

PUBLIC CONTRACTS REVIEW BOARD

Case 2015 – 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 John L. Gauci acting for and on behalf of M Stream 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 Perit Mark Frendo (Chairperson of the Evaluation Committee) as summoned by Dr Joseph Camilleri acting for M Stream 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 2015 – 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 M Stream Ltd filed an appeal against the Water Services Corporation objecting to the decision to reject their tender as it was deemed to be technically not compliant.

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 – M Stream Ltd

Dr Joseph Camilleri

Legal Representative

Mr Gilbert Bonnici Representative
Mr Wallace Fino Representative

Contracting Authority – Water Services Corporation

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

Preferred Bidder – Edile First Choice Zerafa

Dr Andreina Fenech Farrugia Legal Representative

Department of Contracts

Dr Mark Anthony Debono Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joseph Camilleri Legal Representative for M Stream Ltd said that the grievances are clear and as laid out in the letter of appeal. The second grievance is regarding a likely conflict of interest as it appears that a similar name of an individual appears in two of the bidders. This has not been denied by the Contracting Authority in their letter of reply and it is now being requested to state if there is a common interest between the two bidders.

Perit Mark Frendo (93486M) testified on oath as Chairperson of the Tender Evaluation Committee (TEC). He confirmed that that there are two similarly named bidders and more than one, in fact two, common parties – First Choice and Zerafa.

In reply to questions by Dr Vella, Legal Representative for the Contracting Authority, witness said that this matter was considered by the TEC and it was decided that under the General Rules Governing Tenders (GRGT) Rule 3.1, an operator can submit more than one tender.

This concluded the testimony.

Dr Camilleri said that the appeal was on two distinct grievances. The first attacks the exclusion and the second attacks the conflict of interest situation. The first grievance hinges on the decision by the Authority concerning the submission of certificates in lieu of a declaration. The Authority claims that what was required to be submitted are certificates as requested in Article 4.3 of the tender dossier. This is a framework agreement which is a running agreement involving job orders and the correct interpretation is that what was requested was a declaration with certificates being presented at the job order stage - article C(i)(c) of the tender which asks for a declaration that the technicians shall be trained for asbestos removal and that the certificates will be submitted at the assignment of each Job Order. It is clear, therefore, that at the bid stage the declaration had to be submitted. The requisite in 4.3 is different. The Authority claims that both articles should be read together – this, however, does not make sense if the certificate has already been submitted and the logical process is to provide the declaration and subsequently the certificate at the time of the job order. There could be personnel changes between the time of the bid and the time the work is carried out. As requested the declaration has been provided and the exclusion on this point is not justified.

Dealing with the second grievance, Dr Camilleri stated, that Edile First Choice Zerafa could not be awarded the tender as they put in more than one bid. Admittedly General Rule 3.1 allows more than one bid but in this case who is the bidder in the joint venture? One cannot consider this as bids by individuals since in a joint venture the bidder is not an individual. This is borne out by the fact that in the case of a joint venture the Authority requires joint and several liability and the venture becomes a juridical body. One party in a joint venture may offer a bid bond for the venture. In this case the bidder is not First Choice or Zerafa but a joint venture and the offers cannot be considered as multiple bids of the same bidder. Rule 3.1 refers solely to bidders as individuals whilst Clause 3.2 states that an economic operator may not tender both individually and as a partner in a joint venture. The only thing allowed is to participate as a sub-contractor but this is not a *carte blanche* situation. If the General Rules wanted to allow multiple consortia it would have stated so. The multiple bids should be excluded.

In regard to the conflict of interest claim Dr Vella said that in the GRGT there is no bar to a joint venture joining another joint venture and the TEC was correct in following the General Rules as there is no prohibition on multi offers by joint ventures. Offers cannot be rejected when there is no law prohibiting it since a joint venture is not recognised as a juridical person. In respect of the first grievance the TEC followed Article 4.3 in the tender and the appellant failed to submit the certificates as it maintained that the declaration was sufficient. Further, a clarification was sent but it still submitted a declaration in response. The Board should not concern itself if the tender has contradictory clauses – all it has to do is to judge if the tender has been correctly adjudicated. Appellant decided to ignore Article 4.3 on two occasions.

Dr Debono on behalf of the Department of Contracts said that the TEC has to abide by Regulation 39 of the PPRs and Regulation 2 in regard to the conflict of interest. On the first grievance Article 4.3 is clear on what is required and the appellant is incorrect in its interpretation. The Authority even went a step further and requested rectification. PPRs 229 allows the Authority to ask for further documents if necessary. The appeal should be denied.

Dr Camilleri requested the Board to circulate the decisions on both appeals on this tender to all parties concerned. The Board assured him that all decisions by the Board are published and available to all.

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 M Stream 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. 2015 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Camilleri
Appearing for the Contracting Authority: Dr Christopher L. Vella
Appearing for the Preferred Bidder: Dr Andreina Fenech Farrugia
Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

a) ***1st grievance - Technical Compliance Misinterpretation -***

The decision letter states, "*The EO was asked to rectify missing literature regarding the Training Certificates requested for Environmental Technicians in asbestos removal. The EO submitted a declaration instead of the requested certificates. (Specifications Clause 4.3).*" Contrary to this, the tender document clearly specifies under point (C): "*Declaration that the Registered Environmental Technicians for asbestos removal shall be trained for asbestos removal and registered with the OHSA, and that the training certificates... will be submitted to the Contracting Authority at the assignment of each Job Order.*" The Objector adhered precisely to these instructions by submitting the required declaration, in strict conformity with the tender's stipulated submission process. The decision misinterpreted these guidelines, unjustifiably marking the Objector as non-compliant. Thus the appealed decision should be overturned and Objector reinstated in the Tender process.

b) ***2nd grievance - Ethical and Conflict of Interest Concerns -***

The award decision recommends Edile First Choice Zerafa (TID 199662), while revealing that offers were also submitted by Barbagallo First Choice Zerafa. This raises substantial ethical issues, leading to a potential conflict of interest, as these entities appear to be related. Such instances of conflict of interest go contrary to basic principles of public procurement legislation and applicable General Rules Governing Tenders. Furthermore such a situation breaches the fundamental procurement principles of fairness and integrity.

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) ***1st grievance - Technical Compliance Misinterpretation -***

The Appellant states, by means of this objection, that the appellant adhered to the requirements found in the Tender Dossier and the Clarification Question related thereto requesting Training Certificates for Environmental Technicians in asbestos removal. In fact, in the Letter of Objection the Appellant states that this was done by submitting a declaration and therefore not the Training

Certificates themselves. The Appellant is making incorrect reference to the Tender Dossier and quoting erroneously. Reference is made to Clause 4.3 of the Tender Dossier in the section titled 'Certification Requirements' which is crucial to the case at issue. This provides as follows:

For this framework agreement, the tenderer must present the following:

.....

4.3 Training certificates for Environmental Technicians in asbestos removal who are registered with the Occupational Health and Safety Authority (OHS/A).

4.4 Certificates from accredited certification bodies regarding the company Management Systems covering the company's asbestos removal operations certified to Health & Safety ISO 45001:2018.

The Appellant failed to submit the certificates required and as a result a rectification request was submitted. Nevertheless, the Appellant failed again in submitting the requested certificates and instead submitted a declaration. This was not in line with the requirements of the Tender Dossier and thus the bid was considered as not technically compliant. In the Objection Letter, the Appellant erroneously refers to Section 5(c)(i)(c) - Specifications under Selection and Award Requirements which requires that a declaration is required. However this is a separate requirement from that mentioned in Clause 4.3. Thus the submission of the declaration as required in the former section did not satisfy the requirement for certificates as requested by the latter section.

b) ***2nd grievance - Ethical and Conflict of Interest Concerns -***

The Appellant states that the fact that an offer was submitted by Barbagallo First Choice Zerafa and Edile First Choice Zerafa raises substantial ethical issues leading to potential conflict of interest since these entities appear to be related. The Appellant stops short from delving further into the manner of conflict of interest. The Contracting Authority does not take such allegations lightly and it does not appear, in any manner, that there is any conflict of interest in having the same company or individual participating in two separate bids in two different joint ventures. In this regard, reference is made to Sections 3.1, 3.2, 3.3 and 3.4 of the General Rules Governing Tenders, which do not in any manner prohibit such a scenario. In fact, section 3.1 states that: *"Bidders may submit up to three (3) multiple and non-identical (technically and financially) bids for a tender. In cases where bidders submit more than three (3) non-identical bids, the evaluation board will only consider the first three (3) cheapest offers submitted - irrespective of their administrative, technical and financial compliance. All other bids submitted by the tenderer will be automatically disqualified."* Section 3 of the abovementioned rules is specifically dedicated to Multiple Tenders and therefore who may submit more than one tender. No exclusion for entities participating in more than one bid as part of different joint ventures exist. Moreover, the Contracting Authority, does not consider that this situation creates any situation of a conflict of interest.

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.

a) ***1st grievance - Technical Compliance Misinterpretation -***

- i. From both the verbal and written submissions, it is being noted that the facts surrounding this grievance are not being contested.
- ii. What needs to be analysed, and decided upon, is the interpretation of paragraph 4.3 of Section 3 of the tender dossier (page 15).
- iii. The appellant duly submitted the declaration as per requirement 5(C)(i)(c) of Section 1 of the tender dossier, however even after being provided with the possibility to rectify its situation did not submit / present the 'training certificates' as per requirements of paragraph 4.3 of Section 3 of the tender dossier. It is to be noted that Section 3 "Specifications / Terms of Reference" is duly marked as 'Note 3' and hence the possibility of a 'Rectification' is also questionable!
- iv. This Board opines that nowhere was it specified that these specific requirements (paragraph 4.3 of Section 3) were 'Post Award Criteria' and therefore the onus to satisfy the requirements of the tender document rested solely on the economic operator, now appellant.
- v. As discussed, time and time again, it is not up to the economic operators to decide what should and what should not be submitted. The requirements of the tender dossier are to be fully adhered.

Therefore, this Board does not uphold this first grievance of the appellant.

b) ***2nd grievance - Ethical and Conflict of Interest Concerns -***

- vi. Reference is made to the testimony under oath of Perit Mark Frendo who confirmed that parties within the joint venture which is being proposed as the recommended bidder (Edile First Choice Zerafa) also formed part of another joint venture which participated in this tender procedure (Barbagallo First Choice Zerafa).
- vii. Reference is also made to section 3 of the General Rules Governing Tenders ("GRGT") entitled 'Multiple Tenders' whereby in paragraph 3.1, the GRGT duly list out the possibility of 'bidders' to submit up to three multiple and non-identical bids for a tender.
- viii. Paragraphs 3.2, 3.3 and 3.4 of the same GRGT then proceed to list out instances whereby economic operators are precluded from submitting 'multiple tenders'.
- ix. Within such 'exclusions', economic operators are not allowed to submit multiple tenders if they submit an offer as an individual tenderer and another as being a partner in a joint venture / consortium (reference to paragraph 3.2).

- x. Another ‘exclusion’ revolves around the scenario whereby an economic operator who submits a bid either as an individual and / or as a partner in a joint venture / consortium and then being nominated as a subcontractor. This, as per paragraph 3.3, is strictly prohibited.
- xi. However, the GRGT are silent with respect to a scenario / situation as mentioned in subparagraph (i) above. As per the Latin maxim *ubi lex voluit dixit, ubi noluit tacuit*, this Board is hampered from reaching an equitable decision because of the presumed lacuna of the GRGT.
- xii. Therefore, whilst this Board, due to the conclusion reached above, cannot uphold this second grievance of the appellant, it strongly recommends to the Director General of the Department of Contracts to clarify such situations by issuing a clarification through an updated version of the General Rules Governing Tenders.

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, contentions and subsequent grievances raised;
- b) Under normal circumstances, the Contracting Authority’s decision would be re-confirmed to proceed with the award of the tender, however due to the decision issued today, PCRB 2014 with subject matter also being tender with reference CT2192/2023, this Board will be sending back all bids received for re-evaluation according to the findings of this Board in both decisions of PCRB Cases 2014 and 2015;
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member