

PUBLIC CONTRACTS REVIEW BOARD

Case 1077 – KLBO 01/2017 – Service Tender for the Street Sweeping and Cleaning of the Locality of Cospicua in an Environmentally Friendly Manner

The Publication Date of the Call for Tenders was 20 February 2017 whilst the Closing Date for Call of Tenders was 20 March 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 134,000.

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

On 28 July 2017, Progressive Solutions Limited filed an Objection against the decision of the Kunsill Lokali Bormla to award the Tender to Mr Owen Borg for the price of € 110,489.60 (Exclusive of VAT) against a deposit of € 672.50.

On 29 August 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 – Progressive Solutions Limited

Ms Marika Mifsud Bonello	Representative
Dr John Bonello	Legal Representative

Recommended Bidder – Mr Owen Borg

No representative from the Recommended Bidder has attended for this Public Hearing

Contracting Authority – Kunsill Lokali Bormla

Ms Alison Zerafa	Chairperson, Evaluation Board
Mr Duncan Hall	Secretary, Evaluation Board
Mr Lydon Vella	Member, Evaluation Board
Dr Mark Simiana	Legal Representative

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

Dr John Bonello, the Legal Representative for Progressive Solutions Limited, opened by saying that the proposed recommendation made by Kunsill Lokali Bormla was not legally sustainable. His clients' concern was based on the concept of precarious employment. The Tender Document was requiring two full time employees to work forty hours each, per week.

Dr Bonello continued that Progressive Solutions Limited's offer was technically and financially compliant while the offer submitted by Recommended Bidder Mr Owen Borg was not enough to pay two full time employees at the obligatory wage stipulated by law.

The Local Council argued that, there were several decisions issued by the Honourable Court of Appeal, who changed decisions of the Public Contracts Review Board due to the fact that there was no need for the latter to delve into these issues. On the other hand, if one had to look carefully at these sentences, these were referring to the resources available to the Bidders.

In this Tender, the Local Council was requesting for two Full Time Workers, on the bases of 40 hours a week, hence these could not be paid at a lower rate than the one stipulated by law. It was clear that the Recommended Bidder was offering a price which was well beyond the cost of the one stipulated.

The Evaluation Board had to take all the necessary considerations prior to making their recommendation for award and not justifying their decisions at a later stage. Dr John Bonello said that the European Law sends similar cases to a semi-judiciary institution, this makes lives easier and time will not to be lost in legalities which cost a lot of time and money to whoever is litigating.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, added that currently the European Union is passing legislations in order to give Review Boards more strength but on the other hand these had to present a report every six months indicating the number of cases discussed and time lags which there could have been between filing an Objection and issuing a decision.

Dr Cassar then asked the Local Council's Representatives whether they had any assurances that Mr Owen Borg, the Recommended Bidder, was going to pay his employees at the stipulated rate of € 6.62 per hour for which Mr Duncan Hall, on behalf of Kunsill Lokali Bormla replied that it was their intention to request the full working conditions which were agreed between the Recommended Bidder and his employees, which included the hourly rate. If this does not happen, then the contract will not be signed.

Dr Mark Simiana, the Council's Legal Representative, added that the Award Criteria was the cheapest price and this condition has bounded the Contracting Authority in this case through electronic procurement. On the other hand, the Bidders were to present a Declaration about the Minimum Hourly Workers' Cost together with their offer.

Dr John Bonello, the Legal Representative for Progressive Solutions Limited noted that from the information he had, Mr Owen Borg did not have any employees working with him.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that he might subcontract the Tender to other parties for which Mr Duncan Hall, on behalf of Kunsill Lokali Bormla, noted that subcontracting was not allowed in this Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked whether the Local Council made their checks on how many workers the Recommended Bidder had. Mr Duncan Hall, the Secretary of the Evaluation Board, replied that this will be done once the contract is signed.

Dr John Bonello, the Appellant's Legal Representative, said that this was not the first time that they were present for Appeals made by Mr Owen Borg who according to his knowledge, he does possess other Tenders. There are also certificates issued by Jobsplus who show that the Recommended Bidder does not have any employees working with him.

Mr Duncan Hall, on behalf of Kunsill Lokali Bormla, countered that this matter can be verified.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that the Evaluation Board had to delve into detail in order to see whether the Bidder had all the necessary resources.

Dr Mark Simiana, the Legal Representative for Kunsill Lokali Bormla, said that this can be done depending on how easy it was to obtain the resources.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, remarked that this Board's task was to check whether the Evaluation Board worked correctly when assigning the Tender. On the other hand, the latter was obliged to enter in detail about all matters.

Dr Mark Simiana, the Local Council's Legal Representative, said that one cannot disqualify the Recommended Bidder on the criteria which Progressive Solutions Limited was mentioning.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board concluded by saying the Recommended Bidder could not be disqualified unless they fulfil their obligations but on the other hand, the Local Council had to be responsible enough to see that the contract was going to be fulfilled.

At this stage, the Public Hearing was adjourned to Tuesday 5 September 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.

This Board,

Having noted this Objection filed by Progressive Solutions Ltd (herein after referred to as the Appellant) on 28 July 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference KLBO 01/2017 listed as Case No 1077 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Bormla (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr John Bonello

Appearing for the Contracting Authority: Dr Mark Simiana

Whereby, the Appellant contends that:

- a) The Recommended Bidder's offer does not even cater for the minimum wage which should be paid. This could lead to precarious working conditions;**

- b) Progressive Solutions Limited maintain that Mr Owen Borg has no employees and in this regard, the Appellants have doubts as to**

whether the Recommended Bidder can conform with the working conditions as stipulated in the Tender Document.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 31 July 2017 and its verbal submissions during the Public Hearing held on 29 August 2017, in that:

- a) **Kunsill Lokali Bormla insist that it had carried out its Evaluation in accordance with the “*Award Criteria*” as dictated in the Tender Document and at the same instance, the Evaluation Board took into consideration the various judgement in similar cases both by the Public Contracts Review Board and the Hon Court of Appeal.**

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

1. **This Board, after having examined the relative documentation and heard submissions from the parties concerned, opines that the two main issues involved in this Appeal are, the “*Quoted Price of the Recommended Bidder*” and the “*Lack of Labour Resources of the Recommended Bidder*”. In this regard, both issues are being considered as follows:**

i) **Quoted Price of the Recommended Bidder**

First and foremost, this Board justifiably notes that the “*Award Criteria*” of this Tender was the price, therefore the Tender will be awarded to the Bidder who submitted the cheapest priced offer satisfying the administrative and technical criteria.

In this regard, this Board is credibly justified to opine that Mr Owen Borg satisfied the prime mandatory condition. This Board would like to respectfully refer to one of the decisions issued by the Hon Court of Appeal where *inter alia* it was stated that,

“Fl-ahharnett din il-Qorti tenfasizza li ladarba s-Socjeta’ Appellanti ssodisfat is-“Sole Award Criterion” dwar rati/prezzijiet, la l-Evaluation Board u lanqas il-Bord ta’ Revizjoni ma kellhom is-setgha li jiddipartixxu minn din il-Kundizzjoni Principali stipulata fit-Tender”

The above clearly affirms that once the offer satisfy the administrative and technical conditions as laid out in the Tender, then the cheapest offer is being selected. In this particular case,

this Board notes that Mr Owen Borg did satisfy all these conditions and in this regard, the Evaluation Board acted in a fair and transparent manner, in their deliberations.

With regards to the claim by Progressive Solutions Limited that Mr Owen Borg's offer did not even cover the minimum rate of pay to the employees, when one takes into consideration the number of workers and hours stipulated in the Tender Document, this Board would like to primarily opine, that the Appellant did not present any credible evidence or proof that the Recommended Bidder will, in any way, incur precarious working conditions to his employees.

This Board would also emphasize the fact that once the Bidder has signed the declaration that he will pay his employees the minimum dictated rates, it is of no concern to any interested party whether the Recommended Bidder will make a profit or incur a loss, so that neither the Evaluation Board nor this Board should enter into this merit.

With regards to this issue, this Board is satisfied that Mr Owen Borg has signed the necessary declarations in this regard. On the

other hand, this Board would expect the Contracting Authority to exercise the necessary supervision to ensure that the Recommended Bidder is paying his employees the rates in accordance with his declaration, in that not less than the legislative rate. In this regard, this Board does not uphold the Appellant's First Grievance.

ii) The Preferred Bidder's Lack of Labour Resources

With regards the Appellant's Contention with regards to this issue, this Board justifiably notes that the Appellant has declared in his offer, that he will provide the necessary labour force and work the dictated number of hours in the execution of the Tendered Works.

In this respect, Kunsill Lokali Bormla should only treat this issue once the Tender is awarded and contracted and therefore the same Local Council will have to ensure that once the "*Contract of Award*" comes into effect, Mr Owen Borg must have on his payroll, the dictated number of employees to be able to give the necessary hours for the Tendered Services.

In other words, at Award Stage, Kunsill Lokali Bormla should accept the Recommended Bidder's Declaration but upon the execution of the Contract of Award, the latter is obliged to examine and confirm that the Recommended Bidder has the necessary dictated labour resources as declared in his offer.

In this regard, this Board would like to point out that the declaration contained in the Tender Document is a written commitment by the Recommended Bidder to abide by the conditions laid out in the latter, should the same be awarded the Tender.

At the same instance, the Tender Document did not dictate a condition that the prospective Bidder must have a labour force of so many employees, at the time of submission of the offer. This Board, in arriving at its deliberations, notes that no evidence of proof was presented to justify an instance where Mr Owen Borg will not be able to engage the necessary workers to carry out the Tendered Works. In this regard, this Board does not uphold the Appellant's Second Contention.

**In view of the above, this Board finds against Progressive Solutions Ltd
and:**

a) Does not uphold the latter's Grievances;

b) Confirms the decision taken by Kunsill Lokali Bormla;

**c) Recommends that the deposit paid by the Appellants should not be
refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

5 September 2017