

PUBLIC CONTRACTS REVIEW BOARD

Case No. 968 – MLC 01/2016: Tender for the Provision of Sweeping and Cleaning of Streets, Washing and Cleaning of Main Entrance Doors, Emptying and Washing of Street Litter Bins and Collections of Bulky Refuse in an Environmentally Friendly Manner.

The Tender was published on the 19th January 2016. The closing date was on the 22nd February 2016. The estimated value of the Tender was €75,000 (Exclusive of VAT)

Six (6) offers had been submitted for this Tender.

On the 7th April 2016 WM Environmental Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to Mr Charles Gauci who was not the cheapest bidder.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday the 25th August 2016 to discuss the Objection.

Present for the hearing were:

WM Environmental Limited:

Mr Wilson Mifsud	Representative
Mr Robert Napier	Representative
Dr John Bonello	Legal Representative

Kunsill Lokali Mdina:

Mr Peter Sant Manduca	Mayor
Mr Mark Mallia	Executive Secretary
Dr Stefano Filletti	Legal Representative

The Chairman made a brief introduction wherein he pointed out that the Letter of Objection had failed to give any reasons for the Objection. He then invited Appellant's representative to make his submissions.

Dr John Bonello on behalf of WM Environmental Ltd explained that the Tender Adjudication had been made during a Council Meeting wherein it was stated that while his client's offer was economically better, it was not the most advantageous since WM Environmental Ltd's performance for a previous Tender had entailed formal warnings to improve the service. The Council went on to award the Tender to another bidder at a higher cost. This is not allowed as it goes against the Public Procurement Regulations. The Council is managing public funds and must abide with these regulations.

Dr Bonello continued that the other contract cited by the Mayor, during Adjudication, was for an entirely different service and not for services like the present Tender. He stressed that although the Contracting Authority is now claiming that it was not satisfied with the service that had been provided by his client in that other Tender, the same Contracting Authority had issued to Appellant two Letters of Recommendations, in July 2014 and July 2015 saying that the services provided by Appellant merited recommendation. Dr Bonello reiterated that in spite of everything, the Contracting Authority went on to choose a much higher offer for award. He contended that it was uncontested that Appellant's offer was the cheapest and thus the award process had been compromised.

Mr Peter Sant Manduca, ID No. 49966M, the Mayor under oath testified that in another contract that had been awarded to WM Environmental Ltd, it had been found necessary to issue three default notices against the latter and numerous telephone warnings. No records of these telephone warnings were kept. During cross-examination, the witness agreed that the previous contract had in fact continued to its natural end and was not stopped.

It had now lapsed. No other default notices had been issued against Appellant who had remedied the complaints when notified. The other contract to which reference was made dealt with the upkeep of Howard Gardens and other soft areas.

The Chairman remarked that the present Tender was for street sweeping.

Dr Stefano Filletti on behalf of the Contracting Authority submitted that the Local Council was bound to try to obtain the best value for money. Since the Appellant had another contract with the Contracting Authority – for upkeep of gardens etc - where the said Contracting Authority was not satisfied with the service offered - it was rightly assumed that the same result would be obtained if the present Tender was awarded to Appellant.

The Council used the principle of "*bonus pater familiae*" to award the present Tender. The fact that the Council had offered Letters of Reference to Appellant showed that there was no animosity against Appellant. He claimed that a Letter of Reference did not necessarily reflect the true idea the Council had of the contractor.

Dr John Bonello for the Appellant pointed out that the services for which Mdina Local Council had issued recommendations included the upkeep of Howard Gardens, and these reference letters had recommended WM Environmental for similar works. This meant that the Appellant was providing a satisfactory service. It was not right to black list a contractor for a few possible infringements.

Dr Stefano Filletti submitted that this Board had to decide if the Contracting Authority had a right or not to base Adjudication on the past experience of the cheapest bidder.

Dr John Bonello insisted that if the Contracting Authority was convinced of this it should have included past experience in the Tender criteria in a transparent manner with proper indicators.

Mr Richard A Matrenza, a Board member, pointed out that it resulted that the Contracting Authority had failed to keep a proper record of infringement warnings given by telephone. He stressed that a proper record should be kept.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 7 April 2016 and also through their verbal submissions during the Public Hearing held on 25 August 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) WM Environmental Ltd contend that Kunsill Lokali Mdina rejected its bid on the basis of alleged infringements on a previous tender, by the Appellants. The latter are maintaining that the previous Tender in question was related to different services.**

- b) The Appellant also maintains that the Contracting Authority had issued "*Letters of Recommendation*" in their favour and in this regard, WM Environmental Ltd is finding it strange that Kunsill**

Lokali Mdina is now claiming grounds of past tenders which were not mentioned in the “*Letter of Recommendation*”.

Having considered the Contracting Authority’s undated “*Letter of Reply*” and also their verbal submissions during the Public Hearing held on 25 August 2016, in that:

- a) Kunsill Lokali Mdina contends that during the evaluation process, the previous performance on other tenders carried out by WM Environmental were in fact taken into consideration;**

- b) The Contracting Authority maintains that the positive “*Letter of References*” given in favour of the Appellant, did not necessarily reflect the true reputation the Council had on the Appellants.**

Reached the following conclusions:

- 1. With regards to the Appellant’s First Grievance, this Board, after having examined the relative documentation and heard credible submissions, opines that:**
 - Kunsill Lokali Mdina’s Mayor confirmed under oath that due**

consideration was given to previous infringements which were carried out by WM Environmental Ltd. It was justifiably established that these infringements were of minor issues and it was also confirmed that the mentioned previous Tender was in fact carried out to its natural finish, so that nowhere along the line, the Contractor was requested to relinquish the completion of the Tender. In this regard, this Board notes that the previous Tender on which infringements were made by WM Environmental Ltd related to the *“Upkeep of Howard Gardens and other Soft Areas”*, whilst the present Tender relates to *“Sweeping and Cleaning of Streets and the Collection of Bulky Refuse”*.

This Board is also concerned of the fact that, as stated during the submissions made by the Contracting Authority, the latter took into account the assumption that the alleged infringements on previous Tenders carried out by the Appellant would be repeated.

In this regard, this Board credibly opines that no Evaluation Board should ever base their adjudications on assumptions, but on actual proven facts, which were not presented to this Board. In this regard, this Board upholds the Appellant’s First Grievance.

2. With regards to the Appellant's Second Grievance, this Board noted the Contracting Authority's submissions in that it was confirmed by the latter that whenever they complained on the mentioned previous execution of the Tender, WM Environmental had remedied these complaints, so that, in this regard, this Board considers these complaints on a minor factor.

These were not serious enough to justify, a discontinuation of the Tendered works. This Board would also refer to the two "*Letters of Recommendations*" dated 1 July 2014 and 9 July 2015, wherein positive recommendations are made by Kunsill Lokali Mdina in favour of WM Environmental Ltd, the Appellants, with special reference on the performance of the previous Tender on which the Contracting Authority based its present evaluation of this Tender under appeal.

This Board also notes that any complaints which the Contracting Authority is alleged to have made on the previous Tender were done by telephone call. This Board was not presented with any proof that such complaints have been logged or registered.

In fact, this Board was presented with "*Two Letters of*

Recommendation” made by the Contracting Authority in favour of WM Environmental Ltd which had special reference to their good performance on the same Tender which Kunsill Lokali Mdina was alleging that there were complaints. In this regard, this Board upholds the Appellant’s Second Grievance.

In view of the above, this Board finds in favour of WM Environmental Ltd and recommends that:

- i) The Appellant’s Offer is to be re-integrated in the Evaluation Process;**
- ii) The deposit paid by WM Environmental Ltd should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

2 September 2016