

PUBLIC CONTRACTS REVIEW BOARD

Case 2043 – CT2175/24 – Tender for the Supply, Delivery and Commissioning of Brand New Multifunctional Compact-Sized Street Washers for the Cleaning and Maintenance Division

5th December 2024

The Board,

Having noted the letter of objection filed by Mr Carl Grima, Mr Charlton Grima and Mr Martin Grima acting for and on behalf of Martin Grima Ltd, (hereinafter referred to as the appellant) filed on the 16th July, 2024;

Having also noted the letter of reply filed by Ms Ramona Deguara acting for and on behalf the Cleaning and Maintenance Division and the Department of Contracts (hereinafter referred to as the Contracting Authority) filed on the 23rd July, 2024;

Having heard and evaluated the testimony of the witness Mr Carl Grima (Representative of Martin Grima Ltd) as summoned by Dr Tonio Cachia acting for Martin Grima Ltd;

Having heard and evaluated the testimony of the witness Ing. Margaret Zammit (Representative of the Cleansing and Maintenance Division) as summoned by Dr Chris Cilia;

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 28th November 2024 hereunder-reproduced.

Minutes

Case 2043 – CT 2175/2024 – Supplies – Tender for the Supply, Delivery and Commissioning of Brand-New Multifunctional Compact Sized Street Washers for the Cleansing Department and Maintenance Division (Inclusive of Maintenance Agreement)

Call for Remedies prior to the closing date of a Call for Competition

The tender was issued on the 3rd July 2024 and the closing date was the 23rd July 2024.

The estimated value of this tender, excluding VAT, was € 1,295,000.

On the 16th July 2024 Martin Grima Ltd filed an application for remedies prior to the closing date of a call for competition in terms of Regulation 262 of the Public Procurement Regulations.

A deposit of € 6,500 was paid.

On the 3rd December 2024 the Public Contracts Review Board composed of Dr Vincent Micallef as Chairman, Mr Lawrence Ancilleri and Mr Keith Grech as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Martin Grima Ltd

Dr Tonio Cachia
Mr Carl Grima

Legal Representative
Representative

Contracting Authority

Dr Chris Cilia
Mr Duncan Hall
Ing Margaret Zammit

Cleansing and Maintenance Division

Legal Representative
Representative
Representative

Dr Vincent Micallef Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Tonio Cachia Legal Representative for Martin Grima Ltd said that the wording of this tender restricts competition as market research carried out by the appellant indicates that there is only one supplier of this type of machinery. The wording of the tender clearly indicates that the Authority wants to keep to the same supplier. The tender should be based on the purpose of the procurement not on the details of the required machine and should be such as to encourage competition.

Dr Chris Cilia Legal Representative for the Contracting Authority said that the letter of reply explained the position of the Authority very clearly. The technical specifications were drawn up specifically to cater for machinery that can be used everywhere and for every purpose – this is the reason for such specific technical details. All that the tender is requiring is that the technical specifications are met at the cheapest price. These types of machines can be procured from any EU country but the appellant insists on competing with one particular type of machine and expects the tender to be tailor-made accordingly. As far as the Authority is aware there are three firms offering the type of machine detailed in the tender.

Mr Carl Grima (292089M) called to testify by the appellant stated on oath that his firm can offer a machine similar to the one requested and nearly matching the very detailed requirements of the tender which were too specific. There are various machines on the market that meet some of the specifications like turning circle, wheelbase and length but do not meet other specifications. Only one machine meets all the specifications.

In reply to questions from Dr Cilia, witness stated that products from China should not be recommended. He went on to state that his firm have not yet sold any of the machines he was referring to and was not aware where those machines were manufactured.

Ms Margaret Zammit (376375M) called to testify by the appellant stated on oath that she has been a Senior Engineer since 1997 and for seven years has been employed at the Cleansing

Division. She participated in the tender preparation. It was Government policy to procure products at the best price for the purposes required. The specifications were specially drafted to enable the machines to serve all purposes for which they were required. The previous tenders referred to by the appellant were for sweeping machines whilst this tender required washing machines to be used in restricted spaces. Witness tabled information on two machines that met the tender specifications perfectly and one that met most of the specifications requested (DOC 1(i to iii)). Products manufactured in China are not excluded from competing.

Questioned by Dr Cachia, witness said that this is the first time that this type of equipment is being procured in Malta.

This concluded the testimonies.

Dr Cachia said that the whole point of this appeal is that the Public Procurement Regulations insist that there should be no restrictions on competition. Whilst witness stated that two compliant machines were available, other machines could be made available with slight changes in the specifications. To guide prospective bidders the tender should state the areas where the machines are intended to be used. Citing Court of Appeal Case *Krypton Chemists vs CPSU* (538/23/1) Dr Cachia said that this dealt similarly with small changes in specifications. Tenders should be framed as wide as possible to encourage competition.

Dr Cilia stated that if one were to follow the suggestions of the appellant the tender would lead to objective decisions. The Authority was not preventing competition it was merely specifying what it required. Appellant is adamant that it wants to compete with machinery that does not satisfy the technical specifications thereby tying down the hands of the Authority.

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 3rd December 2024.

Having noted the objection filed by Mr Mr Carl Grima, Mr Charlton Grima and Mr Martin Grima for and on behalf of Martin Grima Ltd (hereinafter referred to as the Appellant) on the 16th July, 2024, refers to the claims made by the same Appellant with regard to the tender of reference CT2175/2024 listed as case No. 2043 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Tonio Cachia

Appearing for the Contracting Authority: Dr Chris Cilia

Whereby, **the Appellant** *inter alia* contends that:

This Tender follows another two previous tenders for identical machines: CT 3039/2023 and CT 2407/2023. The main difference between the first two tenders and this Tender is that the first two tenders were for a machine with a fixed sweeping attachment whereas the latter is the same machine but with multifunction use, i.e. the attachment can be a washer, or a sweeper, or any other compatible attachment. But the base-the machine is identical. This type of machine, with either fixed or multifunctional attachments features across several models in the market, including Jungo (represented by Applicant) and Boshung (represented by third parties), Martin Grima Ltd.

However, when this Tender was published it transpired that certain technical specifications were altered in order to ensure that only the successful bidder of the first two tenders would be technically compliant and thus would also be awarded this Tender. The technical specifications of the vehicle were slightly amended to render Applicant's vehicle technically non-compliant.

Inasmuch as it might be 'convenient' for the Contracting Authority to keep working with the same supplier on successive contracts, it is illegal to intentionally restrict competition in such a manner. In Applicant's view, the additional dimensions highlighted above are solely intended to restrict Applicant and other third parties from submitting any offer proposing any vehicle other than the Boshung model.

The first issue is that it makes little sense to impose a *maximum vehicle width* of 1200mm (Applicant's is 1300mm) with a *spray bar of a minimum width* of 1325mm. Why should the width of the vehicle be restricted to a value which is less than the minimum width of the spray bar? Also, the spray bar maximum width is not established. Applicant claims that the only reason this Tender imposes these particular restrictions on the vehicle dimensions is to exclude Applicant from submitting an offer with its vehicle model.

3.4 The same applies to the introduction of the 'wheelbase' and 'turning circle' in the Tender, which were not included in tender CT 2407/23. Why this was not relevant for the previous two tenders when the Contracting Authority ended up buying fifteen (15) machines from the same supplier? Did this become only relevant after tender CT 2407/2023 when Applicant submitted an offer with the

Jungo 3.0 model, and thus the intention was to exclude Applicant's vehicle from this Tender? Applicant's Jungo 3.0 model was submitted for the first time in CT 2407/2023 and thus when preparing the documentation for this Tender the Contracting Authority had all the necessary data in hand to restrict Applicant by slightly varying the technical dimensions.

This Board also noted the **Contracting Authority's Reasoned Letter of Reply** filed on 23rd July 2024 and its verbal submission during the hearing held on 3rd December 2024, in that *inter alia* it held:

The Cleansing and Maintenance Division confirms that the dimensions and specifications indicated by the applicant in his appeal are as stated in the respective tender documents.

The Contracting Authority does not agree with the applicant's statements and allegations in paragraphs 3.5, 3.6, 3.7 and 3.8 of the appeal application. In fact, the Contracting Authority confirms that the technical specifications set out in this call for tenders were drafted according to the needs and necessities of the Maintenance and Cleansing Division. By no means were the Cleansing and Maintenance Division's intentions to restrict competition and/or disadvantage any particular supplier.

Furthermore, nothing precludes the applicant from making the necessary market research and submit offers with machines which comply with the technical specifications. The applicant may still submit multiple bids with different types of equipment which will be duly evaluated.

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 as follows in their entirety.

Restrictions in the Tender's Technical Specifications

- a. The appellant laments that the provisions within the tender document restricts the tender specifications after these were altered to ensure that only one successful bidder of the first two tenders would be technically compliant and awarded the tender. The appellant alleges

that the specifications stipulated in the tender document are aimed at narrowing competition in full violation of the Public Procurement Regulations and the European Directive.

- b. Mr Carl Grima took the witness stand and under oath testified and made an explanatory brief to the Board in relation to the vehicle dimensions and proceeded with comparing the vehicle dimensions. During the examination-in-chief he was asked whether there are any other available vehicles in the market other than the one selected by the Contracting Authority and he replied by stating that he is not aware that such vehicles with the required specifications are available in the European market. He added that those in the European market may satisfy the technical specifications as required but may fall foul of other requirements such as being single seaters or not articulated, unless the vehicle come from the Chinese manufacturing market.
- c. When Mr Grima was under cross-examination and asked whether he tried to tap other markets such as the ones in China, same affirmed that the company does not deal with vehicles manufactured from a Chinese market.
- d. Ing. Margaret Zammit was summoned to testify on behalf of the Contracting Authority. Ing. Zammit testified under oath and stated that she was involved in various aspects and in the drafting of the tender. The specifications were designed specifically so that the vehicles in question could be used in a number of locations from wide roads to restricted spaces such as the ones in Mdina and Vittoriosa. The design of the specifications was specifically drafted in such a manner to satisfy the needs and necessities of the Contracting Authority.
- e. Ing. Zammit also stated that market research shows that there are other vehicles in the market which also satisfy the technical requirements of the tender. To this effect, same exhibited three (3) documents substantiating her testimony.

Legal Considerations

- f. Clearly the appellant is invoking the violation of Regulation 39(3) of the PPR which is also in line and mirrors Article 18 of the Public Procurement Directive 2014/24/EU which stipulates the following:

“The design of the procurement shall not be made with the intention of excluding it from the scope of these regulations or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators”.

- g. *Sine qua non* requisite, this Regulation presupposes proof of the following essential elements:

- That the Contracting Authority had the intention of excluding it from the scope of these Regulations;
- That the design was aimed at narrowing competition by unduly favouring or disadvantaging certain economic operators.

- h. On the other hand, Regulation 53(6) of the PPR stipulates:

“Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement”.

- i. Also, the appellant is basing his appeal on Premise 74 of the aforementioned Directive, which stipulates:

“The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the market place, including those drawn up on the basis of performance criteria linked to the life-cycle and the sustainability of the production process of the works, supplies and services.

Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services, or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be

achieved in the best way possible. Functional and performance related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible”.

- j. It was clearly proven during the course of the sitting that the allegations put forth by the applicant in his reasoned application were not substantiated throughout the course of the appeal hearing. Neither, in the humble opinion of this Board, the testimony of Mr Carl Grima corroborates such a state of fact. The Board observes that the provisions of the tender were amply and specifically clear to all economic operators indiscriminately. It is ultimately a duty imposed by Regulation 38(1) of the PPR which invariably calls upon Contracting Authorities to ascertain clarity of the procurement documents – *“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”.*
- k. The specifics required allows each and every economic operator to tap the relative market and ascertain that the requirements stipulated by the Contracting Authority that ultimately fulfils its needs and necessities are met with. No evidence at all was produced by the appellant before this Board that in any way translates itself into placing the Contracting Authority to have had:
- Any intention of excluding it;
 - Artificially narrowed competition. For what is worth, the appellant is still able and enjoys the full opportunity to tap the relative markets and provide the vehicles with the required specifications. No evidence was produced that showed that the appellant could not access relative markets/products, for instance, due to patented products or distribution agreements with exclusivity clauses, which could point towards a tender not being a competitive bid;
 - Unduly and intentionally favoured or disadvantaged the appellant;
 - Not afforded the appellant an equal access to the procurement procedure; or
 - Had created any unjustified obstacle.

Therefore, this Board does not uphold Appellant’s grievances.

The Board,

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

- a. Not to uphold Appellant's reasoned application and contentions;
- b. That the technical specifications (vehicle dimensions) does not restrict competition and are not in breach of Public Procurement Directive and the Public Procurement Regulations;
- c. Upholds the technical specifications in question (para. 3.1) and thus same technical specifications should not be revised/revoked;
- d. In terms of Regulation 267 of the Public Procurement Regulations, the closing date of the Call for Tenders is now the 15th January, 2025;
- e. Directs that the deposit paid by Appellant not to be reimbursed.

Dr Vincent Micallef
Chairman

Mr Lawrence Ancilleri
Member

Mr Keith Victor Grech
Member