

PUBLIC CONTRACTS REVIEW BOARD

Case 1483 – KLM 01/2020 – Tender for Street Sweeping and Cleaning using Low Emission Service Vehicles – Marsa Local Council

The tender was published on the 28th February 2020 and the closing date of the tender was the 30th March 2020. The estimated value of the tender (exclusive of VAT) was € 288,000.

On the 24th July 2020 Mr Sandro Caruana filed an appeal against the Marsa Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was rejected.

A deposit of € 1250 was paid.

There were eight (8) bidders.

On 31st August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant– Mr Sandro Caruana

Dr Jonathan Mintoff	Legal Representative
Mr Sandro Caruana	Representative

Contracting Authority – Marsa Local Council

Dr Mattia Felice	Legal Representative
Mr Kenneth Brincat	Chairperson Evaluation Committee
Mr Christopher Falzon	Member Evaluation Committee
Mr Edward Spiteri Audibert	Representative

Recommended Bidder – WM Environmental Ltd

Dr John Bonello	Legal Representative
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Department of Contracts

Dr Daniel Inguanez	Legal Representative
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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 then invited submissions.

Dr Mintoff Legal Representative for Mr Sandro Caruana made a preliminary point that as required by Reg. 276 of the Public Procurement Regulations the preferred bidders' letter of appeal was not filed within ten days of the letter of rejection.

The Chairman ruled that it will not be considered.

Mr Kenneth Brincat (195676M) called as a witness by Appellant testified on oath that he was the Chairperson of the Evaluation Committee. He listed the details of vehicles offered by the preferred bidder including engine classification and ERA permits. He stated that the ESPD declaration regarding blacklisting had been correctly filled by the preferred bidder as he was not blacklisted. There had been no clarifications sent to WM Environmental Ltd. Witness confirmed that the Department of Contracts had authorised the BPQR terms of the tender.

Mr Brian Farrugia (464470M) called as a witness by the Appellant testified on oath that he was a Director at the Ministry for Transport. In his testimony he dealt with road tax details and ownership of the vehicles listed in the tender. He mentioned that although one of the mentioned vehicles had been garaged since 2015 it was a very simple process taking about half an hour, to put it back on the road once the VRT was done.

In the absence of a representative from Jobsplus Dr Mintoff requested the Board to check if the preferred bidder met the requirement of six full time employees according to requirement 6.3 of the tender specifications.

Dr Mintoff said that from the testimony heard it transpires that some of the vehicles which WM Environmental Ltd (WME) will be using are registered in the name of other persons. Wilson Mifsud and WME are different entities and there is no link between them. He referred to the Sultech case where it was held that one must establish a link between the entities – there was neither a link nor evidence of reliance and it was essential to check the ESPD to clarify the position. A vehicle that has been garaged for five years needs time to be made operative and would not be available for immediate use. In PCR case 1236 it was established that the bidder must be conforming at the time of the bid. Clarification should have been obtained on the log book of a third party, since although not required, once provided it formed part of the literature list. Reference was made to ECJ Case 599/2010 where it was held that an authority cannot reject a bid on a point that was not covered in the tender request. The Board should order a revaluation in view of the facts revealed today.

Dr Mattia Felice Legal Representative for Marsa Local Council said that the interest of the Appellant was debateable since even if the tender was re-evaluated he would gain no benefit as he was down the evaluation list. There was a certain sophistry in the argument regarding the vehicles as it was very clear that Wilson Mifsud and WME were one and the same and it was a question of how vehicles were registered. The point re the garaging of a vehicle was a very poor one as witness made it clear that it was

a simple procedure to reverse the process. The question of blacklisting does not exist and the BPQR authorisation had been confirmed. The preferred bidder's offer was the most compliant and beneficial and had been evaluated correctly.

Dr John Bonello Legal Representative for WM Environmental Ltd stated that the tender conditions had all been met and the vehicles all had valid permits and it was irrelevant whether they were garaged or not – those were the exigencies of a business. Transport Malta preferred to register vehicles in the name of individuals and this argument should be discarded.

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 Mr Sandro Caruana (hereinafter referred to as the Appellant) on 24th July 2020, refers to the claims made by the same Appellant with regard to the tender of reference KLM/01/2020 listed as case No. 1483 in the records of the Public Contracts Review Board recommended for award by Marsa Local Council (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Mattia Felice

Appearing for Recommended Bidder: Dr John Bonello

Appearing for the Department of Contracts: Dr Daniel Inguanez

Whereby, the Appellants contend that:

- a) **The *Modus Operandi* of the Contracting Authority is irregular as it should have denoted the mode of payment of the deposit on appeal, in its letter of rejection.**
- b) **The Authority awarded the tender to a bidder who is not compliant.**
- c) **The recommended bidder was convicted of an offence against ‘Labour Laws’.**
- d) **The BPQR award criteria was not approved by Department of Contracts.**
- e) **Appellant’s offer was discriminately rejected by the Authority.**
- f) **The recommended bidders’ offer was not in compliance with Domestic and EU Rules.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 3rd August 2020 and its verbal submissions during the virtual hearing held on 31st August 2020, in that:

- a) **The Authority maintains that, the ‘Letter of Rejection’ contained sufficient information to enable Appellant to object.**
- b) **The recommended bidder was fully compliant and his offer was the most advantageous.**
- c) **The recommended bidder is not blacklisted.**
- d) **The award criteria were approved by the Department of Contracts.**
- e) **The Authority strongly maintains that the evaluation process was carried out in a just and fair manner and there was no discrimination on any of the offers.**

- f) The successful offer was compliant and was not in breach of any Local or EU Laws.**

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

Mr Kenneth Brincat, duly summoned by Mr Sandro Caruana

Mr Brian Farrugia duly summoned by Mr Sandro Caruana

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 consider Appellant's grievances, as follows:

- 1. With regard to Appellant's first grievance, after having reviewed the 'Letter of Rejection' dated 14th July 2020, sent by the Authority, this Board noted that, Appellant was informed of the reasons for the rejection of his offer together with the amount of deposit he has to lodge on appeal and in this respect, same Board does not find any justifiable cause to deem that, the procedure adopted by the Authority, post evaluation, as irregular, or that the contents of the 'Rejection Letter' precluded Appellant from filing an objection, so that, this Board does not uphold Appellant's first grievance.**
- 2. With regards to Appellant's second contention, this Board was made aware, during the hearing, that Appellant's grievance refers to the fact that, at the time of submission, the recommended bidder did not possess the vehicles and labour force as duly stipulated in the tender document.**

2.1. This Board will consider the issue of the vehicles (Equipment) by referring to clause 6.4 of section 3 (Terms of Reference) of the tender dossier as follows:

“6.4 – Equipment

No equipment is to be purchased on behalf of the Local Council as part of this service contract. Any equipment related to this contract which is to be acquired by the Local Council must be purchased by means of separate supply tender procedure.

The Contractor shall have (owned by the economic operator) the following minimum equipment:

- a) Manual Street Sweeping equipment: hand brooms, shovels, and 120ltr bins on wheels*

The Contractor shall submit proof of ownership of the above, through visuals, as per literature list. The Contractor is to have access (not necessarily ownership) to the following mechanical equipment:

- a) 1 x power Washer*
- b) 1 x mechanical Sweeper.*
- c) 1 x rain water culvert cleaning equipment,*
- d) 1 x Grass cutting / weeding equipment,*
- e) 1 x chewing gum removing equipment*
- f) 1 x High Pressure Water Bowser.*

The contractor shall submit, proof of ownership of the above, or else proof of free access if equipment is not owned.”

- 2.2. The above-mentioned clause clearly specifies what is to be owned by the bidder and what machinery can be leased or be accessible. In this particular case, the recommended bidder was in possession (ownership) of the ‘Manual Street Sweeping Equipment’ as duly denoted in their offer.**
- 2.3. After reviewing the recommended bidder’s offer, this Board established that, the recommended bidder had access to all the stipulated equipment and machinery, as duly requested in the tender dossier. At the same instance, it must also be pointed out that, the bidder i.e. WM Environmental Ltd has available all the machinery as duly requested for the execution of the tendered works.**
- 2.4. This Board also established that, the machinery has the necessary ERA permits and other licences to be able to operate. In this respect, it is noted that, one of the vehicles is garaged, which should be, as it is presently not utilised by the economic operator and from the testimony of Mr Brian Farrugia from the Ministry for Transport, this Board was made aware that the garaged vehicle can be easily licensed to operate, so that, the recommended bidder has all the machinery as duly requested in the tender document.**

- 2.5. This Board also notes that, although some of the vehicles are registered in the name of Mr Wilson Mifsud, who is the sole owner, sole director and sole judicial representative of WM Environmental Ltd (the Recommended Bidder), the ownership of such vehicles rests with the latter company. It is also worth mentioning that Transport Malta will register a vehicle in the name of an individual and in this particular case, such vehicles are in the name of the sole director namely, Mr Wilson Mifsud on behalf of WM Environmental Ltd.**
- 2.6. With regard to Appellant's claim that the recommended bidder does not possess enough labour resources to carry out the tendered assignment, this Board after having verified with the appropriate Authority, can confirm that the recommended bidder employed seventeen workers at the time of submission of his offer and in this respect, same Board opines that, WM Environmental Ltd had enough labour resources to be deemed competent to carry out the tendered service and in this regard, this Board does not uphold Appellant's second contention.**
- 3. With regard to Appellant's third contention, in that, the recommended bidder was convicted of an offence pertaining to Labour Regulations, this Board, as it has opined on so many occasions, would only deem a bidder to be disqualified from participating in public tenders if same bidder is officially**

black-listed and in this particular case, WM Environmental Ltd is not blacklisted, so that this Board does not uphold Appellant's third contention.

- 4. With regard to Appellant's fourth contention, in that the BPQR award criteria was not approved by the Department of Contracts, this Board noted the testimony of Mr Kenneth Brincat who confirmed that the BPQR terms of the tender were in fact authorised by the Department and in this respect, this Board does not uphold Appellant's fourth contention.**
- 5. With regard to Appellant's fifth contention, this Board, after examining the evaluation process and the relative documentation presented therein, would confirm that no sign or indication of any discrimination on any particular offer, could be detected and in this regard this Board does not uphold Appellant's fifth contention.**
- 6. With regard to Appellant's sixth contention, this Board does not identify any breach in Local or EU Rules in the evaluation process of the Public Procurement.**

In conclusion, this Board opines that;

- a) The 'Letter of Rejection' dated 14th July 2020 sent by the Authority to Appellant did not deter the latter from filing an objection.**

- b) The recommended bidder possessed all the necessary machinery and labour resources at the time of submission of his offer, as duly stipulated in the tender dossier.**
- c) The recommended bidder is not blacklisted.**
- d) The BPQR award criteria were approved by the Department of Contracts.**
- e) There was no indication of any discrimination on any of the offers participating in this tender.**
- f) There existed no breach of any Local or EU Rules in the evaluation procedure of this tender.**

In view of the above, this Board

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

15th September 2020