

PUBLIC CONTRACTS REVIEW BOARD

Case 1754 – KLBO 01/2021 – Tender for the Provision of Street Sweeping Services in an Environmentally Friendly Manner in Bormla

1st July 2022

The Board,

Having noted the letter of objection filed by Dr Natalino Caruana De Brincat acting for and on behalf of Mr Owen Borg, (hereinafter referred to as the appellant) filed on the 13th May 2022;

Having also noted the letter of reply filed by Dr Mark Simiana on behalf of Lofaro & Simiana Advocates acting for Cospicua Local Council (hereinafter referred to as the Contracting Authority) filed on the 20th May 2022;

Having also noted the letter of reply filed by Dr Mario de Marco and Dr Ryan Bezzina on behalf of Guido De Marco Advocates acting for Mr Sandro Caruana (hereinafter referred to as the Preferred Bidder) filed on the 24th May 2022;

Having heard and evaluated the testimony of the witness Mr Duncan Hall (Executive Secretary of the Cospicua Local Council) as summoned by Dr Mark Simiana acting for Cospicua Local Council;

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 June 2022 hereunder-reproduced.

Minutes

Case 1754 – KLBO 01/2021 – Tender for the Provision of Street Sweeping Services in an Environmentally Friendly Manner in Bormla

The tender was issued on the 12th December 2021 and the closing date was the 6th January 2022. The value of the tender, excluding VAT, was € 64,500.

On the 13th May 2022 Mr Owen Borg filed an appeal against Bormla Local Council as the Contracting Authority objecting to his disqualification on the grounds that his offer was deemed to be technically not compliant.

A deposit of € 400 was paid.

There were five (5) bids.

On the 28th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Owen Borg

Dr Natalino Caruana De Brincat	Legal Representative
Ms Svetlana Borg Dimech	Representative

Contracting Authority – Bormla Local Council

Dr Mark Simiana	Legal Representative
Mr Duncan Hall	Evaluator
Mr Christopher Falzon	Evaluator
Ms Romina Perici Ferrante	Evaluator

Preferred Bidder – Mr Sandro Caruana

Dr Ryan Bezzina	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Natalino Caruana De Brincat Legal Representative for Mr Owen Borg said that the appeal would follow the lines of the objection letter. The first three points in that letter have been dealt with by the Contracting Authority in their letter of reply which left the fourth point dealing with the ownership of the vehicles. The log books in this case indicated that the vehicles were owned by others not the bidder.

Dr Mark Simiana Legal Representative for Bormla Local Council confirmed that three points had been dealt with. With regard to the outstanding point Appellant was now objecting to criteria requested by the Contracting Authority in the tender. These objections should have been raised as a precontractual remedy.

Dr Ryan Bezzina Legal Representative for Mr Sandro Caruana agreed with the statement made by Dr Simiana. If Appellant disagreed with the tender requirements he had recourse to Section 262 of the PPRs. PCR Cases 1733 and 1416 and Court of Appeal cases supported this point. The Evaluation Committee acted correctly and this appeal should not be met.

Mr Duncan Hall (46882M) called as a witness by the Contracting Authority testified on oath that he was the Executive Secretary of the Bormla Local Council and was involved in all aspects of the tender. He stated that the vehicles criteria (tender Clause B5 Item3) indicated that the award of marks is based on the Euro standards rating of the vehicles. Two options were available regarding ownership – either direct ownership or declaration of proof of access. Appellant had not asked for any clarifications.

This concluded the testimony.

Dr Caruana De Brincat said that Appellant had a grievance that the evaluation did not give any weight on the question of the ownership of the vehicles.

Dr Bezzina said that any grievance regarding the ERA Code should have been raised as a precontractual point. Appellant was not correct to claim that the Code should not have been included in the tender. The preferred bidder submitted the right documents and the allegations made had not been proven.

Dr Simiana concluded by stating that according to the Appellant the points should have been awarded differently whilst as regard the argument that the procedure was not correct all that Appellant is doing is trying to turn the clock back.

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 June 2022.

Having noted the objection filed by Mr Owen Borg (hereinafter referred to as the Appellant) on 3rd May 2022, refers to the claims made by the same Appellant with regard to the tender of KLBO 01/2021 listed as case No. 1754 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Natalino Caruana De Brincat

Appearing for the Contracting Authority: Dr Mark Simiana

Appearing for the Preferred Bidder: Dr Ryan Bezzina

Whereby, the Appellant contends that:

- a) The decision of the Contracting Authority was merely based on the related to ERA classes that are not a requirement for the operation of the tender. So much so that Appellant was not disqualified as being technically not compliant with the tender requirements. That the Contracting Authority opted to include two ERA Codes for Different Waste Carrier Classes which are not technically required for the said provision of service for which the Tender was issued. The Classes in subject are Class A3 and Class A4. The former is the Restaurants (Canteen waste) and Municipal Waste whilst the latter regulates Separated waste. That as it transpires from the objects of the Tender the Contracting Authority issued (sic) such Tender was for the provision of street sweeping service, in an environmental manner in Bormla and includes: (i) the removal of general and animal litter from all streets; (ii) the removal of leftovers from refuse bags from all streets; (iii) the cutting and removal of weeds from all streets including soft areas; (iv) Removal of detritus from all surfaced streets including soft areas; (v) the emptying and upkeep of public litter bins located on any part of the street including dog bins and cigarette bins; and (vi) the removal and disposal of any dead animals

from any streets within two hours of reporting. All the above fall within the category of the ERA (Codes for Different Waste Carrier) Class A2 for Road Services & Furniture (Bulky Refuse, beach cleaning, road cleaning, etc). Therefore, the Contracting Authority evaluated the Tender on pre set criterion which should have never been set for such objects particularly when the operation is not related to refuse collation (sic) but rather merely Bulky Refuse, beach cleaning and road cleaning.

- b) Without Prejudice to the aforesaid, from the evaluation sheets it transpired that unjustly the Evaluation Committee deducted one point vis-à-vis the requirement arising out of Section 1 Paragraph 6.3 when such deduction should have been attributed to the awarded bidder. Moreover, this seems to have also been the case vis-à-vis the list of employees and machinery to be used for the Tender in subject.
- c) Without prejudice to the aforesaid, Appellant's offer was at par with the first three bidders therefore Appellant was prejudiced by the Contracting Authority merely on criterion which should have never been included in such Tender.
- d) Without prejudice to the above the decision taken on the 3rd May 2022 is totally unfounded, both as a fact and as a matter of law, as will further result during the course of these proceedings.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th May 2022 and its verbal submission during the virtual hearing held on 28th June 2022, in that:

- a) The Objector complains of the fact that the Tender in issue granted additional points to those bidders who also carry further ERA codes for different waste carrier classes, and submits that these further ERA codes are not required in order to carry out the service which forms the object of the Tender. Before entering into the merits of the Objector's complaints, the Cospicua Local Council hereby observes that it is now an established principle that objection proceedings such as these do not allow any of the bidders to challenge or impugn the criteria laid down by the Contracting Authority in any tender. The law provides a specific remedy and right of action for such complaints, in terms of article 262 of LN352/2016 (SL601.03). It is inadmissible for any bidder to raise these complaints in an objection following the award of the tender. Reference is made to the following decisions of the Court of Appeal in re Managing Consulting Service Industry (MCSI) Limited vs. Direttur tal-Kuntratti et (17/6/2019); AIB Insurance Brokers Limited vs. Awtorità dwar it-Trasport ta' Malta et (27/10/2021); Truevo Payments Limited vs. Direttur tal-Kuntratti et (30/6/2021). Accordingly, since the entire basis of the Objection concerns grounds which existed prior to the closure of the bidding stage and the subsequent award, the Objector should have availed himself of the remedy provided under article 262 of the cited legislation, and his failure to do so bars his right to raise the same grounds by virtue of an objection in terms of article 270 of the same legislation. The Objection should therefore be declared inadmissible.
- b) Without prejudice to the above, the Cospicua Local Council further states that the inclusion of the impugned criteria, and the award of further points to bidders satisfying such criteria, is objectively

justified in that it is reasonable to award additional points to bidders showing additional qualifications which attest to their ability to perform and carry out a wider range of services in the ambit of the services forming the object of the tender.

- c) The Objector further complains, somewhat ambiguously, that the Contracting Authority unjustly deducted points with regard to vehicles and machinery, as well as in regard to the criterion requested under Section 1 Paragraph 6.3, but fails to explain how this evaluation was carried out unjustly. The Cospicua Local Council strongly affirms that the evaluation was carried out correctly, justly and in strict adherence to the criteria set out in the tender document, and that therefore this part of the Objection should also be dismissed.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 24th May 2022 and its verbal submission during the virtual hearing held on 28th June 2022, in that:

- a) In his appeal application, the Appellant claims that the two class permits of the Environment and Resources Authority ("ERA") listed within the tender document, and namely ERA Class Permit A3 and ERA Class Permit A4, ought not to have been included in the tender, since according to the Appellant, these two class permits are not relevant for the tender in question. The Awarded Bidder humbly contends that this claim is unfounded both at law and in fact since the said permits are in actual fact necessary for the proper execution of the works forming the subject-matter of the tender in question. The Awarded Bidder adds that the inclusion of the said class permits as a requirement is highly common in tenders of the nature and scope as the specific tender in question.
- b) Without prejudice to the above, the Awarded Bidder humbly submits that the Appellant could have requested the contracting authority for a clarification as to the reason why such class permits had been included as a requirement, or to put forward his contestations as to the inclusion of the same class permits, prior to the closing date of the call for applications, which specific remedies result from the law. The Awarded Bidder hereby makes reference to Regulation 262 (1) of the Public Procurement Regulations (Subsidiary Legislation 601.03), which permits prospective candidates and tenderers to file a reasoned reply before the closing date of a call for competition asking this Honourable Board to inter alia:

“(C) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications (sic) notes or in any other document relating to the contract award procedure; or

(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure”

- c) The Awarded Bidder therefore humbly submits that the Appellant had ample opportunity to contest the requirements for the submission of the ERA Class Permits being disputed prior to the conclusion of the call for competition. The fact that the Appellant failed to request such

clarification from the contracting authority or to put forward his contestations and duly submitted his bid, only to then contest the decision on the basis of an allegation that the "Appellant was prejudiced by the Contracting Authority merely on criterion which should have never been included in such Tender" is procedurally and legally incorrect. The Awarded Bidder humbly adds that the Appellant's attempt to raise these complaints in his objection following the award of the tender is therefore inadmissible and should be dismissed.

- d) The Appellant also claims, albeit ambiguously, that he was unjustly deducted one point vis-à-vis the requirement arising out of Section 1 Paragraph 6.3 "when such deduction should have been attributed to the awarded bidder". The Appellant has, in his appeal application, failed to make specific reference as to the reason for, and the basis for which, the said deduction had been made by the Evaluation Committee of the contracting authority. The Appellant has also failed to provide any reason to substantiate and justify his allegation why the said deduction was "unjust" and should not have therefore been made in his regard.
- e) That furthermore, the Appellant has also failed to demonstrate or put forward a single justification to attempt to prove that the deduction ought to have been attributed to the Awarded Bidder. Without prejudice to the aforesaid, the Awarded Bidder is confident that he has strictly complied with all the criteria, requirements and instructions set out within the tender document, including all requirements listed within the 'Evaluation Grid' detailed under Paragraph 6.3 thereof. The Awarded Bidder therefore fully refutes any allegation that he was to be deducted any points for non-compliance therewith.

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 witness duly summoned, will consider Appellant's grievances as follows:

- a) Reference is made to the minutes whereby the Appellant states *"The first three points in that letter (objection letter) have been dealt with by the Contracting Authority in their letter of reply which left the fourth point dealing with the ownership of the vehicles. The log books in this case indicated that the vehicles were owned by others not the bidder"*.
- b) This Board notes the Appellant's comments in relation to 'the first three points'. Still this Board would outline that in such instances where grievances are brought forward on matters which existed and known to the economic operators **before** the closing date of the call for tenders, such grievances should be 'appealed' under regulation 262 of the Public Procurement Regulations (always by abiding with the timeframes listed in such regulation).
- c) With regards to the 'log books' issue / grievance, this Board notes that this is a non-starter. The Evaluation Grid is clear and unambiguous and makes no distinction (vis-à-vis points) if the vehicles is directly owned by the economic operator or if access to the service vehicle is obtained

through other means. It goes without saying that different forms of compliance would need to be supplied / shown depending on type of ownership or otherwise, but the evaluation grid is very clear that different points are only to be allotted according to the type of engine within such vehicle.

Hence when considering the above, this Board does not uphold appellant's grievances in toto.

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

Ms Stephanie Scicluna Laiviera
Member