

PUBLIC CONTRACTS REVIEW BOARD

Case 1207 – MXLC 05/2017 – Service Tender for the Collection of Mixed Household Waste and Organic Waste from the Locality of Marsaxlokk in an Environmentally Friendly Manner.

The publication date of the call for tenders was the 29th December 2017 whilst the closing date of the call for tenders was the 7th February 2018. The estimated value of the tender (exclusive of VAT) was € 270,400

On the 8th August 2018, Waste Collection Ltd filed an appeal against Marsaxlokk Local Council as Contracting Authority on being disqualified on the grounds that their bid was not the cheapest. A deposit of € 1352 was paid.

There were ten (10) bidders.

On 11th September 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri 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 Carmel Pullicino	Representative

Contracting Authority – Marsaxlokk Local Council

Dr Errol Cutajar	Legal Representative
Mr Horace Gauci	Chairperson Evaluation Board
Ms Emanuela Vella	Secretary Evaluation Board
Mr Kenneth Brincat	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and stated that members of the Board peruse closely the documents submitted by the parties prior to hearing a case. In this case it is noted that the letter of refusal sent to the Appellants is incorrect in so far as it does not give the real reason for the Council's decision. The bidders were only told that their offer was rejected without giving them the reason, namely that their rates were below the minimum wage – the Appellants should be told clearly the reason for rejection. It therefore stands to reason that the letter of objection was incorrect.

Mr Horace Gauci (46481M) testified on oath that he was the Mayor of Marsaxlokk and the Chairperson of the Evaluation Board. Questioned by the Chairman he confirmed that the reason for disqualification of the Appellants was that their bid did not meet the requirements of

Government Circular 20/2017. He also confirmed that the letter of rejection did not make any reference to, or mention of, the hourly rate.

The Chairman said that the Board cannot accept submissions based on a false premise and asked if the Appellant has been approached or contacted to explain the discrepancy in the hourly rate.

Dr Errol Cutajar, Legal Representative of the Local Council, replied that Appellant had not been approached.

The Chairman said that it would be only fair and just if under the circumstances the tender was cancelled and re-issued. Whilst the Council is perfectly entitled to clarify, if in doubt, possible instances of precarious conditions of work, it also must ensure that explanations are sought. The Board will be making its decision on this basis.

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

This Board,

having noted this Objection filed by Waste Collection Limited, (hereinafter referred to as the Appellants) on 8 August 2018, refers to the contentions made by the same Appellants with regards to the award of the Tender of Reference MXLC 05/2017 issued by Kunsill Lokali Marsaxlokk, (hereinafter referred to as the Contracting Authority) and listed as Case No 1207 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Robert Tufigno

Appearing for the Contracting Authority: Dr Errol Cutajar

Whereby, the Appellants contend that:

- a) Their offer was rejected due to the alleged reason that their bid was not the cheapest. Apart from the fact that the Local Council made a**

mistake in quoting the incorrect value of the Preferred Bidder's offer, Appellants maintain that their offer was the cheapest and fully compliant and in this regard, the Contracting Authority's decision in the award of the Tender should be revoked.

This Board has also noted the Contracting Authority's "*Letter of Reply*", dated 4 September 2018 and also its verbal submissions during the Public Hearing held on 11 September 2018, in that:

- a) Kunsill Lokali Marsaxlokk confirmed that there was an error in the Financial Bid Form, Item 15 Number 1.3 and in this regard, the same Authority sent the necessary clarification to correct the error.**

This same Board has also noted the testimony of Mr Horace Gauci, Mayor, Kunsill Lokali Marsaxlokk who was duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that the reasons given by the Contracting Authority, for the rejection of the Appellants' Offer are totally incorrect and out of context. In this regard, this Board will treat this important issue only, as the basis of the Appellants' contentions has been grossly misleading.

First and foremost, this Board, as on numerous occasions, would, again, emphasize the importance for the Contracting Authority to render the exact and specific reasons for the rejection of the offer to the unsuccessful bidder. It is imperative to appreciate that the unsuccessful bidder can only object on the reasoned grounds for rejection and not otherwise. In this particular case, Waste Collection Limited were informed that their offer was not the cheapest, without informing same if they were fully compliant or not. At the same instance, from the “*Letter of Rejection*” dated 31 July 2018, sent by the Contracting Authority, no mention of other reasons for the rejection of the offer was neither indicated nor mentioned, yet in the Evaluation Report, other reasons were denoted for the discarding of the Appellants’ offer.

This Board would refer to an extract from the Evaluation Report and notes that the Appellants’ offer was, in fact, discarded due to the following:

“Evaluation Committee considered the explanation by the bidder as not satisfactory since quoted amounts are based on rates which are below the minimum statutory hourly cost stipulated in Contracts Circular 20/2017.”

From the above extract, it is being indicated that some form of communication regarding the labour hourly rate was conducted. However, the witness, (under oath), confirmed that no such event occurred and in fact, through the Local Council’s Legal Advisor, this Board was made aware that

Waste Collection Limited had not been approached to explain such a discrepancy on this particular issue.

This Board opines that it is the obligation of the Evaluation Committee to examine and obtain details as to why there is an assumed discrepancy in the hourly rate as quoted by the Appellants and this exercise can only be achieved by requesting the latter to submit the necessary workings of the hourly rate as duly submitted by same in their offer. In this regard, this Board does not find the Evaluation Committee's comment as being transparent and factual and at the same instance; the Appellants were not given the opportunity to submit an explanation or proof as to why they had applied that particular hourly rate. The basic fact that Waste Collection Limited were not given the opportunity to be made aware of the real reason for their offer's discardment, goes against the spirit of the Public Procurement Regulations.

In view of the above, this Board:

- i) Does not uphold Kunsill Lokali Marsaxlokk's decision in the award of the Tender;**
- ii) Does not uphold the reasons given by the Local Council in its "*Letter of Rejection*" dated 31 July 2018;**
- iii) Opines that the Evaluation Process was not carried out in a just and transparent manner;**
- iv) Instructs the Contracting Authority to integrate the offer submitted by Waste Collection Limited in the Evaluation Process;**

- v) **Instructs the Evaluation Committee to request any necessary information to substantiate submissions made by the Appellants and/or other participating bidders;**
- vi) **Instructs Kunsill Lokali Marsaxlokk to form an Evaluation Committee with different members;**
- vii) **Recommends that the deposit paid by Waste Collection Limited should be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

13th September 2018