

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1062 – WID/T/11/2016 - Period Contract for the Supply and Delivery of Second Class Water to Mdina Ditch 2017-2019**

The Publication Date of the Call for Tenders was 11 January 2017 whilst the Closing Date for Call of Tenders was 3 February 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 64,800.

Four (4) Bidders have submitted offers for this Tender.

On 2 May 2017, Victor Busuttil Water Supply Tal-Maniklu filed an Objection against the decision of the Ministry for Transport & Infrastructure to award the Tender to Magro Paul Water Transport for the price of € 59,760 (Exclusive of VAT) against a deposit of € 400.

On 6 July 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Victor Busuttil Water Supply Tal-Maniklu**

Mr Victor Busuttil	Representative
Dr Alessia Zammit McKeon	Legal Representative

#### **Recommended Bidder – Magro Paul Water Transport**

No representative was present for this Public Hearing

#### **Contracting Authority – Ministry for Transport & Infrastructure**

Mr Franco Abela	Chairperson, Evaluation Board
Mr Stephen Serracino Inglott	Member, Evaluation Board
Mr Marco Cassar	Representative

The Public Contracts' Review Board Chairman, Dr Anthony Cassar, opened by reminding the Appellants that this Board was not present to change the conditions of the Tender Document but to see that the Evaluation Board made its job properly.

Dr Alessia Zammit McKeon, the Legal Representative for Victor Busuttil Water Supply tal-Maniklu, submitted that it was true that the Tender requested that the water supplied should have been 700ppm but technically, as indicated by experts in the area, a range between 200ppm and 800ppm is a range which should have been considered for the use of water as requested by the Tender Document.

The experts' information was already submitted and it showed that the 100ppm difference was an irrelevant one. Dr Zammit McKeon then referred to an e-mail which was sent by Mr Joe Vella, an expert and her client Mr Victor Busuttil on 24 April 2017 which stated,

*“You will see that they recommend anything from 200-800 ppm which is exactly what you are getting. The maximum limit is 2000ppm so you are well in the range.*

*Besides – the evaluating board must know very well that tds changes quite drastically depending on the period of the year, definitely one cannot stipulate 700ppm as an absolute maximum, since this factor changes a lot and practice should be considered within a band of readings not an absolute reading.*

*However, a difference of 100ppm is really minimal considering that we are here talking below the 1000-1200ppm range”.*

Dr Alessia Zammit McKeon continued by saying that given the negligent different which there was present when regarding ppms, the Tender should have been awarded to the one which had the better price especially given the fact that the Recommended Bidder could not provide the requested 700ppm.

She also said that there was a similar *ad hoc* quotation in April 2017 and the ppm request was not necessary. The quotation was awarded on the basis of the price and this was a strange decision.

Mr Franco Abela, the Chairperson of the Evaluation Board, said that he was only talking about this Tender. Clause 4 in Section 4, 2.1 of the Tender Document was clear and it said that,

*“The level of Total Dissolved Salts (TDS) in the water should not exceed the 700mg/L”.*

Mr Abela continued by saying that the Evaluation Board has acted according to what the Tender Document said and since this falls under Note 3, which denies any Clarifications or Rectifications, the Contracting Authority had no other option but to discard Victor Busuttil Water Supply Tal-Maniklu's offer.

Mr Carmel Esposito, a member of the Public Contracts Review Board, asked if there was any objection regarding the supply of Water by Magro Paul Water Transport for which Dr Alessia Zammit McKeon, the Appellant's Legal Representative said that they had serious doubts on whether the Recommended Bidder is in a position to abide by the Tender Specifications following investigations which they had made.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board concluded that it was the responsibility of the Ministry for Transport and Infrastructure to see that the Tender Conditions were to be abided.

At this stage, the Public Hearing was adjourned to Thursday 13 July 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

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**This Board,**

**Having noted this Objection filed by Victor Busuttil Water Supply tal-Maniklu (herein after referred to as the Appellant) on 2 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference WID/T/11/2016 listed as Case No 1062 in the records of the Public Contracts Review Board, awarded by the Ministry for Transport & Infrastructure (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Alessia Zammit McKeon**

**Appearing for the Contracting Authority: Mr Franco Abela**

**Whereby, the Appellant contends that:**

- a) **The Quality of Water being supplied by him is negligibly under the dictated 700ppm. In fact this is 800ppm and this minimal difference**

should not have been the factor for discarding his Bid when one should also have taken into consideration that his offer was the cheapest. In this regard, the Appellant insists that according to experts in the field, there is no consequential effect between water with a 700ppm and water with 800ppm.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 8 May 2017 and its verbal submissions during the Public Hearing held on 6 July 2017, in that:

- a) The Ministry for Transport and Infrastructure insists that the Evaluation Board acted in a diligent manner, in that, in its Evaluation, it had adhered to the mandatory condition of the quality of water not to exceed 700ppm. In this regard, since the quality of the Appellant's water measured 800ppm, the Evaluation Board had no other option but to reject the latter's offer.

This Board, after having treated the merits of this case, arrived at the following conclusions:

1. This Board, after having heard the submissions made by both parties and after having examined the relative documentation, would

**emphasize the fact that this Board has no jurisdiction to change or alter any of the conditions relating to the “*Selection Criteria*” of a particular Tender. Its jurisdiction and obligation is to ensure that the method of evaluation adopted by the Evaluation Board was fair, just and proper.**

**With regards to the contention of Victor Busutil Water Supply tal-Maniklu, this Board justifiably notes that the dictated quality of water to be up to 700ppm was a mandatory technical requisite which had to be adhered to in all respects. In this regard, this Board, as had on many occasions before, opines that the Ministry for Transport and Infrastructure has all the rights to impose conditions on a Tender Document as long as these are reasonable and viable.**

**At the same instance, the Contracting Authority, during the Evaluation Process, must ensure that all dictated conditions are met by the Bidders. On the other hand, the latter must ensure that they abide “*in toto*” with these dictated requisites.**

**In this particular case, the Contracting Authority, through Section 4, Clause 2.1 of the Technical Specifications, dictated that “*the level of the total dissolved salts in the water should not exceed the 700 mg/l.*”**

**In this regard, the Appellant has submitted a “*Certificate of Analysis*” which confirms that the quality of water being offered by the Appellant reached a level of 800 mg/l, so that his product did not comply with one of the conditions of the Technical Specifications of the Tender Document.**

**This Board would also like to mention the fact that the Evaluation Board could not ask for a clarification or a rectification as otherwise, the principle of transparency and Level Playing Field would have been breached, so that the Evaluation Board acted in a fair, just and transparent manner in its deliberations.**

**In view of the above, this Board finds against Victor Busuttil Water Supply tal-Maniklu and recommends that the deposit paid by the latter should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*13 July 2017*