

PUBLIC CONTRACTS REVIEW BOARD

Case 1078 – BLC 04/2017 – Street Sweeping Services in the Locality of Hal Balzan

The Publication Date of the Call for Tenders was 25 April 2017 whilst the Closing Date for Call of Tenders was 25 May 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 110,000.

Eight (8) Bidders have submitted offers for this Tender.

On 7 August 2017, Mr Stephen Camilleri filed an Objection against the decision of the Kunsill Lokali Hal Balzan to award the Tender to Progressive Solutions Limited and Premier Business Limited for the price of € 115,664.64 (Exclusive of VAT) against a deposit of € 550.

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 – Mr Stephen Camilleri

Mr Stephen Camilleri	Representative
Mr Keith Caruana	Representative
Dr Michael Grech	Legal Representative
Dr Joseph Zammit	Legal Representative

Recommended Bidder – Progressive Solutions Limited

Mrs Marika Mifsud Bonello	Representative
Dr John Bonello	Legal Representative

Recommended Bidder – Premiere Business Limited

Dr Robert Tufigno	Legal Representative
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Contracting Authority – Kunsill Lokali Hal Balzan

Mr Daniel Muscat	Chairperson, Evaluation Board
Ms Doriette Farrugia	Secretary, Evaluation Board
Mr Joe Galea	Member, Evaluation Board
Notary 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 Joseph Zammit, one of the Legal Representatives for Mr Stephen Camilleri, opened by saying that the Tender Adjudication goes against the Tender Document's requirements which according to Clause 3 of Section 4 of the latter *inter alia* stated,

“The Contractor is to provide the above service on an ongoing basis throughout the period of the contract for the total global sum quoted in the Financial Offer. Such sum is to remain unchanged for the duration of the contract.”

Dr Zammit also referred to two other Clauses in the Tender Document, namely Clause 1.4 in Section 1 which said,

“This is a global price for service contracts”,

and Clause 3 from the same Section which said,

“This Tender is not divided into lots, and Tenders must be for the whole of quantities indicated. Tenders will not be accepted for incomplete quantities”.

Dr Zammit explained that the Tender has a duration of 4 years but that due to the fact that there were two offers which were exactly identical to each other, the Local Council decided to divide the Tender into two, hence dividing the global sum and Tender into lots and eventually going against the original conditions of the Tender.

Dr Joseph Zammit then referred to the Reasoned Letter of Reply issued by Kunsill Lokali Balzan on 10 August 2017, wherein the latter emphasised on the fact that the sole award was the price. The letter written by Dr Veronica Aquilina also said that the Tender was adjudicated following a recommendation given by the Department of Contracts. If the latter gave also this recommendation, therefore even the Director of Contracts went against the Tender Document.

Dr Zammit then referred to the e-mail which Kunsill Lokali Balzan sent to the Department of Contracts on 1 June 2017 which *inter alia* stated,

“The Council clearly specified in the Tender Document that 2 personnel are required on a full-time basis for the period of 4 years”

Dr Zammit referred also to the Reasoned Letter of Reply issued by Progressive Solutions Limited on 24 August 2017 which *inter alia* stated,

“Fis-sejha għall-offerti gie spjegat li l-kuntratt ikopri perjodu ta' erba' snin. Wara l-għażla tal-offerta, il-Kunsill Lokali spjega li s-sentejn ser jinħadmu mill-mittenti filwaqt li s-sentejn l-oħra ser jinħadmu mis-soċjeta' Premier Business Limited”

Dr Joseph Zammit argued that this shows that whilst the Tender Document was binding who ever won the Tender with a four year contract, the Local Council has decided to split the Tender into two giving each of the Recommended Bidders a two year contract.

He also added that there were two circulars, Circular OPM 12/2013 issued by the Office of Prime Minister on 1 July 2013 and Circular 4/2016 issued by the Department of Contracts on 25 April 2016 which contemplate what happens when different Bidders submit identical

offers. The Circulars recommend against dividing Tenders and recommending that certain principles, such as the Best Quality Ratio or the Most Economic Advantageous Tender are to be considered when eventually awarding a Tender.

With regards to precarious employment, Dr Joseph Zammit said that once the Tender was divided into two, there was the risk for precarious employment. This was also catered in the above mentioned circulars.

With regards to the Reasoned Letter of Reply issued by Kunsill Lokali Balzan on 10 August 2017, the Appellant's Legal Representative said that he was expecting the discussion to centre about the principles on which the Appeal was being discussed. Instead, the Local Council was alleging that the Appeal made by Mr Stephen Camilleri was a frivolous one. If this was so, then the Contracting Authority would have argued why the Appellant's Objection was a frivolous one.

Dr Joseph Zammit then referred to the Reasoned Letter of Reply issued by Progressive Solutions Limited on 24 August 2017 which *inter alia* stated that,

“Il-mittenti ma tistax tifhem kif l-Appellant ħass ruġu aggravat minn din id-deċiżjoni u dan għaliex irrispettivament mill-liema offerta kienet ser tintagħżel jirriżulta li l-offerta tal-Appellant qatt ma setgħet tkun eligibbli”.

Dr Joseph Zammit concluded that the Public Procurement Regulations say that anybody with an interest in the outcome of a particular Tender can appeal and since his clients had an interest, they have acted within their rights to file an Objection.

Dr Michael Grech, another Legal Representative for Mr Stephen Camilleri, opened by referring to the e-mail sent by the Department of Contracts to Kunsill Lokali Balzan on 26 July 2017 which *inter alia* said,

“In view of the fact that Circular 4/2016 paragraph 4 recommends the use of BPQR and in view of the fact that most of the Executive Secretaries are still in the process of becoming fully conversant with the e-procurement system, the Department has instructed Local Councils to adjudicate Tenders using cheapest administratively and technical compliant criteria until further notice from our end”.

According to Dr Grech, The Department of Contracts was admitting that there was a problem and that the Local Council should work according to the Circulars issued next time around. It was totally incorrect to go against the Tender at all times, even if at the moment the Administration was still in a phase of transition.

With regards to the precarious employment issue, Dr Michael Grech referred to the e-mail sent by Kunsill Lokali Balzan to the Department of Contracts on 1 June 2017 which *inter alia* stated,

“The Council clearly specified in the Tender Document that 2 personnel are required on a full-time basis for the period of 4 years”.

Therefore, according to the Appellant's Legal Representatives, the Recommended Bidder had to employ two people for forty hours per week for the whole four years of the duration of the Tender, even if more than one recommended Bidder was chosen otherwise, there is an issue of precarious employment.

Dr Michael Grech continued by saying that the Tender Document said that the Tender can only be awarded to one recommended Bidder and that if the Contracting Authority was going against the Tender if it did not have the means to choose between the two Bidders who were chosen for the Award.

Dr Veronica Aquilina, the Legal Representative for Kunsill Lokali Balzan, opened by saying that this was not the first Objection for which the Public Contracts Review Board has convened a Public Hearing about the issue of precarious employment. In the previous case, it was established that it was impossible for a Bidder to employ people as stated by the Appellant. She also added that it was already decided that Mr Stephen Camilleri was going to be eliminated after both the First Tender and the Second Tender.

Dr Aquilina continued by explaining that following consultations which Kunsill Lokali Balzan made with the Department of Contracts, it was established that the Tender Award was going to be split into two, with each Recommended Bidder getting the Tender for two years. There was no question regarding precarious employment since the duration of the works was not going to be changed.

Although the Circulars recommended that such Tenders were to be decided with the Best Price Ratio criteria, the Tender Document dictated that the award was to go for the cheapest administrative and financially compliant offer.

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

Following Mr Muscat's testimony, Notary Ian Spiteri, the Mayor of Balzan, holding ID Card 566877 M, was also summoned by Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, to testify under oath before this same Board.

At the end of Notary Spiteri's testimony, Dr Michael Grech, the Legal Representative for Mr Stephen Camilleri felt that he was being given the impression that his client had no right to appeal for this Tender. This was strongly denied by Dr Anthony Cassar, the Chairman of the Public Contracts Review Board.

Dr Michael Grech continued by saying that the discussion was about the incorrect way with which the Local Council has made its considerations when adjudicating the Tender.

Dr Robert Tufigno, the Legal Representative of Premier Business Limited, questioned whether the amount of deposit paid by the Appellant was the correct one for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that Mr Camilleri paid the correct amount of deposit whilst adding that the latter had to be calculated as 0.5% of the Estimated Value of the Tender.

Dr Tufigno continued by arguing that in order for the Appellant to have the right to appeal, he should have an interest in this Tender by first and foremost being Administratively and Financially Compliant which was not the case since his offer could not be awarded the Tender.

Circular 7/2017 issued by the Department of Contracts on 3 May 2017 established that the minimum rate for sweepers was € 6.62 per hour and a Clarification was issued by Kunsill Lokali Balzan wherein it was notified that this Circular was the one which the Bidders had to work on and which superseded previous circulars.

Dr Robert Tufigno added that here there is a case where two Recommended Bidders have tendered with the same financial amount. Kunsill Lokali Balzan has taken an advice of the Department of Contracts who told them that they can carry on as long as they are both Administratively and Financially Compliant.

Dr John Bonello, the Legal Representative of Progressive Solutions Limited said that Mr Stephen Camilleri has made it clear that the wages which he was going to pay won't be compliant with the minimum wage stipulated by Law. This alone is a good enough reason for the Appeal to be considered as invalid.

Secondly, Progressive Solutions Limited maintained that the fact that the Tender was going to be shared was not going to break the fundamental principles of the latter and the procedures were safeguarded.

At this stage, the Public Hearing was adjourned to Tuesday 12 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 Mr Stephen Camilleri (herein after referred to as the Appellant) on 7 August 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference BLC 04/2017 listed as Case No 1078 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Hal Balzan (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Michael Grech

Dr Joseph Zammit

Appearing for the Contracting Authority: Dr Veronica Aquilina

Whereby, the Appellant contends that:

- a) **The procedure adopted by the Local Council in evaluating the offers, went against the principles of the Tender itself. In this regard, Mr Stephen Camilleri insist that by dividing the Tender between two Bidders, the Evaluation Board did not heed the fact that the Tender could not be divided into lots and that the instructions given in the Circular 04/2016 issued by the Department of Contracts on 25 April 2016 were not adopted by the Contracting Authority**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 10 August 2017 and its verbal submissions during the Public Hearing held on 29 August 2017, in that:

- a) **Kunsill Lokali Balzan contends that it had abided by the advice given by the Department of Contracts. At the same instance, the Contracting Authority contests the fact, as to whether the Appellant's Objection can be considered to be valid since his bid was discarded due to the fact that he quoted an hourly rate to be paid to his employees, which is below the minimum rate of € 6.62 per hour.**

In this regard, the Appellant's offer could never have been considered for the award, since he was technically not compliant.

This same Board also noted the Testimonies of the witnesses summoned both by the Chairman of the Public Contracts Review Board who were:

1. Mr Daniel Muscat;

2. Notary Ian Spiteri

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 interested parties, including the witnesses duly summoned by the latter, opines that the issue at stake is whether:

i. The Objection filed by Mr Stephen Camilleri is valid;

ii. The Procedure adopted by the Evaluation Board in arriving at its deliberations.

These two main issues are being considered as follows:

i) The Validity of the Objection Filed by Mr Stephen Camilleri

This Board justifiably notes that the Appellant’s Objection relates solely to the mode and procedure adopted by the Evaluation Board in assessing and awarding the Tender. At the same instance, this Board credibly establishes the fact the Mr Camilleri’s offer was disqualified due to the basic fact that his Bid was technically non compliant.

The reason for such rejection was the just and credible cause that the Appellant’s Offer indicated clearly precarious working conditions, hence the Appellant could never be considered for the award of the Tender.

In this regard, this Board would pertinently quote three sentences from the Hon Court of Appeal which clearly define who qualifies as an interested party:

a) Gafa’ Saveway Limited vs Malta International plc etc decided on 7 March 2008

“La darba l-iskwalifikazzjoni tas-soċjeta’ attriċi kienet ġustifikata, jonqos, hawnhekk, l-interess ġuridiku tas-soċjeta’ attriċi li tkompli b’ din il-kawża. Is-soċjeta’ attriċi kellha interess

tmexxi din il-kawża fid-dawl tal-allegazzjoni tagħha li hi giet m'caħħda ingustament mill-ghoti tal-kuntratt.

Darba jirrizulta li dan ma kienx minnu, m' għandha ebda interess titlob stharrig dwar jekk il-proċess aġġudikatorju kienx gust ukoll fi-konfront tal-offerenti l-oħra. L-eżami li kellha tagħmel din il-Qorti kellu bil-fors isir in kontradizzjoni ta' min allega ingustizzja, u ma kienx leċitu li din il-Qorti tidhol biex teżamina l-offerta ta' kumpannija oħra li ma humiex parti f' din il-proċedura u ma lmentawx dwar kif ipproċeda l-proċess aġġudikatorju."

b) Dr Kenneth Grima nomine vs Director of Contracts decided on 28 June 2013

"Ladarba s-soċjeta' appellanti ma spurgatx l-iskwalifika tagħha quddiem din il-Qorti, kif kellha kull jedd li tagħmel, ifisser li hija llum qegħdha –il barra mill-girja għal dan il-kuntratt, u anke sempliċi dikjarazzjoni favorevoli haliha f' dawn il-proċeduri ma tkunx tista' twassal għall-ebda eżitu, ghax tali dikjarazzjoni, f' kull każ, m'hijiex se tħassar l-iskwalifika tal-partecipazzjoni tagħha mill-konkors tal-ghoti tal-kuntratt. Is-soċjeta' appellant ma hijiex iżjed konkorenti fl-aġġudikazzjoni ta' dan il-kuntratt, u

allura ma għandha ebda interess li tindaħal fil-proċess meritu tal-Appell. Hija giet skwalifikata b'mod assolut u legalment definittiv, u l-involviment tagħha fil-proċess issa spiċċa.

c) **Karl Mueller Construction vs Enterprise Settlement Corporation decided on 29 June 2007 at the Canadian Court of Appeal**

“The failure to submit a compliant Tender precluded the non-compliant Bidder’s ability to successfully bring claims based on the owner’s duty of fairness. Counsel for Enterprise acknowledged that all of the Tenders received contained some deficiencies. I need not, however, go on to determine whether the Tenders other than KMC’s were also non-compliant because, if they were, they would all amount to counter-offers and Enterprise could accept any one of them. A duty of fairness does not arise in those circumstances, giving KMC no grounds for complaint”.

The above sentences clearly dictate that once the Appellant’s Bid rejection was fully justified, the Objector loses the rank of a “*Legally Interested Party*” to this particular award of the Tender.

It must be made clear that this Board gave the opportunity to the Appellant to present justified evidence as to why his offer was technically compliant. However, it transpired that Mr Stephen Camilleri is objecting to the procedure adopted by Kunsill Lokali Balzan in awarding the Tender and not as to the cause of alleged non technically compliance of his offer.

ii) The Procedure Adopted by the Evaluation Board

The purpose of treating this matter is to clarify certain issued which deserve some observations, namely the “*Question of Lots*”, “*Time Factor*” and the “*Division of Tender*” as follows:

a) Question of Lots

This Board after hearing the descriptive submissions and interpretations with regards to “*Lots*” would justifiably opine that when the Tender Document dictates that the works or services being Tendered for, cannot be divided in Lots, it is referring to Tenders where there is one type of service to be rendered and this type of service is “*a single unit*” but complete services/works.

When a Tender is comprised of various different services or works and the latter is composed of different types of skills and services, the Tender itself can be split into lots. In other words, the element of Lots, (separate works) exists.

In this particular case, the Tender was comprised of a single yet complete service, that of “*Street Sweeping*”, so that there was no instance or possibility of dividing this service into Lots. In this regard, this Board does not uphold the alleged contention that Kunsill Lokali Balzan divided the Tender into Lots.

b) Time Factor

With regards to the Time Factor, this Board justifiably opines that this condition in the Tender has not been changed. The Tender requested the services of “*Street Sweeping*” for a period of four years.

This condition remains, however, instead of the four year Term Contract being given to one Bidder, Kunsill Lokali Balzan awarded the same service for two periods of two years each split among two Bidders quoting the same price.

Again, in this regard, this Board was not presented with any proof or evidence that this mandatory condition in the Tender Document have been altered.

c) Division of the Tender

The Award Criteria in accordance with Clause 9.1 of the Tender Document was stipulated to be the price. In this regard, this Board justifiably notes that in assessing the offers, the Evaluation Board had adhered to this condition throughout, to the effect that the Tender was awarded to the cheapest offers.

At that particular stage of the Tendering process, two offers which were fully compliant quoted the same price, hence Kunsill Lokali Balzan decided to split the Tendered services between these two Bidders.

In this regard, this Board justifiably opines that the Award Criteria which forms part of the basic conditions of a Tender, could not be changed to a more appropriate method, such as the Most Economic Advantageous Tender, (MEAT), in order to

extract the economically better offer between these two Bidders.

This Board would also like to refer to the advice given by the Department of Contracts and opines that under the circumstances, since the Award Criteria was the price, the advice given on which the decision of the Award was based, could not be otherwise.

On the other hand, this Board would like to recommend that to avoid similar circumstances; Kunsill Lokali Balzan should adopt the MEAT system, now referred to as the Best Price Quality Ratio (BPQR) so that whenever two or more Bidders quote the same price, other conditions will apply and the end result would enable the Local Council to choose a Bidder that offers the Best-Value-For-Money.

In view of the above, this Board finds that:

- i) Mr Stephen Camilleri does not qualify to be an interested party since his offer was disqualified as being technically non-compliant and hence could not be considered further;**

ii) Due to the fact that the Award Criteria was the price, Kunsill Lokali Balzan complied with this condition throughout the Tendering Process;

iii) The Deposit Paid by the Appellant should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

12 September 2017