

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1481 – SVP 1379 – Call for Quotations for the Provision of Gardening Services at St Vincent de Paul Long Term Care Facility, Luqa**

The tender was published on the 14<sup>th</sup> April 2020 and the closing date of the tender was the 5th May 2020. The estimated value of the tender (exclusive of VAT) was up to € 10,000.

On the 16<sup>th</sup> July 2020 Mr Alistair Bezzina filed an appeal against St Vincent de Paul Long Term Care Facility as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the cheapest compliant.

A deposit of € 400 was paid.

There were six (6) bidders.

On 28<sup>th</sup> August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Mr Alistair Bezzina**

Dr Jonathan Mintoff	Legal Representative
Mr Alistair Bezzina	Representative

#### **Contracting Authority – St Vincent de Paul Long Term Care Facility**

Dr Justyne Caruana	Legal Representative
Ms Claudia Muscat	Secretary Evaluation Committee
Mr Noel Vidal	Member Evaluation Committee
Ms Frances Ascjak	Member Evaluation Committee
Ms Marica Saliba	Member Evaluation Committee
Mr Mark Micallef Costa	Member Evaluation Committee

#### **Recommended Bidder – Mr Nicholas Mizzi**

Dr Emmanuel Schembri	Legal Representative
Mr Nicholas Mizzi	Representative

## **Department of Contracts**

Dr Daniel Inguanez  
Mr Mark Mizzi

Representative  
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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Jonathan Mintoff Legal Representative for Mr Alistair Bezzina requested the Board to hear the testimony of witnesses before submissions.

Ms Claudia Muscat (298282M) called as a witness by Mr Alistair Bezzina testified on oath that she was the Secretary of the Evaluation Committee. In reply to questions from Dr Mintoff witness replied that clarifications had been sent to any of the bidders where these were necessary. There was no need to send any to the preferred bidder and one had been sent to the Appellant regarding the key expert and supporting documents.

Mr Joseph Saliba (23579M) called as a witness by Mr Alistair Bezzina testified on oath that he was a Senior Executive at Jobsplus. Witness was exempted by the Chairman from his confidentiality obligation in his professional role.

Questioned by Dr Mintoff witness stated that Mr Nicholas Mizzi was registered as a self-employed gardener and as at 5<sup>th</sup> May 2020 employed three persons – Robert Grech, Carmel Magri and Joseph Mizzi.

Mr Omar Grech (115894M) called as a witness by St Vincent de Paul Long Term Care Facility testified on oath that he is a Compliance Officer at the Department of Industrial and Employment Relations (DIER). He stated that the applicable rate for gardeners doing work in the public sector is € 6.69 per hour, which is the same rate payable to contractors in the public service. He further confirmed that an additional amount of € 0.25 per hour is payable for holiday pay, sick pay etc. making an overall rate of € 6.94 per hour.

Mr Jason Grech (185071M) called as a witness by St Vincent de Paul Long Term Care Facility testified on oath that he an Assistant Director at the Department of Contracts responsible for IT matters. He explained that one can register to use the EPPS through the electronic ID in the case of companies or through the VAT registration number in the case of sole traders.

At this stage Dr Emmanuel Schembri Legal Representative for Mr Nicholas Mizzi advised the Board that his client was registered for VAT under registration number 21669335MT.

Ms Frances Ascjak (25276M) called as a witness by the Public Contracts Review Board testified on oath that she was a member of the Evaluation Committee and confirmed that Mr Mizzi had stated in his submissions that he has a good knowledge of gardening and landscaping and his c.v. indicated that he has a diploma in horticulture.

Mr Malcolm Borg (422387M) called as a witness by St Vincent de Paul Long Term Care Facility testified on oath that he works in the Agriculture Section at MCAST. He stated that a diploma in horticulture at level 3 gives the holder wide competence to work in various sectors of the horticultural industry including aspects of landscaping.

Dr Mintoff dealing with the grievances raised in the objection letter said that for a start the tender award refers to Mizzi Gardening Services and Water Transport but he was registered only as Nicholas Mizzi for VAT purposes. He referred to PCRB Case No 789 (Tika Taka) where the Board held that the preferred bidder was not a registered legal entity. Nicholas Mizzi and Mizzi Garden Services was not the same entity and the latter does not exist neither is it a trade name. The Contracting Authority must be in some difficulty trying to award a contract to an entity that does not exist.

The representative of DIER confirmed that the rate on public works contracts is € 6.94 per hour whilst Nicholas Mizzi was offering a rate of € 6.85 per hour which is in conflict with the terms of the tender which dictated that the bidder had to comply with the existing conditions of employment. Appellant's offer is obviously abnormally low and the Authority was obliged to enquire if that was the case. Bidder also does not seem to have made provision for the additional costs arising from the tender conditions such as grass cutting, watering, damage repairs and hiring of lifting equipment and it was logically impossible to see how at the low rate he was offering he could comply with all the requirements in the tender. Apart from all these points the preferred bidder is not compliant simply because he does not exist.

Dr Justyne Caruana Legal Representative for St Vincent de Paul Long Term Care Facility said that the many points raised in the objection letter had been dealt with in the letter of reply. Nicholas Mizzi is a sole trader and is not trying to represent any other entity – he is simply describing the various aspects of his work. The case of Tika Taka referred to by Appellant bears no similarity to this case. It has been established that the VAT registration is in the name of Nicholas Mizzi and there is no doubt that it is not referring to a company but to a sole trader. Regarding the hourly rate, the DIER circular referred to in the letter of reply makes no reference to this type of work – it merely states a rate of maximum € 4.48 per hour. The rate cannot be abnormally low if the bidder declared that he is meeting all legal obligations mentioned in the tender – once that declaration is made the bidder is committed. Action can only be taken if subsequently the bidder is found to be in default. The extra commitments mentioned by Appellant did not form part of his appeal and were only thrown in at the last minute. The Contracting Authority followed the correct course in their evaluation – proof was supplied that the committee had the necessary experience and there is no point in casting aspirations on them by innuendo.

Dr Mintoff said that the fact cannot be denied that Nicholas Mizzi and Mizzi Gardening are not the same entity.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Mr Alistair Bezzina (hereinafter referred to as the Appellant) on 16<sup>th</sup> July 2020, refers to the claims made by the same Appellant with regard to the ‘Call For Quotation’ of reference SVP 1379 listed as case No. 1481 in the records of the Public Contracts Review Board recommended for award by St Vincent De Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Jonathan Mintoff**

**Appearing for the Contracting Authority: Dr Justyne Caruana**

**Appearing for the Recommended Bidder: Dr Emmanuel Schembri**

**Appearing for the Department of Contracts: Dr Daniel Inguanez**

**Whereby, the Appellants contend that:**

- a) The Evaluation process was not evaluated according to Law.**
- b) The recommended bidder was not compliant at the time of submission of his offer.**
- c) The recommended bidder has no legal entity,**
- d) The recommended bidder’s offer was not financially compliant.**
- e) The Key Expert proposed by the preferred bidder is not compliant with the Authority’s requirements.**

- f) The recommended bidder's offer is not compliant with Local and EU Regulations.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 23<sup>rd</sup> July 2020 and its verbal submissions during the virtual hearing held on 28<sup>th</sup> August 2020, in that:**

- a) The Authority maintains that, the evaluation process was conducted in accordance with the Public Procurement Regulations.**
- b) Both the recommended bidder and Appellants were fully compliant however the main award criterion was the price.**
- c) The recommended bidder is clearly denoted to be Nicholas Mizzi, duly registered with the VAT Authority, performing commercial activities under the designation of 'Nicholas Mizzi Gardening Services and Water Transport'.**
- d) Appellants 'contention in this regard refers to the successful offerer's hourly rate and in this respect the Authority referred to the DIER published weekly wages for 2020 which states that for 'Agriculture & Allied Industries', the minimum hourly rate is €4.48 and the recommended bidder's hourly rate was €6.85.**
- e) The Key Expert proposed by the recommended bidder is indeed qualified to carry out the assigned duties.**

**f) The Alleged claim that the successful offer is not compliant with Local and EU Regulations, is totally unfounded and vague.**

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

**Ms Claudia Muscat duly summoned by Mr Alistair Bezzina**

**Mr Joseph Saliba duly summoned by Mr Alistair Bezzina**

**Mr Omar Grech duly summoned by St Vincent De Paul Long Term Care Facility**

**Mr Jason Grech duly summoned by St Vincent De Paul Long Term Care Facility**

**Ms Frances Asciale duly summoned by the Public Contracts Review Board**

**Mr Malcolm Borg duly summoned by St Vincent De Paul Long Term Care Facility**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, will treat the merits of Appellants' grievances as follows:**

- 1. With regard to Appellant's first contention, this Board after having examined closely the evaluation report and its supporting documentation, cannot identify any incorrect action taken by the Evaluation committee to deem that, the adjudication procedure, adopted by the Committee, was not in conformity with the Public Procurement Regulations (PPR) or any other Law. In this regard, this Board would respectfully point out that, Appellant, in his 'Letter of Objection' did not indicate or mention any issue which might have breached**

**any Regulation contained in the PPR. At the same instance, Appellant did not present any evidence to justify his alleged claim so that, in this regard this Board does not uphold Appellant's first contention.**

**2. With regards to Appellant's second grievance in that, the recommended bidder was not compliant as at date of submission of his offer, this Board established, during the hearing that Appellant is referring to resources available by the recommended bidder. In this respect, the direct testimony of the witness namely, Mr Joseph Saliba of 'Jobsplus', confirmed that the recommended bidder was registered as self employed and employed three persons. In this regard, this Board took also into consideration the nature and magnitude of the tendered works and justifiably establishes that the labour resources which the recommended bidder has at his disposal are sufficient for the proper execution of the tendered works and in this respect, this Board does not uphold Appellant's second contention.**

**3. With regard to Appellant's third contention, in that, the recommended bidder has no Legal Identity, this Board would respectfully point out the following issues:**

- Mr Nicholas Mizzi, is a self-employed person.**
- Mr Mizzi has an identity card number.**
- Mr Mizzi is registered with the VAT department.**
- In his capacity, Mr Mizzi is entitled to participate in public tenders.**

**Mr Nicholas Mizzi conducts his commercial activities through the designation of “Nicholas Mizzi Gardening Services and Water Transport”. In this respect, it is vividly clear that, this designation refers to the commercial activities of Mr Nicholas Mizzi without any reasonable doubt and in this regard, this Board does not uphold Appellants third contention.**

- 4. With regard to Appellant’s fourth contention, this Board established, during the hearing, that Appellant is referring to the hourly rate quoted by the recommended bidder of €6.85, in his offer.**
- 5. This Board is not concerned as to whether the recommended bidder will make a profit or sustain a loss but rather that, the quoted rate is in accordance with Local Labour Regulations.**
- 6. This Board heard the testimony of the witness Mr Omar Grech, a representative from the Department for Industrial and Employment Relations (DIER) who stated that, the minimum wage payable to gardeners employed by a contractor, the latter of whom will provide gardening services to a Public Entity, is €6.69 per hour, however such rate does not include, holiday pay, sickness benefits, etc.**
- 7. Since, it is this Board’s main concern to ensure that, the preferred bidder’s rate does not involve any precarious working conditions, same Board communicated with the DIER to enquire and establish whether the rate of**

**€6.85 is within the Local Labour Regulations and the following correspondence between this Board and the DIER ensued:**

**Correspondence sent by this Board**

*“Ms Diane Vella Muscat  
Director General  
Department for Industrial and Employment Relations*

*Dear Ms Vella Muscat,*

*Further to the telephone conversation with PCRB Chairman it would be appreciated if a reply to the following clarification will be forthcoming at your earliest.*

- a) A recommended bidder was awarded a tender for gardening services to a Local Council;*
- b) The recommended bidder quoted an hourly rate of €6.85 per hour excluding VAT. Is such an hourly rate in accordance with Local Labour Regulations?*

*Many thanks*

*Best wishes”*

**Received from DIER**

*“Dear Ms Vella*

*In the case of the grade of a “Gardener,” those who offer their services in the public sector/service have to peg the employees, working as such, with the basic rate of the Government Scale as applicable in this case.*

*As per the Schedule of Grades found in Appendix N of the “Public Service Employees Collective Agreement covering period 2017-2024,” “Gardeners” fall under salary scale 16 (other industrial grades).*

*This means that the pegging of such employees working with the contractor, who wins the tender, have to be pegged (paid) at least to the basic of Salary Scale 16.*

*To facilitate this procedure, each year DIER together with Department for Contracts issues a Circular in which lower salary scales (most frequently in use by subcontractors) are broken down in hourly rates. This means that as per Contracts Circular N° 01/2020 dated 6<sup>th</sup> January 2020 the:*

- **Minimum payable basic rate excluding (net of) Statutory Bonuses, Vacation Leave, Sick leave, Public Holidays, NI and Maternity fund contribution is €6.69 per hour. To note however, that an employer may pay the employee a higher rate than €6.69.***
- **The rate Payable to Contracts is that of €9.40 which is inclusive of €6.69 (Basic Rate) €1.01 (Vacation Leave) €0.25 (Statutory Bonuses) €0.52 (Public Holidays) €0.67 (NI) €0.23 ( Sick Leave) €0.03 (Maternity Leave Fund)***

*Regards*

*Diane Vella Muscat*

*Director General*

*Department for Industrial and Employment Relations”*

- 8. With regard to Appellant’s fifth contention in that, the Key Expert is not compliant, this Board noted the testimony of Ms Frances Ascjak, an evaluator,**

**who vividly stated that Mr Mizzi has a good knowledge of gardening and landscaping. At the same instance, from Mr Mizzi's CV, this Board also notes that, Mr Mizzi (Named Expert) holds a diploma in horticulture. In this regard, from the testimony of Ms Asciak and the CV of Mr Mizzi, this Board is convinced that Mr Mizzi is qualified enough to execute the tendered gardening services, so that, this Board does not uphold Appellant's fifth contention.**

**In conclusion, this Board, opines that,**

- a) The evaluation process was carried out in accordance with the Public Procurement Regulations.**
- b) The recommended bidder has enough manpower to carry out the tendered services.**
- c) The recommended bidder has an identity and is eligible to participate in Government Tenders. This Board also establishes that, the designated name of "Nicholas Mizzi Gardening Services and Water Supply", refers and relates directly, without any doubt, to the commercial activities of Mr Nicholas Mizzi.**
- d) The recommended Bidder's rate of €6.85, covers the minimum net wages payable to the recommended bidder's employees and this Board is not concerned whether the bidder incurs a loss or realises a profit on the outcome of the tendered works.**

- e) The Key Expert indicated in recommended bidder's offer is sufficiently qualified to execute the tendered services.**
- f) This Board does not identify any justifiable cause to treat Appellant's sixth contention.**

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

- i. does not uphold Appellant's contention,**
- ii. Upholds the Contracting Authority's decision in the recommendation for the award of the tender,**
- iii. directs that the deposit paid by Appellant should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*3 September 2020*