

PUBLIC CONTRACTS REVIEW BOARD

Case 1850 – CT 2145/2022 – Services – The Hiring (including Supply, Delivery and Positioning on Site) of One (1) Mobile Waste Shredder with Feeding, including Fuel and the Operator Services for the Operation of the Shredder

6th March 2023

The tender was issued on the 30th June 2022 and the closing date was the 23rd August 2022. The estimated value of the tender excluding VAT, was € 3,465,000.

On the 23rd January 2023 Rockcut Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that the Contracting Authority had deemed their bid to be not technically compliant.

A deposit of € 17,325 was paid.

There were ten (10) bids on this tender.

On the 28th February 2023 the Public Contracts Review Board composed of, Dr Charles Cassar as Chairman Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Rockcut Ltd

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| Dr Frank Testa | Legal Representative |
| Ms Beryl Buttigieg | Legal Representative |

Contracting Authority – Wasteserv Malta Ltd

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| Dr Charlon Gouder | Legal Representative |
| Mr Helder Rocha | Chairperson Evaluation Committee |
| Mr Karl Mizzi | Evaluator |
| Ms Pearl Agius | Evaluator |
| Ms Branica Xuereb | Representative |

Preferred Bidder – M-Stream Ltd

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| Dr Colin Deguara | Legal Representative |
| Mr Andre Parnis | Representative |

Department of Contracts

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| Dr Mark Anthony Debono | Legal Representative |
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Frank Testa Legal Representative for Rockcut Ltd stated that the documents presented after clarification proves that the literature is compliant.

Dr Charlon Gouder Legal Representative for Wasteserv Malta Ltd said that the Contracting Authority will rely on the written submissions and the testimony of one witness.

Mr Rocha Helder (0301244A) called to testify by the Authority stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) and he oversaw all the working of the evaluation team and guided them through the process and had prepared the final recommendation. The request for clarification was made under Note 2 and was sought because the Economic Operator had failed to provide the literature necessary to validate the information in the tender submissions. Item 17 in the tender technical offer requested 'Construction and Demolition' (C&D) as a specification with accompanying literature. The literature subsequently provided did not mention C&D but referred to 'Industrial Waste' and other wastes with no reference to C&D. The economic operator confirmed that the machine had the throughput required and that it processed industrial waste. This did not fulfill the requirements of the tender. C&D is different to industrial waste which comes from all sources and not necessarily from demolition and construction.

Questioned by Dr Testa, witness was referred to page 14 of the tender, Tables 1 & 2 and stated that the definitions for waste used there came from the established Departmental definitions and previous use. There is subsidiary legislation which defines the types of waste. Asked to define what green waste is, witness stated that he could not do so without reference to the legislation which he did not have at hand but it was generally taken to mean garden waste. Witness was not aware of other sources defining waste.

This concluded the testimony.

Dr Colin Deguara Legal Representative for M-Stream Ltd said that the preferred bidder would rely on the written submissions.

Dr Testa said that what the Authority is claiming is that the submissions have to follow the subsidiary legislation. This cannot be so as in certain instances, as for example, green waste there are no established definitions. This reference to subsidiary legislation is an afterthought as confirmed by the witness. Definitions are wider than Subsidiary Legislation 549.63 as claimed. The vehicle required for this tender is manufactured in a foreign country and different terminology is used and which terminology might not match exactly what was requested – but it is not enough to disqualify a bid simply because the definition might vary. Different countries refer to the same type of waste under different names. Even under the Occupational Health and Safety Act the machine would fulfill the requirements. In the *Ballut* case the Appeal Court stated that as much as possible bids should be saved. The point made by the preferred bidder regarding the vehicle's output was rather vague as the output offered matched the tender.

Dr Gouder stated that the TEC had no option but to disqualify the bid. Jurisprudence and past PCR cases made clear what is expected of the TEC. The scope of the literature list was to corroborate the tender specifications and the reliance that the TEC will ensure that the requirements are met. C&D is not green waste and is not the point at issue. No proof has been submitted that the literature lists backed the

requirements and no proof has been submitted that what is termed industrial waste is the same as C&D. S.L. 549.63 is relevant as it deals with the different definitions and clearly specifies what C&D is. Industrial waste has no relevance to C&D. Witness clearly identified the difference between what was offered and what was required. The TEC could not accept the offer of the Appellant as there would have been lack of equality and it would have been prejudicial to other bidders. Tender is clear and unambiguous in its terms. Reference to several cases was made in support of corroboration of information and on the responsibility of the TEC in evaluating tenders.

Dr Deguara said that the powers of the PCRB is to ensure that the evaluation was carried out correctly. The Appellant claims that the literature was supplied but there is no reference in that literature to construction waste – industrial waste is different to C&D and there is a distinct definition of both types of waste streams. It is clear that Appellant's bid does not satisfy the terms of the tender. The TEC, bound by the principle of proportionality, could not accept the literature submitted as it did not fulfill requirements. PCRB Case 1656 confirms this point. And there would be lack of proportionality and lack of self-limitation if the TEC accepted incomplete submissions. There were different remedies available to the Appellant if they disagreed with the terms or if those terms were not clear. The TEC acted correctly in this case.

Dr Testa pointed out that all that Appellant is requesting is that its bid is re-integrated in the process. The law quoted excludes C&D in places but not in this case. It is not stated in the tender that waste streams are different and the only difference in the literature provided are that the exact words 'construction and demolition' are not used.

Dr Gouder concluded by saying that Item 17 was not complied with. No proof was provided that industrial waste and construction waste as the same. This proof could have been sought from the manufacturer but this not done as it does not exist since there are two types of waste. The TEC decision is correct and the appeal should be denied.

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 Rockcut Ltd. (herein after referred to as the Appellant) on 23rd January 2023, refers to the claims made by the same Appellant with regard to the tender listed as case No.1850 in the records of the Public Contracts Review Board awarded by Wasteserv Malta Ltd

(herein after referred to as the Contracting Authority)..

Whereby, the Appellant contends that:-

- A) Rockcut Ltd was technically compliant and as such the evaluation committee was erroneous in their decision.
- B) Rochcut Ltd. did in fact succeed to submit both the clarifications and the corresponding literature as requested by the said committee.

The Board also noted the letter of reply dated 2nd February 2023 from the Contracting Authority together with its verbal submissions during the hearing on the 28th February 2023 whereby they contend that,;

The Evaluation Committeedid not manage to find the submitted information in the corresponding literature to corroborate the requirements of the tender. It further pointed out that industrial waste could not be considered as construction waste as the definition of these types of waste is different and exclusive from one another.

In conclusion after the Board considered the arguments and documentation from both parties namely the Appellant and the Contracting Authority, it concludes that the role of PCRБ is to assess whether the evaluation process was carried out correctly and within the terms of the tender requirements and this is the factor that was taken into consideration. On this point it is the view of the Board that the Appellant failed to prove that industrial waste is equivalent to construction and demolition waste, as requested in the tender Tables 1 & 2, page 14 of the tender neither in the written submissions nor during the hearing.

The Board therefore concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision.
- c) Directs that the deposit is not to be refunded.

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member