

PUBLIC CONTRACTS REVIEW BOARD

Case 1854 – SPD1/2021/168 – Services – MCST – Tender for the Provision of Cleaning Services at the Esplora Foreshore using Environmentally Friendly Cleaning Material

4th April 2023

The Board,

Having noted the letter of objection filed by Dr Ryan Bezzina acting for and on behalf of Mr Sandro Caruana, (hereinafter referred to as the appellant) filed on the 16th February 2023;

Having also noted the letter of reply filed by Dr Joseph Gerada on behalf of Legis Services Malta Consortium acting for the Malta Council for Science and Technology (hereinafter referred to as the Contracting Authority) filed on the 24th February 2023;

Having also noted the letter filed by Dr Marycien Vassallo on behalf of 8Point Law acting for Specialist Group Cleaners Ltd (hereinafter referred to as the Preferred Bidder) filed on the 28th February 2023

Having heard the testimony of Mr Sandro Caruana called to testify by the Appellant

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 14th March 2023 hereunder-reproduced;

Minutes

Case 1854 – SPD1/2021/168 – Services – MCST – Tender for the Provision of Cleaning Services at the Esplora Foreshore using Environmentally Friendly Cleaning Material

The tender was issued on the 19th December 2021 and the closing date was the 24th January 2022. The estimated value of the tender excluding VAT, was € 155,029.

On the 16th February 2023 Mr Sandro Caruana filed an application for an appeal against the Malta Council for Science and Technology as the Contracting Authority on the grounds that his bid was not technically compliant.

A deposit of € 775 was paid.

On the 14th March 2023 the Public Contracts Review Board composed of, Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Sandro Caruana

Dr Ryan Bezzina
Mr Sandro Caruana

Legal Representative
Representative

Contracting Authority – Malta Council for Science and Technology

Dr Joseph Gerada
Ms Jacqueline Pace
Ms Zoe Field
Mr Joseph Degabriele
Mr Mario Borg
Mr Vladimir Cutajar Forte
Mr Louis Cordina

Legal Representative
Chairperson Evaluation Committee
Evaluator
Evaluator
Evaluator
Representative
Representative

Preferred Bidder – Specialist Group Cleaners Ltd

Dr John Bonello

Legal Representative

Department 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 Ryan Bezzina Legal Representative for Mr Sandro Caruana referred to the price difference between the bids submitted and gave the reasons why appellant was deemed to be non-compliant and which decision was being challenged. The list of products provided was not irrelevant, as claimed, and previous bids for the same Authority, for the same service had been awarded to the Appellant.

Dr Joseph Gerada Legal Representative for the Malta Council for Science and Technology stated that the tender was on BPQR basis whilst the previous tender referred to was a call for quotations which is a totally different requirement. The tender required a list of products – what was offered was a safety statement of products. Without the required list the document offered was irrelevant. Whilst accepting that the BPQR process gives discretion to the Tender Evaluation Committee (TEC) in this case there were no doubts, simply because the list was not there.

Mr Sandro Caruana (354876M) called to testify as the Appellant stated on oath that he had around two years' experience in these type of tenders with no problems. He had previously tendered for the cleaning of this area specified in the tender and the mentioned products were those specified in this tender which included cleaning the railings.

Witness was directed to the Safety Data Sheet from SC Johnson shown on the screenshare and he confirmed that this 50 page document was the one submitted by him in his bid. It indicated products like Clean Linen, Powder Fresh with illustrations of air fresheners, bathroom cleaners etc. Witness confirmed that he had not submitted any other document.

This concluded the testimony.

Dr Bezzina stated that there was no contestation on the document presented. The Authority argues that there was no list provided but the documents submitted is in itself a detailed list of the products to be used – so essentially the list was submitted. Appellant's bid was the cheapest and therefore the better one in BPQR terms. In essence this case was similar to PCRB Case 1541.

Dr John Bonello Legal Representative for Specialist Group Cleaners Ltd said that it was clear that the Appellant failed to understand the tender requirements. Previous experience had no material bearing

on this tender. The document submitted was not what was required and a Safety Sheet can in no way be a substitute for a list. The award of a previous tender does not exempt a bidder from meeting the requirements of the present tender. Substance over form is no reason to accept incorrect bids.

Dr Gerada stated that the title of the tender clearly states ‘ cleaning of the foreshore’. The witness confirmed that the safety list was the only document submitted with examples of the wrong products being offered, as for example, toilet paper. This indicated items submitted in other tenders. The Data Sheet from the manufacturers did not meet the tender requirements. Whilst the TEC has discretion in awarding points the criteria of the requirements were clear and the TEC had no choice but to disregard the offer as non-compliant. PCRB Case 1577 and the Appeal Court decision on the *St Vincent de Paul* case back the decision of the TEC which was correct.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 14th March 2023.

Appearing for the Appellant:	Dr Ryan Bezzina
Appearing for the Contracting Authority:	Dr Joseph Gerada
Appearing for the Preferred Bidder:	Dr John Bonello
Appearing for the DoC:	Dr Mark Anthony Debono

Whilst having noted the objection filed by Mr Sandro Caruana (hereinafter referred to as the Appellant) on 16th February 2023, and heard submissions by all parties involved on the claims made by the Appellant with regards to the tender of reference SPD 1/2021/168 listed as case No. 1854 in the records of the Public Contracts Review Board (“PCRBR”), specific reference is made to PCRBR case No. 1855 the decision on which case was issued on this same day, i.e. 4th April 2023, whereby a potential conflict of interest situation was decided upon.

In PCRBR case No. 1855 it was ascertained that since Mr Joseph Degabriele’s (Member of the Evaluation Committee) wife is employed with a company related to an economic operator that participated in this tender procedure and this potential conflict was not duly declared, the contracting authority was ordered to re-evaluate the bids received from all participants in the tender process through a newly constituted

Evaluation Committee composed of members which were not involved in the original Evaluation Committee

For transparency's sake and in line with safeguarding and upholding the principles of natural justice and given that the evaluator Mr Joseph Degabriele might be perceived to potentially influence the outcome of the decision and even though this has not been pointed out, and this Board is not stating that this has actually happened, such situation falls squarely within the definition article of "conflict of interest" as emanating from subsidiary legislation 601.03 being the Public Procurement Regulations. In this context this Board feels it is equitable to raise the matter *ex officio* and therefore sends this tender process back to the contracting authority for a re-evaluation by an independent evaluation committee.

The Board,

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

- a) To cancel the 'Notice of Award' letter dated 7th February 2023;
- b) To cancel the Letters of Rejection dated 7th February 2023 sent to all participants in the tender process;
- c) To order the contracting authority to re-evaluate the bids received from all participants in the tender process through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee,;
- d) after taking all due consideration of the circumstances, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member