

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1449 – MGOZ/MPU T32/2019 – Framework Agreement for the Provision, Maintenance and Regular Collection of Open Skips at Various Sites in Gozo**

#### **Contextual Application raised by Sultech & Co**

On 29th May 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss this application.

The attendance for this public hearing was as follows:

#### **Applicant– Sultech & Co**

Dr Jonathan Mintoff	Legal Representative
Mr Noel Sultana	Representative

#### **Contracting Authority – Ministry for Gozo**

Dr Abigail Caruana Vella	Legal Representative
Mr Marnol Sultana	Representative
Mr Joseph Cutajar	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He invited submissions.

Dr Jonathan Mintoff Legal Representative of Sultech & Co stated that this Case had already been heard by the Public Contracts Review Board and after an appeal the Court of Appeal had directed that it should be re-evaluated. The application for a copy of the entire Evaluation Report was necessary since despite the re-evaluation ordered by the Court the process had again been carried out by the same evaluation committee. It was necessary to have a copy of the Evaluation Report to ensure that the Court's directives had been followed and to ensure fairness and equality.

Dr Abigail Caruana Vella Legal Representative for the Ministry for Gozo said that the Court of Appeal did not find anything wrong in the work of the evaluation committee or that the bid was not technically compliant - it had merely found that certain facts had been assumed. The case had been resubmitted to establish the contractual relationship between Mercieca father and son and on a point on the contingency measures. The points already decided cannot be re-opened.

Regulation 17 of the Public Procurement Regulations refers only to the Contracting Authority having access to evaluation reports and there is no mention of the bidders whilst ECJ Case No 450/06 – Varec SA vs Belgian Government cites the right of protection of public information and the risk of prejudicing

commercial interests, public or private, and the prejudicing of fair competition through the divulging of tender information. Making reports accessible to others except the Contracting Authority could lead to the breaking of other laws such as data protection, status of tax positions, bankruptcy and others.

Dr Mintoff said that the processing of data in a public role was legitimate. The Appeal Court decided that there should be a full re-evaluation and all facts should be re-heard and to ensure that the process was carried out correctly his clients required a copy of the Evaluation report as there are doubts regarding the correctness of the second evaluation.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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## **Decision**

**This Board,**

**having noted this ‘Contextual Application’ filed by Sultech & Co (hereinafter referred to as the Applicants) on 21<sup>st</sup> May 2020, refers to the claims made by same Applicants with regard to the tender of reference MGOZ/MPU/T/32/2020 listed as case No. 1449 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Jonathan Mintoff**

**Appearing for the Contracting Authority: Dr Abigail Caruana Vella**

**Whereby, the Applicants request:**

- a) A copy of the evaluation report to ensure that the Court’s Directives were adhered to by the Evaluation Committee and to safeguard fairness and equality in the evaluation process.**

**This Board also noted the Contracting Authority’s ‘Reply’ by way of an email dated 21<sup>st</sup> May 2020 and its verbal submissions during the virtual hearing held on 29<sup>th</sup> May 2020, in that:**

- a) The Authority insists that the evaluation report is an internal document which contains sensitive commercial information pertaining to third parties. At the same instance, the Authority had always abided by the rulings of the Court of Appeal and the Public Contracts Review Board.**

**This Board, after having examined the Applicants’ ‘Contextual Application’ and heard submissions made by the parties involved, would respectfully refer to clause 17(2) & (3) of the Public Procurement Regulations, as follows:**

- 1. “17(2) When an Evaluation Committee is appointed by a Contracting Authority listed in Schedule 3, the Evaluation Committee shall draw up an evaluation report and communicate their report to the Contracting Authority.*  
*17(3) When the Evaluation Committee is appointed by the Ministerial Procurement Unit it has to prepare the evaluation report and communicate the said report to the mentioned unit.”*
- 2. The above-mentioned clause makes it vividly clear that, the evaluation report is regarded as an internal document and is to be submitted to the Contracting Authority only and not distributed to the participating bidders.**

- 3. It is a known and established fact that, the evaluation report contains sensitive commercial information and other personal details of the competing bidders and in this regard, the Authority would breach the principle of confidentiality, if it allows distribution of such a report outside the Contracting Authority's domain.**
- 4. Applicants' contended justification for this request is to ensure that the rulings and directives given by the Court of Appeal were carried out by the Evaluation Committee in re-assessing the offers. In this regard, this Board would respectfully point out that, in its review, same Board would establish whether the Authority carried out the rulings given by the Court of Appeal.**

**In view of the above, this Board opines that,**

- a) the reasons presented by Applicants for the availability of the evaluation report are not justified,**
- b) the evaluation report is an internal document and contains sensitive commercial and personal data on the competing bidders and such a report should be contained under the Contracting Authority's safekeeping.**

**In view of the above, this Board does not uphold Applicants' request.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*3<sup>rd</sup> June 2020*