

PUBLIC CONTRACTS REVIEW BOARD

Case 2008- EM 023/23 – Tender for the Cleaning and Waste Disposal, as Part of Decommissioning Works, at the San Lucjan Oil Terminal in Qajjenza.

30th May 2024

This Board

Having noted the letter of objection filed by **Dr Ryan C. Pace** acting for **PT Matic Environmental Services Ltd** on the 8th April 2024;

Having also noted the letter of reply filed by **Dr Andrew Sciberras** on behalf of **Sciberras Associates Advocates** acting on behalf of **Petromal Company Ltd** on the 16th April 2024

Having heard and evaluated the testimony of witnesses:

1. **Mr Charlie Debrincat** (summoned by appellant and
2. **Ms Natalie Ellul** summoned by appellant

Together with the submissions of **Dr Cornelia Zammit German** representative of **Waste Oil Company Ltd** the preferred bidder

Having taken cognizance and evaluated all the acts and documentation filed, as well as the submissions made by the representatives of all parties;

Having noted and evaluated the minutes of the Board sitting of the 13th May 2024 hereunder reproduced;

Minutes

Case 2008 – EM023/23 – Tender for the Cleaning and Waste Disposal, as part of Decommissioning Works, at San Lucjan Oil Terminal in Qajjenza

The tender was issued on the 7th August 2023 and the closing date was the 15th October 2023.

The estimated value of this tender, excluding VAI, was not stated.

On the 8th April 2024 PT Matic Environmental Services Ltd filed an appeal against Petromal Company Ltd objecting to its disqualification on the grounds that its bid was deemed to be not the cheapest offer.

A deposit of € 3,145 was paid based on appellant bid offer.

There were three bids.

On the 13th May 2024 the Public Contracts Review Board composed of Mr Lawrence Ancilleri as Chairman, Ms Stephanie Scicluna Laiviera and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – PT Matic Environmental Services Ltd

Dr Ryan Pace	Legal Representative
Mr Oliver Fenech	Representative
Mr Silvio Spiteri	Representative

Contracting Authority – Petromal Company Ltd

Dr Andrew Sciberras	Legal Representative
Mr Adrian Pace	Evaluator
Mr Sebastian Paelke	Evaluator
Mr Francis Cassar	Representative

Preferred Bidder – Waste Oil Company Ltd

Dr Cornelia Zammit German	Representative
Dr Yvanka Vella	Representative

Mr Lawrence Ancilleri Substitute Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Vincent Micallef Member of the Public Contracts Review Board requested that it be noted that he is a member of a board on which Dr Sciberras, appearing for the Contracting Authority, also serves, and asked if there were any objections to his continuing to preside in this case.

No objections were raised by any of the parties.

Dr Ryan Pace Leal Representative for PT Matic Environmental Services Ltd (PT Matic) said that the grievances of the appellant were well detailed in the letter of objection. The communication sent to the appellant was incorrect and irregular and does not satisfy the Public Procurement Regulations (PPR) and the General Rules governing Tenders (GRGT). As to the merits of the case, the evaluation of the tender is doubtful as the final disposal of waste is limited to one company

Dr Andrew Sciberras Legal Representative for Petromal Company Ltd said that it is the contention of appellant that only one firm has permits to export waste, whilst all that the Contracting Authority was asking for was disposal. The PCRB cannot take on the role of evaluating the tender in-stead of the Tender Evaluation Committee (TEC). The GRGT did not form part of this tender terms and do not apply. Appellant was in no way prejudiced and misinterpreted Regulation 272 as this relies on Regulation 242 explicitly in a request for information on the reasons for rejection.

Dr Pace said that the Authority in question was Petromal whilst the tender was awarded by Enemed Co Ltd, to which Dr Sciberras replied that his was *lapsus calami*. The tender was evaluated by Petromal personnel.

Dr Pace requested that witnesses be heard.

Mr Charlie Debrincat (17294G) called to testify by appellant stated on oath that he is a Senior Officer, Environmental matters at ERA and was responsible for control on movement of waste matter. Referred to the tender dossier he stated that the disposal of oily sludge was more a matter for another person at ERA.

Mr Debrincat's testimony was suspended to enable another witness to testify.

Ms Nathalie Ellul (432183M) called to testify by the appellant stated on oath that she is a Manager at ERA. When referred to the tender she stated that one of the waste streams is oily sludge which can be dealt with by export as there are no facilities in Malta for final disposal. This type of waste can only be exported by an oil broker or through an export permit obtained after storage.

In reply to questions from Dr Sciberras, witness stated that Waste Oils Co Ltd has a permit to store, and for preliminary treatment but required a permit to export and whilst it was licensed as a broker it had no facility to dispose of the waste in Malta.

In reply to further questions from Dr Pace, witness said that Waste Oil's permits cover storage but not disposal and whilst its broker's permit can lead it to find an exporter, they themselves cannot export.

Mr Debrincat resuming his testimony described the process to obtain an export permit for dangerous or problematic waste. Matters like shipping routes, handlers along the route, special handling considerations had to be considered together with lengthy checking and reviewing of applications with countries involved in disposal. This would generally take from three to six months to obtain. Witness stated that PT Matic have an active export permit.

Questioned by Dr Sciberras, witness said that Waste Oil have a permit to store.

In reply to further question from Dr Pace, witness replied that there was a request by Waste Oil for an application number in December 2023 but nothing further happened.

This concluded the testimonies.

Dr Pace said that on the procedural point, appellant accepts that the award being made by a different company was accepted as a *lapsus calami*, however, the fact remains that appellant was not given reasons for the rejection of its bid. The reference to Regulation 242 is to ensure that BPQR is followed and is not appropriate in this case as this is a cheapest price tender. A proper appeal could not be filed as not enough information was given to appellant. Appellant's reference to GRGT is valid as these regulations apply whether mentioned in the tender dossier or not – all regulations apply and on this point alone the appeal should be met. According to the decommissioning plan details had to be provided for the disposal; in this tender only appellant can offer this service.

Testimony has been given, said Dr Pace, that there can be no final disposal facility unless one has an export permit. At the close of tender only PT Matic had export facility as up to now there had been no action by Waste Oil to process an application. If there is no permit for final disposal then the evaluation has not been carried out correctly and the decision must be revoked and the Board should guide the TEC accordingly.

Dr Sciberras stated that Clause 1.5 in the tender merely requires the bidders to be licenced to transport and dispose – this is merely the removal of sludge from site and there is no requirement to export such waste. The preferred bidder had a permit to remove waste and to treat it and is licenced as a broker – does this not make the TEC's decision correct? The PCRБ cannot evaluate the tender itself as held in Court of Appeal cases *Cherubino vs Department of Contracts* and *Saniclean vs SVDP*. The tender was based on the most advantageous offer; appellant's offer did not include the VAT element in their bid price and this made it higher than that of the preferred bidder which was comprehensive. The decision in Court of Appeal Case 292/2020 has a bearing on this point. Appellant had the opportunity of raising queries but this did not happen. Appellant has suffered no prejudice.

Dr Pace pointed out that all the cases quoted were of no relevance to this case as those decisions were based on BPQR tenders which is not the case here. Just because a tender is based on cheapest price does not mean that everything else is ignored – the technical offer has first to be carried out. In the Financial Offer Clause 6.1 (page 22) it is clearly stated that the offer has to exclude VAT. The Financial offer of Waste Oil referred only to rate for filling, and in Clause 5.4 the tender makes a clear reference to the GRGT. This countermands the points raised by the Authority.

Dr Cornelia Zammit German Representative for Waste Oil Company Ltd said that the company has all licences to carry out the tender with permits to store and eventually export the waste. The company can store as long as necessary to obtain an export licence as brokers or can use other firms to carry out the export. The tender requirements were satisfied.

Dr Pace concluded by saying that the price of the bid was irrelevant if the proper technical evaluation was not carried out. There was no reference in Waste Oil's bid that it planned to use sub-contractors.

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

End of Minutes

Hereby resolves:

This Board refers to the minutes of the Board sitting of the **13th May 2024**

Having noted the objection filed by **PT Matic Environmental Services Ltd.** (hereinafter referred to as the Appellant) on the 8th April 2024, refers to the claims made by the same Appellant with regards to the tender reference EM 023/23 listed as case No 2008 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace

Appearing for the Contracting Authority: Dr Andrew Sciberras

Whereby, the appellant contends that it feels highly aggrieved due to the fact that:

1.

The communication/notification of its rejection is incorrect and irregular as it breaches the Public Procurement Regulations. The Contracting Authority governing the tender process is Petromal Company Ltd and yet the notification sent to appellant company states that the tender has been awarded by Enemed Company Ltd which is a separate and distinct legal person.

This means that the latter company should not have had any involvement whatsoever throughout this procurement, let alone award it.

Enemed Company Limited is a separate and distinct legal person with absolutely no ties to Petromal Company Limited and therefore being involved in this procurement makes this procurement procedure vitiated and severely impaired.

2.

The communication/notification informing the appellant company of its rejection is irregular and in manifest breach of the applicable rules and Regulation. To this effect reference is made to Regulation 272 of the Public Procurement Regulations (S.L. 601.03) which states that

“the communication to each tenderer or candidate concerned of the proposed award or of the cancellation of the call for tenders shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 242 or the reasons why the call for tenders is being cancelled after the lapse of the publication period, and by a precise statement of the exact standstill period.”

Reference is also made to the seven sub clauses of Regulation 19.2 of the General Rules Governing Government Tenders which elaborates the relevant reasons relating to the rejection and the precise statement of the exact standstill period are.

Furthermore, the award criterion for this procurement procedure was the cheapest priced offer satisfying the administrative and technical criteria. All bidders should have been notified in accordance with the provisions of clause 19.2 of the General Rules Governing Tenders of all information listed in sub-clauses (i) (ii) (iii) (iv) (vi) (vii). None of this mandatory information was provided to the appellant company. Added to this appellant company submitted the cheapest priced offer while the reasons on the basis of which appellant company was unsuccessful have not been provided. This reason alone should lead to the revocation of the decision subject to this appeal.

3.

Reference is made to the Standard Operating Procedures issued by the Department of Contracts whereby it is provided that the evaluation of technical offers ought to be carried out on all technical aspects comprising the said offer such that in the eventuality that a prospective bidder's offer is found to be, following an evaluation of all technical aspects, technically non-compliant, that very same offer should not be considered any further, irrespective of its financial compliance or otherwise.

In this specific procurement the evaluation process did not match the level of scrutiny one would expect and this lead to an undesirable scenario whereby the preferred procurement proposal does not fully attain the final objectives of this procurement procedure namely **waste disposal**.

The waste streams identified during decommissioning all of which are listed in the **Outline Decommissioning Plan** cannot be disposed of in their entirety domestically and may only be

fully disposed of abroad at environmentally authorized sites. The appellant company is the only company currently in possession of a valid export permit issued by the competent authority and authorized to undertake such operation.

Such a fundamental requisite necessary to fully attain the objectives set out in the tender document has been overlooked by technical evaluators who one would presume to be versed in this subject matter.

Therefore, the award of this procurement procedure must necessarily have been made in favour of an economic operator who is not yet licensed to offer disposal of all waste streams as required under this procurement procedure.

Reference is made to a judgement delivered on the 24th of June 2016 by the Honorable Court of Appeal in the names of Disabled Persons Co-Operative Limited v Direttur Generali tal-Kuntratti where the said Court held that “l-principju ta’ trasparenza jrid li l-Kumitat ta’ evalwazzjoni jimxi mad-dettalji teknici kif imnizzla fid-dokument tas-sejha u mhux jiddeciedi li jaghzel liema li jidhirlu li hi l-ahjar offerta”

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filled on the 16th April 2024 and its verbal submission during the hearing on 13th May 2024 where Petromal maintains that the grievances articulated by the Appellant lack legal and factual merit and should be dismissed by this Honorable Board.

1st Grievance: Nullity of the Notification of the Rejection Notice

The appellant deemed the notification to be erroneous as it attributes the contracting authority to “Enemed Company Ltd” instead of “Petromal”. This discrepancy stemmed from an administration oversight on the part of Petromal which utilized the administrative infrastructure of Enemed in the formulation of the tender.

The failure to modify the template to replace “Enemed” with “Petromal” was purely an oversight or “lapsus calami”.

The contracting authority asserts that Enemed is not a separate and distinct legal entity with absolutely no affiliation with Petromal, and that there is no regulation or rule that deems such a notification invalid to invalidate the tendering process, nor that the appellant suffered any prejudice.

2nd Grievance: Failure to Disclose Reason for rejection and Other Information

Petromal submits that Regulation 272 of the PPR does not impose any obligation on Petromal to disclose the reason for rejection in the rejection notice under scrutiny. Regulation 272 references regulation 242 which explicitly outlines the right for the tenderer to request such information. No such request for information was made by the tenderer. In support of this

Petromal cites the judgment delivered by the Court of Appeal on 16th December 2021 in the case of “ Pharmadox Health Care Limited v. Central Procurement and Supplies Unit fil-Ministeru tas-Sahha et”

The contracting authority insists that the purported lack of reasons for rejection did not result in any prejudice to the Appellant as evidenced by his ability to lodge an appeal on substantive ground including financial and technical consideration.

As regards to the contention that the appellant submitted the cheapest priced offer Petromal submits that the appellant did not include the VAT element in his final financial offer which leads to an over gross offer as compared to the winning bidder.

The contracting authority also contends that the appellant’s offer did not include the subsea pipeline cleaning valued at an additional 130,000 euro excluding VAT even though this was part and parcel of the Decommissioning Plan issued together with the tender document

Also with reference to the General Rules Governing Tenders as cited by the appellant Petromal wishes to clarify that no such rule or general condition regarding the merits of the Objection/Appeal was included in the tender document.

3rd Grievance: Incomplete and Non-Technical Evaluation Process -only the appellant is Licensed to Export Waste

The contracting authority contends that the successful bidder (Waste Oils Company Limited) is compliant with the stipulated tender conditions (and accompanied by documentary evidence of licenses and permits issued by the Environmental and Resources Authority (ERA). Petromal mandated all respondents prior to adjudication to furnish a Method Statement for cleaning and waste oil removal at San Lucian Terminal, Qajjenza, Birzebbuga. The successful bidder has certified its authorization to conduct waste oil removal, storage, processing and disposal at its Marsa facility under Integrated Pollution Prevention and Control Permit IP0002/08/D issued by ERA together with an ERA license as a waste Broker . All this as stipulated in the tender document in Clause 1.5What is more the eligibility criteria did not mandate submission of evidence pertaining to licensing or authorization for waste exportation beyond Malta as insinuated by the appellant in his grievance but only for its removal. Thus there has been no negligent or careless evaluation and/or adjudication throughout any phase of the tender process as contended by the appellant.

This Board after having examined the relevant documentation to this appeal and heard submission mad by all the interested parties including the testimony of the witnesses duly summoned will now consider the Appellant’s grievances. This Board refers to the preliminary

grievance raised by the appellant in relation to that communication-notification relating to its rejection:

The Board asserts that this ground for appeal is justified. The law, in terms of article 272 of the Public Procurement Regulations and also in terms of article 19.2 of the General Rules Governing Tenders makes it undoubtedly clear that it is mandatory at law to provide the reasons why the tenderer did not meet the technical specification/notifications that the offer was not the cheapest. Contrariwise, it is an established administrative law principle (under the realm of principles of natural justice) which is generally applied and confirmed in a number of Court of Appeal judgements that a body vested with the powers to decide on an administrative act is bound by the principle of *ratio decidendi*.

To this effect, this Board disagrees with the Contracting Authority's point of view that the duty to give a valid reason is only 'facultative' in nature. Clearly, that assertion applies to tenders which are inherently a Best Price Quality Ratio (BPQR) tenders.

On another note, this Board also refers to the appellant's grievance that the contracting authority erroneously indicated Enemed Company Ltd instead of Petromal Company Ltd. To this effect, the Contracting Authority is of the opinion that the erroneous indication and the consequent mention of Enemed Company Ltd instead of Petromal Company Ltd constituted a mere *lapsus calami* or an administrative oversight. The Board is of the opinion that such assertion does not hold water.

If this Board is to accept that mentioning the name of a company instead of another is tantamount to a mere oversight, the same Board will rather be creating a dangerous precedent, albeit Enemed forms part of a group structure as indicated by the Contracting Authority. Nonetheless, each company within a group still maintain its own legal identity and responsibilities. Juridical personality implicates that particular company within the group, potentially affecting its liabilities, obligations, and legal standing. Ignoring juridical personality could lead to confusion, disputes, and potential legal consequences. As a consequence, this board is of the opinion that the submission raised by the contracting authority in that context is not justified.

That said the Board will now embark into considering the submission in relation to the financial bid. However, at this juncture, the Board cannot consider the financial bid in isolation from the technical aspect. The latter should always be addressed by the evaluation committee concerned as an *a priori*, i.e. technical matters must be assessed and considered before the determination on the financial bid.

In this context, the Board refers to the tender objective and scope which, ironically, is also replicated in the notice of objection whereby reference is made to "waste disposal as part of decommissioning works".

From evidence produced during the appeal proceedings it has resulted amply clear that in Malta there is no waste disposal facility as waste disposal facilities are only available abroad. Therefore, since the tender document itself requires, as a pre-condition, waste disposal as an integral part of the call and Malta lacks facilities; exportation becomes *sine qua non*. Even the text of the tender makes it clear that the retention of the waste should at no time be retained beyond a stipulated time-frame of twelve months.

Furthermore, during the course of this appeal, it was established that the locally there are only two licensed companies which are equipped with a waste disposal exportation license. The appellant company is one of these companies whereas the preferred bidder is not equipped with such license. This was also proven *ex admissis* by the preferred bidder company representative during her own verbal submission.

The Contracting Authority also made the assertion that the General Rules Governing Tendering do not apply in this tendering process. Although the Board disagrees with such submission, it must be pointed out that the tender document itself states otherwise in article 5.4 in page 20.

On another note the contracting authority also makes reference to the fact that the standard process does not require "the export of waste disposal". Article 3.2.1 clearly refers to the Outline Decommissioning Plan which includes both the cleaning and the "waste disposal" which is the penultimate aim of the tender in question.

This Board makes additional reference to the Contract Authority submission in relation to the failure on part of the appellant to include the "subsea pipeline cleaning" valued at Eur130,000. The Board opines that the submission is also not justified in that clause 3.2.2 refers to the nomenclature "pipe-works" only. At no point in time does it mention subsea pipeline cleaning. Therefore, and in line with the doctrine of self-limitation, this Board cannot extend or widen the text used in the tender document to go beyond what ultimately is considered to be the chosen language used by the Contracting Authority itself.

To this effect and in view of the above the Board decides and concludes that:

1. To uphold the appellant's grievance.
2. The notification of rejection of the 28th March 2024 does not conform with the mandatory requirements set out in the Public Procurement Regulations and the General Rules Governing Tenders and therefore has to be cancelled and revoked.
3. To cancel and revoke the award of the tender to the recommended bidder and to cancel the letter of award.
4. To reintegrate in the tender process PT Matic Environmental Services Ltd in view of all the aforementioned considerations of this Board.
5. To refer back this tender evaluation for re-evaluation by a newly appointed Evaluation Committee composed of persons who did not form part of the first evaluation committee and directs the Contracting Authority that the newly appointed Evaluation Committee should be composed of three (3) voting members in addition to a Chairperson and a Secretary.
5. To order the reimbursement of the deposit paid by the appellant.

Mr Lawrence Ancilleri
Chairman

Ms Stephanie Scicluna Laiviera
Member

Dr Vincent Micallef
Member