

PUBLIC CONTRACTS REVIEW BOARD

Case 2014 – CT2192/2023 – Services - Framework Agreement for the Disposal of Asbestos Containing Material in an Environmentally Friendly manner from Malta for the Water Services Corporation

30th May 2024

The Board,

Having noted the letter of objection filed by Dr Ryan C. Pace acting for and on behalf of PT Matic Environmental Services Limited, (hereinafter referred to as the appellant) filed on the 25th March 2024;

Having also noted the letter of reply filed by Dr Christopher L. Vella on behalf of Old Mint Legal acting for and on behalf of Water Services Corporation (hereinafter referred to as the Contracting Authority) filed on the 4th April 2024;

Having heard and evaluated the testimony of the witness Mr Charles Debrincat (Representative of Environment and Resources Authority) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

Having heard and evaluated the testimony of the witness Perit Mark Frendo (Chairperson of the Evaluation Committee) as summoned by Dr Ryan C. Pace acting for PT Matic Environmental Services Limited;

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 21st May 2024 hereunder-reproduced;

Minutes

Case 2014 – CT 2192/2023 – Services – Framework Agreement for the Disposal of Asbestos containing material in an environmentally friendly manner from Malta for the Water Services Corporation

The tender was issued on the 13th September 2023 and the closing date was the 12th October 2023

The estimated value of this tender, excluding VAT, was € 2,003,340.

On the 25th March 2024 PT Matic Environmental Services Ltd filed an appeal against the Water Services Corporation objecting to the decision to reject their tender as it was deemed to be not the cheapest priced offer.

A deposit of € 10,017 was paid.

There were six bids.

On the 21st May 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 – PT Matic Environmental Services Ltd

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

Contracting Authority – Water Services Corporation

Dr Christopher Vella	Legal Representative
Perit Mark Frendo	Chairperson Evaluation Committee
Eng Nigel Ellul	Evaluator
Eng Gilbert Costa	Evaluator
Mr Matthew Calleja	Evaluator

Preferred Bidder – Edile First Choice Zerafa

Invited but did not attend

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 Ryan Pace Legal Representative for PT Matic Environmental Services Ltd (PT Matic) said that the only point of contestation was on the matter of the export of the waste and which of the contestant is the right one to carry this out. Only PT Matic holds a licence to do this.

Dr Christopher Vella Legal Representative for Water Service Corporation agreed that PT Matic was the only bidder to hold an export licence, however the tender allows either the holding of a licence or a declaration to obtain one within three months (Article 5B(a)(iii)). The preferred bidder made such a declaration.

Dr Mark Anthony Debono on behalf of the Department of Contracts said that the appeal should be denied if the preferred bidder met the requirements of the tender which allowed a choice.

Dr Pace requested that witnesses be heard.

Mr Chalie Debrincat (17294G) called to testify by the appellant stated on oath that he is a Senior Officer at ERA and that the tender under consideration involved dangerous waste requiring special procedures for handling. One had to give early notification of the intention to treat this waste. First of all one has to apply for a number before one can proceed to an application for a licence. He went on to describe the lengthy process to apply for a licence involving treatment of waste, liaison with waste handlers *en route* to final disposal, contracts with all handlers, financial and bank guarantees and waste licence of foreign handlers. After that a cover letter is sent to all parties involved in the process and foreign authorities notified and their feedback awaited. According to the witness this process takes between three and six months to complete with certain cases having taken over a year. The permit for PT Matic expires in August 2024 and it has already filed a renewal application. The

application for a number from Green Skips has still not been received although the letter was sent in April 2024 and it will be three to six months to issue a licence from the time application actually received.

Questioned by Dr Vella, witness said that it is possible that a licence is issued in under three months.

In reply to a question from Dr Debono, witness said that the timing for the issue depends on the experience of the applicant but it is unlikely to be issued in under three months.

Peri Mark Frendo (93486M) called to testify by the appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) but had no involvement in the drafting of the tender. He confirmed that the preferred bidder Edile First Choice Zerafa (a joint venture) had not indicated that they were sub-contracting any part of the contract. Witness was referred to the three months declaration to obtain a valid ERA TFS permit and confirmed that he was familiar with the requirements to obtain such permit and this had been provided by the joint venture. Although the service was required urgently the tender had to strike a balance to widen competition.

Questioned by Dr Vella, witness said that the TEC had followed the tender requirements in respect of the three months declaration.

This concluded the testimonies.

Dr Pace said that the appellant does not agree with the evaluation decision. The Chairperson of the TEC had stated that the disposal of the asbestos was an urgent matter. In fact, the tender in page 15 states that the tenderer must present an active ERA TFS permit for the export of asbestos – hence an active permit was required. PT Matic is the only firm that has so far managed to obtain such licence. Conflictingly article 5B(a)(iii) requests one thing whilst page 15 of the tender requests another. Perit Frendo in his testimony stated that the Authority required the service urgently whilst Mr Debrincat confirmed that only PT Matic have a licence. The TEC confirmed that there is no sub-contracting involved in the preferred bid but a declaration that it will obtain a permit in three months when experience indicates it takes three to six months to obtain a licence. The preferred bidder has not applied for such licence and the only application is from Green Skips, yet Perit Frendo says there is no sub-contracting. The Authority requirements expect urgency on hazardous waste whilst the preferred bidder has not yet even applied for a number. The decision of the TEC should be reviewed.

Dr Vella stated that what matters is how things stood at the time of the evaluation. The preferred bidder met all conditions and criteria at that time whilst appellant is looking at the tender at this stage. Point 4.2 on page 15 of the tender cannot be read in isolation as the tender also offers the possibility of a declaration in lieu. The preferred bidder offered such a declaration and Perit Frendo confirmed that the TEC was satisfied with this. Mr Debrincat did not exclude the possibility that a licence could be obtained within three months by an experienced operator. If the tender had been limited only to licence holder it would have been unfair and anti-competitive.

Dr Debono said that the testimony regarding the time needed to get a licence is irrelevant. The three month period was not challenged by appellant at the time of issue. Citing Court of Appeal Case 158/2015/1 *Grange Security* if a tender allowed an alternative the Board cannot ignore that point. Regulation 39(3) is there to encourage competition.

In a final comment, Dr Pace said that it can be agreed that an active ERA permit is not obtainable whilst PT Matic has it in hand. One would expect the drafters of the tender to be *au fait* with what is required to obtain a permit. Is PT Matic to be penalised for being businesslike and obtaining a permit? Is that unfair or monopolistic competition?

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 21st May 2024.

Having noted the objection filed by PT Matic Environmental Services Limited (hereinafter referred to as the Appellant) on 25th March 2024, refers to the claims made by the same Appellant with regards to the tender of reference CT2192/2023 listed as case No. 2014 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace

Appearing for the Contracting Authority: Dr Christopher L. Vella

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) As per the applicable terms of reference, the works requested by the Contracting Authority and in relation to which a framework agreement would be entered into "*shall comprise the safe removal, export, and treatment of Asbestos Containing Material (ACM) in an environmentally friendly manner from sites in Malta as indicated by Water Services.*" To this effect, the said tender dossier further clarifies that disposal of Asbestos Containing Material shall be carried out "*at an environmentally authorized landfill site abroad*" and "*in accordance with all the procedures approved by the Environment and Resources Authority (ERA) and by the Occupational Health and Safety Authority (OHS/A).*"
- b) The Director General (Contracts') decision to award this procurement to the preferred bidder (Edile First Choice Zerafa) - on the basis, hereby vehemently contested, that it has submitted "*the cheapest priced tender satisfying the administrative and technical criteria*" - attests to an incomplete and non-technical evaluation process - which arbitrarily discarded the objective of this procurement - such that with its recommendation, and eventual award, the scope underpinning this procurement procedure, that is the disposal of Asbestos Containing Material "*at an environmentally authorized landfill site abroad*", cannot, and will not, be achieved.
- c) Reference is made to the Standard Operating Procedures issued by the Department of Contracts whereby it is unequivocally provided that the evaluation of technical offers is ought(sic) 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.

- d) Regrettably, the Director General (Contracts) decision confirms that the evaluation process did not match the level of scrutiny one would reasonably expect in such circumstances, this leading to an undesirable scenario whereby the preferred procurement proposal is not one which will attain the final objectives of this procurement procedure, namely the disposal of Asbestos Containing Material "*at an environmentally authorized landfill site abroad*". This in view of the fact that the preferred bidder does not possess, and is not expected to possess at any time in the foreseeable future (in the absence of a request to this effect), an export permit validly issued by the competent Authority to export the hazardous material to which this tender relates.
- e) The appellant company, which ironically is the only company currently in possession of a valid export permit for Asbestos Containing Material issued by the competent Authority (all permit holders may be viewed on the Environment and Resources Authority's website), fails to comprehend how such a fundamental requisite necessary to attain the objectives set out in the tender document could have ever been overlooked. This compounded further by the fact that the Contracting Authority clearly requested "[a]n active ERA TFS permit for the export of asbestos containing material." It remains unexplained, therefore, how the Director General (Contracts), with the information available to it (or lack thereof), proceeded nonetheless to award a contract for the disposal - by way of export - of Asbestos Containing Material to a bidder which does not possess (nor is expected to possess in the near future) an export permit over another bidder (the appellant company) which is the only company in possession of a valid export permit.
- f) As baffling as it may seem, given that evaluation ought to be undertaken by technical individuals who are well versed in this subject matter, it is evident that the preferred bidder's offer was evaluated from a strictly monetary perspective, doing away with everything else, including the procurement procedure's ultimate objectives. This arbitrary and unjustified departure from the unequivocal text of the tender document does not only run counter to the core principles in public procurement but also cause significant prejudice to the appellant - more so considering that the administrative, technical and financial compliance of its offer, as opposed to that of the preferred bidder, is undoubted.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4th April 2024, its verbal submission during the hearing held on 21st May 2024, in that:

- a) The Contracting Authority is not in contestation that the Appellant may be the only economic operator with a valid licence as requested in terms of section 5(B(a)(ii) of the Tender Dossier.

However the tender permitted that a bidder may be allowed to obtain such a licence within a period of three months from being awarded the contract should a declaration in this regard be made. Reference is made to section 5(B)(a)(ii) of the tender document - Suitability for Selection and Award Requirements.

(ii) Economic operators shall have an active ERA TFS permit for the export of the asbestos containing material mentioned in Section 3 - Terms of Reference.

To this effect, economic operators must:

Either: upload a copy of a valid ERA TFS permit for the export of the asbestos containing material;

Or: declare that he/she will be obtaining such a permit within three (3) months from the awarding of the contract.

This information is to be submitted online through the prescribed Tender Response Format and by using the Tender reparation Tool provided. (Note 2)

- b) It is evident that in the Objection Letter, the Appellant very conveniently did not mention or in any manner make reference to this requirement from the tender dossier. In fact the awarded bidder did include a declaration stating that a permit will be obtained within 3 months from the awarding of the contract. In view of this, the Evaluation Committee was sufficiently satisfied with the declaration made. This also permits that the objectives of the contract may be achieved.
- c) In view of this it is wholly unfounded, the allegation that the Evaluation Committee somehow overlooked that the Appellant is the only economic operator with a valid licence. It is being submitted that the possession of such licence was not the only requirement. In fact the aim behind this public procurement process was indeed to act in a very fair and equal manner and not be discriminatory in this regard by issuing a tender where only one economic operator may submit his bid i.e. the Appellant. The inclusion of a requirement for economic operator with such a licence would have resulted in such discriminatory outcome. The principles of public procurement prohibit this.
- d) In fact the awarded bidder provided a declaration as requested. This sufficiently satisfied the administrative and technical requirements of the tender which did not require that such a licence is in hand at the time of submission.
- e) Without prejudice to the above, the Contracting Authority is not in agreement with the statement made by the Appellant in the Objection letter that the awarded bidder is not expected to possess at any time in the foreseeable future an export permit validly issued. The Authority considers that the period of three months is sufficient period to obtain such permit.

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) Many lines of argumentation were brought forward before this Board. However, it is this Board's opinion that in this specific case,
 - i. How the application process, for an export permit for the disposal of asbestos, with the Environment and Resources Authority works;
 - ii. How long it takes for the whole application process to start and be brought to an end; and
 - iii. Whether the disposal of asbestos was an urgent matter or not to the Contracting Authority are to a certain extent irrelevant to proceedings.
- b) What this Board finds most relevant are the requirements of paragraph 5(B)(a)(ii) of Section 1 of the tender dossier and the requirements of paragraph 4.2 of Section 3 of the tender dossier.
- c) As already seen and discussed in PCRB decision 2015, dated 27th May 2024, dealing with an objection on the same tender CT2192/2023, the 'Certification Requirements' of Section 3 of the tender dossier are not to be thought of as 'Post Award Criteria'. Hence, this Board strongly opines that these requirements had to be adhered to, *ab initio*, as at tender bidding stage.
- d) An anomaly is therefore present between these two sets of requirements [5(B)(a)(ii) - Section 1 and paragraph 4.2 - Section 3].
- e) The Public Procurement Regulations clearly state that "*The procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process.*" [Regulation 38(1)]
- f) It is therefore clear to this Board, that once the Contracting Authority has itself imposed a requirement that economic operators should "*present.... an active ERA TFS permit for the export of asbestos containing material*", it is then its own responsibility to evaluate bids whilst taking into consideration these same requirements that it has itself imposed on economic operators.
- g) Arguments brought forward by the Contracting Authority that the term "active" should also be broadened to include economic operators who did submit a declaration as per paragraph 5(B)(a)(ii) - Section 1 are deemed irrelevant and considered a non-starter by this Board.
- h) Finally, it must be mentioned that the appellant (PT Matic Environmental Services Limited) certainly cannot be accused of having a monopoly simply because it is the only licensed entity by the Environment and Resources Authority to export and dispose of asbestos. Criteria which can point towards a monopoly are 'threats' to new entrants into the market. Once other economic operators had no threats and / or obstacles to apply for such a permit, a monopoly certainly cannot exist!

The Board,

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

- a) To uphold the Appellant's grievance;
- b) To cancel the 'Notice of Award' letter dated 15th March 2024;
- c) To cancel the Letter of Rejection dated 15th March 2024 sent to PT Matic Environmental Services Limited;
- d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- 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

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member