

PUBLIC CONTRACTS REVIEW BOARD

Case 1980 – PLC/T/2023/03 – Street Sweeping and Cleaning Services in the Locality of Pembroke, in an Environmentally Friendly Manner

2nd April 2024

The Board,

Having noted the letter of objection filed by Dr Adrian Mallia on behalf of Michael Kyprianou Advocates acting for and on behalf of Galea Cleaning Solutions JV, (hereinafter referred to as the appellant) filed on the 19th February 2024;

Having also noted the letter of reply filed by Dr Bryony Balzia Bartolo and Dr Desiree Attard on behalf of ABB Legal acting for and on behalf of Pembroke Local Council (hereinafter referred to as the Contracting Authority) filed on the 27th February 2024;

Having also noted the letter of reply filed by Dr Marycien Vassallo on behalf of 8Point Law acting for and on behalf of WM Environmental Limited (hereinafter referred to as the Preferred Bidder) filed on the 26th February 2024;

Having heard and evaluated the testimony of the witness Dr Dean Hili (Chairperson of the Evaluation Committee) as summoned by Dr Bryony Balzia Bartolo acting for Pembroke Local Council;

Having heard and evaluated the testimony of the witness Mr Kevin Borg (Member of the Evaluation Committee) as summoned by Dr Bryony Balzia Bartolo acting for Pembroke Local Council;

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 25th March 2024 hereunder-reproduced.

Minutes

Case 1980 – PLC/T/2023/03 – Street Sweeping and Cleaning Services in the Locality of Pembroke, in an Environmentally Friendly Manner

The tender was issued in on the 30th October 2023 and the closing date was the 30th November 2023.

The estimated value of this tender, excluding VAT, was € 140,000.

On the 19th February 2024 Galea Cleaning Solutions JV filed an appeal against the Pembroke Local Council objecting to their disqualification on the grounds that their bid was not the highest ranking offer under BPQR criteria.

A deposit of € 700 was paid.

There were five bids.

On the 25th March 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Galea Cleaning Solutions JV

Dr Adrian Mallia	Legal Representative
Dr Diane Dimech	Representative

Contracting Authority – Pembroke Local Council

Dr Bryony Balzia Bartolo	Legal Representative
Dr Dean Hili	Chairperson Evaluation Committee
Dr Desiree Vella Brincat	Evaluator
Mr Charles Cesare	Evaluator
Mr Raymond Lanzon	Evaluator
Mr Kevin Borg	Representative
Mr Christopher Falzon	Representative

Preferred Bidder – WM Environmental Ltd

Dr Marycien Vassallo	Legal Representative (Online)
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Adrian Mallia Legal Representative for the Appellant stated that if the Contracting Authority would confirm that the vehicle offered by the preferred bidder is classified as N1 there will be no need for him to press with the first point raised in the appeal letter.

Dr Bryony Balzia Bartolo Legal Representative for the Contracting Authority confirmed this.

Dr Mallia referred to page 35 of the tender dossier wherein it is indicated that the service vehicle shall be not more than 7.5 tonnes (type N2). Classification laid down by Motor Vehicle Regulations (S.L. 65.21) specifies the difference in goods vehicles between type N1 and N2. The tender specifications state that the vehicle must be not more than 7.5 tonnes but then states type N2. This type indication specified that the Authority wanted something more and left it to the bidders whether to submit a type N1 or N2 vehicle. The Evaluation Committee decided that type N1 was acceptable but did not thus follow the specifications. Logically the evaluators should have followed the specifications.

Dr Balzia Bartolo said that Appellant had interpreted the tender incorrectly. Type N2 allows vehicles over 7.5 tons without excluding N1. At no phase was there any clarification sought on this point.

Dr Marycien Vassallo Legal Representative for the preferred bidder said that her client had no argument or grievance regarding the requirements in the tender.

Dr Dean Hili (212288M) called to testify by the Authority stated on oath that he was the Chairperson of the Evaluation Committee and that the tender requested a vehicle not exceeding 7.5 tons, type N2 and excluded vehicles above that weight. The preferred bidder met this requirement.

In reply to questions from Dr Mallia, witness stated that the maximum weight required was 7.5 tons and the reference to N2 was automatic due to the weight limitation.

Mr Kevin Borg (550474M) called to testify by the Authority stated on oath that he was the Head of the Contracting Authority and said that the tender specifications were clear, namely that the vehicle weight could not exceed 7.5 tons. N2 was used as a ceiling.

This concluded the testimonies.

Dr Mallia said that the important specification in the tender was that the vehicle could not exceed 7.5 tons. The addition of the N2 requirement meant that an N1 vehicle was not acceptable.

Dr Vassallo stated that the tender was properly and clearly interpreted by the preferred bidder and there was no point in the Appellant complaining now about the terms when it should have been done so before.

Dr Balzia Bartolo said that the tender was correctly interpreted throughout for all bids and Appellant cannot claim that the evaluation was incorrectly done.

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 25th March 2024.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 19th February 2024, refers to the claims made by the same Appellant with regard to the tender of reference PLC/T/2023/03 listed as case No. 1980 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr Bryony Balzia Bartolo

Appearing for the Preferred Bidder: Dr Marycien Vassallo

Whereby, the Appellant contends that:

a) ***First Grievance Transparency and Right to an Effective Remedy not ensured -***

It should be beyond contention that contracting authorities must administer procurement processes transparently. Participants in a bidding process can only fully exercise their right to an effective remedy if contracting authorities act transparently. Acting transparently means providing

sufficient information to an unsuccessful bidder to allow such a bidder to assess whether the decision taken by the Contracting Authority is unlawful and, therefore, subject to challenge. The Appellant's contention is that the Contracting Authority has failed to act transparently and has therefore fatally undermined the Appellant's ability to exercise an effective remedy. The Appellant's request for information from the Contracting Authority has a solid statutory basis, as well as foundations firmly rooted in recent jurisprudence of the European Courts.

The Contracting Authority has failed to comply with its obligations on a number of counts. Firstly, the rejection letter sent to the Appellant does not provide sufficient information to allow the bidder to understand the assessment made by the Contracting Authority; it does not even indicate the total score obtained by the Appellant or the successful bidder. On this basis alone, the decision taken by the Contracting Authority is null and void. Additionally, the Contracting Authority's behaviour after the decision did nothing to rectify this gross failing. From the email correspondence with the Contracting Authority, it is clear that the Contracting Authority labours under the completely erroneous misapprehension that it is not obliged provide the information that was requested of it. It should be clear that almost all - if not all - of the information submitted by the successful bidder is not confidential and does not constitute a trade secret. This notwithstanding, the Contracting Authority refused to disclose any information, merely providing a generic excuse to the effect that the information is confidential.

b) ***Second Grievance: The Successful Bidder's submission was incorrectly evaluated -***

The Tender Document requested that bidders offer a service vehicle as follows: "*Service vehicle shall be not more than 7.5 tonnes (type N2)*" For the benefit of the Board, the classification of vehicles is determined by Subsidiary Legislation 65.21 Motor Vehicles (Weights, Dimensions and Equipment) Regulations which provide in regulation 4 as follows:

"4. Goods vehicles shall be classified in the following categories:

CATEGORY N

Motor vehicles with at least four wheels used for the carriage of goods-

- N1 Vehicles used for the carriage of goods and having a maximum mass not exceeding 3.5 tonnes;*
- N2 Vehicles used for the carriage of goods and having a maximum mass exceeding 3.5 tonnes but not exceeding 12 tonnes;"*

On the basis of the specifications set forth in the Tender Document, read in conjunction with the abovementioned legislation, it is clear that in terms of the Tender Document, bidders were required to provide a service vehicle of between 3.5 to 7 tonnes. Any bidder providing a service vehicle outside of that range ought to have been, in accordance with the Tender Document, disqualified. As is stated above, the Appellant has requested information from the Contracting Authority in order to be able to objectively confirm what was offered by the successful bidder, however this request was refused. This notwithstanding, the Appellant believes that the successful bidder does not own a service vehicle with the specifications set forth in the Tender Document. The Appellant

has been unable to confirm this objectively as a result of the Contracting Authority's unjustified refusal to disclose information requested by the Appellant. On this basis, it would appear that the Contracting Authority has incorrectly evaluated the successful bidder's submission, since a failure to offer a service vehicle with the specifications requested ought to have resulted in the disqualification of the successful bidder.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th February 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

a) ***First Grievance - Transparency and Right to an Effective Remedy -***

The Contracting Authority notes that, it adhered to its obligations under Article 242, SL 601.03 and communicated with all the bidders on its decision. The Contracting Authority's decision not to publish the bidder's bids is consistent for all bidders, ensuring equal treatment and a level playing field. Any objection of the appellant appears to stem from its subsequent non-selection for the award. What is vital is that the Contracting Authority ensures that there is no discrimination between the economic operators and the terms of the call for tenders are followed in the same way for every bidder (*Pharma-Cos Limited v Central procurement and supplies Unit et, Court of Appeal, 29th April 2016*). The disclosure of information is not an absolute right granted to a bidder. In fact, such right of the bidder to be provided with information is limited in accordance with inter alia article 40, SL 601.03. Moreover, in line with local and ECJ judgments, information disclosed by the Contracting Authority should be relevant, proportionate, and not anti-competitive. In this particular case, although in the appeal the appellant is quoting regulation 242(2) and 40 of SL 601.03, the appellant did not request the Contracting Authority to provide it with any of the information listed in these provisions but instead made a wide and generic request for "a copy of the successful bidder's bid", suggesting a fishing expedition and thus going beyond what is permissible by law, requesting irrelevant information. The bids of all tenderers included confidential information pertaining to inter alia the methodology and operations adopted by the bidders. Thus, the Contracting Authority could not disclose such information.

Moreover, neither of the items listed in Regulation 40(2) of Si (sic) 601.03 refers to the whole bid, as also confirmed in *Kercem Ajax Football Club v. Ministeru ghal Ghawdex et, Court of Appeal, 30th March 2022*. Therefore, in this particular case, the Contracting Authority cannot be accused of failing to act in a transparent manner when the appellant simply failed to request the specific information it required and tried to go beyond that permissible by law. In addition, the request for a copy of the successful bidder's bid is also disproportionate and unreasonable as the appellant would have gained access to more documentation than needed, possibly even resulting in distorting competition.

In fact in a recent decision the ECJ in *Antea Polska SA et v Panstwowe Gospodarstwo Wodne Wody Polskie* remarked that "*the Court has repeatedly held that the principal objective of the EU rules on*

public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators." Ultimately, as evidenced by the objection filed on the 19th February 2023, the information provided to the appellant was enough for such appellant to file the objection.

b) ***Second Grievance - The Successful Bidder's submission was incorrectly evaluated -***

In his appeal, the appellant erroneously states that bidders were required to "provide a service vehicle of between 3.5 to 7 tonnes". The Tender Document contradicts this entirely, simply stating that: "Service vehicle shall be not more than 7.5 tonnes (type N2)". Respectfully, the Appellant's claim is a misguided reading of the Tender Document, which merely limits vehicle weight to 7.5 tonnes, that is, within the range of type N2 vehicles. It is simply a clear indicator that the Local Council would not consider bids which included vehicles exceeding said tonnage or type. Therefore, the Contracting Authority submits that the range for the vehicles was not, as the appellant alleges, between 3.5 to 7 tonnes, but was wider and allowed for smaller vehicles (i.e. in the N1 region) up to a maximum vehicle weight of 7.5 tonnes. Throughout the Tender Document, there was no exclusion of Type N1 vehicles, thus emphasising the point that vehicles in such category were not excluded. As is amply clear from the documentation submitted by the winning bidder, the vehicle at his disposal satisfies this criterion as well as the remaining criteria, and therefore the tender was correctly adjudicated.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 26th February 2024 and its verbal submission during the hearing held on 25th March 2024, in that:

- a) As rightly pointed out by the Pembroke Local Council in its reply dated 15th February 2024, the information requested by appellant is deemed as confidential and hence the request justifiably not be entertained. In exponent's view, the evaluation report had to be considered as confidential as well save for that part concerning the evaluation of appellant's bid. This matter has already been dealt with by the Court of Appeal (Inferior Jurisdiction) in the case Roberto Ragonesi vs l-Kummissarju ghall-Infurmazzjoni u l-Protezzjoni tad-Data, (Appeal 65/2018JVC) decided on the 11th October 2019 whereby the Court noted:-

"Illi min-natura tiegħu evaluation report jidhol fid-dettal tat-tender inkluz l-informazzjoni kummerċjalment sensitiva mogħtija fl-ispeċifikazzjonijiet annessi mal-istess. Din il-Qorti tikkonferma, kif fuq kolloxx ikkwotat mill-istess Tribunal, illi huwa l-kuntratt bejn il-partijiet li jitlef il-kunfidenzjalita' u mbux necessarjament l-

ispecificazzjonijiet u nformazzjoni annessa mal-istess. Il-Qorti ssibha wkoll diffiċli biex tiffhem kif it-Tribunal wasal għall-konkluzjoni li għandu jinghata kopja tal-evaluation report minghajr ma' l-enwiel għarbel kif seta' jigi evitat li nformazzjoni kummerċjalment sensittiva u trade secrets li jinsabu msemmija fl-istess rapport bbala parti mill-evaluation ma jgux noti lit-terzi kompetituri. Fic-cirkustanzi l-Qorti tqis li la darba l-evaluation report imsemmi ma jikkwalifikax bhala l-ftehim finali redatt bejn il-partijiet u li huwa dan ta' l-ahbar li fitlef il-konfidenzjalita' f'partijiet biss minnu, wkoll minbabba l-bizgħa reali li tinkixef informazzjoni kummerċjalment sensittiva, hija għandha tilqa' wkoll dan l-aggravju u tikkonferma d-decizjoni tal-Kummissarju appellat.

Illi dwar ir-Request D din il-Qorti fl-analizi tagħha tal-aggravji tal-Enemalta plc suesposti, ġia waslet għall-konkluzjoni li t-Tribunal kien skorrett meta ddecieda li jilqa' din it-talba in parte u jordna li tinghata l-informazzjoni mitluba cioe' kopja tal-evaluation report tal-EMC iżda minghajr it-technical specifications. Abbażi tar-ragunament ta' din il-Qorti aktar 'il fuq li l-Qorti ged tagħmel tagħha wkoll f'dan l-aggravju, il-Qorti ser tgħaddi sabiex tichad ukoll din il-parti tal-aggravju tal-appellant Ragonesi fl-appell 65/18."

- b) Appellant was provided with a copy of the evaluation report. This satisfied its request submitted in the abovementioned email so that it "*can understand the points awarded*". In respect of the second request, i.e. the provision of a copy of the successful bidder's bid except in so far as this contains confidential information, would be tantamount to a breach of confidentiality as per the quoted judgment (even if the technical specifications are excluded). Hence the Contracting Authority was justified in refusing the latter request.

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) ***First Grievance Transparency and Right to an Effective Remedy not ensured –***
Reference is made to the minutes whereby the legal representative of the appellant requested confirmation from the Contracting Authority that the vehicle offered by the preferred bidder is classified as 'type N1'. Once confirmation was provided by legal representative of the contracting authority, this grievance was confirmed, by the appellant, to be considered as superseded. Therefore, with reference to this specific grievance, no decision is required to be made by this Board.
- b) ***Second Grievance: The Successful Bidder's submission was incorrectly evaluated -***
- i. Of most relevance to this grievance is tender dossier Section 3, article 4.2.3 (b) which states "*Service vehicle shall be not more than 7.5 tonnes (**type N2**)*" (bold & underline emphasis added)
 - ii. It is therefore clear that what was required was a 'type N2' vehicle.
 - iii. As per S.L. 65.21 Motor Vehicles (Weights, Dimensions and Equipment) Regulations, 'Type N1' vehicles are defined as "*N1 - Vehicles used for the carriage of goods and having a maximum mass not exceeding 3.5 tonnes;*" whilst "Type N2" vehicles are defined as "N2 -

Vehicles used for the carriage of goods and having a maximum mass exceeding 3.5 tonnes but not exceeding 12 tonnes;”

- iv. Therefore, in the Board’s opinion, since a specific emphasis was made for a ‘type N2’ vehicle what was required was a vehicle that was of ‘type N2’ with a capacity for carriage of goods exceeding 3.5 tonnes but not exceeding 7.5 tonnes. ‘Type N1’ vehicles, as per the tender dossier, were not acceptable.
- v. If the Contracting Authority did not wish to exclude ‘type N1’ vehicles it should not have made a specific reference to ‘type N2’ in the tender specifications. This Board has time and time again stressed that a tender bid needs to be evaluated against the specifications as listed in the tender dossier. This is necessary to adhere to the fundamental principle of self-limitation.

Therefore, this Board upholds this second grievance of the appellant.

The Board,

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

- a) To uphold the Appellant’s second grievance;
- b) To cancel the ‘Notice of Award’ letter dated 9th February 2024;
- c) To cancel the Letters of Rejection dated 9th February 2024 and 15th February 2024 sent to Galea Cleaning Solutions JV;
- d) To order the contracting authority to re-evaluate the bid submitted by the preferred bidder in the tender procedure through a newly composed Evaluation Committee composed of members which were not involved in the original Evaluation Committee;
- 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

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member