

PUBLIC CONTRACTS REVIEW BOARD

Case 1647 – LCS34/2020 – Cleaning and Clearing of Urban and Surfaced Non-Urban areas using Environmentally Friendly measures for the Siggiewi Local Council

1st November 2021

The Board,

Having noted the letter of objection filed by Dr Carlos Bugeja on behalf of Pro Legal Advocates acting for and on behalf of Owen Borg, (hereinafter referred to as the appellant) filed on the 22nd July 2021;

Having also noted the letter of reply filed by Ms Ritienne Giorgino acting for the Siggiewi Local Council (hereinafter referred to as the Contracting Authority) filed on the 30th July 2021;

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

Having noted and evaluated the minutes of the Board sitting of the 28th October 2021 hereunder-reproduced;

Minutes

Case 1647–LCS 34/2020. Tender for Cleaning and Clearing of Urban and Surfaced Non-Urban Areas using Environmentally Friendly Measures for the Siggiewi Local Council

The tender was published on the 15th December 2020 and the closing date was the 13th January 2021. The value of the tender excluding VAT was € 41,650.

On the 22nd July 2021 Mr Owen Borg filed an appeal against the Siggiewi Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed not to be the cheapest offer after original bids were discounted.

A deposit of € 400 was paid.

There were seven (7) bidders.

On 28th October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Owen Borg

Dr Carlos Bugeja

Legal Representative

Mr Owen Borg

Representative

Contracting Authority – Siggiewi Local Council

Dr Richard Sladden

Legal Representative

Ms Alessia Psaila Zammit

Chairperson Evaluation Committee

Ms Ritienne Giorgino

Secretary Evaluation Committee

Mr Dominic Grech

Member Evaluation Committee

Mr Kenneth Swain 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. He noted that under Clause 17.4 of the General Rules Governing Tenders it was in fact in order for the Contracting Authority to request compliant economic operators to propose a discount on similar financial offers. He then invited submissions.

Dr Carlos Bugeja Legal Representative for Mr Owen Borg said that apart from the discount aspect once the offers had been made public and it transpired there were several bids submitting similar figures then after discount was offered it stands to reason that the rate paid to workers became precarious.

Dr Richard Sladden Legal Representative for Siggiewi Local Council said that the Clause 17.4 referred to by the Chairman reflects the position of the Authority as also confirmed by the Director of Contracts. The technical offer has not changed. The allegation of precariousness is not valid as there is no indication that the wages will be affected – it could be the profit margin that is going to be reduced.

Dr Bugeja stated that since several offers were for a similar amount it is obvious they had all quoted the minimum figures based on hours and rates and if the offer is reduced then it is going below the minimum to which Dr Sladden replied that just because the figures were below the minimum it does not follow that they would be affecting wages.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 28th October 2021.

Having noted the objection filed by Owen Borg (hereinafter referred to as the Appellant) on 22nd July 2021, refers to the claims made by the same Appellant with regards to the tender of reference LCS 34/2020 as case No. 1647 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Carlos Bugeja

Appearing for the Contracting Authority:

Dr Richard Sladden

Whereby, the Appellant contends that:

- a) Appellant was informed that his financial offer was the same as 4 other prospective bids which were submitted. He was requested to submit another bid, this time round [offering ???]a ‘discount’ and without any changes to his technical offer as follows “the operator that submits the greater discount shall be considered as the most advantageous offerent.”
- b) This resulted in Mr Christopher Bezzina having the most advantageous bid and hence declared as the recommended bidder. This however brought about the following 2 arguments:
 - a. The ‘clarification’ requesting the ‘discount’ could not have been done as this amounted to a ‘negotiated procedure’ by the Contracting Authority without the permission of the Department of Contracts.
 - b. The same technical offer but with a cheaper price, of the recommended bidder, means that the employees of the recommended bidder would be working under precarious conditions.
- c) Since the Contracting Authority requested such a change in price after the initial bids were known to all, this goes against the concept of transparency which the Public Procurement Regulations are meant to follow.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 30th July 2021 and its verbal submission during the virtual hearing held on 28th October 2021, in that:

- a) The Contracting Authority always followed the law and its regulations. The modus operandi adopted in this case was decided upon after consultation with the Department of Contracts.

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:

- a) With regards to the Appellant’s first grievance, the Board makes reference to the General Rules Governing Tenders whereby article 17.4 states: *“For tenders that do not fall under the ‘pegging of rates’ scheme, where the financial offers submitted by any of the Economic Operators are the same, the Central Government*

Authority/Ministerial Procurement Unit/Contracting Authority may request Economic Operators (through the Evaluation Board – in the form of a clarification) whose bid is administratively and technically compliant to propose a discount on the offer originally submitted, without altering in any way the technical offer submitted. The Economic Operator, who is both administratively and technically compliant, and that submits the greater discount shall be awarded the contract.” Hence this Board opines that the Contracting Authority adhered to the regulations and more specifically to these General Rules Governing Tenders when requesting a ‘discount’ from those prospective bidders whose financial offer was identical. This also when considering that there were no changes to the technical offer by the Preferred Bidder.

With regards to the Appellant’s second grievance, the Board opines that by providing a lower discounted price, after being requested to do so by the Contracting Authority, that this would not necessarily lead to precarious working conditions. Economic operators may table a proposed bid which would mean they are approaching this tender while consciously knowing that they will be suffering a financial loss with that respective bid or lowering their profit margins. The Board opines that the discount offered by the Preferred Bidder is not in any way posing risks in relation to precarious work.

Hence this Board does not uphold Appellant’s grievances.

The Board,

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

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member