evaluation process and
 - ii. the fact that a new application for the necessary permits had not even been submitted by the sub-contractor of the preferred bidder,

and therefore the requirements as set out in the tender document cannot be met.

Conclusions – 2nd grievance – Insurance

- a) Reference is made to:
 - i. Section 2 – Tender Dossier – Article 14.1, whereby it is stated:
*“the insurance policy shall be delivered to the Contracting Authority **not later than one (1) week from the communication of the award of the contract** and, in any case, before the commencement of the works”* (bold emphasis added)
 - ii. Section 3 – Tender Dossier – Paragraph 3, whereby it is stated:
*“Contractor shall also submit a copy of all necessary permits to dismantle, handle and dispose of Asbestos Containing Material **at tender stage**. Contractor **shall also provide** a copy of all necessary **insurance** as required by legal notices.”* (bold emphasis added)
- b) It is this Board’s opinion that there is an anomaly in the tender dossier, as the requirement of section 2 is clearly a post award condition, whilst the requirement of Section 3 is a requirement that needs to be adhered to at tender stage.
- c) This Board does not agree with statements made by Ms Ruth Spiteri under oath that *“.....the word contractor implied that the insurance had to be provided after the award of the tender.”* There are numerous instances where the word contractor is used interchangeably in the tender dossier. One specific reference is in same page 17 whereby it is stated *“The contractor is encouraged to visit the site and familiarise himself with the site prior to tendering.”* Clearly, the word ‘contractor’ is also being used for an economic operator who is still mulling on whether to participate in the tender or not by being offered the possibility to visit the site **prior** to tendering!
- d) Considering this anomaly and the facts that:
 - i. The Appellant company submitted documentation of its current active relevant insurance policies;
 - ii. The preferred bidder submitted declarations / confirmations as per Section 2 Article 14.1 of the tender dossier
 - iii. This Board already upheld Appellant’s first grievance

This Board does not feel it should consider this grievance any further.

The Board,

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

- a) To uphold the Appellant’s main grievance on the issue of permits;
- b) To cancel the ‘Notice of Award’ letter dated 30th September 2022;
- c) To cancel the Letter of Rejection dated 30th September 2022 sent to PT Matic Environmental Services Limited;

- d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member