

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1571 – SPB T 02/2020 – Tender for the provision of Non-Urban Grass Cutting using Low Emission Vehicles and Environmentally Friendly Equipment for St Paul’s Bay Local Council.**

**3<sup>rd</sup> June 2021**

The Board,

Having noted the letter of objection filed by Dr Adrian Mallia on behalf of Michael Kyprianou Advocates acting for and on behalf of Galea Cleaning Solutions JV, (hereinafter referred to as the appellant) on the 6<sup>th</sup> November 2020;

Having also noted the letter of reply filed by Dr Jonathan Mintoff and Dr Larry Formosa acting for Mr Alistair Bezzina, (hereinafter referred to as the ‘Interested Party’) on the 12<sup>th</sup> November 2020;

Having also noted the reasoned letter of reply filed by Dr David Bonello on behalf of Bonello Advocates acting for St Paul’s Bay Local Council on the 16<sup>th</sup> November 2021;

Having heard and evaluated the testimony of the witness Mr Paul Bugeja who acts as Chairperson of the Evaluation Committee on this tender;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 1<sup>st</sup> June 2021 hereunder reproduced.

#### **Minutes**

### **Case 1571– SPB T02/2020. Tender for the Provision of Non-Urban Grass Cutting using Low Emission Vehicles and Environmentally Friendly Equipment for St. Paul’s Bay Local Council**

The tender was published on the 24<sup>th</sup> August 2020 and the closing date was the 24<sup>th</sup> September 2020. The value of the tender was € 24,000 per year for 4 years

On the 6<sup>th</sup> November 2020 Galea Cleaning Solutions JV filed an appeal against St Paul’s Bay Local Council as the Contracting Authority objecting to their disqualification on the grounds that their offer was not accepted.

A deposit of € 400 was paid.

There were four (4) bidders.

On 1<sup>st</sup> June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – Galea Cleaning Solutions JV**

Dr Adrian Mallia Legal Representative

**Contracting Authority – St Paul’s Bay Local Council**

Dr David Bonello	Legal Representative
Mr Paul Bugeja	Chairperson Evaluation Committee
Ms Romina Perici Ferrante	Member Evaluation Committee
Mr Charlie Galea	Member Evaluation Committee
Mr Robert Ciantar	Member Evaluation Committee
Ms Mariella Strout	Representative

**Interested Party – Mr Alistair Bezzina**

Dr Jonathan Mintoff Legal Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant’s representative to make his submissions.

Dr Adrian Mallia Legal Representative for Galea Cleaning Solutions JV requested that members of the evaluation committee present be asked to leave the virtual meeting as they might be required to give testimony.

The Chairman pointed out that according to regulations members of the evaluation committee shall be present during the whole of the hearing and may be called to give witness (Guidelines for Tender Evaluations – Dept of Contracts Version 1.1 Clause 5.2).

Dr Mallia asked that it be recorded verbally that “in the name of Appellant Galea Cleaning Solutions JV he was requesting members of the evaluation committee to give testimony and therefore requests that those same members of the committee are asked not to be present during the initial submissions”

Dr Mallia then went on to make his submissions. He stated that there are three grounds for this appeal. Firstly, the award as worded is null and void as it is in the name of a non-existent entity. There is confusion as in different instances ‘proofreading.com’ is mentioned, then ‘proofreading.com Ltd’ and the Contracting Authority in their letter refer to ‘JX Landscaping JV’. It is impossible to identify to whom the tender was awarded and unless this is clear all other parties are prejudiced. Proofreading.com is not registered in the Malta Business Register.

The second point refers to an email sent by Mr Robert Fenech dated 26<sup>th</sup> November 2020 in reply to the objection raised on the award of the tender. Mr Fenech states that he, with Mr Matthew Camilleri and Mr Redeemer Mifsud are tendering in a Joint Venture in this tender. This is irregular as Mr Mifsud submitted a separate tender as a sole tender. The tender document in section 4.8 indicates that it

complements the General Rules Governing tenders. These Rules allow same bidder to submit multiple tenders (Art 3.1.) but in Art 3.2 forbids an economic operator from bidding both as an individual as well as a partner in a joint venture. The whole point of the tendering system is to encourage competition and thus get the best value for money. When collusion occurs open and proper competition is fatally defeated. The bids of both proofreading.com and Mr Redeemer Mifsud should be disqualified.

The final ground for objection is that the tender requested the use of certain equipment, the lack of which appears not to comply with the technical requirements.

Dr David Bonello Legal Representative for St Paul's Bay Local Council said that contrary to what has been stated there is no confusion – there is simply a typographical error. To enable one to submit a tender one needs an ID number which corresponds with each different tender submitted whether in the name of a Joint Venture or an individual. There are strict regulations in the tendering process and hence if a tender is accepted the entity in whose name it is submitted must exist.

Dr Jonathan Mintoff Legal Representative for Mr Alistair Bezzina concurred with the submissions made by Dr Mallia. The General Rules limit participation to natural and legal persons which means entities having a legal registration. 'Proofreading' is not registered and has no juridical identity. The letter of the 27<sup>th</sup> October 2020 from the Local Council makes reference to 'Mr Redeemer Mifsud for proofreading' – there is therefore no doubt of the link between the two bidders working together to rig the bids.

Mr Paul Bugeja (689951M) called as a witness by Appellant testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the committee was not interested in the names of the bidders and not concerned whether the bid was in the name of an individual or a joint venture. The only interest was to ensure that the terms of the tender were met.

Referred by Dr Mallia to the Technical Offer Questionnaire in the tender witness agreed that the preferred bidder did not own a steam cleaning machine, which was mandatorily required under item 2.

Questioned by Dr Mintoff witness stated that the committee had not requested to see the power of attorney form required in the case of a joint venture as this was not the concern of the evaluation committee.

Dr Mallia said that the lack of equipment to be used in fulfilling the tender was crucial to the award and the Board need not go any further.

Dr Mintoff pointed out that this lack of equipment came under Note 3 and hence the offer did not conform. The award letter also did not conform.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 1<sup>st</sup> June 2021.

Having noted the objection filed by Galea Cleaning Solutions JV (hereinafter referred to as the Appellant) on 6<sup>th</sup> November 2020, refers to the claims made by the same Appellant with regard to the tender of reference SPB T 02/2020 listed as case No. 1571 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Adrian Mallia
Appearing for the Contracting Authority:	Dr David Bonello
Appearing for Interested Party:	Dr Jonathan Mintoff

Whereby, the Appellant contends that:

- a) The letter of award states that the tender is being awarded to “*Mr Redeemer Mifsud for Proofreading.com. Ltd*”. As a fact, there is no entity registered with the Malta Business Registry with the name *Proofreading.com. Ltd*.
- b) The notification sent to the Appellant by the Contracting Authority provides a table which appears to contradict the letter of award in so far as the award is stated to have been made to *Proofreading.com.mt* rather than *Proofreading.com. Ltd*. Therefore was the tender awarded to a website? Furthermore, it appears that the Contracting Authority considered two bids in its final ranking, namely that of Redeemer Mifsud and that of Proofreading.com.mt. The letter of award clarifies that the tender is being awarded to “Mr Redeemer Mifsud for Proofreading.com. Ltd”. It appears that Mr Redeemer Mifsud in effect submitted two bids for the same tender, one directly and one through what appears to be a website or a non-existent entity.
- c) The recommended bidder did not meet the explicit conditions set forth by the Tender Document as a result of the fact that the recommended bidder does not have the equipment required pursuant to the Tender document.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 16<sup>th</sup> November 2020 and its verbal submission during the virtual hearing held on 1<sup>st</sup> June 2021, in that:

- a) Tendering process was done online on the EPPS system. In order to be able to submit a tender one would need to go through an exhaustive due diligence process with various checks and balances, including the checking of VAT registration. This however does not preclude anyone from

choosing its own username id on the same etenders.gov.mt system. It must be stated that there are no restrictions in the choice of the username of the said entity or person. The recommended bidder chose a username that is unrelated to the name of the entity. When quoting the recommended bidder the council mentioned the username instead of the name of the entity. However as clearly evidenced by the information sheet submitted by the Council the tender was awarded to JX Landscaping Joint Venture.

- b) The two bids were separate and submitted by two separate legal persons.
- c) From the documentation submitted by the recommended bidder one can easily ascertain that the recommended bidder does meet the selection criteria.

This Board also noted the Interested Party's Reasoned Letter of Reply filed on 12<sup>th</sup> November 2020. This also as per Court of Appeal (377/2020/1) whereby it was decreed that the Letter as presented by Alistair Bezzina is valid and needs to remain in the documentation pertaining to this case by the PCRB. This with the premise that it needs to be considered as a Letter of Reply and not as an Objection Letter *"ladarba hija risposta mhux oggezzjoni ghandha tinghata biss l-effetti ta risposta, fis sens li tiswa safejn ressqet ragunijiet favur l-aggranji ga mressqa fl-oggezzjoni ta Galea izda mhux ukoll safejn ressqet aggranji godda"*.

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 witness duly summoned, will consider Appellant's grievances, as follows:

- a) The Appellant's first and second grievances will be dealt with together by this Board.
  - i. The Board opines that it is crucial for the Contracting Authority to be clear in its communications with bidders / prospective bidders during all stages of the tendering process including but not limited to, i) the writing of Notice of Award, ii) Letter of Acceptance and iii) Letters of Rejection. The Board notes that multiple names have been used to refer to the winning bid during the whole tendering process, i.e. *"Proofreading.com.mt"*, *"Mr Redeemer Mifsud for Proofreading.com. Ltd"* and *"JX Landscaping Joint Venture"*. This creates confusion and is not deemed acceptable.
  - ii. Moreover, the General Rules Governing Tenders, in article 3.2, state clearly *"An Economic Operator may not, however, tender for a given contract both individually and as a partner in a joint venture/ consortium"*. This is in fact what happened here. Mr Redeemer Mifsud had his own 'individual' bid, while also participating in another bid forming part of the Joint Venture

called “*Proofreading.com.mt*”, “*Mr Redeemer Mifsud for Proofreading.com. Ltd*” or “*JX Landscaping Joint Venture*”. The Board opines that with this behaviour there was an undermining of free and proper competition.

After considering all the above points, the Board upholds Appellant’s first and second grievances.

The Board would also like to point out that it is in the interest of the Contracting Authority to have an idea of where the bids are coming from and who did in fact bid for their respective tender. This to be well placed to follow the Public Procurement Regulations, General Rules Governing Tenders and also Circulars issued from time to time by the Department of Contracts during the evaluation stage. Such information is crucial for the Contracting Authority to follow Section 3 of the General Rules Governing Tenders.

- b) With regards to the Appellant’s third grievance, the Board notes the testimony of Mr Paul Bugeja whereby he confirmed that the preferred bidder did not own a steam cleaning machine, which was mandatorily required under item 2. The Board upholds Appellant’s third grievance.

**In conclusion this Board opines that;**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the Letter of Acceptance dated 27<sup>th</sup> October 2020 sent to “Mr Redeemer Mifsud for Proofreading.com. Ltd”;
- c) To cancel all the Letters of Rejection dated 27<sup>th</sup> October 2020;
- d) Directs the Contracting Authority to cancel the tender in its entirety;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Richard Matrenza**  
Member