

# PUBLIC CONTRACTS REVIEW BOARD

## **Case 1033 – BLC 01/2016 – Street Sweeping and Cleaning in an Environmentally Friendly Manner for the Hal Kunsill Lokali Balzan**

The Publication Date of the Call for Tenders was 15 November 2016 whilst the Closing Date for Call of Tenders was 15 December 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 19,000.

Ten (10) Bidders have submitted offers for this Tender.

On 22 February 2017, WM Environmental Ltd filed an Objection against the decision of Kunsill Lokali Balzan to award the Tender to Mr Owen Borg for the price of € 13,890 (Exclusive of VAT) against a deposit of € 400.

On 4 April 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri 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 – WM Environmental Ltd**

Mr Wilson Mifsud	Representative
Dr John Bonello	Legal Representative

### **Recommended Bidder – Mr Owen Borg**

Mr Owen Borg	Representative
Ms Svetlana Dimech	Representative
Dr Douglas Aquilina	Legal Representative

### **Contracting Authority – Kunsill Lokali Balzan**

Mr Daniel Muscat	Chairperson, Evaluation Board
Ms Doriette Farrugia	Secretary, Evaluation Board
Mr Joe Galea	Member, Evaluation Board
Dr Ian Spiteri	Member, Evaluation Board
Mr Desmond Zammit Marmara'	Member, Evaluation Board
Dr Veronica Aquilina	Legal Representative

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

Dr John Bonello, the Legal Representative for WM Environmental Ltd opened by saying that his clients have objected for the award of this Tender on three grounds. The first ground was that Kunsill Lokali Balzan just issued the Final Results of the Tender without neither giving reasons nor giving the Evaluation Report.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Contracting Authorities were not authorised to issue the Evaluation Report but that reasons on why the award was given to a particular Bidder had to be given and that copies of the minutes had to be given.

Dr John Bonello for WM Environmental Ltd continued by saying that the Local Council justified this decision by saying that they were not obliged to state their reasons. This should lead to the invalidation of the process. The Appellants' Legal Representative then referred to the Reasoned Letter of Reply issued by Kunsill Lokali Balzan dated 10 March 2017 wherein it was stated that with the Local Council Regulations' Act, the Contracting Authority had to simply publish the results.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that any Objection which comes before this Board falls under the Public Procurement Regulations; hence reasons must be given why the Local Council decided to take the relevant decision.

Dr John Bonello, the Legal Representative for WM Environmental Ltd agreed with the previous statement while adding that the Local Councils fall under Schedule 1 and 3 of the Public Procurement Regulations which together to previous decisions issued by the Public Contracts Review Board request the Contracting Authorities and Local Council to state their reasons behind the decisions. On the other hand, the Local Council Regulations Act has a minimum requirement which say that when awarding a Tender they can only issue the final results.

WM Environmental Ltd continued by saying that their Second Grievance regarded the conditions of employment which according to the Reasoned Letter of Reply issued by Kunsill Lokali Balzan on 10 March 2017 was a secondary issue. Dr Bonello reminded everyone present that here one was discussing public funds and the conditions of the Tender Document requested 2 workers to work for seven hours between Monday and Friday and another five hours for Saturday. This was mandatory according to the Tender Document.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the workers had to be employed on a full-time basis for which Dr Bonello replied in the affirmative.

The Chairman of the Public Contracts Review Board then queried about how much the hourly rate was according to the current directives for which the Appellant's Legal Representative replied that the rate was of € 6.44 per hour.

Dr Anthony Cassar, the Chairman of the Public Contracts' Review Board then replied that the latter could not enter into calculations but was responsible to ensure that the wages paid do not fall under precarious employment. He then proceeded by asking how much did Mr Owen Borg quote for this Tender for which Dr John Bonello, representing WM Environmental Ltd replied that he offered € 13,890, half as much as the offer submitted by his clients which was about € 26,000.

At this point Mr Daniel Muscat, the Chairperson of the Evaluation Board holding ID Card Number 347591 M was summoned by the Chairman of the Public Contracts Review Board to testify under oath.

At the end of Mr Muscat's testimony, Dr Douglas Aquilina, the Legal Representative for Mr Owen Borg, the Recommended Bidder, submitted that with regards to the Appellant's First Grievance, the latter's offer was not refused but what happened was just that Mr Owen Borg was recommended for the award. The latter's criteria was the price.

With regards the Appellant's Second Grievance, the Recommended Bidder's Legal Representative submitted that the Contracting Authority was obliged to investigate certain deals if one had to observe the Public Procurement Regulations and its directives. Mr Borg was going to work this Tender at a loss.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board insisted that the Evaluation Board was obliged to ensure that there was to be no precarious employment.

Dr Douglas Aquilina, the Legal Representative for Mr Owen Borg, countered that his client has given all the reassurances which he had to give regarding the matter. When there was an abnormally low tender, the Contracting Authority is obliged to investigate and blacklist Bidders who did not observe the Public Procurement Regulations. The Recommended Bidder never had any similar issues with other Tenders worked with other different local councils and given the fact that Mr Borg would be working at a loss, he was going to take care of some of the requested work personally. There were commercial reasons why this was going to happen.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board agreed with the latter statements but insisted that they could not cover only half the wages. Here the discussion was about a Public Tender which had to honour the Public Procurement Regulations. This Board is against precarious employment, insisted Dr Cassar.

Dr Douglas Aquilina, the Legal Representative for the Recommended Bidder countered that precarious employment occurs when the wages do not agree with the minimum rate issued at bidding stage. When there was a Tender with low amounts, one had to see whether the Bidder was financially stable and in line with the Regulations. The fact that a Bidder was working at a loss did not mean that there was precarious employment.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board insisted that these arguments had to be done by the Evaluation Board. He felt that the Local Council did not went into depth in the matter and that they have considered only the price.

At this point Dr Ian Spiteri, the Mayor of Balzan and member of the Evaluation Board holding ID Card Number 566877 M was summoned by the Chairman of the Public Contracts Review Board to testify under oath.

Following Dr Spiteri's testimony, Dr Veronica Aquilina, the Legal Representative for Kunsill Lokali Balzan queried how her clients could work things out if the Electronic Public Procurement System has bounded them from doing so for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that they should have written to the Association for Local Councils complaining that this could not be done.

Mr Richard A Matrenza, a member of the Public Contracts Review Board added that at Evaluation Stage, one had to evaluate everything.

Mr Daniel Muscat, the Chairman of the Evaluation Board submitted that the system does not allow users to eliminate things. If a Bidder has submitted everything according to the criteria requested and he declared that he was going to pay with an acceptable rate, the Evaluation Board could not eliminate him since the Bidder complied with all the criteria requested.

Dr John Bonello, the Legal Representative for WM Environmental Ltd said that he understood that there was an electronic system which puts certain parameters but if there were any difficulties, the Local Council should have written to the Department of Contracts and seek guidance from them.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, while agreeing with what Dr Bonello said added that this was mandatory under the Public Procurement Regulations.

Dr Veronica Aquilina, the Legal Representative for Kunsill Lokali Balzan added that currently there were ongoing talks in order for the system to be changed.

Dr Ian Spiteri for the Contracting Authority said that there could have been other criterias apart from the precarious employment issue whilst adding that they were not assessors.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that the problem with the Local Councils is that they observe a different regulation which was not compatible with the Public Procurement Regulations which all Objections filed before this Board had to observe.

At this stage, the Public Hearing was adjourned to Tuesday 11 April 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

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**This Board,**

**Having noted this Objection filed by WM Environmental Ltd (herein after referred to as the Appellant) on 22 February 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference BLC 01/2016 listed as Case No 1033 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Balzan (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr John Bonello**

**Appearing for the Contracting Authority: Dr Veronica Aquilina**

**Whereby, the Appellant contends that:**

- a) Kunsill Lokali Balzan rejected his offer without giving reasons, as is required by the Public Procurement Regulations;**
- b) Mr Owen Borg's offer might lead to precarious working conditions;**
- c) Mr Owen Borg's offer does not even cover the necessary expenses for the execution of this Tender.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 28 February 2017 and its verbal submissions during the Public Hearing held on 4 April 2017, in that:**

- a) Kunsill Lokali Balzan contends that it had obtained all the necessary assurances from Mr Owen Borg that the Tendered Works will be carried out, in accordance with the stipulated conditions of the Tender Document, at the quoted price.**

**This same Board also noted the Testimonies of the witness namely, Mr Daniel Muscat and Dr Ian Spiteri duly summoned by the Chairman of the Public Contracts Review Board.**

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

- 1. With regards to WM Environmental Ltd's First Grievance, this Board, after having examined the relative documentation and heard submissions made by all the parties concerned, on many occasions, has emphasised the obligation of the Contracting Authority to specify the reasons why such an offer has been discarded or rejected.**

**In this particular case, the Contracting Authority is a Local Council and in such similar cases, this Board insisted that the Local Council should at least send a copy of the minutes showing the reasons why the offer of a particular Bidder was discarded.**

**This recommended requirement represents a very basic reason. However, this Board would like to re-affirm that the Local Councils should give the specific reasons with the "*Letter of Rejection*" so that any aggrieved party can appeal to the decision on the specific grounds of rejection.**

**On this particular issue, this Board would like to advise all Contracting Authorities to heed by the decisions arrived at by this Board, as it is only through these recommendations that the system can be improved in this respect and at the same time, the Appellant can exercise his rights and file his Appeal on the specific issues why his offer has been declined. In this regard, this Board upholds the Appellant's First Grievance.**

- 2. With regards to WM Environmental Ltd's Second Grievance, this Board would like to respectfully refer to the number of hours dictated by the Tender to be dedicated to the execution of the Tendered Works.**

**It has been agreed and established by all parties concerned that the number of hours requested amount to 4160 hours. This can be converted to a minimum wage payment of € 26,790 taking into account the minimum hourly rate of € 6.44 per hour.**

**It is not the intention of this Board to delve into whether the Preferred Quoted Rate will result in a profit or loss to the Tender, but, this Board cannot but note that the quoted price of Mr Owen Borg covers only 50% of the wage bill.**

**This Board also considered the fact that the Recommended Bidder gave the assurance that, with his quoted price, he will carry out the Tendered Works in accordance with the dictated requirements. However, in this particular instance, Mr Owen Borg's rate is by far substantially low and in this regard, the written assurance that the works will be executed does not justify the cost of wages. It is for this latter issue that this Board is not comforted with the Recommended Quoted overall price.**

**In this regard, this Board would also point out that, during the Evaluation process, the Evaluation Board had to discuss and consider seriously this low price and although, the latter had the necessary assurances from the Recommended Bidder, the same Evaluation Board had to delve into this issue much more deeply, mainly to establish the logical reason why Mr Owen Borg's quotation represented only 50% of the statutory wages which must be paid out during the execution of the Tendered Works.**

**This Board would respectfully emphasize that it is not delving into the commercial aspect of Mr Owen Borg's offer, but on the other hand, this same Board is in duty bound to detect any possible situation which might lead to precarious working conditions and in**

**this case, this Board is not satisfied that such a Tender can be carried out at a quoted price wherein, the minimum hourly rate is not completely provided for in the price. In this regard, this Board upholds the Appellant's Second Grievance.**

- 3. With regards to WM Environmental Ltd's Third Contention, this Board, as stated above, will not enter into the merits of other related expenses to the execution of the Tendered Works. This issue is acceptable to this Board as it is covered under the assurances given by Mr Owen Borg.**

**This Board's major concern is that the latter's offer does not cater for the payment of wages. In this regard, this Board does not uphold the Appellant's Third Grievance.**

- 4. On a general note, this Board also noted that the majority of the Bidders, with the exception of one, quoted a price which does not cater for the minimum wage. In this regard, this Board, respectfully consider that the quoted prices might give rise to precarious working conditions and in this respect, this Board recommends the following:**

- a) The award of the Tender should be cancelled;**

**b) The Tender itself should also be cancelled and replaced by a fresh one to take into consideration the guaranteed financial back-up to cater for at least the minimum rates to be paid to the Bidder's employees.**

**In this regard, this Board would also recommend deeper scrutiny and consideration to be made by the Evaluation Board to ensure that such assurances are feasible.**

**Finally, this Board recommends that the deposit paid by WM Environmental Ltd is to be fully refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*11 April 2017*