

PUBLIC CONTRACTS REVIEW BOARD

Case 1449 – MGOZ/MPU T 32/2019 – Framework Agreement for the Provision, Maintenance and Regular Collection of Open Skips at Various Sites in Gozo

The tender was published on the 26th May 2019 and the closing date of the tender was the 17th June 2019. The estimated value of the tender (exclusive of VAT) was € 200,200.

On the 21st May 2020 Sultech & Co filed an appeal against Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the cheapest compliant. A deposit of € 1,001 was paid.

There were four (4) bidders.

On 24th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Sultech & Co

Dr Jonathan Mintoff	Legal Representative
Mr Noel Sultana	Representative

Contracting Authority – Ministry for Gozo

Dr Christian Falzon	Legal Representative
Dr Andrew Cauchi	Legal Representative
Mr Joseph Cutajar	Chairperson Evaluation Committee
Mr Joseph Piscopo	Member Evaluation Committee
Mr Angelo Camilleri	Member Evaluation Committee
Ms Vicky Xuereb	Representative
Mr Marnol Sultana	Representative

Preferred Bidder – Mr Anthony Mercieca

Dr Mario Scerri	Legal Representative
Mr Alexander Mercieca	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 agreed to treat it as a normal hearing of the Board. He deplored the submission of documents by Appellants over the weekend and after office hours and reiterated the Board's policy that there is a time requirement to file documents for a hearing. Consequently all documents filed later than the time limit will not be taken into consideration. He also reminded the parties that the Case will be heard in line with the decision of the Court of Appeal on the three points raised at that appeal. Bearing this in mind the Board regretted the calling of unnecessary and numerous witnesses and waste of their time. He then invited submissions.

Dr Jonathan Mintoff Legal Representative of Sultech & Co referred to the letter of the 23rd April 2020 from Dr Mario Scerri replying to the shortcomings raised by the Contracting Authority in their clarification of the 22nd April 2020 and said that no documents had been submitted with the tender to back up the replies. He requested the testimony of witnesses.

Mr Brian Farrugia (464470M) called as a witness by the Public Contracts Review Board testified on oath that he is the Director of Regulatory Affairs at the Ministry of Transport. He referred to the vehicles listed by the bidder for fulfilling this contract namely BCJ 773 and HAU 803 and explained the different permits required and the difference between vehicles used for private purposes and those used for hire and reward. At the date at the close of tenders both vehicles were registered in the same names as currently.

Mr Terry Caruana (12485G) called as a witness by the Public Contracts Review Board testified on oath that since 2016 he has been a Team Leader at the Water Services Corporation and used to work at the Russell Hobbs Site. The contractor currently doing the skips collection uses two vehicles regularly and has a spare one and was not aware that there have been any complaints about the contractor's work.

In reply to a question witness stated that he was giving his testimony from the premises of Sultech & Co and had been asked to give his testimony by Dr Mintoff.

Mr Joseph Antignolo (356557M) called as a witness by Sultech & Co testified on oath that he is the Head of the General Business section at Citadel Insurance and in that role covers the issue of Tools of Trade insurance policies. He confirmed that current insurance covers hirers and this also covers employees of the hirer.

Mr Jonathan Henwood (247282M) called as a witness by the Public Contracts Review Board testified on oath that he is a Manager at the Environment and Resources Authority (ERA). He stated that of the two vehicles mentioned earlier BCJ 773 has a permit for carrying liquid manure whilst the other vehicle does not. He confirmed that at present waste carriers do not have to undertake a training course.

Ms Jacqueline Gili (308268M) called as a witness by the Public Contracts Review Board testified on oath that she is the Director of Operations at the Department of Contracts. She confirmed that Clause 1.7 (a curriculum vitae should be prepared by each member of the evaluation committee) under the Guidelines for Tender Evaluation was still in effect.

Mr Angelo Camilleri called as a witness by the Public Contracts Review Board testified on oath that he was one of the evaluators in this tender. Questioned by Dr Mintoff he stated that he had submitted his c.v. to the Director of Contracts as required.

Mr Joseph Cutajar (1379G) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the evaluation committee. He referred to the clarification note sent to the preferred bidder on the 22nd April 2020 to which he had replied that he owns a family business and therefore there was no subcontracting. With regard to the use of vehicle HAU 083 it is the responsibility of the contractor to confirm that all necessary permits are in hand when signing the contract.

Witness confirmed that after the case had been heard by the Court of Appeal the evaluation committee had asked for clarification in line with the Court's directive and the appropriate replies received. Jobsplus had confirmed that Mario Mercieca has been employed by his father since 2008. Roc-a-Go had confirmed they undertook to make a vehicle available for contingencies with all appropriate permits and licences. The tender asked for the use of only one vehicle and the vehicle offered had all necessary permits and licences.

Dr Mintoff stated that the Court of Appeal decision in paragraph 18 indicated that Anthony Mercieca is a sole trader as he had said 'No' to both questions regarding joint operation or subcontracting. Today it has been stated that it is now a family business – this is obviously a subcontract but the preferred bidder does not want to submit an additional EPPS as he does not want that subcontractor vetted. The additional vehicle does not belong to an individual but to a company and according to the witness from the ERA does not have the necessary permits and it was not compliant at the time of bidding. This leads one to conclude that there was no contingency arrangement at the time of placing the bid. Roc-a Go is either hiring its vehicle or doing subcontract work in which case an ESPD is required. EJCS decision 131/16 refers. According to witness Mr Terry Caruana two vehicles are required to carry out this contract when only one is being offered with the contingency vehicle based in Zejtun which makes it impossible to meet a contingency.

Dr Andrew Cauchi Legal Representative for the Ministry for Gozo said that Sultech & Co claims that the evaluation committee did not carry out the evaluation correctly and did not follow the set criteria. It is very clear that the committee followed the Court's directives and demanded written confirmation accordingly. In its decision of the 10th March 2020 in Paragraph 2 the Appeal Court asked for clarification on the family relationship and the contingency plans. Letters confirming that these directives were met were submitted on both points.

The second Sultech complaint, according to Dr Cauchi, is that the evaluation committee failed to deal correctly in their evaluation with various shortcomings by the preferred bidder - these complaints are frivolous and vexatious and were closely scrutinized by the Court of Appeal. Contrary to what Appellants claim the Court backed Anthony Mercieca's offer as valid and it was therefore wrong for Appellants to claim that preferred bidders were breaking Maltese and European law. Reliance on others is not the same as subcontracting and EJCS cases 389/92, 176/98 and 134/01 all back the principle that one can depend on others if they can prove reliance. Anthony Mercieca could not be excluded as it has been proven that

his son is employed by him and is relying on him. The Contracting Authority would be breaking the law if they had taken Sultech's claims into consideration.

Dr Mario Scerri Legal Representative of Mr. Anthony Mercieca made a brief reference to the Court Injunction filed by Appellants in an attempt to stop the direct order issued by the Ministry for Gozo. Referring back to the actual tender Dr Scerri said that there were three valid offers submitted of which Sultech's was the most expensive - it followed then that even if their appeal was upheld they would still not be awarded the tender. All Sultech was interested in was in lengthening the process as they were benefitting from it. The Appeal Court decided that Anthony Mercieca's offer was valid and should not be discarded. All the witnesses produced by Appellants today had no relevance to this Case. The only course must be to follow the Court's directives. Cap 595 of the Laws of Malta defines family member and this is clearly a family business although this makes no difference to the evaluation committee since Anthony Mercieca tendered as an employer with his son as an employee.

Regarding the contingency vehicle it is very rare, said Dr Scerri, for permits or licences to be issued in other but personal names. Proof has been provided that a vehicle can be provided in a contingency. Ultimately it was the responsibility of the tenderer to execute a contract.

Dr Mintoff said that reliance requires a separate ESPD form and it was an impossibility that the second highest bidder could be granted the tender.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Sultech & Co (hereinafter referred to as the Appellants) on 21st May 2020, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU T 32/2019 listed as case No. 1449 in the records of the Public Contracts Review Board awarded by Ministry for Gozo (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Andrew Cauchi

Appearing for the Preferred Bidder: Dr Mario Scerri

Whereby, the Appellants contend that:

- a) **Their main concern refers to the fact that, they are not convinced that, after the Court of Appeal's decision, the Evaluation Committee followed the instructions and directions given by the same Court.**
- b) **Appellants' second complaint refers to whether the Evaluation Committee took all the necessary considerations in their deliberations for the award of the tender.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 26th May 2020 and its verbal submissions during the virtual hearing held on 24th August 2020, in that:

- a) **The Authority insists that it had followed the directions given by the Court of Appeal and it had obtained all the necessary documentary evidence which the Court deemed applicable in this regard.**
- b) **With regard to Appellants' second concern, the Authority maintains that, the Evaluation Committee carried out the adjudication process, after obtaining the relevant assurances and written confirmations from the preferred bidder.**

This same Board also noted the testimony of the witnesses namely:

Mr Brian Farrugia duly summoned by Sultech & Co

Mr Terry Caruana duly summoned by Sultech & Co

Mr Joseph Antignolo duly summoned by Sultech & Co

Mr Jonathan Henwood duly summoned by Sultech & Co

Ms Jacqueline Gili duly summoned by Sultech & Co

Mr Angelo Camilleri duly summoned by Sultech & Co

Mr Joseph Cutajar duly summoned by Sultech & Co

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the numerous witnesses duly summoned opines that, the issue that merits consideration is, whether the Evaluation Committee followed and abided by the directions and considerations raised by the Court of Appeal during the treatment of application of reference number 105/2020 (Sultech & Co (P147)) vs Ministry for Gozo.

- 1. This Board would, first and foremost, refer to an extract from the decision of the Court of Appeal relating to this particular case, as follows:**

“Dan kollu huwa bizzejjed biex tithasssar id-decizjoni lil-Mercieca, izda dan ma jfissirx illi l-offerta ta’ Mercieca ghandha titwarrab bla ma titqies mill-gdid, flimkien mal-offerti validi l-oħra, fid-dawl tal-konsiderazzjonijiet maghmula fuq. Seww jghid il-Ministeru fit twegiba tieghu illi dwar l-obbligu

tal-oblatur“(to) provide data concerning subcontractors and the percentage of works to be subcontracted”¹, hemm in-nota 2(B) illi tghid illi l-oblaturi ghandhom jaghtu kull taghrif nieqes fi zmien hamest ijiem wara li sirilhom talba ghalhekk. Fic-cirkostanzi l-kumitat tal-ghazla kellu d-dmir jitlob dan it-taghrif nieqes qabel ma jghaddi ghad-decizjoni tieghu.

26. Ghal dawn ir-ragunijiet il-qorti tipprovdi dwar l-appell bill thassar id-decizjoni tal-kumitat tal-ghazla illi l-kuntratt jinghata lil Mercieca u thassar ukoll id-decizjoni tal-Bord tal-Ghazla, b’dan illi fic-cirkostanzi d-depositu mhallas minn Sultech sabiex setghet tressaq l-oggezzjoni taghha quddiem dak il-bord ghandha tintradd. Tordna illi l-process tal-ghazla jsir mill gdid wara li l-kumitat tal-ghazla jitlob u jinghata t-taghrif mehtieg kif imfisser fuq.”

In other words, the Court directed that, apart from cancelling the decision of the PCRB and the Authority’s in the award of the tender, directed also that, the Evaluation Committee should re-assess the compliant bids after obtaining documentary evidence from Mr Anthony Mercieca pertaining to the relationship between him and his son, Mr Mario Mercieca and also evidence to support Mr Anthony Mercieca’s claim regarding the availability of sufficient open skip resources to cover any contingency that may arise.

- 2. This Board would respectively treat only the issues raised by the Court of Appeal which can be summarised as follows:**

- (i) Documentary Evidence of Relationship between Mr Anthony Mercieca (the bidder) and His son Mario Mercieca**
- (ii) Documentary Evidence regarding the availability of sufficient Open Skip Resources**
- (iii) Re-Evaluation Process**

3. With regard to the relationship of Mr Anthony Mercieca with Mr Mario Mercieca, this Board refers to correspondence dated 23rd April 2020, sent to the Authority, wherein, apart from a description of the close commercial relationship between Mr Anthony Mercieca and Mr Marco Mercieca, there is also a clear description of the set-up of the business of Mr Anthony Mercieca in relation to his sons, Mario and Joseph.

3.1. With regard to documentary Evidence showing the commercial contractual relationship between Mr Mario Mercieca and Mr Anthony Mercieca, this Board would refer to an agreement entered into between the two parties for the execution of the works being tendered for, as follows:

“Ftehim milhuq

Illum, sebgha u ghoxrin (27) ta’ April elfejn u dsatax (2019).

Bejn

Minn nah l-wahda: Anthony Mercieca, kuntrattur, bin il-mejtin

Fortunato Mercieca u Maria Nee Gauci, imwieled Sannat, Ghawdex, fid-

29 ta Settembru 1948, u joqghod 23, Triq il-Bebunaq, Sannat, Ghawdex detentur tal-karta ta l-identita numru 74848(G).

*Minn naha l-oħra: **Mario Mercieca**, impjegat, bin il fuq imsemmi Anthony Mercieca u Vitorina nee Refalo, imwieled Rabat, Ghawdex, fil-25 ta Ottubru 1981, u joqghod Flat 1, ‘ ‘Tan-Nannu’, Triq Cenc, Sannat, Ghawdex, detentur tal-karta ta’ l- identita numru 29081G.*

Li bis-sahha tieghu

Il-partijiet jiddikjaraw u jippremettu:-

(i) Illu l-komparenti Mario Mercieca huwa sid ta’ skip loader bin-numru ta’ registrazzjoni BCJ 773, liema vettura hi koperta bil-permessi kollha tal-Awtorita tal-Ambjent u Rizorsi u tad-Direttorat ghar-Regolazzjoni Veterinarja ta kategorija 1, A1, A2, C2, u A4 għall-garr u rimi ta skart u kull materjal iehor tar-rimi nkluż hmieg u kull fdal iehor tal-annimali;

(ii) Illi Mario Mercieca huwa impjegat ma missieru Anthony Mercieca;

(iii) Illi billi l-komparenti Anthony Mercieca talab ukoll is-servizzi ta ibnu l -komparenti Mario Mercieca għall-uzu ta l-skip loader imsemmi;

(iv) *Illi l -komparenti Mario Mercieca accetta li jghamel dan is-servizz b'rati li gew miftiehema bejniethom skont il-hin li fih isir dan is-servizz, konsistenza u durata tas-servizz;*

Ghaldaqstant bis-sahha ta dan il-ftehim il-partijiet qeghidn jiftiehemu dan li gej:-

- 1. Il-kompurenti Anthony Mercieca jimpjega b'effett immedjat is-servizzi tal-kompurenti Mario Mercieca li jaccetta, ghall-uzu u operazzjoni ta l-skip loader bin-numru BCJ 773;*
- 2. Illi l-kompurenti Mario Mercieca ikun jintrabat li jaghmel dan is-servizz mitlub mill-kompurenti Anthony Mercieca f'kull hin tal-gurnata b'dawk ir-rati ta hlas gia miftiehema u accettati mill-partijiet;*
- 3. Illi l-kompurent Mario Mercieca ikun obligat li jirrendi s-servizz mitlub b'diligenzu u b'hila, u li jzomm il-vetturi fi stat tajjeb ta manutenzjoni, tiswija u ndafa;*
- 4. Illi l-kompurent Mario Mercieca jiddikjara li l-skip loader huwa debitament illicenzjat u kopert bil-poloż tal-assikurazzjoni kollha biex jintuza bhala tool of trade u jinstaq fit-triq u huwak opert ukoll b'dawk il-permessi kollha necessarji mahruga mill-awtoritajiet kollha kompetenti biex jintuza ghall-iskop li ghalih il-kompurenti*

Anthony Mercieca irid juza l-istess trakk bhala waste carrier vehicle.

Dan il-ftehim jissosstitwixxi kull ftehim iehor li sar bejn il-partijiet qabel illum.

B'xhieda ta dan il-partijiet iffirmaw din l-iskrittura.

Anthony Mercieca

KI 74848(G)

Mario Mercieca

KI 29081(G)

Dr. Mario Scerri LL.D., LL.M.

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Victoria VCT 1300

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3.2. With regard to the availability of sufficient resources which the bidder has available to cater for any contingency that might arise during the execution of the tendered works, this Board would respectfully refer to an agreement dated 5th August 2020, between Mr Anthony Mercieca (Bidder) and Roc-A-Go Crane Services Ltd, as follows:

“Ftehim milhuq

Illum, hamsa (5) ta' Awissu elfejn u dsatax (2019).

Bejn

*Minn nah l-wahda: **Anthony Mercieca**, Kuntrattur, bin il mejtin Fortunato Mercieca u Maria nee Gauci, imwieled Sannat, Ghawdex, fid-29 ta' Settembru 1948, u joqghod 23, Triq il-Bebunaq, Sannat, Ghawdex, detentur tal-karta ta' l-identita numru 74848(G).*

*Minn naha l-ohra: Victor Micallef li ghandu l-karta ta; l-identita' numru 940547(M) in rapprezentanza tal-kumpanija **Roc-A-Go Crane Services Ltd.** (C 27553) bl-indirizz registrat Roc-A-Go, Triq Tal-Barrani, Zejtun. Li bis-sahha tieghu*

Il-partijiet jiddikjaraw u jipremettu:-

(i) Illi l-kumpanija Roc-A-Go Crane Services Ltd, hi sid ta' DAF Skip loader tal-ghamla Leyland bin-numru ta' registrazzjoni HAU 803 debitament illicenzjat, u kopert bil-licenzji u permessi kollha tal-awtoritajiet kompetenti biex jintuza fit-triq bhala waste carrier vehicle kif jirrizulta mid-dokumenti hawn annessi:

(ii) Illi billi l - komparenti Anthony Mercieca gie mgharraf li l-offerta li xebet ghat-Tender bin-numru MGOZ/MPU T 32/2019: 'Framework Agreement for the Provision, Maintenance and Regular Collection of Open Skips at Various Sites in Gozo', kienet l-aktar wahda vantaggjuza;

- (iii) *Illi billi l - komparenti Anthony Mercieca talab lill-kumpanija li tpoggi ghad-dispozizzjoni tieghu l-skip loader imsemmi f'kaz li dak li ghandu tigrilu hsara sakemm idum jissewwa;*
- (iv) *Illi l-kumpanija Roc-A-Go Crane Services Ltd. acettat li tipprovdi dan skip loader lil Anthony Mercieca u li tpoggi ghad-dispozizzjoni tieghu dan l-skip loader meta tigi mitluba li taghmel dan f'kazijiet ta' kontingenza biss meta l-skip loader li ghandu tigrilu l-hsara u ghaz-zmien sakemm iddum tisewwa l-istess hsara u b'rati li gew miftiehema bejniethom;*

Ghaldaqstant bis-sahha ta' dan il-ftehim il-partijiet qeghdin jiftiehemu dan li gej:-

- 1. Il-kumpanija Roc-A-Go Services Ltd. tintrabat u tobbliga ruhha li taghti u tpoggi ghad-dispozizzjoni tal-komparenti Anthony Mercieca, li jaccetta, ghall-uzu tiegu u tal-impjegati tieghu dan l-skip loader kull meta jkollu bzonn ghall-htigijiet ta' kontingenza ghaz-zmien biss kemm l-skip loader li ghandu bin-numru BCJ 773 ma jkun jista' jintuza minhabba hsara u sakemm tisewwa l-istess hsara;*
- 2. Il-partijiet jaqblu li ghal dan is-servizz ta kontingenza ghandhom jigu applikati bejniethom daww l-istess rati li gia kienu gew miftiehema u applikati bejniethom kull darba li l-kumpanija iprovdiet dan l-skip loader lill-istess Anthony Mercieca meta kellu bzonn u li qed tintrabat li tkompli tipprovdi l-bis-sahha ta' dan il-ftehim.*

B'xhieda ta' dan il paritjiet iffirmaw din l-iskrittura.

Anthony Mercieca

KI 74848(G)

Victor Micallef obo

Roc-A-Go Services Ltd.

From the above documentation, this Board is justifiably convinced that Mr Anthony Mercieca has sufficient back-up to support any contingency that might arise. It should also be pointed out that, all the quoted documentation was submitted to the Authority.

3.3. This Board would also mention the fact that, the necessary equipment being utilised by the bidder for the tendered works is properly licensed and insured for the execution of the tender.

4. With regard to the re-evaluation process, this Board, after having examined in detail, the Evaluation report and the documentary evidence with regard to the issues raised by the Court of Appeal, can confirm that,

- i. The Evaluation Committee carried out the instruction given by the Court of Appeal.**
- ii. The Evaluation Committee obtained all the necessary documentation to confirm and establish the relationship between Mr Anthony Mercieca (the Bidder) and Mr Mario Mercieca.**
- iii. The Evaluation Committee are in possession of documentary evidence to prove that, Mr Anthony Mercieca has sufficient**

resources to cater for any contingency that might arise during the execution of the tendered works.

5. This Board would respectfully point out that, after having treated Appellants' complaints during the two hearings of the same case, same Board cannot but note the following facts, which for transparency's sake, must be recorded, as follows:

- i. The publication of this tender was 26th May 2019,**
- ii. Through various appeals and unnecessary delays, Appellants are still carrying out the works being tendered for,**
- iii. The Appellants' contracting rate, is much higher than the rates being quoted by Mr Anthony Mercieca in his offer,**
- iv. Such events were truly to the benefit of Appellants yet unnecessarily detrimental to the Authority and Government funds.**

In conclusion, this Board opines that:

- a) All the necessary documentary evidence, as duly directed by the Court of Appeal, was submitted to the Authority by Mr Anthony Mercieca and found to conform with what was being requested.**
- b) The Evaluation Committee carried out their adjudication process in a just, fair and transparent manner, after re-evaluating the compliant offers.**

- c) The Evaluation Committee, in their deliberations, took all the issues raised by the Court of Appeal and abided by the principles of the Public Procurement Regulations.**
- d) The offer of Mr Anthony Mercieca is fully compliant and the cheapest.**
- e) The unjustifiable delays, through various appeal and applications, has been beneficial to Appellants and financially detrimental to the Authority.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Authority's decision in the recommendation for award,**
- iii. directs that, the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

1st September 2020