

PUBLIC CONTRACTS REVIEW BOARD

Case 1562 – DLC03-2020 – Tender for Street Sweeping and Community Cleansing in an Environmentally Friendly Manner – Had-Dingli Local Council.

19th May 2021

The Board,

Having noted the letter of objection filed by Dr Jonathan Mintoff and Dr Larry Formosa acting for and on behalf of Mr Sandro Caruana, (hereinafter referred to as the appellant) filed on the 19th February 2021;

Having also noted the letter of reply filed by Dr Anita Giordimaina on behalf of Dingli Local Council filed on the 1st March 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 8th April 2021 and 18th May 2021 hereunder-reproduced;

Minutes

Case 1562 – DLC 03 – 2020. Tender for Street Sweeping and Community Cleansing in an Environmentally Friendly Manner – Had-Dingli Local Council

The tender was published on the 24th June 2020 and the closing date was the 24th July 2020. The value of the tender was € 140,000 (excluding VAT).

On the 19th February 2021 Mr Sandro Caruana filed an appeal against Dingli Local Council as the Contracting Authority objecting to his disqualification on the grounds that his bid did not meet all the necessary financial requirements stipulated in (Department of Contracts) Circular 1/2020.

A deposit of € 700 was paid.

There were eight (8) bidders.

On 8th April 2021 the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito 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

Dr Larry Formosa

Legal Representative

Contracting Authority – Dingli Local Council

Dr Anita Giordimaina	Legal Representative
Mr Raymond Schembri	Representative
Mr Shawn Tanti	Representative

Preferred Bidder – WM Environmental Ltd

Dr Marycien Vassallo	Legal Representative
Mr Wilson Mifsud	Representative

Dr Ian Spiteri Bailey 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 in line with Article 89 of the Public Procurement Regulations (LN 174.04). He then invited submissions after confirming that the submissions made in Case No 1561, where applicable, were relevant to this appeal.

Dr Jonathan Mintoff Legal Representative for Mr Sandro Caruana stated that the Contracting Authority claims that Appellant's bid did not take into consideration the wages rates stipulated in Circular 1/2020. The financial criterion in the Best Price Quality Ratio (BPQR) part of the tender does not refer to the Circular or indeed to the rates of wages payable but simply to a global price contract. Submitting a global price does not mean that precarious wages will be paid. Reference was made to the Bezzina vs St Vincent de Paule Home Case in the Court of Appeal which decreed that the minimum rate was immaterial in the award of a tender as it was up to the Contracting Authority to ensure that the contract was enforced. The bidder was only carrying out what the tender stated it required.

Dr Mintoff noted that although there were several bidders in this case those that had not contested the offer were disqualified from contesting a later decision should there be a re-evaluation of the tender. He based his contention on the Court of Appeal decision in Case 115/2013.

Dr Anita Giordimaina Legal Representative for Dingli Local Council said that she maintained the claim she made in the earlier case that what was decreed regarding the global price and precarious wages in the Court of Appeal decision was the very opposite to what was being stated. No contracting authority can accept offers that were lower than the minimum wage which was established by law. Under the BPQR system the results were worked out automatically and a re-evaluation is not going to change that. The decision of the Authority should be upheld as correct as the evaluators had followed all regulations and Government circulars. It was not enough for the Appellant to claim that the result was incorrect without providing any proof thereof.

Dr Marycien Vassallo Legal Representative for WM Environmental Ltd agreed that the Authority's letter lacked the necessary details but pointed out that in PCRB Case 1483 a similar claim on the lack of details in the rejection letter was deemed as insufficient to cancel an award whilst in Case 1140 the appeal was not upheld on the grounds that the bid appeared to lead to the payment of precarious wages, similarly in Case 706 where a premeditated loss was envisaged.

Dr Mintoff said that the Contracting Authority had abdicated its responsibility by not seeking to clarify or question if the Appellant's bid was abnormally low as required in Article 243 of the Public Procurement Regulations, in particular to their obligation referred to in Regulations 13(m) and 16 (k).

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 8th April 2021 and 18th May 2021.

Having noted the objection filed by Mr Sandro Caruana (hereinafter referred to as the Appellant) on 19th February 2021, refers to the claims made by the same Appellant with regard to the tender of reference DLC03-2020 listed as case No. 1562 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Mintoff

Appearing for the Contracting Authority: Dr Anita Giordimaina

Appearing for the Preferred Bidder: Dr Marycien Vassallo

Whereby, the Appellant contends that:

- a) The *'modus operandi'* of the Contracting Authority post evaluation is irregular for not providing i) the deadline for filing a notice of objection (appeal) & ii) the deposit required if lodging an appeal
- b) The Objector's bid was discriminately rejected. The Objector did provide a Global Price, and did not indicate in his offer any hourly rate or minimum hourly rate. In the Appellant's view *"It is evident that the Contracting Authority grossly erred in its conclusion since the bidders were only requested to submit a Global Sum and in this particular Tender the bidders were not requested to indicate the amount to be paid to its employees. The Objector insists that he pays his employees according to current legislation and Circulars in force at the time of submission"*.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 1st March 2021 and its verbal submission during the virtual hearings held on 8th April 2021 and 18th May 2021, in that:

- a) The *'modus operandi'* of the Contracting Authority. Even though the Contracting Authority confirms that the notice provided to the Appellant *"did not stipulate the deadline for filing a notice of objection (appeal) and the deposit required for lodging an appeal. However it should also be noted that the intendere of communicating such information is to inform all unsuccessful bidders of the winning bid and to place them in a well-informed position. The period within which one can file the notice of objection and the deposit are stipulated in Articles 271 and 273"*

of S.L 601.03, hence the appellant's position was not prejudiced because such information was obtainable from the said Subsidiary Legislation.....”

- b) The objector's bid was rejected since his submitted offer was of €94,900 and is thus tantamount to an offer of a precariat nature.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances, as follows:

1. With regard to Appellant's first grievance, after having reviewed the 'Letter of Rejection' dated 11th February 2021, sent by the Contracting Authority, this Board noted that Appellant was informed of the reasons for the rejection of his offer but was not informed of the deposit to be lodged on appeal. Finally, the Contracting Authority stated *“The Had-Dingli Local Council shall be precluded from concluding the contract during the period allowed for the submission of appeals in accordance with [Part IX of the Public Procurement Regulations].”* The Board makes reference to PCRB Case 1557 whereby the Board opined *“The Board deems appropriate to take this opportunity to solicit any contracting authority to refrain from indicating any dates by when a letter of objection is to be sent, but to solely indicate and/or reproduce the relative provision of the law which entitles a party to appeal.”* This Board does not uphold Appellant's first grievance.
2. With regard to the Appellant's second grievance, the Board will sub-divide this into two sections;
 - a) The Board is of the opinion that the Contracting Authority should have sought clarifications from the economic operator from whom it deemed to have received a bid which is *“Abnormally Low”*. This as per Article 243(1) of the Public Procurement Regulations, since the Estimated Procurement Value, based on market research, is that of €140,000 excluding VAT (vide Section 1.3 of Tender Document). Article 243 (1) states *“Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. .”* This Board upholds this part of Appellant's second grievance.
 - b) The Board notes that by submitting a lower global price it does not necessarily mean that precarious wages will be paid. This as per previous Court of Appeal decisions. Moreover the Board makes reference to Court of Appeal decision in Case 115/2013 whereby bidders that did not contest the offer in the first place were disqualified from contesting a later decision should there be a re-evaluation.

In conclusion this Board opines that;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To annul the rejection letter sent to the appellant by the contracting authority dated 11th February 2021.
- b) To annul the letter of acceptance sent to the preferred bidder dated 11th February 2021.
- c) As per Regulation 243 of the PPR to require the economic operator (Appellant) to explain the global price proposed in the tender which appears to be abnormally low.
- d) To order the contracting authority to subsequently re-evaluate the bids received in the tender .
- e) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

19th May 2021