

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1604 – CT2262/2020 – Service Tender for the Management of Asbestos Containing Waste (including the provision of Asbestos Containers and Air Monitoring) from Wasteserv**

27<sup>th</sup> July 2021

The Board,

Having noted the letter of objection filed by Dr John L Gauci on behalf of Dr John L Gauci & Associates acting for and on behalf of M Stream Ltd, (hereinafter referred to as the appellant) filed on the 30<sup>th</sup> May 2021;

Having also noted the letter of reply filed by Dr Gavin Gulia on behalf of Wasteserv Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 9<sup>th</sup> June 2021;

Having also noted the letter of reply filed by Dr Ryan C Pace on behalf of PT Matic Environmental Services Ltd (hereinafter referred to as the Preferred Bidder) filed on the 21<sup>st</sup> June 2021;

Having heard and evaluated the testimony of the witnesses Mr Gilbert Bonnici (Representative of the Appellant company) as summoned by Dr Gavin Gulia acting for Wasteserv Malta Ltd;

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 20<sup>th</sup> July 2021 hereunder-reproduced;

#### **Minutes**

### **Case 1604 – CT 2262/2020. Service Tender for the Management of Asbestos containing Waste (including the Provision of Asbestos Containers and Air Monitoring) from Wasteserv Sites**

The tender was published on the 15<sup>th</sup> July 2020 and the closing date was the 25<sup>th</sup> August 2020. The value of the tender was € 469,440.

On the 28<sup>th</sup> May 2021 M Stream Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to the cancellation of the award on the grounds that the offer was not compliant.

A deposit of € 2,347 was paid.

There were three (3) bidders.

On 20<sup>th</sup> July 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 – M Stream Ltd**

Dr John Gauci	Legal Representative
Mr Gilbert Bonnici	Representative

**Contracting Authority – Wasteserv Malta Ltd**

Dr Gavin Gulia	Legal Representative
Ms Fabiola Useche	Representative
Ms Stephanie Scicluna Laiviera	Representative
Ms Branica Xuereb	Representative

**Preferred Bidder – P.T. Matic Environmental Services Ltd (PT Matic)**

Dr Ryan Pace	Legal Representative
Mr Oliver Fenech	Representative

**Department of Contracts**

Mr Nicholas Aquilina	Representative
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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 John Gauci Legal Representative for M Stream Ltd stated that originally Appellant had been awarded this tender but following an appeal the Board ordered a re-evaluation following which Appellant was disqualified and the tender awarded to PT Matic on the grounds that the former had changed the handling procedure for collecting the asbestos waste. Appellant was objecting that Wasteserv had changed the reasons for exclusion without giving enough information. Appellant had in fact never changed its offer and was still planning to export the waste directly and there was no breach as alleged.

Dr Gavin Gulia Legal Representative for Wasteserv Malta Ltd said that Appellant was given two reasons for the refusal of his offer. The second reason that Appellant brought up in his appeal follows from the first reason and therefore was fully aware that the reason was the change in handling procedure which highlights the ambiguity between claiming direct export and the indication that storage of the waste between the point of collection and shipment was intended.

Mr Gilbert Bonnici (50681M) called as a witness by the Contracting Authority testified on oath that he was familiar with the tender and is fully aware of what handling procedures mean. Handling involves

two methods – either the material is first stored and then exported or it is exported direct. He was not aware of how the tender form was completed nor had he written the reply to the clarification letter.

Questioned by Dr Gauci witness said that the export permit could not be obtained before the award of the contract. The process envisaged is to collect the waste in containers and store it at ERA premises until the permit is obtained.

Dr Ryan Pace Legal Representative for P.T. Matic Environmental Services Ltd said that there was ample reference to the facts in the hearing of this case by the Board in January 2021. The Authority did not at that stage consider that a bidder had to have the necessary licence and permits in hand at the time of the offer and not once the contract is awarded. The Board concluded that the evaluation committee were not conscious of this and therefore reached the wrong conclusion. On this occasion certain considerations had been taken into account. This appeal is on the implementation of the PCRБ decision and the present grievances are extraneous to that decision. The first grievance is incorrect and invalid as the second grievance cancels it since detailed information was given.

The claim in the second grievance is that there has been no change in procedure. If M Stream is claiming that it will export direct then there is no in-between handling and the export permit has to be in hand and not applied for later as claimed. The procedure mentioned by Appellant involves the storage of waste (incidentally there is no reference to sub-contracting or third parties involvement in the temporary storage) without a storage permit. It has been confirmed that Appellant has no permits and the PCRБ are faced with a situation where it cannot change tack since the first hearing.

Dr Gauci said that the PCRБ decision was meant to establish that a clarification was required. The tender was just dealing with the method of disposing of waste with no reference to permits being required beforehand.

Dr Gulia stated that the first objection was frivolous as the reason for refusal had been given. Once Appellant introduced the aspect of storage the question of permits was irrelevant as the process was no longer one of direct export and hence the ambiguity in the clarification letter which was contradictory and made the Evaluation Committee’s decision a correct one.

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 20<sup>th</sup> July 2021.

Having noted the objection filed by M Stream Ltd (hereinafter referred to as the Appellant) on 30<sup>th</sup> May 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2262/2020 listed as case No. 1604 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr John L Gauci

Appearing for the Contracting Authority: Dr Gavin Gulia

Appearing for the Preferred Bidder: Dr Ryan C Pace

Whereby, the Appellant, in their Letter of Objection, contends that:

- a) **The Exclusion Notice is null and void as it is not clear and does not contain any details about the alleged non-compliance of Objector** – it is amply clear that the Exclusion Notice fails to indicate how the Objector’s clarification reply constitutes a change in the technical offer, this on the tenets of administrative law that authorities should give clear and comprehensible reasons for their decision. This even more so in the sphere of public procurement legislation, due to the additional legal requirements of fairness, transparency, the need to maintain a level playing field and express requirements to disclose reasons in a clear and intelligible manner. Hence it is null and void due to lack of reasons which would permit the Appellant to properly evaluate the Contracting Authority’s reasoning leading to the Appellant’s exclusion.
  
- b) **No departure from Objector’s offer** – Appellant’s clarification reply does in no way change the technical offer. The solution offered is completely in line with PCR’s decision in afore-said case (Case 1525), since the waste can be exported straightway in a commercial and economic sustainable way.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9<sup>th</sup> June 2021 and its verbal submission during the virtual hearing held on 20<sup>th</sup> July 2021, in that:

- a) **The Exclusion Notice is null and void as it is not clear and does not contain any details about the alleged non-compliance of Objector** – in the notice it was communicated to the Objector that the offer was deemed not compliant on the basis that “this is due to a change in the handling procedure as clarified in the last clarification reply”. Contracting Authority did in fact state a reason thus executing its duty to “state reasons for a contested decision”. The handling procedure was requested in the tender document itself whether the Objector opted for direct export or storage.
- b) **No departure from Objector's offer** – Contracting Authority submits that there is a very serious departure from the original offer. Direct export is direct in the very sense of the word. Any indication of storage, in the interim, is not tantamount to “direct export”, as this would necessarily mean that the merchandise shall be stored between point of departure and shipment. “Direct export” will require the production of an export permit “ab initio”. There can be no doubt that in the original offer the Objector had opted for direct export. However, in its clarification of 8<sup>th</sup> April 2021, it went to state that it will utilise “service providers with valid transport and storage permit until export permit is issued”.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 21<sup>st</sup> June 2021 and its verbal submission during the virtual hearing held on 20<sup>th</sup> July 2021, in that:

- a) **The Exclusion Notice is null and void as it is not clear and does not contain any details about the alleged non-compliance of Objector** – the section (within the appeal / objection) relative to this ground of appeal comprises only of an extensive list of judgments which highlight general principles at law, rather than arguments and submissions confirming the validity and legitimacy of this ground of appeal. The Contracting Authority did in fact provide a clear-cut reason for the appellant's non-compliance “a change in the handling procedure”.
- b) **No departure from Objector's offer** – such was the clarity and the comprehensibility of the reasons provided by the Contracting Authority – and therefore the invalidity and illegitimacy of the first ground of appeal – that the appellant company submitted, in its second ground of appeal, that “there is absolutely no departure from Objector's offer”. This second ground of appeal is intentionally heedless to many important facts established in PCRB Case 1525, more predominantly the following:
  - a. Appellant's submitted offer is based on direct export;

- b. Appellant's submitted offer listed no third party contractors / subcontractors;
- c. Appellant's submitted offer, although based on direct export, still requires temporary storage;
- d. Appellant is not in possession of all applicable/mandatory permits.

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 Exclusion Notice is null and void as it is not clear and does not contain any details about the alleged non-compliance of Objector –**

- i. This Board opines that the Contracting Authority was amply clear in its letter of 21<sup>st</sup> May 2021 to the Appellant company, whereby it stated *“Following a rectification request to provide all the missing technical literature with clear cross referencing and two clarification requests following the decision of the PCRB in case ref. number 1525, the offer was deemed not compliant. This is due to a change in the handling procedure as clarified in the last clarification reply. This constitutes a change in the technical offer which has rendered the offer not compliant.”* The Contracting Authority clearly made reference to the “change in handling procedure” which information was submitted by the same Appellant company as a reply to the clarification request of 8<sup>th</sup> April 2021.
- ii. It must be noted that the handling procedure is very much known to the Appellant company. This was stated under oath by Mr Gilbert Bonnici, representative of M Stream Ltd.
- iii. Finally, this Board makes reference to the second grievance of the Appellant, whereby it is the same Appellant that is aggrieved by the reasoning provided in such Letter of Rejection.

Hence this Board, does not uphold Appellant's first grievance.

b) **No departure from Objector's offer –** The Board notes that:

- i. The tender dossier made reference to two ways in which the ‘asbestos waste’ could be disposed of, 1) direct export (i.e. exporting directly without an ‘in between’ storage solution) and 2) collection / storage of asbestos waste and its eventual disposal abroad (export after being stored temporarily locally).
- ii. Different licenses / permits are required for each specific way of disposal being sought.
- iii. The Appellant company in its proposal submitted that it was offering the Contracting Authority the ‘direct export’ option.
- iv. That no subcontractors for an ‘in-between’ service have been declared by the Appellant company in its original proposal.

- v. As per clarification request of 8<sup>th</sup> April 2021, the offer of the Appellant would still require temporary storage by 'service providers with valid transport and storage permit until permit is issued'.

This Board is of the opinion that when one considers all these points cumulatively, especially point (v) above, this would constitute a departure in the handling procedure offered to the Contracting Authority.

Hence this Board, does not uphold Appellant's second grievance.

**In conclusion this Board;**

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to PT Matic Environmental Services Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Richard Matrenza**  
Member