

PUBLIC CONTRACTS REVIEW BOARD

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| Appeal Reference Number | 2101 |
| Tender Reference Number | PT008/24 |
| Tender Name | Tender for Cleaning and Waste Disposal as Part of Decommissioning Works at the San Lucjan Oil Terminal in Qajjenza |

The Public Contracts Review Board (hereinafter the 'Board' or the 'PCRB') convened a public hearing on the 14th April, 2025 to hear the appeal as filed by the appellant PT Matic Environmental Services Limited (C-17720) (hereinafter the 'Appellant') on the 10th March, 2025, and after taking cognisance of:

The written pleadings as filed by PT Matic Environmental Services Limited (C-17720) on the 10th March, 2025, together with proof of payment of a deposit in the amount of €3,534.10;

The written reply as filed by Petromal (Holdings) Company Limited (C-65288) on the 20th March, 2025 (hereinafter the 'Contracting Authority');

The written reply as filed by Waste Oils Company Limited on the 21st March, 2025 (hereinafter the 'Preferred Bidder');

The minutes of the proceedings dated 14th March, 2025, in which hearing there appeared:

Dr Ryan Pace as legal representative for the Appellant;
Ing. Oliver Fenech as company representative of the Appellant;
Dr Andrew Sciberras as legal representative of the Contracting Authority;
Francis Cassar as Chairperson of the Contracting Authority;
Rien Langerveld as Chairperson of the Evaluation Committee;
Dr Steve Decesare and Dr Stefan Cutajar as legal representatives of the Preferred Bidder;

Cornelia Zammit German and Yvanka Vella as company representatives of the Preferred Bidder;

Dr Mark Anthony Debono as legal representative of the Department of Contracts (hereinafter the 'DOC').

The testimonies of the witnesses produced by the Appellant, namely, Ing. Oliver Fenech and Rien Langerveld *qua* Chairperson of the Evaluation Committee, as well as the witnesses produced by the Contracting Authority, namely, Ing. Oliver Fenech as reproduced and Simon Farrugia *qua* representative of the Environment and Resources Agency (hereinafter 'ERA').

The opening submissions and the final oral submissions made by the legal representatives of the Appellant, the Contracting Authority, the Preferred Bidder and the Department of Contracts;

Considers;

Before delving into the grievances proper as raised by the Appellant in its appeal, the Board notes the preliminary observation made by the Appellant *vis-à-vis* procurement procedure with reference number EM23/23 and a previous decision of the Public Contracts Review Board dated 30th May, 2024 with Appeal Reference Number 2008.

The Board holds that the Contracting Authority was right to point out that the Appellant did not take any action in terms of the Public Procurement Regulations, Subsidiary Legislation 601.03. (hereinafter the 'PPR' or the 'Public Procurement Regulations') to challenge the decision of the Contracting Authority to cancel EM23/23. That inaction on the part of the Appellant, essentially meant that the procurement process of tender EM23/23 ended with the decision to have it cancelled, and as such, should not be considered further. Furthermore, the Board deems that it is necessary to underline that it is hereby considering and treating the present tender process with reference number PT008/24 in an independent manner.

Considers further;

That the grievances proper of the Appellant may be summarised as follows:

- a) The Letter of Rejection issued by the Contracting Authority dated 28th February, 2025 is not in conformity with the Public Procurement Regulations as well as with the General Rules Governing Tenders;
- b) The Contracting Authority failed to provide an estimated contract value;
- c) The ineligibility of the Preferred Bidder; and
- d) Consequently, and in view of the ineligibility of the Preferred Bidder, the request for a discounted offer by the Contracting Authority dated 11th February, 2025 is null and void.

A. The Letter of Rejection

The Appellant contends that the Letter of Rejection issued by the Contracting Authority dated 28th February, 2025 (hereinafter the 'Decision') does not respect the statutory requirements prescribed at law. On the other hand, the Contracting Authority contends that the Decision contains an administrative oversight in that it omitted the recommended price, this owing to a purely clerical error which did not alter the substantive facts of evaluation.

The Board refers to Regulation 272 of the PPR on communication to tenderers or candidates which states verbatim:

*"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**" (Emphasis of the PCRB).*

Regulation 272 itself necessitates further reading of Regulation 242 of the same PPR, which states as follows:

“(1) The authority responsible for the tendering process shall inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, the authority responsible for the tendering process shall as quickly as possible, and in any event within fifteen days from receipt of a written request, inform:

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;*
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 53(9) and (10), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;*
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;*
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers;*

- (e) *any unsuccessful tenderer of his right to appeal a decision taken pursuant sub-regulation (1)."*

The Board further refers to Rule 19.2. of the General Rules Governing Tenders version 4.10 which states verbatim:

"Unsuccessful bidders shall be notified with the outcome of the evaluation process, and will be provided the following information:

- (i) *the criteria for award;*
- (ii) *the name of the successful tenderer;*
- (iii) *the recommended price of the successful bidder;*
- (iv) *the reasons why the tenderer did not meet the technical specifications/ notification that the offer was not the cheapest,*
- (v) *In case where the award criteria is linked to the best price quality ratio the contracting authority must inform the economic operator who has submitted an admissible tender of the characteristics and relative advantages of the selected offer (only upon request as per Regulation 242 (2))*
- (vi) *the deadline for filing a notice of objection (appeal);*
- (vii) *the deposit required if lodging an appeal."*

The Board has reviewed the Decision dated 28th February, 2025 and deems that it is regrettable that notwithstanding a laborious vetting process, presumably also overseen by the Department of Contracts, errors such as the present ones still occur.

The Board, however, notes that it is evident that the lapsus within the Decision in respect of the recommended price of the successful bidder is in fact a *lapsus calami* or *lapsus computeri*. There is then only mention within the Decision of *"a deposit equivalent to 0.50% of the estimated value of the tender"* vis-à-vis the deposit required to lodge an appeal.

Errors such as the present ones are not only easily avoidable but are serious in that they may cause uncertainty to an appellant in calculating the amount of deposit due in terms of Regulation 273 of the PPR, *multo magis* when the Contracting Authority also failed to indicate an estimated contract value within this tendering process.

Notwithstanding the errors in the present case, it results to the Board that the Appellant was in no way misguided or prejudiced by the said errors, and this lack of prejudice results squarely from the acts of this appeal themselves, particularly the fact that a) the appeal was filed on time and is being considered and b) Ing. Oliver Fenech testified that the Contracting Authority provided him with the discounted price offered by the Preferred Bidder after the conclusion of the discounted procedure.

The Board must however stress the due importance, consideration and attention which ought to be given to documents such as the Decision and others alike. For the contents of a written document, and the correctness and reliability of the said contents, are the responsibility of the person who ultimately signs the document.

To conclude on this grievance, as correctly pointed out by the Contracting Authority in its written pleadings, the law does not impose the pain of nullity, and therefore, an error of such a kind does not import nullity. Whilst the Board partially agrees with the Appellant that the Decision is missing information which in terms of paragraphs (iii) and (vii) of Rule 19.2. of the General Rules Governing Tenders version 4.10 should have been included, the Board declares that the Decision does however respect the rule as set forth in Regulation 272 of the PPR, that is, it does contain a “*summary of the relevant reasons relating to the rejection of the tender*”, at least enough for the Appellant to be able to set forth its grievances through this appellate stage, thereby not suffering any irremediable prejudice emanating from the Decision’s shortcomings.

B. Lack of Estimated Contract Value

The Appellant further contends that the Contracting Authority's failure to provide the estimated value of the tender throughout the procurement documentation constitutes a blatant omission of information and as such is indefensible. The Contracting Authority on the other hand states that the Appellant had every opportunity to seek redress by utilising the pre-contractual remedy as found within Regulation 262 of the Public Procurement Regulations.

The Board refers to Regulation 262(1)(d) of the Public Procurement Regulations which states as follows:

"(1) Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board:"

"(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure;"

The Board, whilst acknowledging the concern the Appellant was faced with at tendering stages, shares the stance of the Contracting Authority, in that it holds that the Appellant cannot at this stage, raise issue with or complain of that which may have been ironed out at tendering stage. This is also in line with the jurisprudence of the PCRB and the Court of Appeal in its Superior Jurisdiction, whereby time and again it has been held that when a bidder fails to exercise the pre-contractual remedy, the said bidder cannot then after resulting as unsuccessful, seek to challenge aspects of the tender document which could have been done prior to the closing date of competition i.e. in terms of Regulation 262 of the Public Procurement Regulations.

The Board refers to the judgment delivered by the Court of Appeal in its Superior Jurisdiction in the names '**Truevo Payments Limited vs. Direttur tal-Kuntratti et'** dated 30th June, 2021, where the Court of Appeal held as follows:

"Hu ċar li l-ilmenti tas-socjeta` Credorax Ltd huma diretti lejn il-proċedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-socjeta` qed tilmenta mill-użu tal-proċedura tal-għoti tal-kuntratt b'negozjati, fuq il-modkif għie imfassal il-proċess ta' din il-proċedura u li ma kienx hemm l-approvazzjoni tad-Direttur tal-Kuntratti għall-użu ta' din il-proċedura. Dawn it-tlett aggraovji li abbażi tagħhom il-kumpanija appellata Credorax Ltd ppreżentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taħt ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel id-data tal-għeluq ta' sejha għall-kompetizzjoni u mhux , bħal fil-każ tallum, wara dik id-data, u saħansitra wara d-deċiżjoni dwar l-għoti tal-kuntratt.

8. Saret referenza għas-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea tat-12 ta' Frar, 2004 , fil-każ fl-ismijiet **Grossman Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich (C-230/02, CJEU)** fejn fost il-konklużjonijiet milhuqa jingħad is-segwent:

"1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he

was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract awarded."

(Sottolinear ta' din il-Qorti).

9. Jidher ċar mill-premess illi darba li, anke f'dan il-każ, il-kuntratt ġie rakkomandat u s-socjeta` Credorax Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-għeluq tat-terminu għall-preżentata tal-offerta, ma tistax aktar tappella biex tressaq l-aggravji tagħha."

Therefore, the Board concludes that the Appellant is late in the day to bring forward a complaint with respect to the Contracting Authority's failure to provide an estimated value of the tender.

The Board must however declare that it deems it unacceptable for an appellant and legal counsel to have to make assumptions as to what amount of deposit is due to accompany an appeal and this in terms of Regulations 272 and 273 of the Public Procurement Regulations, and to have to be constrained in offering to remain "amenable to adjust its deposit in accordance with any direction and/or order duly given by this Review Board"¹.

C. Ineligibility of the Preferred Bidder

The main bone of contention in this tendering process is the differing views between the Appellant, the Contracting Authority and the Preferred Bidder, on whether the economic operator is required to also dispose of the different waste streams, whether locally or abroad, and if so, whether the authorisation required for an economic to dispose of certain waste streams abroad is required at tendering stage.

¹ Vide ultimate paragraph of the Appellant's appeal dated 10th March, 2025.

The Appellant on the one hand is adamant that waste disposal is entirely within the scope of this tender, and that the Preferred Bidder lacks the relevant authorisation to do so. The Contracting Authority on the other hand states that the requirements were limited to cleaning the site in question, and that the technical and regulatory aspects of waste disposal are to be managed by the successful contractor. On this point the Preferred Bidder contends that the scope of the tender is cleaning and waste removal, and the events which take place after, including treatment, storage and disposal of the waste streams are regulated at law and the person carrying on the activities must comply with the said legislation. It further submits, that *dato ma non concessio* the disposal is considered to remain part of the scope, the Preferred Bidder is well placed to undertake the disposal, either through an *ad hoc* licence or through another entity which has the necessary export licence.

Rien Langerveld testifying *qua* Chairperson of the Tender Evaluation Committee confirmed under oath that the Preferred Bidder did not indicate that it will be relying on the capacities of third parties or sub-contractors.

Simon Farrugia testifying in representation of the Environment and Resources Agency testified in detail with respect to the permits held by the Preferred Bidder, which are the Industrial Pollution Prevention and Control permit (IPPC), the waste broker permit and other waste carrier permits.

When asked to describe the waste brokerage permit held by the Preferred Bidder, Mr Farrugia stated that the waste broker permit is not really a permit but a registration which entails the authority being notified that the registration holder is dealing in waste on behalf of others. Mr Farrugia continued by stating that by itself, the waste broker 'permit' does not allow it to do anything else, it needs to be combined with other permits such as Trans Frontier Shipment of waste permit (TFS) and the notifications related to it to be able to allow the waste broker to export waste. In Malta, waste broker permits are required to export waste on behalf of others.

Mr Farrugia further confirmed that with the waste broker permit alone, the waste broker may not export the waste. In cross-examination, Mr Farrugia confirmed that the Preferred Bidder is authorised to deal in waste, to store it, to carry it and to treat it to some degree, and that the Preferred Bidder does not hold a TFS permit but that the Preferred Bidder can engage another operator to export the waste.

Considers;

The Board feels that the answer to this query lies within the tender document with reference number PT008/24 (hereinafter the 'Tender Document'). Particular reference is made to Clauses 1.5. and 1.5.3.1. of the Tender Document, which state as follows:

1.5. "To be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder.

Any contractor bidding for this tender must be licensed, permitted and compliant as necessary and with relevant Authorities, to handle, transport and dispose of any waste stream encountered on site. Proof of these licences/ permits is to be submitted along with the relevant bid."

(Emphasis of the PCRB)

1.5.3.1. "Provide data concerning subcontractors and the percentage and nature of services to be subcontracted." ... "It is being assumed that if the information being requested regarding sub- contracting is left empty, it will be assumed that no sub-contracting will take place (0% subcontracting". (Emphasis of the PCRB)

Finally, the Board refers to the written pleadings made by the Contracting Authority wherein it states as follows:

“Petromal submits that the issuance of the revised tender document was a necessary and proportionate measure taken to eliminate any ambiguity regarding the division of responsibilities. The change from “Disposal” to “Waste Removal” was not intended to alter the underlying substantive requirements of the project but to clarify that Petromal’s requirements was limited to cleaning the site, leaving the technical and regulatory aspects of waste disposal to be managed by the successful contractor.”

In view of the foregoing, the documents available to this Board as well as the testimonies of Rien Langerveld and Simon Farrugia, the Board determines that the Appellant is correct in stating that the waste disposal fell squarely within the scope of the tender, and further that the economic operators were expected to:

- a) possess the relevant licence or permit for the disposal of any waste stream encountered on site in terms of Clause 1.5. of the Tender Document i.e. the TFS for sludge **OR** in case they do not possess the TFS, to declare that they shall be sub-contracting the export service in terms of Clause 1.5.3.1. of the Tender Document; and
- b) submit proof of the TFS with the bid.

The Preferred Bidder’s submission that it need not have the TFS in hand at the time of submission is, in its opinion, in line with the Court of Appeal judgment dated 31st May, 2023 in the names ‘**Leone Grech v. Jobsplus et’**. In the *Leone Grech* case, the particular documents were required at contract stage whereas in this present case, Clause 1.5. of the Tender Document unequivocally necessitated the submission of proof that the economic operator or its sub-contractor possessed the relevant licence or permit at submission stage, and not at contract stage.

It results to the Board that the Preferred Bidder neither possesses a TFS, nor did it indicate that it will be sub-contracting the export service in terms of Clause 1.5.3.1. of the Tender Document, thereby rendering the Preferred Bidder as technically non-compliant.

D. Nullity of the Discounted Procedure

The Appellant contends that the Contracting Authority's request for a discounted offer in terms of Rule 17.4. of the General Rules Governing Tenders (today Rule 17.5.) may only be utilised in cases where the economic operators submitting identical financial offers are both administratively and technically compliant.

The Board shall refer to Rule 17.4. of the General Rules Governing Tenders version 3.0 of April 2019 (as quoted in the written request for discounted offer issued by the Contracting Authority dated 11th February, 2025) which states as follows:

*"For tenders that do not fall under the 'pegging of rates' scheme, where the financial offers submitted by any of the Economic Operators are the same, the Central Government Authority/Ministerial Procurement Unit/**Contracting Authority may request Economic Operators whose bid is administratively and technically compliant to propose a discount on the offer originally submitted**, without altering in any way the technical offer submitted. The Economic Operator, who is both administratively and technically compliant, that submits the greater discount shall be awarded the contract."*
(Emphasis of the PCRB).

In view of the considerations as set forth above, particularly that the Preferred Bidder did not meet the technical criteria to comply with the tender requirements, it follows that the discounting procedure should not have ensued BUT that in this present case, given the fact that at the point in time, that is on the 11th February, 2025, the Tender Evaluation Committee deemed the Preferred Bidder as technically compliant, the Contracting Authority did nothing untoward in utilising the discounting procedure in terms of the General Rules Governing Tenders, during which the Appellant participated. What was incorrect however, was the Contracting Authority quoting of version 3.0. of the General Rules Governing Tenders on the 11th February, 2025, when in truth, it was version 4.10. of the General Rules Governing Tenders which was in force as of August 2024.

The Board considers that given its stand on the lack of eligibility of the Preferred Bidder in terms of technical criteria, it would be superfluous in these circumstances to declare the discounting procedure as null and void.

DECIDE

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to:

- i) Reject the Appellant's first request;
- ii) Uphold the Appellant's second and third requests, and hereby revokes the decision of Petromal (Holdings) Company Limited (C-65288) dated 28th February, 2025 as well as the award notice also dated 28th February, 2025; and
- iii) **Consequently, to uphold the Appellant's fourth request, and orders Petromal (Holdings) Company Limited (C-65288) *qua* Contracting Authority to re-integrate the bid received by PT Matic Environmental Services Limited (C-17720) and orders the Tender Evaluation Committee to re-evaluate the bids submitted after taking into consideration this Board's findings;**
- iv) Reject the Appellant's fifth request in view of the upholding of the Appellant's fourth request and the order it is making above;
- v) Uphold the Appellant's seventh request and orders the full re-imburement of the deposit paid by the Appellant;
- vi) Abstains from taking cognisance of the Appellant's sixth request.

Dr Ana Thomas
Chairperson

Ing. Dr Damien Gatt
Member

Mr Keith Victor Grech
Member