

PUBLIC CONTRACTS REVIEW BOARD

Case 1005 – SC 52-04/2016 – Request Service for the Cleaning of Access Roads and Access Only Roads in an Environmentally Friendly Manner, Emptying of Litter and Dog Bins, Washing of Bins and Roads

The Publication Date of the Call for Tenders was 19 July 2016 whilst the Closing Date for Call of Tenders was 25 August 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 600,000.

Seven (7) Bidders have submitted offers for this Tender.

On 28 October 2016, Waste Collection Ltd filed an Objection against the decision of Kunsill Lokali San Ġiljan to award the Tender to Galea Cleaning Solutions JV for the price of € 225,000 (Exclusive of VAT) against a deposit of € 2,323.92.

On 15 November 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Waste Collection Ltd

Mr Mario Tufigno	Representative
Dr Robert Tufigno	Legal Representative

Recommended Bidder – Galea Cleaning Solutions JV

Mr Christian Galea	Representative
Dr Adrian Mallia	Legal Representative

Contracting Authority – Kunsill Lokali San Ġiljan

Mr Paul Spiteri	Executive Secretary
Dr Stefano Filletti	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Robert Tufigno the Legal Representative for Waste Collection Ltd opened by asking the Public Contracts Review Board to summon Dr Claudette Fenech, Legal Officer at the Registrar of Companies within the Malta Financial Services Authority to be called to witness for which the Public Contracts Review Board acceded.

At this point, Dr Claudette Fenech, ID 53572 M, was called to testify under oath. A Transcript of the testimony is being attached with this decision.

Dr Stefano Filletti, the Legal Representative for Kunsill Lokali San Ġiljan requested that the Mr Paul Spiteri, the Executive Secretary of the Local Council to testify for which the Public Contracts Review Board acceded.

At this point, Mr Paul Spiteri, ID 87960 M was called to testify under oath. A Transcript of the Testimony is being attached with this decision.

Following Mr Spiteri's Testimony, Dr Robert Tufigno, Legal Representative of Waste Collection Ltd argued that if the Notice of Award was published, this cannot be changed as if nothing matters because the rules of the game would have been changed. He wondered with what right did the Contracting Authority changed the game when the Tender was at Appeals' stage.

The Bidders aren't notified who won the Tender and the only way wherein one can get to know who won the Tender was through the Local Council Notice Board which was even changed because a mistake was noted in the Notice of Award since not even the electronic systems tells you who has been awarded the Tender.

Dr Tufigno continued by saying that one cannot prejudice anyone, constrain them to enter a financial obligation to file an Appeal before the Public Contracts Review Board and then you change the rules of the game when we are talking about a Tender where you have five days to file an objection.

With regards the second point, the Appellants submit that if one makes an accurate examination of the figures available, one finds out that with those rates one cannot employ workers and thus, Waste Collection Ltd is requesting the Public Contracts Review Board to check whether there were grounds of precarious employment or not said Dr Robert Tufigno.

Dr Stefano Filletti, the Legal Representative for Kunsill Lokali San Ġiljan said that he was amazed with the way certain submissions are made. Here we have a tender which was made through the Electronic Procurement System (EPPS) in order for the system to be transparent.

There was no contestation to the fact that the Recommended Bidder submitted his bid as a Joint Venture and the Evaluation Board has considered him as such. There was no contestation to the fact that the Contracting Authority gave the Tender to Galea JV. What happened was that there was a typographic mistake in the Notice of Award wherein it was written as Limited instead of JV.

The Appellant had no time to check the EPPS but had the time to go and check with the Registrar of Companies. Dr Filletti continued by stating that the Appellant was using the excuse of the notification of award for this Tender wherein the Notice of Award was corrected prior to the filing of the Objection. If there was a mistake in the EPPS, he would be

right. When you have a contract which was to be awarded and ranked on the price, it was obvious that the Tender was to be awarded to the cheapest to spec.

With regards the Second Grievance, Dr Filletti argued that this was a glorified fishing expedition. The Appellant did not bring one single proof that the Recommended Bidder was using Precarious Employment. Throughout his testimony, the Executive Secretary has furnished a lot of information to show that the rates were correct and that the process was done correctly.

The truth is that the Appellant was neither right on the notification nor on the precarious employment. The truth was that since the Appellant was the incumbent in this Tender, he filed the Objection so that the whole process would stop and the contract would have been extended until the Public Contracts Review Board comes out with a decision for the Objection.

Dr Adrian Mallia, the Legal Representative for Galea Cleaning Solutions JV said with regards to the Precarious Employment that if one had to see the bids which entered, the difference between the three cheapest bidders was minimal when one sees that the contract is for three years. Even the difference between the Appellants and the Recommended Bidders was of € 29.000 in a three year contract.

With regards the submissions, as it was proven, it was crystal clear that the Appeal was made on Galea Cleaning Solutions JV and it was not fair that his clients were to suffer for a minimal error, concluded Dr Mallia.

At this stage, the Public Hearing was closed.

This Board,

Having noted this Objection filed by Waste Collection Ltd (herein after referred to as the Appellant) on 28 October 2016, refers to the Contentions made by the latter with regards to the award of Tender of Reference SC 52-04/2016 listed as Case No 1005 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali San Ġiljan (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Robert Tufigno

Whereby, the Appellant contends that:

- a) **In the notice of award, the Recommended Bidder was referred to as “*Galea Cleaning Solutions Ltd*”, which company does not exist, so that the award was given to a non existing entity. In this regard, the Appellant maintains that the Recommended Bidder should be disqualified from the Adjudication Process.**

- b) **From the rates as quoted by the Recommended Bidder, the wages costs will be below those dictated in the Local Legislation.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 7 November 2016 and its verbal submissions during the Public Hearing held on 15 November 2016, in that:

- a) **Kunsill Lokali San Ġiljan insists that the Recommended Bidder submitted his offer under the proper legal entity of a “*Joint Venture*”. At the same instance, all documentation submitted and on which evaluation was carried out indicated the Joint Venture.**

It was only during the notification of award, through a genuine human error, that the word “*Limited*” was written instead of “*JV*”, which mistake was eventually rectified by the Contracting Authority.

b) Kunsill Lokali San Ġiljan maintains that enough proof and documentation was submitted by the Recommended Bidder to ensure them that the former will pay wage rates in accordance with the Local Regulations.

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

- i) Dr Claudette Fenech duly summoned by Waste Collection Ltd;**
- ii) Mr Paul Spiteri duly summoned by Kunsill Lokali San Ġiljan.**

The Transcript of the latter is herewith attached.

This Board, after having treated the merits of this case, arrived at the following conclusions:

- 1. With regards to the Appellant’s First Grievance, this Board after having examined the relative documentation and heard submissions from all parties concerned, opines that Galea Cleaning Solutions**

JV's submission was correctly made in the name of the Joint Venture, so that from the submissions' point of view, the Appellants clearly distinguished the entity through which they were submitting their offer.

On reviewing the documentation relating to the assessment of the Recommended Bidder's offer, all documentation, reference and evaluation thereof was made on the Joint Venture as properly indicated by the Recommended Bidder himself.

The fact that the Notice of Award was published, on the Notice Board of the Contracting Authority with an inadvertent human error by including the word "*Limited*" instead of "*Joint Venture*" does not in any credible way, nullify or effect whatsoever the evaluation procedure and the eventual award to the Recommended Bidder.

In this respect, it was credibly established that, once the mistake was noted, Kunsill Lokali San Ġiljan amended it accordingly. The documentation and credible submissions by the Contracting Authority asserts the fact that the Evaluation Board carried out its function in a fair and transparent manner.

At the same instance, this Board opines that the inadvertent mistake in publishing the name of the Recommended Bidder under the title of a Limited Liability Company instead of a Joint Venture is trivial. In this regard, this Board does not uphold the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board, as had on many occasions, would strongly remark that it is not the jurisdiction of this Board to delve into whether the rates quoted by the Recommended Bidder would lead to precarious working conditions since the Evaluation Board are assured that the wages to be paid to workers are in conformity with the Local Labour Regulations.**

In this regard, from documentation in possession of this Board, such an assurance is evident and therefore, the Board is justifiably satisfied that the wage rates to be paid to workers by the Recommended Bidder do not lead to precarious working conditions. In this regard, this Board does not uphold the Appellant's Second Grievance.

In view of the above, this Board finds against Waste Collection Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

21 November 2016

PUBLIC CONTRACTS REVIEW BOARD

Today, 15 November 2016

PCRB Case 1005

Waste Collection Ltd

vs

Kunsill Lokali San Ġiljan

Dr Claudette Fenech, ID 53572 M, summoned to testify under oath by Waste Collection Ltd who said:

Dr Robert Tufigno: Dr Fenech, what is your position within the Registry of Companies, please?

Witness: Legal Advisor within the Registry of Companies.

Dr Robert Tufigno: You were asked to research whether there is a company registered with the name of Galea Cleaning Solutions Ltd, what can you tell us in this regard?

Witness: I can personally testify and confirm from my side that Galea Cleaning Solutions Ltd is not a registered company.

Dr Robert Tufigno: Thanks.

Dr Stefano Filletti: One question, I'm Dr Filletti for Kunsill Lokali San Ġiljan. Private Joint Ventures are not registered with you, am I right?

Witness: No.

Dr Stefano Filletti: Thanks.

This was the witness of Dr Claudette Fenech before the Public Contracts Review Board.

Dr Anthony Cassar
Chairman
Public Contracts Review Board

I declare that I have transcribed the recording honestly and faithfully and to the best of my knowledge and abilities.

Antonello Abela
Principal
Public Contracts Review Board

PUBLIC CONTRACTS REVIEW BOARD

Today, 15 November 2016

PCRB Case 1005

Waste Collection Ltd

vs

Kunsill Lokali San Ġiljan

Mr Paul Spiteri, ID 87960 M, summoned to testify under oath by Kunsill Lokali San Ġiljan who said:

Dr Stefano Filletti: Let's start with the First Grievance which treats the fact that the Notice of award was published as being awarded to Galea Cleaning Solutions Ltd, what can you tell us regarding this matter, please?

Witness: Today, the procurement system is an electronic one wherein one can see its auditing. What happened was that when the notice was published in the Notice Board, which strictly speaking we are not obliged to do so since nowadays everything is sent electronically, there was a typing error wherein instead of JV it was written as Ltd.

Dr Stefano Filletti: Under which name did the Recommended Bidder submit his offer?

Witness: The Bidder has submitted his offer as JV.

Dr Stefano Filletti: Therefore as Joint Venture and not as Ltd.

Witness: In fact, one of the documents submitted, which one can check found in the system, one can find a document which certifies that they are a Joint Venture as requested in the Tender Document.

Dr Stefano Filletti: How was the evaluation made?

Witness: The evaluation was made through the electronic system and was made under JV.

Dr Stefano Filletti: Who inputted the name Galea Cleaning Solutions Ltd?

Witness: This was simply a typing error.

Dr Stefano Filletti: But who?

Witness: One of my secretaries.

Dr Stefano Filletti: And then what happened?

Witness: After two days we have noticed the error and a correction was made.

Dr Stefano Filletti: And the award under which name was eventually issued then? When you received the Evaluation Report, who indicated the changed name, who was recommended for the award?

Witness: JV

Dr Stefano Filletti: JV and the Secretary has made the error. What happened then?

Witness: After two days, we removed the advice from the notice board and arranged the mistake.

Dr Stefano Filletti: As regards the timing, the correction was made prior or following the filing of the Objection?

Witness: It was done prior.

Dr Stefano Filletti: With regards the Second Grievance, do you have any documents which can prove the facts?

Witness: Yes.

Dr Stefano Filletti: Can you please exhibit them in order to show that during the process, there was always a Joint Venture.

(At this point, the Witness exhibited three documents, an Evaluation Report dated 26 September 2016, a list of Suppliers indicating the Economic Operators who were interested for this tender and a Tender Opening Report dated 25 August 2016).

Witness: This was a report which was presented to the Council.

Dr Anthony Cassar: Therefore a document is being presented, Document Number 1.

Dr Robert Tuffigno: Can we have a copy of it, please? In order to follow what is being discussed.

Dr Stefano Filletti: This document, Paul please correct me if I'm wrong....

Witness: That is a document which I do regarding the Evaluation Board to present to the Council.

Dr Stefano Filletti: This is the Evaluation Report which is to be presented to the Council and which in the second page indicates, the ranking...

Dr Anthony Cassar: Of the result, am I right? Any further documents?

Witness: The list of suppliers which comes out from the system.

Dr Anthony Cassar: Can you please explain once again?

Witness: This is a list of suppliers as it comes out from the Electronic Procurement System.

Dr Anthony Cassar: As JV

Witness: As JV

Dr Anthony Cassar: Ok.

Dr Stefano Filletti: This means that the applicants apply online, Paul?

Witness: Yes.

Dr Stefano Filletti: And you have access from your side to print out?

Witness: The system works out like this. Nowadays everything is made electronically, the procedure does not in any way at Tendering stage let me know who's submitting offers. I can only check who was interested but I cannot open the Tenders until the opening day when everybody can attend for the opening of the Tenders and then until Evaluation Stage, everything happens electronically.

Dr Stefano Filletti: What's in that print out?

Witness: This is a rankings print out how the rankings were made according to the prices.

Dr Stefano Filletti: This was issued from the system.

Witness: Yes, the system can be audited. I cannot touch the system prior to the opening of the Tenders except for printing the reports from the system.

Dr Stefano Filletti: Let me show you a document which was attached with the Objection. Here there is a picture of a notice since even the flash is shown wherein there is the mistake etc etc, what are we seeing?

Witness: We are seeing the paper which I have wrote and typed by one of our secretaries, which we published on the notice board of the Local Council.

Dr Stefano Filletti: Am I right in saying that this was where the mistake was made?

Witness: Yes.

Dr Stefano Filletti: And then what happened?

Witness: We noticed the mistake and changed everything.

Dr Stefano Filletti: The Second Grievance, Paul, here it is being suggested that there was something missing with regards the Recommended Bidder, and that the salaries were not according to the norm or that the values were not as they are supposed to be, what can you tell us about this?

Witness: When we opened the Tenders, there was also Mr Richard Abela from the Department of Contracts who was helping us with our requests. Since they were the cheapest, one had to check whether the times given, the ETC registrations, the van emissions....

Dr Anthony Cassar: That the requirements were included in the price, am I correct?

Witness: They are all there so when we evaluate the prices, we work according to the Memo issued in 2014

Dr Anthony Cassar: Issued by the Department of Contracts regarding the rates which one had to pay. It is an official document which we know about, it is a Circular which talk about the rates which Contractors have to pay their employees.

Dr Stefano Filletti: Can you please explain to us this document and why we are going to exhibit it?

Witness: These are the minimum hourly rates for Galea Cleaning Solutions.

Dr Anthony Cassar: Now, were you assured that the Recommended Bidder was going to pay those rates?

Witness: That was the Memo which we were going to send.

Dr Robert Tufigno: Can I see it please? This was not exhibited, right?

Dr Adrian Mallia: Mr Chairman, I would like to raise a legal point. The bids are to be kept confidentially since they are part of the submissions...

Dr Anthony Cassar: I agree with you

Dr Stefano Filletti: Those are the rates which the Recommended Bidder submitted with which he was going to pay his employees.

Dr Anthony Cassar: But I have asked a question. How you were assured that the Recommended Bidder is going to pay for those rates?

Dr Adrian Mallia: I am raising this point which is neither related neither to the question nor to the answer, in the interest of my clients is that what my colleague is rightly taking note of, is confidential information.

Dr Anthony Cassar: Yes, I agree with you. Are those the rates?

Dr Stefano Filletti: Those are the rates.

Dr Adrian Mallia: The law is clear on this point, Mr Chairman. The bids are to be kept on a confidential basis.

Dr Anthony Cassar: Therefore you were assured that the Recommended Bidder is in line with the regulations.

Dr Stefano Filletti: No further questions from my part.

Dr Robert Tufigno: Mr Spiteri, am I right in saying that the only document which you sent to Waste Collection Ltd was an e-mail wherein there was no indication of who was the Recommended Bidder?

With my objection, Mr Chairman, I exhibited a copy of an email with the document which was being sent to Waste Collection Ltd, unsigned

but it was a soft copy dated 20 October. If you can see it, can you confirm that that was the only document sent to Waste Collection Ltd? Please answer either yes or no, Mr Spiteri.

Dr Anthony Cassar: Please keep calm.

Witness: That is a notification which we send automatically from the system but then any Bidder can enter and see what happened.

Dr Robert Tufigno: That was not my question. Was that the document which you sent them? Yes or no?

Witness: Yes. In it there is written where one can see the ranking from the system.

Dr Robert Tufigno: Am I right in saying that this exhibited document which is reviewed and signed by yourself, is that your signature?

Witness: Yes, it is.

Dr Robert Tufigno: So haven't you read the document before you have signing it?

Witness: Yes but it is obvious that if there is a small mistake you won't notice it.

Dr Robert Tufigno: Am I right in saying that in the Electronic System, there isn't the name of the Recommended Bidder?

Witness: No there is and there is also the ranking.

Dr Robert Tufigno: The ranking is different, tell me whether there was the name of the Recommended Bidder, whether it is written in the electronic system, I am suggesting to you that there isn't, who in reality is the Recommended Bidder who will be awarded the Tender.

Witness: Yes, there is the ranking.

Dr Robert Tufigno: No it's not the ranking, who is the Recommended Bidder tell me.

Witness: Yes, the Recommended Bidder is in the Ranking.

Dr Robert Tufigno: No you are not right. Tell me who is the Recommended Bidder in the electronic system whether it comes out from somewhere.

Witness: Yes.

Dr Robert Tufigno: Mr Spiteri, you are under oath, does it comes out from somewhere in the system?

Dr Stefano Filletti: Can you give the witness the chance to answer?

Witness: All bidders have access to the electronic system. Following the receipt of the notification, the Bidders can enter in the system and see the ranking which is automated. If the only thing that there was was the price, the ranking is given automatically by the system and not by myself according to the price.

Dr Robert Tufigno: You are saying that you made a mistake that it was a Joint Venture and not a Limited Liability Company, am I right?

Witness: In the notice which there is attached on the Notice Board.

Dr Robert Tufigno: We are being aware of this today because the only document which indicated the word Ltd it was when the ranking was adjudicated, is indicating that it is Ltd, am I right?

Witness: There was a mistake.

Dr Robert Tufigno: There was a mistake.

Dr Anthony Cassar: The notice which was affixed on the notice board.

Dr Robert Tufigno: When we saw this document, Mr Chairman, the only way which we had to see who won the Tender was to go and check the notice board. It doesn't tell you who was recommended for the award. My question therefore is this, when you saw the documents which are stated as Joint Venture, did you see a document which is about a partnership or a Joint Venture?

Witness: Yes

Dr Robert Tufigno: Is it in the file?

Witness: Yes, I can forward it.

Dr Adrian Mallia: I object.

Dr Anthony Cassar: Hold on a minute. Did you have a proof that there was a Joint Venture?

Witness: Yes.

Dr Anthony Cassar: That's it.

Dr Robert Tufigno: Therefore there is a private scripture which shows that there is a joint venture between these people?

Witness: Yes, you can enter in the electronic system and see it.

Dr Robert Tufigno: This was not the question which I was asking. The Evaluation was not made by the system but by yourselves.

Dr Anthony Cassar: Please calm down and answer the question.

Witness: Nowadays, the Evaluation is made electronically.

Dr Robert Tufigno: Do you have an Evaluation Committee?

Witness: Yes.

Dr Robert Tufigno: What was the role of the Evaluation Committee? They do not see or verify things?

Witness: I have already said that in the beginning, the system when it does the Evaluation, it gives maximum points or not. When somebody has missing documents, the system cannot give him maximum points. When the system cannot give maximum points, that bid will be automatically discarded.

Dr Robert Tufigno: Mr Spiteri, when you say that you have seen that it is a Joint Venture, did you ask for the documents which establish that that is a Joint Venture?

Witness: Yes.

Dr Adrian Mallia: It was sent automatically.

Dr Robert Tufigno: I don't know what is automatic.

Dr Anthony Cassar: If this was sent, it was sent.

Dr Robert Tufigno: When you did the Evaluation Committee, did you have somebody to assist you?

Witness: In fact in the first part of the Evaluation, there was Mr Richard Abela from the Department of Contracts.

Dr Robert Tufigno: How long did the Evaluation Process take?

Witness: Between one and a half hours and two hours.

Dr Robert Tufigno: How many times did you met?

Dr Stefano Filletti: This is becoming a fishing expedition.

Dr Anthony Cassar: This is going to be the last question, Dr Filletti.

Witness: The problem was that when we started our Evaluation, each Committee Member makes his Evaluation, one of our members had a problem to enter in the system and it delayed the process but the Evaluation was already made.

Dr Robert Tufigno: When you started to work out whether the salaries and conditions of employment were according to your rules or not, practically the Conditions of Employment and whether they are precarious or not, what did you take into consideration?

Witness: We took into consideration, the Memo in question.

Dr Robert Tufigno: What were the factors which you took into consideration when you saw the costings of the Recommended Bidder?

Witness: We naturally took into consideration the work which was needed, we made our calculations on whatever we have found, in fact when one sees what the other

Bidders offered, they were almost similar. One of them was about Eur 6,000 more on three years.

Dr Robert Tufigno: Did you take in consideration....

Dr Stefano Filletti: I am objecting to this question.

Dr Robert Tufigno: No. I am doing the questions in line with the Second Grievance.

Dr Anthony Cassar: One regarding the Limited and JV.

Dr Robert Tufigno: That is settled. Now I am doing the questions on the Second Grievance.
I can't not make questions about the latter.

Dr Anthony Cassar: You can and you will do but there are rules which you need to observe.

Dr Robert Tufigno: I agree.

Dr Stefano Filletti: Can I make a submission?

Dr Robert Tufigno: No you can't.

Dr Stefano Filletti: With all due respect, I can make an objection and I'm addressing the Chairman and not you, Colleague.

Dr Anthony Cassar: Come on.

Dr Stefano Filletti: Mr Chairman, the matter is the following. It is clear that they made an Appeal and one of the grounds was that the Recommended Bidder has submitted no proof and now he is making a fishing expedition so that he can try and gain something.

Dr Anthony Cassar: Let's make one thing clear, this Board is not interested how much the Recommended Bidder quoted. This Board is only interested to know whether the latter will pay the correct rates or not.

Dr Robert Tufigno: When you made the Evaluation, did you took into consideration the fact there will be workers needed on Sundays to ensure that the place is to be kept clean?

Witness: We evaluate according to the Tender.

Dr Robert Tufigno: Did you take into consideration, vacation leave, sick leave and replacement staff?

Witness: That is found in the Tender Document.

Dr Robert Tufigno: That's enough.

Dr Anthony Cassar: Thanks.

This was the witness of Mr Paul Spiteri before the Public Contracts Review Board.

Dr Anthony Cassar
Chairman
Public Contracts Review Board

I declare that I have transcribed the recording honestly and faithfully and to the best of my knowledge and abilities.

Antonello Abela
Principal
Public Contracts Review Board