

PUBLIC CONTRACTS REVIEW BOARD

Case 1201 – KLM 01/2018 – Collection of Manure from the Marsa Racecourse Area

The publication date of the call for tenders was the 9th April 2018 whilst the closing date of the call for tenders was the 9th May 2018. The estimated value of the tender (exclusive of VAT) was € 25,000.

On the 1st August 2018, WM Environmental Ltd filed an appeal against the Marsa Local Council against their exclusion on the grounds that their offer was rejected following an internal analysis on the various services provided by them. A deposit of € 400 was paid.

There were two (2) bids.

On 23rd 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 – WM Environmental Ltd

Dr John Bonello	Legal Representative
Dr Marycien Vassallo	Legal Representative
Mr Wilson Mifsud	Representative

Contracting Authority – Marsa Local Council

Mr Edward Spiteri Audibert	Secretary Evaluation Board
Ms Mary Lourdes Lautier	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions. He then deplored the fact that there were inaccuracies in the letter of Dr Abigail Critien in so far as her statements that the Public Contracts Review Board does not have the *vires* to hear this case and the limit of contracts for the Board to hear such cases was € 12,000 were both incorrect.

Mr Edward Spiteri Audibert, Secretary of the Evaluation Board, requested the deferment of the case to a later date due to the enforced absence of the Mayor.

Dr Bonello, Legal Representative of WM Environmental Ltd, was not in agreement with a deferment and asked for the hearing to proceed.

The Chairman ruled that the hearing would proceed and enquired why, since both parties had been given the same weighting, the Marsa Local Council had decided to award the tender to the higher bidder.

Mr Spiteri Audibert said that the environmental weighting of the preferred bidder was higher.

The Chairman stated that the Board found it difficult to understand how it was possible to give the same financial weight to prices that varied considerably. On perusal of the Evaluation Report submitted it was obvious that in the case of the Chairperson of the Evaluation Committee there was a conflict of interest, apart from a recommendation that did not make sense as it seemed to award the tender to the excluded bidder at the price submitted by the preferred bidder.

Dr Maryciel Vassallo, Legal Representative of the Appellant, said that the tender seemed to have been awarded on the basis of references sought on the bidders. This was not one of the selection criteria.

Dr John Bonello said that in his experience of dealing with Local Council they always seemed to be looking for 'needles in haystacks' in their award of tenders.

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

This Board,

having noted this Objection filed by WM Environmental Limited, (hereinafter referred to as the Appellants) on 1 August 2018, refers to the contentions made by the latter with regards to the award of Tender of Reference KLM 01/2018 awarded by Kunsill Lokali Marsa, (hereinafter referred to as the Contracting Authority), and listed as Case 1201 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr John Bonello

Appearing for the Contracting Authority: Mr Edward Spiteri Audibert.

Whereby, the Appellants contend that:

- a) Although their offer was fully compliant and the cheaper, it was discharged by the Contracting Authority simply due to the fact that other Local Councils were not satisfied with the services carried out by the Appellants. In this regard, the latter insist that such information from other Local Councils cannot be used to justify the award to another Bidder at a much higher price.**

This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 10 August 2018 and its verbal submissions during the Public Hearing held on 23 August 2018, in that:

- a) Kunsill Lokali Marsa maintains that the Objection submitted by WM Environmental Limited in front of the Public Contracts Review Board should be dismissed on the grounds that the latter can only hear appeals on Tenders of value in excess of € 12,000. In this regard, the Local Council insists that such an Objection is regulated by the Local**

Councils (Tendering) Regulations, (Subsidiary Legislation 363.03) with particular reference to Article 10 (2);

- b) The Contracting Authority contends that although, on paper, the Appellants' offer appeared to be the more advantageous, upon establishing feedback from other Local Councils regarding the Appellants' working performance, the Authority decided to award the Tender to the next compliant Bidder.**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the issues worth of consideration are twofold, namely, this Board's jurisdiction and the Evaluation Report prepared by Kunsill Lokali Marsa.

Prior to the commencement of the Hearing, the Local Council requested this Board to defer this Appeal to a later date due to the unexpected availability of the Mayor who also acted as the Chairman of the Evaluation Committee. This Board also noted that the Legal Representative of the Local Council was also absent. After hearing WM Environmental Limited's credible request not to defer the Hearing, this Board decided to carry on with the proceedings of the Public Hearing for the treatment of the issues raised by the Appellants,

whilst taking into account the fact that this Board was only informed of the unavailability of the mayor, one hour prior to the Public Hearing.

1. This Board's jurisdiction

This Board would respectfully refer to the “*Reasoned Letter of Reply*” issued by Kunsill Lokali Marsa on 10 August 2018, with particular reference to Paragraph Number 1. In this regard, the Contracting Authority is incorrect in stating that this Board can only treat Appeals on Tenders of value in excess of € 12,000. This Board would point out that the limit of € 12,000 has been amended to read € 5,000 in 2016 and in this regard, this Board would have expected a better updated interpretation of the same Regulations by the Contracting Authority.

At the same instance, this Board would also refer to the latter's claim that such an appeal falls under the Local Councils' (Tendering) Regulations. Again, this Board opines that such a claim is incorrect, as this Board is authorised to treat Appeals for all Tenders of the value of € 5,000 and in this respect, this Board would also remind Kunsill Lokali Marsa that this same Board conducts and hears Objections in accordance with the Public Procurement Regulations and in this regard, this Board does not uphold Kunsill Lokali Marsa's claim.

2. The Evaluation Report

It is the duty and obligation of this Board to examine the documentation, in its possession, regarding this Objection and the most important document is the Evaluation Report which shows how the offers submitted were assessed on both the technical and financial aspects.

The reason given by the Contracting Authority for the rejection of the Appellants' offer has been established as being due to the simple fact that upon enquiring with other Local Councils, the Contracting Authority received negative feedback with regards to WM Environmental Limited's working performance. In this regard, this Board would point out that the nature of the Tendered Works is totally different from works on which negative feedbacks were received by other Local Councils and although the Appellants may have had default notices from other Councils, this Board notes that the Appellants' are not black listed or debarred from participating in Public Tenders, so that, it is not equitable to discard a technically compliant and cheaper offer simply on comments or reports of different works carried out by the Appellants for other Local Councils. This Board would also remind

the Contracting Authority that it has all the remedies available if, after awarding the Tender, the successful candidate does not carry out the Tendered Services as requested in the Tender Dossier. In this regard, this Board does not uphold the reason given by Kunsill Lokali Marsa for the rejection of WM Environmental Limited's offer.

3. General Note

During the examination of the documentation, this Board noted the following deficiencies which this same Board is obliged at law, to point out, as follows:

- i) The Evaluation Report in general contains basic and unexplained errors which contradicts the Local Council's decision in the award of the Tender;**
- ii) The allocation of points regarding the financial scores does not reflect the difference in the prices quoted of the Bidders;**
- iii) This Board notes that the Chairman of the Evaluation Committee is also the Chairman of the entity where such tendered services are to be provided and as duly denoted in the Evaluation Report:**

“However, the Chairman of the Board, Mr Francis Debono, who is also the Chairman of the Marsa Local Council, notified that the Marsa Local Council does not want to accept the offer of WM Environmental following negative reports.”

In this respect, this Board opines that there exists an element of “Conflict of Interest”.

In view of the above, this Board

- i) Upholds WM Environmental Limited’s grievances and recommends the re-integration of their offer in the evaluation process;**
- ii) Recommends that the deposit paid by the Appellants should be fully refunded;**
- iii) Does not uphold Kunsill Lokali Marsa’s decision in the award of the contract;**
- iv) Opines that the Evaluation process was not carried out in a transparent and proper manner;**

v) Instructs Kunsill Lokali Marsa to carry out a re-evaluation process on all the offers by an Evaluation Board differently composed whilst taking into consideration this Board's conclusions.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

28th August 2018