

PUBLIC CONTRACTS REVIEW BOARD

Case 1006 – RLC/T/0155/16 – Tender for Manual Sweeping, Emptying and Cleaning of Litter Bins, Dog Bins and Ashtrays Using Environmentally Friendly Measures

The Publication Date of the Call for Tenders was 4 August 2016 whilst the Closing Date for Call of Tenders was 12 September 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 150,000.

Nine (9) Bidders have submitted offers for this Tender.

On 3 November 2016, Euro Clean Waste Services filed an Objection against the decision of Kunsill Lokali Rabat to award the Tender to Waste Collection Ltd for the price of € 101,433 (Exclusive of VAT) against a deposit of € 750.

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 – Euro Clean Waste Services

No Representative present for this Public Hearing

Recommended Bidder – Waste Collection Ltd

Mr Mario Tufigno	Representative
Dr Robert Tufigno	Legal Representative

Contracting Authority – Kunsill Lokali Rabat

Ms Orietta Cardona	Chairperson, Evaluation Board
Ms Brendaline Attard	Member, Evaluation Board
Mr Charles Azzopardi	Member, Evaluation Board
Mr Andrew Mallia	Member, Evaluation Board
Dr Richard Sladden	Legal Representative

First Hearing

The Public Contracts' Review Board Chairman, Dr Anthony Cassar opened the Public Hearing by stating that apart from the fact that despite the fact that they were aware, no representative for the Appellants was present for the Public Hearing, the Public Contracts Review Board could not understand why the documents were not submitted from the Local Council. This was the first time that such a situation occurred.

Dr Cassar reminded everyone present that when one files an Appeal before the Public Contracts Review Board, the Objection must be heard under the Public Procurement Regulations. The Public Contracts Review Board Chairman then quoted Clause 21 (4) of the Public Procurement Regulations which *inter alia* states:

“After the expiry of the period allowed for the submission of a complaint, the Contracting Authority shall deliver the Letter of Complaint, the deposit receipt and all documents relating to the Public Contract in question to the Review Board who shall examine the matter in a fair and equitable manner.”

The Public Contracts Review Board, continued Dr Cassar, was neither comfortable nor fair to treat the case without any relevant documents. This Board could not treat the merits of the case without all the documentation submitted by the Contracting Authority. He also reminded that when the Hon Courts of Justice request the documents, they must be submitted.

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, submitted that in view of the fact that the related documents of this Appeal did not arrive, could not consider at this stage the merits of the latter as requested by the Legal Notice 174.04 (4). At the same time, this Board is not comfortable to deliberate its adjudication in the absence of these documents. Therefore he is ordering Kunsill Lokali Rabat to submit all necessary documentation in 48 hours' time.

Dr Richard Sladden, as the Legal Representative for Kunsill Lokali Rabat relieves that the documents requested were sent as copies by registered post on 7 November 2016. These included 11 documents. Kunsill Lokali Rabat has no objections to exhibit all documents *animo ritirandi* and that after their examination these are returned back to the Local Council due to the obligation that there is in the Legislation for Local Councils on terms of Chapter 363 of the Laws of Malta wherein all documents relating to the Local Council are to stay at the premises.

Dr Anthony Cassar then said that they have requested the file and that he was going to call a member of the Public Contracts' Review Board Secretariat to witness.

At this point, Mr Victor Incorvaja, ID 678256 M, a member of the Public Contracts' Review Board Secretariat was summoned to testify under oath.

Following Mr Incorvaja's Testimony, Dr Richard Sladden asked Kunsill Lokali Rabat's Executive Secretary Ms Orietta Cardona, ID 23676 G, to also testify under oath.

Following Ms Cardona's Testimony, the Public Hearing was closed and rescheduled for Thursday 24 November at 9:00am at the premises of the Public Contracts Review Board.

At this stage, the Public Hearing was closed.

Second Hearing

On 15 November 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Euro Clean Waste Services

Dr Joseph Mizzi

Legal Representative

Recommended Bidder – Waste Collection Ltd

No Representative present for this Public Hearing

Contracting Authority – Kunsill Lokali Rabat

Ms Orietta Cardona

Chairperson, Evaluation Board

Ms Brendaline Attard

Member, Evaluation Board

Mr Charles Azzopardi

Member, Evaluation Board

Ms Roberta Galea

Member, Evaluation Board

Mr Andrew Mallia

Member, Evaluation Board

Dr Richard Sladden

Legal Representative

Following an introduction by the Chairman of the Public Contracts Review Board, the Appellants were invited to make their submissions.

Dr Joseph Mizzi, the Legal Representative for Euro Clean Waste Services, said that his clients have filed an Objection because they have asked the Local Council to give them a copy of the Evaluation Report which was never given to them. The Objection was also filed because in their opinion, there were doubts whether the prices quoted for this Tender were enough in order for the cleaning to be made efficiently. The Local Council, according to Dr Mizzi, had to check whether it was possible for the works to be done at the requested prices.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that neither the latter nor the Evaluation Board can intervene on the rates since it might be that a bidder who knows that he won't be chosen anyway for this Tender bid so that he could show on his CV that he participated in that particular Tender. Dr Cassar requested that the discussion was to be held on the Appellant's First Grievance only.

Dr Richard Sladden, the Legal Representative Kunsill Lokali Rabat argued that the Local Council had to only check whether the Bids submitted were compliant or not because if there was a Bidder whose submission was not completed as requested, the latter could not be considered. One cannot enter into assumptions as the Appellants tried to do since the Tender was clear and it was the latter's problem how to submit the best compliant bid possible. Once the bids were compliant, the criteria which determined the Award of the Tender was the price

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that this Board was only interested whether the Evaluation Board was assured that there won't be precarious working conditions and he asked the Contracting Authority whether there were any of the latter conditions.

Dr Richard Sladden, the Legal Representative for Kunsill Lokali Rabat replied that the Contracting Authority was satisfied that there were no precarious conditions in the bids. He also remarked that Waste Collection Limited has decided to give up on the Recommendation of the Tender and that the Appellant was classified seventh in the Tender Award.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board concluded that the latter is not interested in the withdrawal of the Recommended Bidder.

At this point, the Public Hearing was closed.

This Board,

Having noted this objection filed by Euro Clean Waste Services Ltd (herein after referred to as the Appellant) on 3 November 2016 refers to the Contentions which they made with regards to the award of Tender RLC/T/0155/16 listed as Case No 1006 in the records of the Public

Contracts Review Board, awarded by Kunsill Lokali Rabat, (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Joseph Mizzi

Appearing for the Contracting Authority: Dr Richard Sladden

Whereby, it is being contested that:

- a) **Euro Clean Waste Services Ltd contends that on requesting a copy of the Evaluation Report, his request was not granted. In this regard, the Appellant maintains that such requested information was necessary to enable the Appellant to compile his objection;**

- b) **The Appellant is also contending that the rates which the Recommended Bidder quoted were not sufficient enough to cover the costs in the execution of this Tender. In this regard, Euro Clean Waste Services Ltd maintains that this factor alone could lead to precarious working conditions.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 7 November 2016 and their verbal submissions during the Public Hearings held on 15 and 24 November 2016, in that:

- a) **Kunsill Lokali Rabat maintain that the Evaluation Board had carried out all the necessary assessments to ensure that the Recommended Bidder, with his quoted offer, was compliant and capable of carrying out the execution of the Tendered Works without the possibility of inflicting precarious working conditions.**

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

- i) **Mr Victor Incorvaja – ID 672856 (M) duly summoned by the Public Contracts’ Review Board;**
- ii) **Ms Orietta Cardona – ID 23676 (G) duly summoned by Kunsill Lokali Rabat.**

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 cannot but agree *in toto* with the actions taken by the Contracting Authority. This Board would like to remind all prospective Bidders, that the Evaluation Report, as requested by the Appellant, is an internal confidential document wherein sensitive information and comments are included.**

This report also includes collated information on all the Bidders, hence revealing certain sensitive information, which is not prudent to reveal to any one Bidder. In this particular case, the Appellant requested such information which is not allowed to be circulated among the Bidders.

On the other hand, the Notice of Award and the “*Letter of Rejection*” including the specific reasons for the rejection of the offer should form the Basic elements on which an Objection could be compiled. In this regard, this Board does not uphold the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Grievance, this Board after having examined the relative documentation, justifiably opines, that as had been remarked on numerous occasions, it is not this Board’s jurisdiction to delve into whether the rates, as quoted in the Recommended Bidder’s offer, would lead to precarious working conditions.**

This Board must reaffirm that it is the Evaluation Board’s responsibility to ensure that enough assurance has been given by the Recommended Bidder that, in executing the Tendered Works, the latter will abide by the Local Regulations in so far as wages are concerned.

The Contracting Authority, on the other hand, should ensure and monitor the Tendered Works to establish that the execution of such works are carried out in accordance with the specifications as dictated in the Tender Document.

In this respect, this Board would like to also remark the fact that, should the Recommended Bidder fail in this regard, the Contracting Authority has other remedies to rectify the eventual situation. In this regard, this Board does not uphold the Appellant's Second Grievance.

In view of the above, this Board finds against Euro Clean Waste Services Ltd and recommends that the deposit paid by the latter should not be reimbursed.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

30 November 2016