

PUBLIC CONTRACTS REVIEW BOARD

Case 1264 – PAGAR 52 – 16/2018 – Tender for the Upkeep and Maintenance of Parks and Gardens using Environmentally Friendly Products and Procedures

The publication date of the call for tenders was the 23rd August 2018 whilst the closing date of the call for tenders was 28th September 2018. The estimated value of the tender (exclusive of VAT) was € 60,000.

On the 29th November 2018 Progressive Solutions Ltd filed an appeal against the St Julian's Local Council as the Contracting Authority objecting that their bid was rejected. A deposit of € 400 was paid.

There were two (2) bidders.

On 13th February 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Progressive Solutions Ltd

Dr John Bonello	Legal Representative
Ms Charlotte Cordina	Representative

Recommended Bidder – Galea Cleaning Solutions JV

Dr Adrian Mallia	Legal Representative
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Contracting Authority – St Julian's Local Council

Dr Maurice Meli	Legal Representative
Mr Edgar Montanaro	Member Evaluation Board

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr John Bonello Legal Representative of Progressive Solutions Ltd said that two bids had been submitted in this tender – one from Galea Cleaning Solutions JV (Galea) and one from Progressive Solutions Ltd (PS Ltd). There was a 10% difference in the bid price and both met the tender conditions: thus there was no reason to disqualify PS Ltd. In their letter of the 18th December 2018 the St Julian's Local Council gave as their reason for disqualification the fact that there was a common director between a company (WM Environmental Ltd) that had defaulted on a previous contract and the Appellant company.

The Contracting Authority is not at liberty to do as it pleases or take decisions which are patently 'ultra vires' or discriminate between bidders. The Local Council's action was infringing not only the Public Procurement Regulations but also administrative law. There must be a legal basis for refusal, and even in serious cases they cannot debar at will. The crux of the appeal is the need to acknowledge the theory of legal separate personalities and entities. The Appellant Company has a totally separate labour force to the defaulting company and the companies are totally separate from each other.

Mr Edgar Montanaro (22049M) called as a witness by the Local Council, testified on oath that he was a member of the evaluation committee and a local councillor. He stated that the tender covers the maintenance of soft areas, gardens, roundabouts etc. The Council had constant problems with the previous contractor and despite regular complaints the work had not been carried out properly. A string of letters and emails (dated 13th April, 3rd May, 11th June and 11th July all in 2018) had been ignored leading to the mutually agreed termination of the contract. Subsequent to this the Council issued a new tender and two bids were submitted. One of the bidders PS Ltd had a director, Mr Wilson Mifsud, who was also the sole director of the defaulting contractor – there was thus a basic problem in that although there were two separate companies they had the same controlling person.

Questioned by Dr Bonello witness stated that the Contracting Authority did not carry out due diligence on Galea Cleaning Solutions JV or how it was constituted. He confirmed that both PS Ltd and Galea were technically compliant.

Dr Maurice Meli Legal Representative of St Julian's Local Council said that the previous contractor had been served with several default notices over a period of a year until it was mutually agreed to terminate the contract. Once the bids were submitted on the new tender it became obvious that one of the bidder companies was in the same ownership as the previous contractor – the workforce may have been different but the control was in the same hands – it was irrelevant that there was a separate labour force as the direction was the same. The concept of a separate legal personality enunciated in Solomon vs Solomon has had many inroads made into it in cases heard since then. In any case tenderer was fully aware of the clause in the tender stating that the Contracting Authority reserved the right to refuse any offer.

Dr Adrian Mallia Legal Representative of Galea Cleaning Solutions JV agreed that there had been inroads made into the principle of separate legal personality – there was less importance given to it in current practice.

Dr Bonello concluded by stating that the Authority had not shown one single criterion in the tender why they should exclude Appellant.

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

This Board,

having noted this Objection filed by Progressive Solutions Limited, (hereinafter also referred to as the Appellants), on 29 November 2018, refers to the contentions made by the same Appellants with regard to the Tender of Reference PAGAR 52-16/2018 listed as Case No 1264 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali San Ġiljan, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants: Dr John Bonello

Appearing for the Contracting Authority: Dr Maurice Meli

Whereby, the Appellants contend that:

- a) the reason given by Kunsill Lokali San Ġiljan for the rejection of their offer, goes against the legal concept of separate entity, in that, the adjudicating committee, in their selection decision, took into consideration the past performance of another company, having a separate legal entity from the actual bidding company.**

This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 18 December 2018 and its verbal submissions during the Public Hearing held on 5 February 2019, in that:

- a) Kunsill Lokali San Ġiljan insists that the Appellants, although under a different company name, represents the same ultimate beneficial owner**

of the company which rendered a past unacceptable level of service to the Local Council. In this regard, the Contracting Authority were aware that the director and sole shareholder of the Appellant Company, was the same economic operator who, in the past, failed on numerous occasions, to deliver the tendered service to the satisfaction of the Contracting Authority.

This same Board has also noted the testimony of Mr Edgar Montanaro, Evaluator, who was duly summoned by Kunsill Lokali San Ġiljan.

This Board, 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 issue that merits consideration is the consideration of the separate legal entity principle.

- 1. This Board will not dispute the important principle of “*Separate and Legal Entity*”. However, one must consider the facts in the light of this particular case. Prior to the issue of this Tender, the Local Council contracted WM Environmental Limited to carry out these services. The sole Director and shareholder of the latter company is Mr Wilson Mifsud. During the execution of works carried out by WM Environmental Limited, the Contracting Authority encountered various problems regarding the former’s performance in the execution of the then tendered works, so much so, that on 1 July 2018, the Tender**

contract was terminated. In this respect, this Board has confirmed from documentation in hand that, prior to the termination of the contract, Kunsill Lokali San Ġiljan had, on various occasions, requested WM Environmental Limited to improve its performance but to no avail.

2. The Local Council issued this Tender and two offers were submitted namely, Progressive Solutions Limited, (the Appellants) and Galea Cleaning Solutions JV, (the Preferred Bidder). The Evaluation Committee, quite appropriately, noted that the sole Director and shareholder of the appellant company is the same person who is also the sole director and shareholder of WM Environmental Limited, with the exception that Progressive Solutions Limited had a different registered address and a different registered work force.

3. Again, this Board is not disputing the fact that WM Environmental Limited and Progressive Solutions Limited are two separate legal entities, however, this Board would pertinently point out that, the person behind these two separate legal entities, is the same individual involved in both companies, namely Mr Wilson Mifsud, who is the sole common director and shareholder of both companies. This Board also opines that the fact that Progressive Solutions Limited has a different registered address and a separate workforce does not change

the administration and direction of Progressive Solutions Limited from those of WM Environmental Limited, as the sole beneficiary and administrator is the same person. At the same instance, it is understandable that the Evaluation Committee was somewhat sceptical about the Appellants' offer as past experience of the economic operator who is also the same beneficiary of the Appellant company, was not so favourable. In this regard, apart from the fact that the Local Council had every right to refuse any offer, this Board opines that, in this particular case and under these circumstances, the Evaluation Committee, rightly, had the discretion to consider Progressive Solution Limited's offer on past performance of the previous contractor, the beneficiary of whom is the same person directing the operations of Progressive Solutions Limited. In this regard, this Board does not uphold the Appellants' contentions.

- 4. One should be careful in applying the principle of "*separate legal entity*" on companies having the same sole director and shareholder, especially when the ultimate beneficiary owner is the same person. At the same instance, separate legal entity principles should not be a means to create a veil, so as to appear to be a different operational activity under a separate mode of control of economic operations.**

5. This Board would refer to Kunsill Lokali San Ġiljan's "Letter of Rejection" addressed to Progressive Solutions Limited, wherein it was stated that, an appeal may be lodged within ten working days. In this regard, this Board would point out that the period allowed is ten calendar days and not as stated in this letter.

In view of the above, this Board,

- i) upholds the decision taken by Kunsill Lokali San Ġiljan in the award of the Tender;**

- ii) does not uphold the contentions made by Progressive Solutions Limited;**

- iii) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

21st February 2019