



**During the submissions made by both the Appellant and the Contracting Authority, it transpired that there existed doubts as to whether the Tender Document specified that the quotations should be expressed per annum or whether the quoted prices cover a period of 3 years, as a global price.**

**In this regard, this Board noted that Kunsill Lokali Ghaxaq was under the impression that the quotations received referred to a rate per annum, however, no such indication was denoted in the Tender Document.**

**In view of the apparent misunderstandings, Kunsill Lokali Ghaxaq requested that proceedings are to be suspended until it investigates such an event in order to regulate itself.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*16 November 2017*

## **Second Hearing**

On 27 September 2017, Progressive Solutions Limited filed an Objection against the decision of Kunsill Lokali Ghaxaq to award the Tender to Mr Elton John Zammit for the price of € 62, 847 (Exclusive of VAT) against a deposit of € 503.

On 18 January 2018, 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 – Progressive Solutions Limited**

Ms Marika Mifsud Bonello	Representative
Dr John Bonello	Legal Representative

### **Recommended Bidder – Mr Elton John Zammit**

Mr Jason Cassar	Representative
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### **Contracting Authority – Kunsill Lokali Ghaxaq**

Ms Fiona Said	Secretary, Evaluation Board
Dr Luciano Busuttil	Legal Representative

### **Other Interested Parties Present For This Public Hearing**

Mr Mario Tufigno	Representative, Waste Collection Limited
Dr Robert Tufigno	Legal Representative, Waste Collection Limited

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

Dr Luciano Busuttil, the Legal Representative for Kunsill Lokali Ghaxaq opened by saying that the indicated amount for the Estimated Value of the Tender was for three years. Nevertheless, the Local Council's main argument was that in these types of contracts, the employees have to be safeguarded. The Local Council has requested two full time employees to be employed for 40 hours per week and cannot consider offers which are equally to the minimum wage because if they had to do this there would be no competition and the Contracting Authority would have to employ more persons.

Dr Busuttil continued by saying that Kunsill Lokali Ghaxaq's juridical relationship is with the employer. The Local Council pays the amount to the employer and then it's up to him to pay the money to the right persons. If a Contracting Authority had to pay the minimum wage for every service which they requests, they would pay more than the supposed amount.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that from a commercial point of view he agreed with what Dr Busuttil was saying but that this Board's remit was whether the Tender covers the minimum hourly wage.

Dr Luciano Busuttil, the Legal Representative for Kunsill Lokali Ghaxaq replied that the employees are already being paid anyway. With regards the Local Councils, these have to be assured that the employees are being covered correctly. One has to remember that the Contractor can send two employees for the first day and another two the following day.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that there was no guarantee that the Recommended Bidder will not employ more than two employees for this Tender.

Dr Luciano Busuttil, the Legal Representative for Kunsill Lokali Ghaxaq said that Mr Elton John Zammit did not state this in his offer. The Public Contracts Review Board had to see whether the Local Council made a good choice with regards to the financial and legal procedures which there are installed. That was not the right way to safeguard the employees.

Dr John Bonello, the Legal Representative for Progressive Solutions Limited, said that from what he was understanding, the Local Council made an analysis and eventually decided on the basis of the Tenders which they had in front of them. He understood the fact that there were a lot of sentences issued by both the Hon Court of Appeal (Superior) and the Public Contracts Review Board which are different but he cannot make different arguments when the cases are different.

Dr Bonello continued by saying that there are directives issued by the European Union which are transposed in Regulations which include many principles of the Community Law which can help the Governments to make better Tenders. The Competition Rights which come out from the European Union cannot be different from the Public Procurement Regulations. Both laws have to be conformed to each other. In this case, the Public Procurement Regulations regulate abnormally Low Tenders.

Dr Luciano Busuttil, the Legal Representative for Kunsill Lokali Ghaxaq noted that in this Tender, there was a Bid which was discarded since it was considered to be abnormally low.

Dr John Bonello, the Legal Representative for Progressive Solutions Limited said that there are a number of circumstances where abnormally low Tenders can be considered but this is

not the case when it comes to social and employment issues. The Public Procurement Regulations cannot accept these type of Bids since the Regulation protects social payments.

Dr Bonello added that the Public Contracts Review Board is bound to apply the Public Procurement Regulations and the directives issued by the European Union. In this case, there is a situation where the Local Council had the impression that the Estimated Value for the Tender was for one year and that his clients had the impression that this same Value was for three years. If the Appellant's Tender was to be worked for a single year, the Bid would have either not or be on the border line of compliance while the Recommended Bidder has offered four months wages for a one year Tender.

Dr John Bonello concluded that the Public Procurement Regulations' has a set of rules which give a Level Playing Field to all Bidders and any abnormally low Bid, such as the one presented by Mr Elton John Zammit was to be disqualified.

Mr Jason Cassar, representing Mr Elton John Zammit, the Recommended Bidder said that the persons employed for this Tender are employed with Mr Zammit and that they will be sent where they are needed.

At this stage, the Public Hearing was adjourned to Thursday 25 January 2018 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 Progressive Solutions Limited (herein after referred to as the Appellant) on 27 September 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference GHLC-T-03-2017 listed as Case No 1102 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Ghaxaq (herein after referred to as the Contracting Authority).**

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

**Appearing for the Contracting Authority: Dr Luciano Busuttil**

**Whereby, the Appellant contends that:**

- a) **The value of Mr Elton John Zammit's offer is too low a quotation not to be considered as an "*Abnormal Low Tender*". In this regard, the Appellants insist that the Recommended Bidder's Offer should have been discarded.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 3 October 2017 and its verbal submissions during the Public Hearings held on 16 November 2017 and 18 January 2018, in that:**

- a) **Kunsill Lokali Ghaxaq contends that its relationship is with the employer in that, it is up to the latter to pay the correct wages to his employees. In this regard, the Contracting Authority also took into consideration the fact that the Contractor will utilise already engaged labour force to carry out the Tendered Works so that no new influx of labour is required for this Assignment.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by all interested parties, opines that the issue of this Appeal is not only the possibility of precarious working**

conditions but also the rather abnormally low offer of the Recommended Bidder. In this respect, both issues merit consideration as follows:

**1. Probability of Precarious Working Conditions**

**This Board would respectfully emphasize that it is not its remit to delve into whether the successful Contractor will realise a profit or incur a loss, through this assignment. On the other hand, this same Board has to abide by the Public Procurement Regulations, in that, it has to ensure and verify as to whether, in awarding the Tender, the Evaluation Board has taken cognisance of the whole situation.**

**In this particular case, Mr Elton John Zammit's offer does not reflect the recoupment of the minimum wage to be paid in accordance with Circular 07/2017 issued by the Department of Contracts on 3 May 2017. Although, there is the counter argument that the successful Contractor will utilise already existing employees with fixed number of hours to be deployed, the latter requirements will not permit the Contractors to utilise these workers on other assignments. In this regard, this Board opines that Mr Elton John Zammit's offer is far from covering the minimum wage for the labour to be expanded for this assignment over the three year contractual period.**

**On reviewing the comments made by Kunsill Lokali Ghaxaq during the approval of the adjudication of this Tender, this Board justifiably noted that the Council was aware of the fact that there were offers of an abnormally low value, one of which was the Recommended Bidder's Offer.**

**What this Board would have expected was, for the Local Council to approach the Recommended Bidder and obtain the necessary assurances that, through his quoted price, he will provide 2 Full Time workers for three years.**

**In this regard, this Board notes that no such action was taken by the Evaluation Board, prior to presenting its recommendation for award to the Council. At the same instance, this Board is not comfortably convinced how such works can be carried out, in accordance with the requirements of the Tender, over a period of three years without effecting a saving in whatsoever form, to recoup a portion of the labour costs. In this regard, this Board is not credibly convinced that the successful Contractor can carry out the said works to the satisfaction of Kunsill Lokali Ghaxaq, without the possibility of adopting precarious working conditions.**

## **2. Abnormally-Low Offer**

**In the current economic climate, there is often keen competition between operators, which submit competitive, low-price Bids in order to secure work. It is also the case that low-prices Tenders are “*Too Good to be True*” and will be very poor value for money or will not be delivered at all. It is in this context that the concept of “*Abnormally-Low Tenders*” arises.**

**The submission of an abnormally low Tender can be the remit of either an underestimation of the risks in the exclusion of the project or the non-compliance with the social and labour laws. In practice, various methods are often used for the identification of Tenders that appear to be abnormally low. However, the most practical methods are:**

- a) An analysis of the costs proposed by an economic operator to be made in comparison with the object of the Procurement;**
- b) A comparison between the Estimated Value of the Tender and the offered price;**

- c) A comparison of the price offered by the Economic Operator with a mean average price of the other offers.

In this particular case, this Board would respectfully point out that had one of the above mentioned methods been applied to Mr Elton John Zammit's offer, the Evaluation Board would have obtained a clear indication that the successful Bid was an "*Abnormally-Low Normal Offer*" and therefore the same should have been discarded. In this regard, this Board would like to refer to Article 69 (1) of the directive relating to Abnormally Low Tenders as follows:

*"The Contracting Authority is not allowed to:*

- *Accept a Tender that appears to be abnormally low without having First Conducted an Investigation;*
- *Reject a Tender that appears to be abnormally Low without having allowed the Bidder to Explain the Low Level of the Price or Costs"*

The above extract from the directive issued by the European Union regarding abnormally Low Tenders should always be applied so that such indications will reveal an abnormally low offer. In this regard, this Board justifiably opines that since the requirements of the

**Tender dictated a specific number of employees on a full time basis, Kunsill Lokali Ghaxaq should ensure that all offers, at least, comply with Circular 07/2017 issued by the Department of Contracts on 3 May 2017.**

**In view of the above, this Board:**

- i) Revokes the decision taken by Kunsill Lokali Ghaxaq in the Award of the Tender;**
  
- ii) The Tender is to be cancelled;**
  
- iii) The deposit paid by Progressive Solutions Limited should be fully refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*25 January 2018*