

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1949 – SPD4/2023/036 – Services - Framework Contract for the Provision of Health & Safety Services, Training and Certifications at St. Vincent De Paul Long Term Care Facility**

**2<sup>nd</sup> February,2024**

The Board,

Having noted the letter of objection filed Dr Mary Gauci acting for and on behalf of AME Health & Safety Services Limited, (hereinafter referred to as the appellant) filed on the 30<sup>th</sup> November 2023;

Having also noted the letter of reply filed by Dr Noel Bezzina acting for St Vincent De Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority) filed on the 10<sup>th</sup> December 2023;

Having noted the letter of objection filed Dr Alexander Schembri acting for and on behalf of JK Services Limited, (hereinafter referred to as the Preferred Bidder) filed on the 7<sup>th</sup> December 2023;

Having heard and evaluated the testimony of the witness Mr Anthony Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Mr Kevin Borg (Representative of JK Services Ltd) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Dr Dennis Zammit (Representative of Malta Further and Higher Education Authority) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Mr Lawrence Azzopardi (Representative of Malta Further and Higher Education Authority) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Mr Ryan Mallia (Representative of Building and Construction Authority) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Mr Mario Camilleri (Representative of AME Health & Safety Services Limited) as summoned by Dr Mary Gauci acting for AME Health & Safety Services Limited;

Having heard and evaluated the testimony of the witness Mr Anthony Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Noel Bezzina acting for St Vincent De Paul Long Term Care Facility;

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 11<sup>th</sup> January 2024 hereunder-reproduced.

## **Minutes**

### **Case 1949 – SPD4/2023/036 – Services – Framework Contract for the Provision of Health & Safety Services, Training and Certifications at Saint Vincent De Paul Long Term Care Facility**

The tender was issued on the 10<sup>th</sup> August 2023 and the closing date was the 18<sup>th</sup> September 2023.

The estimated value of this tender, excluding VAT, was € 211,575.

On the 30<sup>th</sup> November 2023 AME Health and Safety Services Ltd filed an appeal against Saint Vincent de Paul Long Term Care Facility objecting to their disqualification on the grounds that their bid was not the cheapest offer.

A deposit of € 1,057.88 was paid.

There were five bids.

On the 11<sup>th</sup> January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – AME Health & Safety Ltd**

Dr Mary Gauci	Legal Representative
Mr Mario Camilleri	Representative

#### **Contracting Authority – St Vincent de Paul Long Term Care Facility**

Dr Noel Bezzina	Legal Representative
Mr Anthony Caruana	Chairperson Evaluation Committee
Mr Dennis Spiteri	Secretary Evaluation Committee
Mr Leonard Diacono	Evaluator
Mr Silvio Cilia	Evaluator
Ms Phyllis Mercieca	Representative
Ms Marica Saliba	Representative

#### **Recommended Bidder – JK Services Ltd**

Dr Alexander Schembri	Legal Representative
Mr Kevin Borg	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 Gauci Legal Representative for the Appellant requested that witnesses be heard first.

Mr Anthony Caruana (44470M) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) and detailed Mr Marco Putzulu Caruana and Mr Joseph Gili as the approved Health & Safety officers and Engineer Gordon Camilleri as the warranted engineer nominated by the preferred bidder.

In reply to a question from Dr Alexander Schembri Legal Representative for JK Services Ltd witness confirmed that all three named persons had been verified as competent and on the approved list.

Mr Kevin Borg ( 192679M) called to testify by the Appellant stated on oath that he represented JK Services Ltd and that his firm was on the point of having their licence approved to obtain qualification. The tender did not indicate that it was necessary to have the licence in place at the time of the tender and this could be obtained after being awarded the tender. The Appellant has made arrangements in the meantime with another institute, the Health & Safety Institute, which is accredited, to provide the necessary courses and issue certificates.

Mr Dennis Zammit (400077M) called to testify by the Appellant stated on oath that he is the Legal Officer at the Malta Further and Higher Education Authority (MFHEA) and therefore he is not in a position to answer questions regarding applications for licences. He cannot tell if an application has been received from the Appellant as his duties are in the legal department.

Mr Lawrence Azzopardi (76579M) called to testify by the Appellant stated that MQF Level 1 has to be accredited and that only the MFHEA can provide such accreditation. One first has to apply for accreditation which takes from six to twelve months and there is no guarantee that this will be awarded automatically. The next step in obtaining a licence is to have an accredited course. JK Security is not accredited and no application has been submitted and thus they cannot offer courses or claim that they are offering courses unless they are accredited.

Mr Ryan Mallia (333484M) called to testify by the Appellant stated on oath that he is representing the Building and Construction Authority which will be taking over the issuing of skills card once the policy is in place. Witness had no information if MQF Level 1 will be part of the skills card in future. Courses are run for accreditation leading to obtaining a skills card. H&S courses and skill cards are separate things and any accredited institution can offer courses.

Mr Mario Camilleri (118570M) called as a witness by the Appellant testified on oath that he is the Managing Director of AME Health & Safety Services Ltd and stated that to obtain skills card one first needs an MQF Level 1 and then follow courses. In 2021 the Company had a memorandum of understanding with the Building Industry Consultative Council to recognise certificates issued by accredited company. Section 4 of that agreement was read out stating that one must have Level 1 and an agreement for life-long learning to obtain the certificate.

Mr Anthony Caruana was recalled by the Contracting Authority to testify on oath. He stated that the tender evaluation followed the normal process and once three bids were found to be compliant the final decision was based on the cheapest price and awarded to JK Services Ltd. The date on the award notice was a genuine clerical error. The individual notices all stated that the economic operator had ten days to appeal. In the case of the key experts, the requirement was for CVs and proof of accreditation and in the case of the electrical engineer evidence that the person concerned was warranted. The TEC was satisfied that the names proposed met the requirements. Referring to Section

2.4 of Section 3 of the tender, witness said that training formed only a small part of the tender with one of the courses leading to obtaining the skills card. The tender allowed the contractor a free hand in how to provide accreditation.

In reply to questions from Dr Gauci witness said that the requirement above was to be seen as a whole and there was no requirement in the tender to state if there would be any sub-contracting, and courses could be supplied by key experts.

Questioned by Dr Schembri, witness confirmed that the bulk of the tender covered the H&S services. There was no requirement that companies had to be licenced and courses could be run over a three year period. Under Clause 2.4 courses could be delivered by key experts, which is what was proposed by bidder.

Dr Debono Legal Representative for the Department of Contracts was told by the witness that the preferred bidder confirmed that the courses offered would lead to qualification.

Dr Gauci further questioned the witness about any sub-contracting proposed by the preferred bidder but the question was objected to as it did not form part of the appeal.

This concluded the testimonies.

At this stage the Chairman directed that Mr Borg on behalf of JK Services Ltd was to submit to the Board copies of documents regarding his application for a licence and of the e-mails with the firm carrying out accreditation. These to be submitted by the 12<sup>th</sup> January with written replies submissions by the 18<sup>th</sup> January 2024.

Dr Gauci said that the tender must be considered as a whole. JK Services Ltd was not in a position to meet the tender requirements as it was not accredited. Appellant disagreed entirely with the witness regarding the possibility of sub-contracting as the tender dossier clearly requests data on this point. Any sub-contracting by the preferred bidder should have been declared – although only a small part of the tender requirements it still contravenes the terms. Obtaining a licence and eventual accreditation is a long process which makes it impossible to meet the terms of the tender which stipulates that service commences 15 days after award. The law state that it is illegal to provide training if the provider is not accredited or to obtain certification from another source. The bid is therefore not compliant.

Dr Schembri stated that the question of sub-contracting was not included in the appeal and cannot be raised now. The typing error in the award/rejection letters was not prejudicial to any party and this complaint should be denied. The key experts nominated are all competent and accredited. The skills card form a very small part of the tender requirements as the major part is the H&S aspect. The training schools provide only skills card training by H&S officers and have no role in H&S requirements stipulated in the tender. There is a three year period to provide the courses and the judgement in the *Cherubino vs Director of Contracts* stands in good stead on this point. Only schools could bid in the tender if the skills card could only be issued by external sources and it is possible to have a situation where courses are run by key experts and the skills card is issued by others. Accreditation takes a maximum of one year to achieve and therefore the three year period allowed in the tender suffices.

Dr Debono said that the wrong date on letters is a matter of substance over form. What was requested in the tender regarding the provision of skills card has been confirmed as fulfilled. This is not up to the TEC to look into the ability of the tenderer to provide the service requested as this affects the execution of contracts as laid down in the *Joe Micallef Skip Services* case. The key experts are duly accredited as confirmed by witnesses.

Dr Bezzina Legal Representative for the Contracting Authority said that most of the points on which the appeal is based have been covered by his legal colleagues. The execution of the contract is not part of the evaluation. The major part of the courses requested can be provided by the bidder and there are no restrictions either in the period when they can be provided nor to obtaining them from other sources. The appeal should not be met.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 11<sup>th</sup> January 2024.

Having noted the objection filed by AME Health & Safety Services Limited (hereinafter referred to as the Appellant) on 30<sup>th</sup> November 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD4/2023/036 listed as case No. 1949 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Mary Gauci
Appearing for the Contracting Authority:	Dr Noel Bezzina
Appearing for the Preferred Bidder:	Dr Alexander Schembri
Appearing for the DoC:	Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) ***The notice by which the tender was awarded is null:*** - The award notice is flawed in a material aspect. It was issued on the 20th November 2023 and stated that *"Tenderers are informed that any appeals by means of an objection to the decision listed above must be lodged electronically with the Public Contracts Review Board by sending an email on [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt) by 12:00hrs (noon) of 20th November 2023. Objections shall contain in a very clear manner the reasons for the complaint. Payments are to be made to the amount indicated in the table above, calculated in terms of Regulation 273 of Legal Notice 352 of 2016; otherwise, they will not be considered."* This notice goes contrary to regulation 271 of Legal Notice 352 of 2016 which clearly states that *"The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period."*

- b) **Recommended tenderer does not conform with clause 2.4 of Section 3:** - The recommended tenderer cannot provide courses complete with examination to provide skill card/certificate required. The successful bidder is not in a position to provide the certificates to qualify for a skill card. The skills cards are issued by the Building Industry Consultative Council. The BICC issues skill cards upon presentation of a trade test certificate issued either by JobsPlus or any other recognised body. Recognised bodies need to be licenced by the Malta Further & Higher Education Authority and courses must be accredited by the same Authority. In order to obtain a skill card, the person needs to show evidence that s/he has successfully attended a Health and Safety Course MQF Level 1 in health and safety (clause 2.4 of Section 3; page 17 of the tender document). An MQF certificate can only be issued by a licenced institution and the courses that the institution provides need to be accredited. Licencing and accreditation take several months, and therefore, the successful bidder is non-compliant and not able to mobilize within two (2) weeks as per tender requirement. The successful bidder is not an accredited institution, therefore, it is unable to provide the necessary certification to obtain a skill card so it cannot perform the services that it has been awarded in the tender.
- c) **The key experts** proposed by the recommended tenderer are neither compliant with the Authority's requirements, and do not have the competence to carry out the works as per tender requirements.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10<sup>th</sup> December 2023 and its verbal submission during the hearing held on 11<sup>th</sup> January 2024, in that:

- a) **The notice by which the tender was awarded is null –**  
The Contracting Authority submits that, while it is conceded that this was an error in writing (lapsus calami), in no way did such error jeopardise the objector's position. In fact, such error was only made in the generic award notice and, as evidenced in the individual letters sent to the unsuccessful bidders, the correct timeframes were given and thus the objector was not prejudiced in any manner. Also, it is to be noted that the period of appeal is not a matter decided upon by the contracting authority but emanates from the Public Procurement Regulations. As a matter of fact, the very regulation which stipulates the appeal period is cited by the objector in his reply, so much so that the objection itself was filed within the stipulated time-frames! Furthermore, contrary to what (sic) is being argued by the objector, there is no flaw of a 'material aspect' since, as already stated, the error in question did not, in any manner whatsoever, jeopardise (sic) or prejudice the objector's position in any manner.
- b) **Recommended tenderer does not conform with clause 2.4 of section 3 -**  
In this regard, the contracting authority humbly submits that, the tender document did not require prospective bidders to be accredited institutions and to conduct the examinations and provide the skills card themselves. Although the tender document stipulates that courses are to be complete

with examination to provide skill card/ certificate required, this however, does not mean that the recommended bidder is to provide the skill card itself. Also and without prejudice to the above, the tender required that the contractor was to provide training through courses as indicated in the tender document; however there was no requirement that any accredited courses together with consequent certification is to be provided by the contractor directly.

c) **The recommended bidder's key experts are not compliant with the authority's requirements nor do they have the competence to carry out the works as per tender -**

With respect to this ground of appeal, the Contracting Authority humbly submits that such ground lacks the motivation and basis as a ground of appeal. Additionally, such ground, besides being unsubstantiated, is unfounded. Nonetheless, the contracting authority submits that the key experts of the recommended bidder were compliant with the tender requirements and satisfied the criteria stipulated therein.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 7<sup>th</sup> December 2023 and its verbal submission during the hearing held on 11<sup>th</sup> January 2024, in that:

a) ***The notice by which the tender was awarded is null:*** - It is maintained that it is clearly evident that, even if it results that the award notice in question did, indeed, state the incorrect date by when objections should be filed, such an incorrect date did not, in any way, prejudice any of Objector's rights at law. In fact, Objector proceeded to submit its objection within the time period allowed by law, and therefore, clearly, any incorrect date stated on the award notice in question did not, in fact, have any material impact on these proceedings and on Objector's rights, and was merely a typo. In our opinion, therefore, it is evident that Objector's first grievance abovementioned should be rejected.

b) ***Recommended tenderer does not confirm with clause 2.4 of Section 3:*** -

i. The time-limit for the execution of the contract in question is that of three (3) years, as per, amongst others, clause 18.2 of the Special Conditions, and therefore, the courses in question, together with the entire portfolio of services required by the tender in question, must be rendered and delivered within the said period of three (3) years, and not immediately upon mobilisation - which is to occur within two (2) weeks from date of signing of the contract - as suggested by Objector.

ii. In fact, the services which should be rendered and delivered by the successful bidder within the said period of three (3) years go way beyond the courses in question - which courses only constitute a fraction of the services required - and are stated as being, under clause 2.2 (Specific Objectives) of the Terms of Reference, the following:

- Observe the duties established in Legal Notice 88 of 2018 and subsequent amendments (if applicable).
- Ensure that all the elements pertaining to health, safety and environment during the

works and general operations are in conformity with local and international legal requirements. • Updating the Health and Safety file for any inspections from the relevant authorities. • Ensuring that the Health and Safety Regulations and Plans are followed during all of the stages of projects. • Coordinate the contractors or other employees working at Saint Vincent de Paul on the sites with respect to Health and Safety provisions. • Preparation of Risk Assessments as may be requested by the Contracting Authority; to be carried out in areas such as wards, sections and projects. • Holding regular site meetings involving the pertinent personnel including the Saint Vincent de Paul Contractor's health and safety officers including taking down of minutes and their circulation. • Ensuring that an adequate and regular number of site inspections depending on the nature and extent of work and as agreed with the contracting authority are held. Taking any necessary actions in case of serious hazards including cessation of work. • Compilation and submission of notifications to the OHSA in a timely manner. Clearly, therefore, the courses in question constitute only a small portion of the portfolio of services which are to be rendered and delivered by the successful bidder within the said period of three (3) years.

- iii. Nowhere is it stated in the tender document that all bidders must be an accredited institution, licensed by the Malta Further & Higher Education Authority, at the time of the submission of their bids, as suggested by Objector. Consequently, in the present case, there is nothing prohibiting any bidder from obtaining such license after having been awarded the tender in question, which process does not take several months as suggested by Objector. The above is being stated particularly since, as stated above, the courses in question only constitute a fraction of the portfolio of services which must be rendered and delivered within a period of three (3) years by the successful bidder, and therefore such courses may be delivered at any point throughout the entire duration of three (3) years. Furthermore, all other services required by the tender in question - and therefore the absolute greater part of the services required - do not require the license in question.
- c) **Keys experts:** - By means of its third grievance Objector states that: *"The key experts proposed by the recommended tenderer are neither complaint (sic) with the Authority's requirement, and do not have the competence to carry out the works as per tender requirements"*. This grievance, in our opinion, is too vague to be admissible (sic) at law, and is tantamount to a fishing expedition on Objector's part. Our Client maintains that the key experts it proposed are fully compliant with the requirements, and have the requisite competence to carry out the works as per tender requirements, as will further result during the course of these proceedings. Without prejudice to the above, according to Section 5 (C) of the Instructions to Tenderers: *"Any Key Expert who still needs to obtain authorisation to practice profession in Malta can be proposed"*. In our opinion, therefore, Objector's third grievance is also totally unfounded, both as a matter of fact and as a matter of law, and should be rejected.



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.

- a) **1<sup>st</sup> grievance - The notice by which the tender was awarded is null:** - Without going into too much detail it is as clear as day that this is a typographical error, which is to be deemed as *lapsus calami*. No material error can be deemed to have occurred and no prejudice has been suffered by the appellant. It is to be stated that the specific rejection letter issued to the appellant on 20<sup>th</sup> November 2023, duly included the correct date by which an appeal was to be filed, i.e. by noon of 30<sup>th</sup> November 2023.

Therefore, this Board proceed to reject appellant's first grievance.

- b) **2<sup>nd</sup> grievance - Recommended tenderer does not confirm with clause 2.4 of Section 3:** - Considering that the criteria for award was set as the *"The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying administrative and technical criteria"*, the argument brought forward by the contracting authority, preferred bidder and also by Mr Anthony Caruana in his testimony under oath that the training needing accreditation formed only a small part of the tender is deemed irrelevant. In such tenders, when the criteria for award is set as stated above, for economic operators to proceed to financial evaluation, their bid needs to satisfy all the requirements forming part of the administrative and technical criteria.

However, this Board agreed with the statements of Mr Anthony Caruana when he stated that *"the tender allowed the contractor a free hand in how to provide accreditation"* and that *"There was no requirement that companies had to be licenced and courses could be run over a three year period. Under Clause 2.4 courses could be delivered by key experts, which is what was proposed by bidder"*

This Board is of the opinion that what the appellant is alleging is a post award criteria. Therefore, the issue of subcontracting and all arguments brought forward also become irrelevant. More so when one considers that the tender execution is over a 3-year period and accreditation can be obtained in less than a year. It has also been proven that the preferred bidder has already begun such process. Finally, it must also be stated that the tender document did not require prospective bidders to be accredited institutions ab initio.

Therefore, this Board proceed to reject appellant's second grievance.

- c) **3<sup>rd</sup> grievance - The key experts**

Once it has been ascertained that the key experts of the preferred bidder duly satisfied the requirements of the tender dossier, such as being listed in the OHSa list and / or are duly warranted electrical engineers, this grievance become superfluous. It is also this Board's opinion that this grievance lacks the minimum requirements as set in regulation 270 of the Public

Procurement Regulations which requires that grievances “.....*shall contain in a very clear manner the reasons for their complaints*”

Therefore, this Board proceed to reject appellant’s third grievance.

**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

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member