

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 747**

**SPBLC 06/2014**

### **Tender for the Service of Bulky Refuse Collection.**

The tender was published on the 6<sup>th</sup> June 2014. The closing date was the 7<sup>th</sup> July 2014.

The estimated value of the Tender was €17,942.40(Exclusive of VAT).

On the 21<sup>st</sup> August 2014 Dimbros Limited filed a letter of objection objecting to the proposed award of the tender to Mr Antoine Fenech.

Seven (7) offers were submitted for this tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 16<sup>th</sup> October 2014 to discuss the objection.

Present for the hearing were:

#### **Dimbros Limited - Appellant**

Mr Malcolm Dimech	Representative
Dr Franco Galea	Legal Representative

#### **Mr Antoine Fenech - Preferred Bidder**

Mr Antoine Fenech	Representative
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#### **Kunsill Lokali San Pawl Il-Bahar - Contracting Authority**

Mr Frans Chircop	Executive Secretary
Mr Raymond Tabone	Mayor
Dr Larry Formosa	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Franco Galea on behalf of the appellants Dimbros Limited explained that this tender was for a period of three years and bidders had to submit a rate per call. This rate had to be inclusive of VAT and a management fee of 5% charged by the contracting authority. The award criterion was the "most favourable tender". It is understood that all bidders were compliant with the tender conditions. He contended that the most favourable did not necessarily mean the cheapest. Appellants contend that the preferred bidder's rate of €1.55 per call, after removing the overheads and the payment of fees to Wasteserv, is not enough to make any profit. The other grievance is that with that rate, the preferred bidder is falling foul of the accepted principle regarding precarious employment. Employees in the cleansing and security sectors have to be paid a minimum established rate. Dr Galea insisted that with the rate submitted by the preferred bidder, he is surely going to fall foul of the standard acceptable rates.

Dr Larry Formosa on behalf of the contracting authority said that the preferred bidder's tender was both the cheapest and the most favourable. He said that regarding the question of precarious employment he wanted to cite from a recent decision by the Court of Appeal on the 30th July 2014 in the case 'Kerber Securities Limited vs Wasteserv et' wherein it was stated that it was not the remit of the Public Contracts Review Board to go into the question of profits in its decision because this matter of profit interested only the bidder, who could have had other interests other than those of a financial nature. Dr Formosa contended that the preferred bidder could have chosen to make a loss in this tender in order to increase his profile. He claimed that the contracting authority had to see the cost of the service. That the preferred bidder's employees are then paid according to law was not the remit of the contracting authority but of other entities.

The Chairman remarked that the Board had to be alert that no chances of precarious employment arise through the low submitted rates. The contracting authority should consider the question of precarious employment albeit not go into the question of profit.

Dr Larry Formosa pointed out that the rates submitted by the bidders were not those payable to employees. A bidder could choose to make less profit. Furthermore the rates submitted are not hourly rates but rates per call and it would be difficult to assess a factor of precarious employment when rates per call are being offered.

Mr Raymond Tabone the mayor of St Paul's Bay on behalf of the contracting authority said that the evaluation board took into consideration the price of the bids and whether the Council could obtain a better service. The payment of wages to the preferred bidder's employees did not depend only on this tender because he has other ongoing contracts where the rate for bulky refuse is cheaper still. This was no full-time job but depending on the number of calls made requesting the service. On the whole the evaluation board considered that the income for the preferred bidder was not dependant only on the present tender. The overheads for all the contracts together were covered by the rate submitted.

Dr Franco Galea for the appellant explained that the rates were per call. Appellant was providing the service at present and knows the amount of waste generated. He pointed out the rates submitted by all bidders and admitted that a bidder could take a commercial risk of working at a loss. The government circular plainly states that each contract should be

considered on its own. Appellant had submitted a list of employees that were to be assigned for the job. It is up to the Board to see if the preferred bidder had done the same. He insisted however that mathematically the rate submitted by the preferred bidder does not cover all expenses. After all this was for a period of three years.

Mr Antoine Fenech, the preferred bidder said that the disposal of the waste gathered is not paid for at €20 per ton as stated by appellant. He uses the CA site and pays 50cents per ton before VAT. To service 40 households does not take all day. He manages to call at 20 households in ninety minutes. He would be satisfied if he makes a profit of €50.

Dr Franco Galea said that to serve 40 households it would take 3 hours and with two employees and if these are paid the minimum wage, the amount would be in the region of forty to forty six.

Mr Antoine Fenech said that his van is equipped with a tail lift and does not require employees.

The hearing was at this point closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 21<sup>st</sup> August 2014 and also through Appellant's verbal submissions during the hearing held on 16<sup>th</sup> October 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant contends that the rate as quoted by the Preferred Bidder falls foul of the precarious employment guidelines.**
- b) Appellant also claims that the rates quoted by the Appellant Company will incur a loss in its trading activity.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 16<sup>th</sup> October 2014, in that:**

- a) In evaluating the most advantageous offer, the Contracting Authority had to take into consideration the cost of the service being tendered for. In this regard, the Evaluation Board took into consideration the fact that this tendered service was not a full time service provider but rather depends on the demand of calls for the collection of bulky refuse.**
- b) The tendered rate was not an hourly rate but a rate per call of collection. In this regard, the Contracting Authority maintains that the rate as quoted by the Preferred Bidder cannot be connected to the minimum hourly rate which should be paid to employees.**

**Reached the following conclusions:**

- 1. This tender called for a commercial rate per call for the collection of bulky refuse. It was credibly established that this activity does not entail a full time service. In this regard, this Board opines that the rate quoted by Preferred Bidder, represent a commercial rate per call for the collection of bulky refuse. At the same time this Board does not consider the Appellant's contention that the rate quoted by the Preferred Bidder should be related to the minimum hourly rate to be paid to his employees, as this is an offset service which the Preferred Bidder can perform during his normal trading activity. In this regard, this Board does not uphold Appellant's contention that the Preferred Bidders rate can lead to precarious employment situation.**
- 2. It is not the competence of this Board to delve into whether the rate as quoted by the Preferred Bidder will result into a loss or profit. Through credible submissions made by the Preferred Bidder, this Board is justifiably convinced that the rate quoted by the Preferred Bidder is a quote which will not inflict any precarious working condition.**
- 3. This Board also notes that the Evaluation Board of the Contracting Authority was correct in taking into consideration the fact that the tendered works did not entail a 'Full Time' service. At the same time, the Contracting Authority also noted the fact that the Preferred Bidder had other commercial activities, so that this particular tendered service being provided was not the only and original source of commercial activity being carried out by the Preferred Bidder.**

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by Appellant should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*4 November 2014*