

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1195 – BLC/T02/2018 – Service Tender for the Collection of Mixed Household Waste from the Locality of Birzebuga in an Environmentally Friendly Manner**

The publication date of the call for tenders was the 26<sup>th</sup> January 2018 whilst the closing date of the call for tenders was the 27<sup>th</sup> February 2018. The estimated value of the tender (exclusive of VAT) was € 265,000.

There were six (6) bids submitted.

On the 1<sup>st</sup> June May 2018, Waste Collection Ltd entered an appeal against the Contracting Authority's decision to exclude them on the grounds that their bid was found to be abnormally low. A deposit of € 1,325 was paid.

On 2<sup>nd</sup> August 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Waste Collection Ltd**

Dr Robert Tufigno	Legal Representative
Mr Mario Tufigno	Representative

#### **Recommended Bidder – Progressive Solutions Ltd**

Dr Marycien Vassallo	Legal Representative
Dr Iana Said	Representative
Mr Wilson Mifsud	Representative

#### **Contracting Authority – Birzebuga Local Council**

Mr Joseph Cutajar	Chairperson Evaluation Board
Mr Svetlick Flores	Secretary Evaluation Board
Dr Victor Bugeja	Member Evaluation Board
Ms Doreen Mintoff	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and invited submissions.

Mr Svetlick Flores (ID 51281M) testified on oath that he is the Secretary of the Birzebbuga Local Council. He confirmed that Appellants offer was rejected but he was not on the Evaluation Committee that made that decision. He mentioned that the figure quoted in respect of the bid by Progressive Solutions Ltd covered four years and not one year as erroneously stated in correspondence.

Ms Doreen Mintoff (ID 150280M) testified on oath that she is an accountant and was a member of the Evaluation Committee. Witness stated that the offer of Appellant was abnormally low and did not appear to have taken into consideration allowances for sick leave, vacation leave, public holiday pay and other benefits which would increase the rate per hour from the € 5.70 tendered to € 6.10 per hour. According to the witness the Department of Industrial Relations had confirmed a figure of € 6.76 (equivalent to minimum scale 20) as the minimum to anyone offering services to a Government Department

Mr Mario Tufigno, Representative of Waste Collection Ltd, said that the Council had not taken in their calculations the route and usage of vehicles. He envisaged fulfilling this contract using a truck and two collectors for five hours a day and a van with one collector for two hours fulfilling the hours stipulated in the tender. The minimum hourly rate quoted by him was based on the experience of the amount of sick leave taken by his employees, whilst the collectors were not full time employees so the benefits did not apply. He had six years experience in this line of business – all his drivers were employed on full time basis and any part-timers were registered.

The Chairman mentioned that care must be taken about the use of the phrase ‘abnormally low’, and the way it is calculated, and must be based on the mean average of the bids. The offers made by three of the bidders were very similar and whilst the Council were right to go for value for money they must ensure fairness. The issue in this appeal seems to revolve around how the drivers’ rates have been calculated, and he suggested that the matter should be discussed between the parties, bearing in mind that the appeal is not about the number of hours. He proposed that a second hearing be held on the 23<sup>rd</sup> August at 9.30am to give the parties an opportunity to resolve the issue.

He thanked both parties for their submissions and declared the hearing closed.

## **SECOND HEARING**

The resumed hearing was held on the 23<sup>rd</sup> August 2018.

The Public Contracts Review Board composed of Dr Anthony Cassar, Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened to hear the resumption of submissions.

The attendance for this public hearing was as follows:

### **Appellant: Waste Collection Ltd**

Dr Robert Tufigno	Legal Representative
Mr Mario Tufigno	Representative

### **Recommended Bidder: Progressive Solutions Ltd**

Dr Marycien Vassallo	Legal Representative
Mr Wilson Mifsud	Representative

### **Contracting Authority: Birzebbuga Local Council**

Mr Joseph Cutajar	Chairperson Evaluation Board
Mr Svetlick Flores	Secretary Evaluation Board
Ms Doreen Mintoff	Member Evaluation Board
Architect Carmel Cacopardo	Member Evaluation Board

The Chairman of the Public Contracts Review Board welcomed the parties and reminded them that the purpose of this hearing was to explain the discrepancies in the costings between Appellants and the Contracting Authority.

Dr Robert Tufigno, Legal Representative of Waste Collection Ltd, asked to produce a witness prior to presenting the Appellants costings.

Mr Mario Tufigno (197959M) testified on oath that in his costings he had allowed costs for five days annual sick leave although from his experience the number of day's sickness taken by his employees only averaged two days.

Dr Robert Tufigno then presented the costings as worked out by the Appellant, and went on to mention that according to the Public Procurement Regulations the Contracting Authority had to inform the Appellant how and why they considered his offer as abnormally low – this they had failed to do, therefore their rejection of his bid was not according to law. The baseline taken by

the Local Council was incorrect. The criterion of the tender was the price and Appellant had offered the lowest price.

Miss Doreen Mintoff, Representative of the Contracting Authority, stated that the cost had to be based on Grade 20 of the Government Scale – even if this is ignored the figures supplied by the Department of Industrial Relations showed that Appellants’ offer was below the minimum wage.

The Chairman, also quoting from figures supplied by the same department, noted that there was a difference between the figures supplied. Appellants’ costs appeared to be within the current legislation and it was up to the Board to decide.

He thanked the parties for their submissions and declared the hearing closed.

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**This Board,**

**having noted this Objection filed by Waste Collection Limited, (hereinafter referred to as the Appellant) on 1 June 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of Reference BLC/T/02/2018, issued by Kunsill Lokali Birżebbuġa and listed as Case 1195 in the records of the Public Contracts Review Board.**

**Appearing for the Appellant: Dr Robert Tufigno**

**Appearing for the Contracting Authority: Dr Victor Bugeja**

**Mr Joseph Cutajar**

**Ms Doreen Mintoff**

**Whereby, the Appellant contends that:**

- a) The Local Council’s decision to consider their offer as abnormally low is incorrect. It appears that the Contracting Authority took this decision on the premise that the hourly rate to be paid to the labour force will be below the minimum national wage. In this respect, the Appellant insists that, owing to the number of daily hours required to execute the service, labour remuneration, in this respect, is within the prescribed minimum wage regulations.**

**This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 12 June 2018 and its verbal submissions during the Public Hearings dated on 2 August 2018 and 23 August 2018, in that:**

- a) Kunsill Lokali Birżebbuġa contends that the Appellant indicated an hourly rate of € 5.70 whilst on the other hand, the prescribed national minimum wage is € 6.10 per hour, so that the Evaluation Committee considered this issue as a risk leading to precarious working conditions;**
- b) In accordance with the standards approved by the Department for Industrial and Employment Relations (DIER), the hourly rate**

**applicable for collectors and truck drivers should be of € 6.76, which is well above the Appellant's hourly rate as quoted in his submissions;**

**This same Board has also noted the testimony of the following witnesses duly summoned by Waste Collection Limited, namely:**

- 1. Mr Svetlick Flores;**
- 2. Ms Doreen Mintoff;**
- 3. Mr Mario Tufigno.**

**This Board has also taken note of the documents submitted by Waste Collection Limited which consisted of a table of the Minimum Hourly Workers' Costs.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned during the two Public Hearings held, opines that the issues worth of consideration are twofold, namely:**

**(i) Abnormally Low Tenders;**

**(ii) Hourly Rate Payable as submitted by Waste Collection Limited.**

**(i) Abnormally Low Tenders**

**First and foremost, this Board would remind the Contracting Authority that, its Letter of Rejection dated 23 May 2018 does not give the specific reasons as to why the Appellants' offer was considered to be abnormally low. One has to acknowledge that, it is the duty and obligation of the Contracting Authority to inform the unsuccessful Bidder where and why their offer was considered unsuccessful in this respect. This Board notes that although, on numerous occasions such a requisite has been lacking on the Local Council's part, still, this Board is being presented with such similar deficiency.**

**This Board would also refer to the suggested guidelines as to how one would establish whether an offer is abnormally low or not, by applying the following calculations:**

- **A comparison of the offered cost by the Bidder with the objective of the procurement or services;**
- **A comparison of the Tendered price with the Estimated Value of the Tender;**
- **A comparison of the Tendered price with the average of the offers so submitted**

**So that prior to branding an offer abnormally low, the Evaluation Committee must carry out such calculations. In this regard, this Board notes that such an exercise was not carried out, so that this Board, instructed the Appellant to submit an explanation as to how they derived the hourly rate of € 5.70 in their offer. Such an action should have also been taken by the Local Council before declaring the Appellant's offer as being abnormally low.**

**In this particular case, the issue which, in the opinion of the Evaluation Committee, suggested that Waste Collection Limited's offer is to be abnormally low, was the hourly rate of employees as indicted by the**

**latter in their submissions and it is this particular issue which preoccupied the Authority.**

**(ii) Hourly Rate as Indicated by Waste Collection Limited**

**Prior to entering into the merits of this issue, this Board would confirm that Circulars 7/2017 and 1/2018 are not applicable to workers employed in the collection of waste, so that, this same Board would adhere to the National Minimum wage, which is established at € 5.94 per hour for the year 2018.**

**At the same instance, this Board was made aware and acknowledges the fact that the type of labour force being utilised for the tendered service, does not entail full-time employees. This Board has also credibly established that certain estimated provisions have been taken into consideration by the Appellant in establishing the labour costs envisaged to be incurred.**

**This Board would also respectfully point out that there is a difference between a labour rate and a labour cost in that, whilst the correct labour rate may be applied, the actual cost of labour per effective hour**

**can be less than the prescribed minimum. The labour rate prescribed is composed of the Basic Wage, Sick Leave, Vacation Leave, Bonus, NI and maternity leave. If any one of the elements constituting the rate is not availed of, then the effective cost will be less than the rate and this is simply due to the fact that the labour force indicated in the Appellant's submissions is not on a full-time basis. In this regard, this Board is convinced that the labour cost per hour applied by the Appellant do not indicate any risk of precarious working conditions. At the same instance, the labour cost to the economic operator will also depend upon the Labour Force's efficiency, since such Labour Force is on a part-time basis.**

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

- (i) Does not uphold Kunsill Lokali Birżebbuġa's decision in the award of the Tender;**
- (ii) Upholds Waste Collection Limited's grievances and recommends that the latter's offer is to be re-integrated in the Evaluation process;**

**(iii) Recommends that the deposit paid by the Appellants should be fully refunded**

**(iv) Instructs Kunsill Lokali Birżebbuġa to carry out a re-evaluation process, through a differently composed Evaluation Committee, whilst taking into consideration this Board’s conclusions.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*31<sup>st</sup> August 2018*