

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1981 – LLC 05/2023 – Street Sweeping Services in the Locality of Hal Lija, using Low Emission Service Vehicles**

**2<sup>nd</sup> 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 16<sup>th</sup> February 2024;

Having also noted the letter of reply filed by Dr Errol Cutajar on behalf of Farrugia, Gatt & Falzon Advocates acting for and on behalf of Lija Local Council (hereinafter referred to as the Contracting Authority) filed on the 20<sup>th</sup> March 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 20<sup>th</sup> February 2024;

Having heard and evaluated the testimony of the witness Ms Pamela Seguna (Secretary of the Evaluation Committee) as summoned by Dr Adrian Mallia acting for Galea Cleaning Solutions JV;

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 25<sup>th</sup> March 2024 hereunder-reproduced.

#### **Minutes**

#### **Case 1981 – LLC 05/2023 – Street Sweeping Services in the Locality of Hal Lija, using Low Emission Service Vehicles**

The tender was issued on the 24<sup>th</sup> October 2023 and the closing date was the 24<sup>th</sup> November 2023.

The estimated value of this tender, excluding VAT, was € 96,600.

On the 16<sup>th</sup> February 2024 Galea Cleaning Solutions JV filed an appeal against the Hal Lija Local Council objecting to their disqualification on the grounds that their bid was not the highest ranking offer under BPQR criteria.

A deposit of € 482.78 was paid.

There were seven bids.

On the 25<sup>th</sup> 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 – Hal Lija Local Council**

Dr Errol Cutajar	Legal Representative
Mr Anthony Dalli	Chairperson Evaluation Committee
Ms Pamela Seguna	Secretary Evaluation Committee
Mr Chris Falzon	Evaluator
Ms Romina Perici Ferrante	Evaluator

**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 requested witnesses be heard.

Ms Pamela Seguna (535493M) called to testify by the Appellant stated on oath that she was the Secretary of the Evaluation Committee. She was referred by Dr Mallia to an email dated 8<sup>th</sup> February which he sent to her requesting information on the evaluation. Witness stated that on receipt of the email she had consulted a lawyer and replied to the email as advised. She considered the preferred bidder's offer as an entire document and felt could not divulge parts of it.

This concluded the testimony.

Dr Mallia said that a local council was a public authority and there was an administrative right to review their decisions. It was difficult to contest a decision if the facts were not known. Apart from the Public Procurement Regulations there are also CJEU decisions establishing further principles on this dynamic point which changes from time to time. Public authorities decisions are liable to be scrutinised and remedies are available as clearly laid down in paragraph 50 of the *Antea Polska* case which obliges the contracting authority to balance what information is not confidential and what requests are mandatory (para 66). This was clearly not done in this Case and as a result the decision of the Authority is null. The Board should so decide and order that the information is given. The decision in the *South Lease* case recognised the need for more information to be made available.

Dr Errol Cutajar Legal Representative for the Contracting Authority said that the letter to the Appellant expresses the basis of the award to the preferred bidder and the reasons for the Appellant's rejection. If the Appellant is aggrieved why not appeal on this point – the fact is that it is unable to find grievance since it could not rebut the decision of the Authority. The appeal should have been denied as there is no real grievance and the full reasons for the rejection were given including the table of points awarded.

Dr Marycien Vassallo Legal Representative for the preferred bidder said that some information can be provided so long as it is not confidential as directed by the Court of Appeal in the *Ragonesi* case.

There being no further submissions the Chairman thanked the parties 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 25<sup>th</sup> March 2024.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 16<sup>th</sup> February 2024, refers to the claims made by the same Appellant with regard to the tender of reference LLC 05/2023 listed as case No. 1981 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Adrian Mallia

Appearing for the Contracting Authority: Dr Errol Cutajar

Appearing for the Preferred Bidder: Dr Marycien Vassallo

Whereby, the Appellant contends that:

- a) The Contracting Authority has failed to comply with its obligations on a number of counts.
- b) 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.
- c) 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.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20<sup>th</sup> March 2024 and its verbal submission during the hearing held on 25<sup>th</sup> March 2024, in that:

- a) The rejection letter included all the information that is standard.

- b) Appellant had all the required information as to how and why they were deducted points, and hence they had information on what to base their appeal.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 20<sup>th</sup> February 2024 and its verbal submission during the hearing held on 25<sup>th</sup> March 2024, in that:

- a) As rightly pointed out by the Hal Lija Local Council in its reply dated 9<sup>th</sup> February 2024, the evaluation report is an internal document belonging to the Local Council which cannot be shared and is solely intended for the use of the Local Council. To this extent appellant was furnished with a limited version of the evaluation report showing the points awarded to appellant by evaluators. This matter has already been dealt with by the Court of Appeal (Inferior Jurisdiction) in the case Roberto Ragonesi vs l-Kummissarju għall-Infommazzjoni u l-Protezzjoni tad-Data, (Appeal 65/2018JVC) decided on the 11th October 2019 whereby the Court noted:-

*“Illi min-natura tiegħu evaluation report jidbol fid-dettal tat-tender inkluz l-infommazzjoni kummerċjalment sensitiva mogħtija fl-ispeċifikazzjonijiet annessi mal-istess. Din il-Qorti tikkonferma, kif fuq kollox ikkwotat mill-istess Tribunal, illi huwa l-kuntratt bejn il-partijiet li jitlef il-kunfidenzjalita' u mhux necessarjament l-ispeċifikazzjonijiet u nformazzjoni annessa mal-istess. Il-Qorti ssibha wkoll diffiċli biex tifhem kif it-Tribunal wasal għall-konkluzjoni li għandu jingħata kopja tal-evaluation report mingħajr ma' l-enwel għarbel kif seta' jigi evitat li nformazzjoni kummerċjalment sensitiva u trade secrets li jinsabu msemija fl-istess rapport bhala parti mill-evaluation ma jgħux noti lit-terzi kompetituri. Fic-cirkustanzi l-Qorti tqis li la darba l-evaluation report imsemmi ma jikkwalifikax bhala l-fiehim finali redatt bejn il-partijiet u li huwa dan ta' l-abbar li fitlef il-kunfidenzjalita' f'partijiet biss minnu, wkoll minhabba l-bizgħa reali li tinkixef infommazzjoni kummerċjalment sensitiva, hija għandha tilqa' wkoll dan l-aggravju u tikkonferma d-deċiżjoni tal-Kummissarju appellat.*

*Illi dwar ir-Request D din il-Qorti fl-analiżi 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 tingħata l-infommazzjoni mitluba cioe' kopja tal-evaluation report tal-EMC iżda mingħajr 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 the part of the evaluation report limited to the awarding of points by each evaluator in respect of his bid. 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 er (sic) 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 witness duly summoned, will now consider Appellant's grievances.

**On the rejection letter -**

- a) Initially, it must be noted that the rejection letter sent out to Galea Cleaning Solutions JV, on 7<sup>th</sup> February 2024, did not include all the 'standard' information as is normally the case when the criterion for award is based on the Best Price Quality Ratio (BPQR) offer. As a minimum, the rejection letter should have included a table summarising the total technical and financial scores obtained by the economic operator to whom the rejection letter is being sent, in this case Galea Cleaning Solutions JV, and of the preferred bidder.
- b) However, following an email sent by same Galea Cleaning Solutions JV, on the 8<sup>th</sup> February 2024 to the Contracting Authority, the relevant information in respect of these two bids was eventually provided. This information was provided on the 9<sup>th</sup> February 2024.
- c) It is however important to point out, that the way the information was presented was not in accordance with the 'standard' prescribed format. All the relevant information such as price of the successful bidder and area/s where points of a technical nature were deducted from the appellant evaluation grid, have however been provided. In the opinion of this Board, the information available to Galea Cleaning Solutions JV as of 9<sup>th</sup> February 2024, was sufficient enough for them to be able to lodge an appeal should have they wished to proceed in this prescribed manner.

**On the evaluation report & successful bidder's bid –**

- d) The Board notes the argumentation brought forward by the appellant and agrees with what is stated in Antea Polska (Case C-54/21) that *"..... the principle of the protection of confidential information must be reconciled with the requirement of effective judicial protection..... That **balancing** exercise must take account of ....."* (bold & underline emphasis added).
- e) It is exactly the word '**balancing**' which in the opinion of this Board is crucial. This was also very evidently stated in the case Varec SA v Etat Belge (Case C-450/06) whereby it was affirmed that *"It follows that, in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the adversarial principle **does not mean that the parties are entitled to unlimited and absolute access to all of the information** relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute (see, by analogy, Case C-438/04 Mobistar [2006] ECR I-6675, paragraph 40) and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial."* (bold & underline emphasis added).

- f) In the opinion of this Board, this ‘balancing exercise’ can in this specific case be achieved by following what is stated in Regulation 270 of the Public Procurement Regulations where it is stated that “.....*may file an appeal by means of an objection before the Public Contracts Review Board, **which shall contain in a very clear manner the reasons for their complaints.***” (bold & underline emphasis added).
- g) Therefore, while blanket statements that all information is confidential are certainly not to be entertained, this Board cannot on the other hand uphold the requests of the appellant which on the other **extreme** part of the spectrum is requesting “a copy of the evaluation report” (presumably in full and not redacted) and “a copy of the successful bidder’s bid” without the appellant having even explained in a very clear manner the reason for their complaints and / or request for information.
- h) It can be argued that without such information it would be difficult to ‘find out reasons’, however a balancing exercise cannot result in having complete evaluation reports and whole successful bidder’s bids sent out to economic operators in the hope of finding a possible grievance on which to appeal. This would, in the opinion of this Board lead to anarchy in the public procurement sector with economic operators losing faith in the process.
- i) Finally, if plausible reasons are brought forward as to why certain information is being requested, and reasons provided why such information is not of a confidential nature, Contracting Authorities should do well to analyse such requests in detail. However, they should not entertain requests which would only serve as a fishing expedition.

### **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

**Mr Lawrence Ancilleri**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member