

PUBLIC CONTRACTS REVIEW BOARD

Case 1855 – 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 Franco Galea and Dr Daniel Cutajar on behalf of Saga Juris Advocates acting for and on behalf of Mr Melchior Dimech, (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 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 1855 – 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 Melchior Dimech 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.

There were five (5) bids.

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 Melchior Dimech

Dr Franco Galea
Mr Melchior Dimech

Legal Representative
Representative

Contracting Authority – Malta Council for Science and Technology

Dr Joseph Gerada	Legal Representative
Ms Jacqueline Pace	Chairperson Evaluation Committee
Ms Zoe Field	Evaluator
Mr Joseph Degabriele	Evaluator
Mr Mario Borg	Evaluator
Mr Vladmir Cutajar Forte	Representative

Preferred Bidder – Specialist Group Cleaners Ltd

Dr John Bonello	Legal Representative
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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 Franco Galea Legal Representative for Mr Melchior Dimech stated that since the letter of reply from the Contracting Authority it transpires that one of the Evaluators in this tender, Mr Joseph Degabriele, is the husband of an employee of the Appellant, and this fact has not been disclosed.

The Chairman proposed a short recess to give time to the Board and to the parties concerned to assimilate this information.

On resumption Dr Gerada on behalf of the Contracting Authority stated that it has been established that Mr Degabriele's wife was not employed by Appellant but by Dimbros Ltd a separate legal entity and that she is employed as a cleaner and not involved in any way in the administration of the business.

The Chairman noted that these facts seem to be uncontested and it is a fact that the wife is employed by Dimbros Ltd but the bid was by Melchior Dimech. He then proposed a further short recess.

After the recess the Chairman stated that the Board having considered the submissions made on the point of conflict of interest decrees that this case is adjourned to a future date to give it time to consider in detail the matter in question. The legal representatives of all the parties concerned are invited to put any further points before the meeting is adjourned.

Dr Galea said that Dimbros is a Dimech family firm with Melchior being a shareholder. There must be transparency in the award of a tender.

Dr Debono on behalf of the Department of Contracts said that the Department's view was that it is up to the PCR to decide on this point.

Dr John Bonello Legal Representative for Specialist Group Cleaners Ltd said that the allegation is that one of the evaluators has a conflict of interest. He referred to Chap 733 and 734 of the Code of Organisation and Civil Procedure and the Public Procurement Regulations and said that the PCR is quasi-judicial Board. If one looked at Chap 734 of the COCP one would clearly realise that there is no basis for the recusing of the Chairman. Similarly the evaluation process is an administrative analysis and the mentioned relationship does not create a conflict of interest merely because the wife happens to be an employee. The allegation of conflict is far-fetched.

Dr Gerada said that he is in agreement with what Dr Bonello had stated and he cannot see where the conflict lies. The evaluator in question was one of several and all they did was examine documents to

ensure they conform. The wife was employed with Dimbros as a cleaner and they were not involved in the process. In any case the claim was outside the 10 day appeal limit. The PCRB has to be careful that it is not creating a precedent in delaying or stopping tenders through tactical moves and extreme measures. The person in question was not even aware of the connection and only examined documents. It is re-iterated that procedurally the objection was not made in time.

The Chairman thanked the parties for their submissions and adjourned the hearing.

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 Franco Galea
Appearing for the Contracting Authority:	Dr Joseph Gerada
Appearing for the Preferred Bidder:	Dr John Bonello
Appearing for the Department of Contracts:	Dr Mark Anthony Debono

Whilst having noted the objection filed by Mr Melchior Dimech (hereinafter referred to as the Appellant) on 16th February 2023, refers to the claim made by the same Appellant, with regards to the tender of reference SPD 1/2021/168 listed as case No. 1855 in the records of the Public Contracts Review Board, on the additional verbal claim of a conflict of interest which was heard on a preliminary basis.

This Board, after having heard and examined the submissions made by all the interested parties, will consider Appellant's grievance on this specific point.

- a) Regulation 271 of the Public Procurement Regulations ("PPR") is very clear when it states that "*The objection shall be filed within ten calendar days following the date on which the contracting authority.....*" This point, on an alleged conflict of interest by one of the members of the evaluation committee, was not raised by the appellant in its letter of objection filed on 16th February 2023. Therefore, *prima facie* evidence suggests that this Board should not take cognisance of such matter. However, the Appellant was not in a position to raise such a point by the stipulated timeframe since such information was not available to him before the list of witnesses, as requested by the Contracting Authority, was made public. In similar circumstances, the Court of Appeal in

its decree 176/21/1 dated 31st August 2021 between Supreme Travel Limited v. Awtorita ghat-Transport f'Malta et stated *“Trattat l-appell, din il-Qorti tara li, fl-interess tas-serjeta` u l-gustizzja, irid jinghad li s-sojjeta` appellanti ghandha ragun. Hu veru li l-ligi timponi terminu ta' sitt xbur ghal kontestazzjoni li jibda jghaddi mid-data tal-kuntratt, pero`, jekk l-operaturi ekonomici interessati ma jkunux jafu b'din id-data li ma tkunx giet reza` pubblika, hu diffiċli li jinghad li tterminu jghaddi mid-data tal-kuntratt li jkun inżamm mistur!”* Even though, in this specific case, there was information that was not made public not on an intentional basis, it is still deemed that this information was not known by the Appellant within the stipulated timeframe for appeal. Therefore, this Board opines that it should consider the merits of this grievance.

- b) The uncontested facts are the following:
- i. The economic operator participating in this tender procedure is Mr Melchior Dimech in his personal capacity.
 - ii. The wife of Mr Joseph Degabriele, Member of the Evaluation Committee, is employed with Dimbros Limited
 - iii. Mr Melchior Dimech is a significant, although not major, shareholder in said company, Dimbros Limited.
 - iv. Mr Joseph Degabriele, , did not know of fact (iii) above and therefore was not even aware of a possible conflict of interest
 - v. This tender procedure was evaluated under the BPQR method, which requires a comparative analysis between offers of all different economic operators participating in the tender process.
- c) Reference is now made to the definition of “conflict of interest” in the PPR which is listed as *“conflicts of interest - **shall at least mean** any situation where any person, including staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure **or may influence the outcome** of that procedure have, directly or **indirectly**, a financial, economic or other personal interest **which might be perceived** to compromise their impartiality and independence in the context of the procurement procedure;”* (bold & underline emphasis added)
- d) This Board opines, that even though there was not even the slightest shred of evidence that the evaluation of Mr Joseph Degabriele was compromised because of this conflict of interest, it none-the-less believes that the definition as per the PPR is wide enough to encompass such a situation.
- e) Therefore, it is this Board’s opinion that because of the words “which might be perceived”, this situation falls within the scope of the definition article of conflict of interest.

The Board,

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

- a) To uphold the Appellant's concerns and grievance raised during the hearing of 14th March 2023;
- b) To cancel the 'Notice of Award' letter dated 7th February 2023;
- c) To cancel the Letters of Rejection dated 7th February 2023 sent to all participants in the tender process;
- d) To order the contracting authority to re-evaluate the bid 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;
- e) 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