

PUBLIC CONTRACTS REVIEW BOARD

Case 1468– BLC/T/1/2020 – Cleaning and Upkeep of Public Conveniences in the Locality of Birzebbuga in an Environmentally Friendly Manner

The tender was published on the 17th Mach 2020 and the closing date of the tender was the 7th April 2020. The estimated value of the tender (exclusive of VAT) was € 87,300.

On the 28th May 2020 Mr Sandro Caruana filed a Contextual Application and an appeal against the Birzebbuga Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was technically non-compliant. A deposit of € 436.50 was paid.

There were six (6) bidders.

On 3rd August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Mr Sandro Caruana

Dr Jonathan Mintoff	Legal Representative
Mr Sandro Caruana	Representative

Contracting Authority – Birzebbuga Local Council

Dr Victor Bugeja	Legal Representative
Mr Kenneth Brincat	Chairperson Evaluation Committee
Eng Stanley Zammit	Member Evaluation Committee
Ms Maria Mifsud	Member Evaluation Committee
Mr Alexander Caruana	Member Evaluation Committee
Ms Rosalie Mintoff	Member Evaluation Committee
Mr Svetlick Flores	Representative

Preferred Bidder – Mr Christopher Bonello

Dr Alexander Schembri	Legal Representative
Mr Christopher Bonello	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions on the Urgent Contextual Application prior to the main hearing.

Dr Jonathan Mintoff Legal Representative for Mr Sandro Caruana stated that the Contextual Application was a request for a copy of the Evaluation Report to be made available to his client as in his view the principle of a level playing field had not been applied in the evaluation process of this tender. A similar application was outstanding before the Court of Appeal. European Union Regulation 2014/14 stipulates that to prevent discrimination the Contracting Authority must give all the relevant reasons that lead to a disqualification. In the case Delia vs Muscat in the Lower Courts the court met the request for copies of full details whilst the Appeal Court in the case Alberta vs Director of Contracts in 2015 it was held that all documents must be made available. Appeal hearings are one-sided as the Authority has a copy of the evaluation report which is not available to the Appellant. In the case Galea vs Farrugia it was held that the defendant could not prepare his case as he did not have all the information in hand.

The Chairman said that the Board maintains that an evaluation report is an internal document which includes personal and confidential information which should not be in the public domain. It is accepted that the Appellant must have the information necessary to enable an appeal to be made and the Contracting Authority must provide sufficient details without divulging the personal evaluation by individuals. Appellant has to be provided with sufficient information but personal evaluation must be safeguarded – that is the reason why only extracts are provided but not a full report. The Board will follow this procedure unless the Appeal Court decides otherwise.

Dr Mintoff, dealing with the tender appeal, sought to call witnesses.

Mr Joseph Saliba (23759M) called as a witness by the Public Contracts Review Board testified on oath that he is a Senior Executive at Jobsplus. He sought and obtained exemption from the Board to reveal information which may be protected under the Data Protection requirements. He testified that Mr Christopher Bonello had two part-time employees registered on 7th April 2020 but he could not be aware of how many hours they actually worked, as it was not Jobsplus role to monitor hours worked.

Dr Mintoff stated that the tender in section 4.2.4 and 4.2.5 requires daily attendance of 16 hours at two public conveniences which meant that the preferred bidder did not employ sufficient staff to fulfil the contract.

Dr Victor Bugeja Legal Representative of the Birzebbuga Local Council pointed out that the number of employees stipulated applied to the date when the contract was awarded not to the time of tendering. The lack of sufficient manpower applied equally to Appellant.

Mr Christopher Bonello (2170M) called as a witness by the PCRFB testified on oath that on the 7th April 2020 he had two people on his payroll – himself and Mr Edward Scerri.

Mr Kenneth Brincat (195676M) called as a witness by the PCRFB testified on oath that he was the Chairperson of the Evaluation Committee. He stated that an economic operator could bid even if he did not have sufficient number of employees at the time. Both public conveniences needed to be attended for 8 hours a day in total and not 16 hours as had been stated. The number of employees required to bid was not stipulated and the Authority would ensure that the successful bidder had to supply the required manpower at the time of the signing of the contract.

Questioned by Dr Mintoff witness was asked if he was aware that the PCRB in their decision in Case 789 of 2015 had established that it was necessary for the economic operator to have the correct number of employees at the time of bidding. In this case it was clear that the preferred bidder employing only two part-timers could not meet this requirement.

Mr Svetlick Flores (51281M) called as a witness by the PCRB testified on oath that he was the person who had drafted the terms of the tender and uploaded it on the system. He confirmed that the BPQR criteria had been approved by the Department of Contracts on the 11th March 2020.

Mr Omar Grech (011594M) called as a witness by the PCRB testified on oath that he is an Inspector at the Department of Industrial and Employment Relations. He stated that part-time workers are allowed to work a maximum of 39.5 hours per week. When it was pointed out to the witness that S.L. 123.39 limited part-time work to 30 hours per week witness said that that legislation refers to Jobsplus and a distinction must be drawn between DIER and Jobsplus. The Department of Contracts followed the DIER hourly rates of remuneration of workers.

Dr Miguel Balzan (580691M) called as a witness by the PCRB stated on oath that he is a lawyer at the VAT Department. Even though given an exemption on confidentiality by the Board he stated that he was not allowed to divulge the VAT status of Mr Christopher Bonello.

Mr Kenneth Brincat resuming his testimony stated that Appellant had failed to obtain maximum points on tender item B5.1. Referred to clause 6.1.3a of the tender witness stated that the name of the Appellant did not appear on the uniforms to be provided but that of the preferred bidder did. The majority of bidders had not included their name on a speculative tender as a matter of cost but would add this once awarded the tender. He agreed that this was a mandatory criteria but the Evaluation Committee had used common sense and considered, for the reason stated, that this requirement would be met by all bidders.

The four bidders that had marks deducted under clause 5.1 had all failed to provide details of the full uniforms – in every case they had components of the uniform missing. Witness re-iterated that no points had been deducted from any bidder for failure to have their name on the proposed uniform.

Dr Mintoff said that S.L. 123.39, Reg. 5.2 limited the number of hours that can be worked by part-timers to 30 hours maximum. The financial bid stipulated a total of 2920 hours and the bidder was therefore aware of this when bidding and which was impossible to achieve with only part-time workers. PCRB Case 789 earlier referred to states that a bidder must be fully compliant at time of tender. With reference to clause 6.1.3a regarding the omission of names the Evaluation Committee had confirmed that none of the bidders had met this stipulation and it was illogical of the committee to ignore it. According to the testimony of the Chairperson of the committee the preferred bidder was only 99.9% compliant. The rate of expenses submitted by the preferred bidder for all three years of the tender was one cent and this should have made the committee challenge the offer of the bidder as abnormally low. The offer of the preferred bidder is neither technically nor financially compliant and the failure of names on uniforms makes all bids non-compliant and they should be looked again.

Dr Victor Bugeja Legal Representative for Birzebbuga Local Council said that Appellant had based his complaints on three points. Of these, it has been established that the number of employees that need to be identified are those at the time the contract is signed, not when the tender is submitted and therefore the fact that preferred bidder had only two part-timers then did not matter. The claim that the preferred bid is abnormally low is undermined by Appellant's own bid which is only €12 different from that of the preferred bidder. Using the lack of names on the uniforms as a form of lever to re-open the tender was a very poor and trivial attempt.

Dr Alexander Schembri Legal Representative for Mr Christopher Bonello said all Appellant's grievances were based on trying to undermine all other offers and none of the claims were justified. The tender did not ask for confirmation of an adequate labour force and it did not make sense to expect an economic operator to engage staff in anticipation that they might win a tender. Appellant has no grievance on the names on the uniforms to the extent that they did not appeal about their lack of failing to offer aprons.

Dr Mintoff concluded by saying that an apron could not be offered as Appellant did not have one with their name on it – on this basis all tenderers should be disqualified.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Mr Sandro Caruana (hereinafter referred to as the Appellant) on 28th May 2020, refers to the claims made by the same Appellant with regard to the tender of reference BLC/T/1/2020 listed as case No. 1468 in the records of the Public Contracts Review Board awarded by Birzebbuga Local Council (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Victor Bugeja

Appearing for the preferred bidder: Dr Alexander Schembri

Whereby, the Appellant contends that:

- a) His contextual application for a request of a copy of the evaluation report should be acceded to so that, Appellant will have a clearer picture of the reasons for the Authority's rejection of his offer.**
- b) Referring to this appeal, he also maintains that, in accordance with articles 4.2.4 and 4.2.5 of section 3 of the tender dossier, a daily attendance of 16 hours per day at two public conveniences must be performed. In this regard, he maintains that, the preferred bidder does not have sufficient workforce to execute such attendances on a daily basis.**
- c) Appellant maintains that, since none of the bidders were fully compliant with clause 6.1.3a regarding the omission of name of the Local Council on the uniforms, all offers should have been discarded.**
- d) He also contends that, the preferred bidder's offer is abnormally low and the Evaluation Committee should have enquired further on this particular issue.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 3rd June 2020 and its verbal submissions during the virtual hearing held on 3rd August 2020, in that:

- a) With regard to Appellant's second grievance, the Authority insists that, in accordance with criteria 6.1 (a), the tender does not stipulate that the bidder must have sufficient employees to cater for the attendance but rather demands**

that, as at contract date, the successful bidder must have the necessary workforce as duly stipulated therein.

- b) With regard to Appellant's third contention, it is an accepted logical concept that, all the bidders left out the name of the Local Council, on their respective uniforms. In this regard, since all bidders omitted the same item on their uniforms, a level playing field was created and adjudication was conducted on the other mandatory issues pertaining to uniforms.**
- c) With regard to Appellant's fourth grievance, the Authority insists that, all the offers were in the same price region and the issue of abnormally low offer certainly did not apply to the Preferred Bidder's offer.**

This same Board also noted the testimony of the witnesses namely:

Mr Joseph Saliba duly summoned by the Public Contracts Review Board

Mr Christopher Bonello duly summoned by the Public Contracts Review Board

Mr Kenneth Brincat duly summoned by the Public Contracts Review Board

Mr Svetlick Flores duly summoned by the Public Contracts Review Board

Mr Omar Grech duly summoned by the Public Contracts Review Board

Dr Miguel Balzan duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to the contextual application for a request of a copy of the full evaluation report, would respectfully

refer to this Board’s previous decision on the same issue, however, this Board would once again, establish that, the full version of the evaluation report is an internal document which contains certain sensitive information relating to third parties and disclosure of findings or comments made therein will prejudice the position of the individual evaluators.

In this regard, this Board would maintain that, the unsuccessful bidder should be given all the relevant information by the Authority to enable same to file an appeal before this Board, but not the full evaluation report.

With regard to appeal on tender BLC/T/1/2020, this Board after having examined the relevant documentation with special reference to the evaluation report and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines, that the issues that merit due consideration are three-fold, namely:

- Lack of manpower by the preferred bidder**
- All the offers did not satisfy article 6.1.3a**
- Preferred bidder’s offer is an abnormally low bid**

Each of these issues will be considered in their merit as follows:

1. Lack of Manpower to Execute the Tender

1.1. With regard to Appellant’s first contention in that, he is claiming that, the preferred bidder does not have the necessary manpower to fulfil the stipulated attendance of the two conveniences, this Board would refer to articles 4.2.4 and 4.2.5 of the tender dossier, as follows:

“4.2.4 Opening Hours

<i>Location</i>	<i>June</i>	<i>July-Sep</i>	<i>Oct-May</i>
<i>Misrah is -Summit</i>	<i>7.00hrs till 21.00hrs</i>	<i>7.00hrs till 22.00 hrs</i>	<i>7.00 hrs till 18.00hrs</i>
<i>Xatt ta San Gorg</i>	<i>7.00hrs till 19.00hrs</i>	<i>7.00hrs till 21.00hrs</i>	<i>7.00hrs till 16.00hrs</i>

Premises must be open during the above mentioned times. Earlier opening, or later closing (of not more than 30 mins is allowed, but under no circumstances the premises can be opened later or closed earlier that the times stipulated.

During the religious feasts week (Monday and Sunday the Public Convenience shall remain open till 01:00am, and shall be attended.

The Council reserves the right to extend the opening hours on any occasions which the Council deems as being of certain importance to provide such serve to the general public.

4.2.5 Attendance Hours

The Convenience is to attended for a period of time during all the day. Public conveniences are to be attended for a total of eight (8) hours daily, which hours shall be as specified by the Council’s Representative from time to time, and need not be consecutive.”

The above-mentioned article clearly denotes what will be required if the bidder is selected for award, so that, the issue of whether the successful operator will have sufficient workforce to execute the tendered services is established on the signing of the contract and not at the closing date of the submission of offers.

1.3. This Board would also point out that, the wording of article 4.2.5 could have been better phrased to avoid any misinterpretation of same article, however, the issue, in this particular case, is that, the tender document did not stipulate the number of employees the bidder had to have, at the time of closing date of submission of offers.

2. Compliance related to uniforms

2.1. One of the requisites of the tender document refers to uniforms which must be worn by the employees of the economic operator deployed on the contract of the tendered service, viz article 6.1.3 as shown hereunder:

“6.1.3 Uniforms

a) The economic operator shall ensure that all persons employed in the performance for the contract shall at all times be appropriately attired for the performance of the service. Attire shall include

- trousers of dark colour,*
- dark coloured sweater / shirt*
- apron.*

The Uniform shall bear the Local Council Logo. All clothing and attire shall meet the health and safety legislation requirements. Clothing shall bear the name of the economic/ operator / company name.

b) All persons employed in the performance of the contract shall be provided with the following minimum health and safety wear / attire:

- *Rubber Gloves adequate for cleaning*
- *Safety goggles for eye protection against any chemical.”*

2.2. First and foremost, the above article will come into effect upon the signing of the contract for award, so that, one has to acknowledge the fact, that the tender is not asking for such requisites as at the date of submission of offers.

2.3. At the same instance, this Board refers to article B 5 para. 1 of clause 6 (selection criteria) which dictates the details to be submitted with regard to uniforms, as follows:

“B5 – Attire, Equipment and Cleaning Products (Mandatory Criteria)

The Economic Operator is to submit proof / evidence indicating the following requirements.

- 1. Uniforms and Attires – Availability of attire to be worn by the Public Convenience operator / s. Economic operators are to provide a visual / picture / photo illustrating all minimum requirements set in Terms of Reference article 6.1.3a. (3 points)*

For the Uniform and Attire criteria, a 'O' score will be allotted if the Economic Operator does not provide a picture / visual / photo of the uniform / attire and / or the picture / visual / photo provided does not illustrate all minimum requirements. Full marks will be given if the picture / visual / photo of the uniform / attire is provided and illustrates all minimum requirements stipulated in this call for tenders."

- 2.4. It is a fact that, according to the above-mentioned article, bidders were to submit visual presentation of, trousers, sweater / shirt and apron. At this particular stage of consideration, it was important that, bidders submit visual presentation of the uniform composed of the three items so mentioned, which had to be available at the time of the closing date of the tender.**
- 2.5. The requirement that the name of the Local Council should be shown on the uniform, was not met by any of the bidders and this is acceptable, as such a requirement can only be understandably adhered to, on the award of the tender. In this regard, this Board opines that, a level playing field was in fact created so that, the Evaluation Committee could assess the offers on the quality of the uniform and submission of the visual presentation only. This Board notes that, Appellant failed to**

submit visual presentation of the apron, so that the related proportionate points were allocated to their offer.

2.6. With regard to Appellant's contention in that, since all the bidders failed to submit the name of the Local Council on their uniform, the tender should be cancelled, this Board, would, first and foremost point out that, it is the duty and obligation of the Authority to save, wherever possible, the offers and since all the bidders failed to submit such same trivial item, the Evaluation Committee adhered to the principle of proportionality and level playing field.

3. Abnormally Low Offers

3.1. With regard to Appellant's fourth contention, this Board would respectfully point out that the methods for identifying whether an offer is abnormally low or not, comprise of the following:

- A comparison of the preferred bidder's quoted price with the estimated value of the tender.**
- A comparison of the preferred bidder's quoted price with the other competing offers.**

The above indications would immediately expose whether such an offer is abnormally low or not.

3.2. This Board reviewed all the quoted prices and would justifiably point out that:

- **The preferred bidder's quoted price was €84,942, whilst the estimate value of the tender stood €87,000, so that the successful offer is not abnormally low.**
- **The average price of the offers is €87,000, so that, when the preferred bidder's offer is compared to such an average, it represents a reasonable competitive price.**

In this regard, the Board establishes that the successful offer is definitely not an abnormally low bid.

In conclusion, this Board opines that;

- a) With regard to Appellant's contextual application, this Board re affirms its previous decision, in that, the evaluation report is an internal document containing sensitive commercial information pertaining to third parties.**
- b) With regard to Appellant's second contention, this Board confirms that the tender document did not stipulate the number of employees which the bidder had to employ as at the closing date of the tender.**

- c) With regard to Appellant's third contention, this Board opines that, the fact that all bidders failed to submit the name of the Local Council on the uniforms, does not justify the cancellation of the tender.**
- d) With regard to Appellant's fourth contention, this Board has justifiably demonstrated that the successful offer is definitely not abnormally low.**

In view of the above, this Board,

- i. does not uphold Appellant's contentions,**
- ii. upholds the Local Council's decision in the award of the tender,**
- iii. directs that, the deposit paid by Appellant should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

10th August 2020