

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1633 – CT 2156/2021 – Lot 2 – Tender in Lots for the Service Collection of Organic Waste from Commercial Establishments in Malta and Gozo Tourism Areas in an Environmentally Friendly Manner.**

**7<sup>th</sup> October 2021**

The Board,

Having noted the letter of objection filed by Dr Cedric Mifsud on behalf of Mifsud & Mifsud Advocates acting for and on behalf of Mr Christ Gatt, (hereinafter referred to as the appellant) filed on the 23<sup>rd</sup> July 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for the Association for Local Councils (hereinafter referred to as the Contracting Authority) filed on the 2<sup>nd</sup> August 2021;

Having also noted the letter of reply filed by Dr Alessandro Lia on behalf of Lia & Aquilina Advocates acting for SRF and Veladrians Ltd (hereinafter referred to as the Preferred Bidder) filed on the 6<sup>th</sup> August 2021;

Having heard and evaluated the testimony of the witness Mr Mario Fava (Member of the Evaluation Committee) as summoned by Dr Alexia Farrugia Zrinzo acting for Association for Local Councils.

Having heard and evaluated the testimony of the witness Ms Maria Gatt (representative of Mr Christ Gatt) as summoned by Dr Malcolm Mifsud acting for Mr Christ Gatt.

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

Having noted and evaluated the minutes of the Board sitting of the 5<sup>th</sup> October 2021 hereunder-reproduced.

### **Minutes**

#### **Case 1633–CT 2156/2021. Tender in Lots for the Service Collection of Organic Waste from Commercial Establishments in Malta & Gozo Tourism Areas, in an Environmentally Friendly Manner – LOT 2**

The tender was published on the 9<sup>th</sup> May 2021 and the closing date was the 10<sup>th</sup> June 2021. The value of the tender on Lot 2 excluding VAT was € 195,167.

On the 23<sup>rd</sup> July 2021 Mr Chris Gatt filed an appeal against the Local Councils Association as the Contracting Authority objecting to his disqualification on Lot 2 on the grounds that the bid was considered technically non-compliant.

A deposit of € 976 was paid.

There were four (4) bidders on Lot 2.

On 5<sup>th</sup> October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Mr Chris Gatt**

Dr Malcolm Mifsud	Legal Representative
Dr Ian Barbara	Legal Representative
Ms Maria Gatt	Representative

**Contracting Authority – Local Councils Association**

Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Mario Fava	Member Evaluation Committee
Ms Lianne Cassar	Representative
Ms Ruth Debrincat	Representative
Mr Kristian Sultana	Representative

**Preferred Bidder – SRF and Veladrians Ltd**

Dr Alessandro Lia	Legal 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 invited submissions.

Dr Malcolm Mifsud Legal Representative for Mr Chris Gatt wished it to be recorded that he had requested the full evaluation report on this Case but he had been informed that making the report public was contrary to the Public Procurement Regulations. Dr Mifsud wished it to be recorded that he was repeating his request.

Dr Mifsud then dealt with the grounds for the appeal. Appellant's bid was the cheapest and reference was made to the Court of Appeal case involving Kerber Security (2014) where it was held that when price is the criterion then award must go to the cheapest offer. Appellant indicated in his bid that his vehicle had been upgraded; however the Contracting Authority decided that since the upgrade had not yet been certified by Transport Malta (TM) the vehicle did not meet the tender requisites. TM's approval has since been received. Appellant maintains that the bid should not have been rejected without further checks on the credibility of his claim.

On the aspect of the Gross Vehicle Weight of the vehicle offered, the criterion here was the width of the roads – Appellant had experience of working with a 7 ton truck (instead of the 6 ton specified in the tender) in narrow streets. Two clarifications by the Authority on 19<sup>th</sup> May 2021 indicated a minimum of 6 tons. If the Authority had any doubts on this point it should have sought a clarification.

Should the Board consider Appellant's claim correct then the tender has to be awarded to him on price concluded Dr Mifsud.

Mr Mario Fava (495472M) called as a witness by the Contracting Authority testified on oath that he was a member of the Evaluation Committee and stated that no confirmation was submitted that the vehicle in question had been certified EUR VI by TM. Clause 4.2.2 specified that the vehicle had to be 6 tons and the evaluation had to follow the tender. A 6 ton vehicle was considered most suitable for narrow streets.

Questioned by Dr Mifsud witness said that no document was submitted from TM that the vehicle in question was EUR VI standard and the evaluators had not considered any documents unless official. He agreed that the tender states 'any credible third party' but the Authority were only looking for TM certification. On the question of the vehicle weight it was clear from the tender that the 6 tons was the minimum and the Authority interpreted that as a maximum figure.

In reply to a question from Dr Alessandro Lia Legal Representative for SRF and Veladrians Ltd witness said that the upgrade certificate submitted did not indicate equivalence to meet the tender requirements.

Mrs Maria Gatt (052189M) called as a witness by the Appellant testified on oath that she had submitted the tender and that documents had been included indicating that the vehicle had reached EUR VI emission standards.

That concluded the testimonies of witnesses.

Dr Mifsud said that it was quite clear that the Evaluation Committee was only interested in TM documents – the tender did not state that but asked for a credible alternative which word was also mentioned in clarifications. It is a fact that subsequently TM confirmed the conversion. Mr Fava in his testimony made it clear that the Authority would accept only TM's confirmation. He also stated that as far as the Authority was concerned the GVW was only 6 tons or nothing; however the tender did not request maximum but minimum and the Authority cannot at this stage change the goalposts. The bid should be adjudged in favour of the Appellant and if technically compliant should be awarded the tender.

Dr Lia said that the tender was not based on BPQR adjudication and hence the point regarding the price of the tender is immaterial if the bid was not technically compliant. The EUR VI standard is recognised and certified by TM and Mr Fava was justified in his claim that the Authority only considered them as the credible third party; therefore if alternative certification was submitted it had to be accompanied by confirmation of equivalence to meet the requirements. He referred to Case 1476 of 2020 - Specialists' Group Cleaners vs CPSU where the PCRB insisted that equivalence had to be proved. As regards the weight of the vehicle the tender clearly states 'not larger than 6 tons GVW' and this has prevalence - it is a fallacious argument to claim that it was sufficient that a vehicle could go through the streets of Mdina.

Dr Alexia Farrugia Zrinzo Legal Representative for the Local Councils Association agreed with the points made by Dr Lia. The certification required was one issued by TM not by the convertor which was the only declaration presented – this was an instance where the Authority could not ask for clarification. On the question of the vehicle weight the tender states 'not larger than 6 tons' and there was a very

valid reason for the Authority to insert such clause since the vehicle had to be suitable for purpose. In Case 1278 (2019) the PCRB upheld the principle that it was essential to respect the terms of a tender.

The Chairman thanked the parties for their submissions 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 5<sup>th</sup> October 2021.

Having noted the objection filed by Mr Christ Gatt (hereinafter referred to as the Appellant) on 23<sup>rd</sup> July 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2156/2021 Lot 2 listed as case No. 1633 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Malcolm Mifsud

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) The bid offered by SRF & Velandrians Ltd was not the cheapest price since the Appellant offered a bid which was nearly €40,000 cheaper.
- b) The offer was primarily rejected on the basis that the proposed vehicles to be used were inadequate and thus ineligible in terms of the tender instructions.
  - i. In accordance with Article 4.2.2 (b) the vehicle that exceeds 16 tonnes must have a minimum of Eur VI standards. More importantly “vehicles that are not certified as Euro VI, but technical after-treatment has achieved the same standard”, are allowed. The Appellant presented the relevant documents in the tender application certifying that the vehicle in question was upgraded, and emissions were effectively reduced by 47%, reaching the emission levels of Eur VI vehicles. The Director General held that since the logbook was not updated by Transport Malta from Euro V to Euro VI than such vehicle cannot be used. There is no mention of Transport Malta being the sole credible third party, any other credible third party may certify the upgrade from Euro V to Euro VI.

- ii. With regards to 7 tonne Euro V vehicle, it is alleged that the vehicle is ineligible since it exceeds the capped criterion of 6 tonnes. In fact, the vehicle in question is 7 tonnes, however from the Appellant's vast experience in the field of swill collection, there were instances whereby the Appellant's 7 tonne vehicles were used in small and narrow streets in places such as Mdina. Appellant contends that although the vehicle marginally exceeds the established tonnage criteria, it is still adequate to carry out the required operation.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2<sup>nd</sup> August 2021 and its verbal submission during the virtual hearing held on 5<sup>th</sup> October 2021, in that:

- a) The Contracting Authority (CA) submit that the objectors are wrong in claiming that they have submitted all the relevant and necessary documentation together with their offer. Reference is made to the Service Vehicle Type and Minimum Requirements under heading 4.2.2. The objectors try to argue that the word used is should and not must, thereby creating the possibility that it may be submitted at a later stage. What the objectors fail to note, is that the Tender Application is classified as a Note 3 document. Therefore, had the objector read the Tender Document in its entirety, it would have become evident that once the Tender Application is submitted, it could not be changed. Therefore, since the Tender Requested that the after-treatment should be documented in the tender application, it is obvious that it was being requested.
- b) The argument with regard to the 7 tonne Euro V vehicle as submitted in their offer is inadmissible. The technical requirements made it absolutely clear that for narrow alleys and pathways and street, the vehicle is not to exceed 6 Tonnes GVW and must comply to Euro V standards. Moreover, this was subsequently confirmed by the Director General that the vehicle shall not be larger than 6 Tonnes GVW or more for small and narrow streets, alleys, etc. Notwithstanding this second confirmation, the objector submits that his 7 Tonne vehicle satisfies the technical requirement. The CA contend that the technical requirements was unambiguously clear in stating that the vehicle shall not exceed 6 Tonnes, and this was further confirmed by the Director General following a request to clarify was made by the objector themselves. That said, the objectors decided to submit their technical offer with a 7 Tonne vehicle (clearly different to that requested in the technical requirement) and opted to justify this by arguing that based on the objectors' vast experience, this vehicle of 7 Tonnes still passes.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 6<sup>th</sup> August 2021 and its verbal submission during the virtual hearing held on 30<sup>th</sup> September 2021, in that:

- a) The fact that the Appellant had the cheapest offer does not mean that it should be awarded to him. This due to the fact that his bid was deemed non compliant in the technical evaluation stage on several points that fall under Note 3.
- b) The 16 tonnes vehicle is still registered as Euro V while the requirements were for a Euro VI vehicle. Regarding the 6 Tonne vehicle, the argument that a 7 Tonne vehicle can also be used does not hold water. That is an argument which could have been brought forward under regulation 262 of SL. 601.03.

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:

- a) **Cheapest price offered**
  - b) **16 tonnes vehicle**
  - c) **7 tonnes vehicle**
- a) **Cheapest price offered** – with regards to this first grievance this Board opines that since the Evaluation Committee deemed the offer of the Appellant to be technically non-compliant, then no financial evaluation has been carried out on its bid. Therefore, no arguments can be raised on the financial aspect of the bid.

This Board does not uphold Appellant's first grievance.

- b) **16 tonnes vehicle** – Reference is made to Section 3 'Specification / Terms of Reference' (Note 3) whereby, "Where in this tender document a standard, brand or label is quoted, it is to be understood that the Contracting Authority will accept equivalent standards, brand or labels. **However, it will be the responsibility of the respective bidders, at tendering stage, to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.**" (bold & underline emphasis added)
  - i. This Board opines that the reference of "at tendering stage" in the quote above is there since this section, i.e. Section 3 'Specification / Terms of Reference' falls under Note 3, hence no Rectifications are allowed. Only clarifications on the submitted information may be requested.
  - ii. This Board notes that the Appellant did submit in its original bid a certificate, issued by Mr Carmel Brincau, with a result of 'Test Emission Reduction of 47%'. This was however,

not followed with a submission of the official regulator of Malta, in this particular case, Transport Malta.

- iii. This Board notes that, if Appellant was in doubt as to which certificate had to be submitted, they had the possibility to make use of the clarifications tool and resolve this issue, prior to submission of their offer. No remedies of the sort were availed of.
- iv. As already noted, this Board opines that as mentioned in the top part of Section 3, it is the responsibility of the bidder to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.

After having considered the points above, this Board does not uphold Appellant's second grievance.

- c) **7 tonnes vehicle** – The Board notes that the Tender Dossier was very clear and unequivocal in its descriptions provided.

- i. Reference is made to Section 3 'Specification / Terms of Reference' (Note 3) Sub Section 4.2.2 Article 1.1 (d) whereby "*The Contractor bidding for this contract must be equipped with all requested vehicles to be of a Euro VI standard waste carrier **not exceeding 6 tonnes** or better per lot, suitable to manoeuvre in narrow strait streets, where such equipment must be ready available prior commencement of the contract. Additional vehicles **not exceeding 6T** GVW used under this contract must comply with the Euro V emission standards.*" (bold & underline emphasis added)
- ii. Reference is made to Section 3 'Specification / Terms of Reference' (Note 3) Sub Section 4.2.1 Sub-title 'Period and Frequency' whereby, "*1 truck of 16T GVW or more and **1 truck not larger than 6T GVW** for small and narrow streets.....*" (bold & underline emphasis added)
- iii. The Board deems that the argument brought forward by Appellant that he has vast experience using a 7 tonne vehicle in narrow streets and alley ways is inadmissible in his objection under Regulation 270 of the Public Procurement Regulations. Such an argument could have been brought forward under Regulation 262 Call for Remedies during the stipulated time-frames.

After having considered the points above, this Board does not uphold Appellant's third grievance.

**The 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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Richard Matrenza**  
Member