

PUBLIC CONTRACTS REVIEW BOARD

Case 1857 – 01/2023 – Services – Tender for the Provision of Cleaning Services with a Reduced Environmental Impact for the Zejtun Local Council

30th March 2023

The Board,

Having noted the call for remedies filed by Dr Christopher Chircop on behalf of Saga Juris Advocates for and on behalf of Ms Roberta Mifsud, (hereinafter referred to as the appellant) filed on the 7th March 2023;

Having also noted the letter of reply filed by Dr Alessandro Lia acting for the Zejtun Local Council (hereinafter referred to as the Contracting Authority) filed on the 9th March 2023;

Having heard and evaluated the testimony of the witness Mr Anton Falzon (Representative of Zejtun Local Council) as summoned by Dr Alessandro Lia acting for Zejtun 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 March 2023 hereunder-reproduced.

Minutes

Case 1857 – 01/2023 – Services – Tender for the Provision of Cleaning Services with a reduced Environmental Impact for the Zejtun Local Council

Remedies before Closing Date of a Call for Competition

The tender was issued on the 21st February 2023 and the closing date was the 14th March 2023. The estimated value of the tender excluding VAT, was € 31973.76.

On the 7th March 2023 Ms Roberta Mifsud lodged an appeal against the Zejtun Local Council as the Contracting Authority in terms of Regulation 262 of the Public Procurement Regulations.

A deposit of € 400 was paid.

On the 28th March 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this virtual public hearing was as follows:

Appellant – Ms Roberta Mifsud

Dr Christopher Chircop

Legal Representative

Ms Roberta Mifsud

Representative

Contracting Authority – Zejtun Local Council

Dr Alessandro Lia

Legal Representative

Mr Anton Falzon

Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Christopher Chircop Legal Representative for Ms Roberta Mifsud said that the terms of the tender exclude any self-employed person from bidding and is therefore discriminatory. This is unusual and similar tender (03/2021) issued by the Zejtun Local Council allowed this. The reply by the Contracting Authority infers that the economic operator must have employees. The requisite of the tender is only 24 hours work per week and a simple declaration by an individual should suffice. In any case the number of hours cannot exceed 30% of the tender value and hence cannot reach 40 hours. Why is there the need for a supervisor in a simple cleaning job? It is unrealistic. A self-employed person would make sure, in their own interest, to have arrangements in place for absences. The terms of the tender deprives self-employed persons from ever bidding on a tender.

Dr Lia Legal Representative for the Zejtun Local Council requested the hearing of witness.

Mr Anton Falzon (103679M) called to testify by the Contracting Authority stated on oath that he has for the last fourteen years been the Executive Secretary of the Zejtun Local Council. The present cleaner, engaged by direct order is Ms Roberta Mifsud who is self-employed. When she has been indisposed no service has been provided. The Council wishes to have matters on a more structured basis.

In reply to questions from Dr Chircop witness said that he does not recall on how many occasions did absences happen and that the Council had never asked for Ms Mifsud to be replaced.

This concluded the testimony.

Dr Lia said that the appeal claims discrimination on technical and economic grounds but this is an administrative matter. Ms Mifsud is self-employed but there is no reason why she cannot employ people – something that can be easily achieved and is within her own power. On this point alone the claim of discrimination fails. The tender (page 8 Item B2) lays down the condition of a replacement whilst on page 22 paragraph 2.1 the Council maintains the right to increase the number of employees due to the number of sites to be serviced. The Appellant appears not to be prepared to accept restrictions and the claim of discrimination does not hold water. Any self-employed person can have employees on their books.

Dr Chircop said that all the Appellant was requesting is that at the time of submitting the bid there is no need to have employees but to do this once the contract is awarded otherwise there is discrimination against the self-employed.

Dr Lia stated that all the points claiming discrimination are all elements that are part of the structure of a tender.

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 March 2023.

Having noted the call for remedies filed by Ms Roberta Mifsud (hereinafter referred to as the Appellant) on 7th March 2023, refers to the claims made by the same Appellant with regard to the tender of reference 01/2023 listed as case No.1857 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Christopher Chircop

Appearing for the Contracting Authority: Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) This tender has discriminatory specifications for the reason that, although its main scope is cleaning of offices (local council premises), it excludes self-employed persons who do not employ from competing. This is because there are a number of mandatory and add-on criteria that require documentation that can only be provided by economic operators with employees. Reference to criteria C1 – Social Aspects – Equal Opportunities and C2 – Employment Conditions.
- b) That Clause 3.1 of Section 3 of the Tender document states that this tender requires the services of 1 cleaner for 24 hours per week. Therefore, a self-employed who currently does not employ should be allowed to participate. In fact, in other similar tenders issued by Local Councils for street-sweeping or for cleaning of public conveniences, it is the norm that such tender is open for economic operators who does not employ because for such criteria mentioned above, the following clause is allowed *“For Economic Operators -currently with no employees: A score of '0' shall be allotted if a self-declaration of compliance is not submitted whereas full marks will be given to the Economic operator that submits a self declaration committing oneself to have written contract in place should employees be engaged during the contract duration.. If a score of '0' is allotted, the bidder shall be disqualified”*. The above clause is being quoted from a tender issued by the same Contracting Authority, Zejtun Local Council for the Tender Ref 03-2021 Service - Tender for the Provision of Street Sweeping Services In The Locality Of Zejtun. It is a normal clause found in other tenders issued by other Local Councils too.

- c) That the rationale is that economic operators who at tendering stage do not employ, shall be allowed to compete. If this is allowed for whereby one needs to employ a number of street sweepers, how come it is not allowed for a tender which requires 1 cleaner. It is a known fact that cleaning of an offices/hall/library such as of a Local Council can be carried out by a self-employed cleaner and therefore one cannot understand the requirement that such tender is open only for economic operators who employ a number of employees. It is a discriminatory criteria which is excluding economic operators currently with no employees from participating. The remedy is that such criteria shall allow economic operators currently with no employees to submit a self declaration.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9th March 2023 and its verbal submission during the virtual hearing held on 28th March 2023, in that:

- a) It is clear that the grievances brought forward are not of a technical, financial / economic nature but more of administrative nature. The appellant is aggrieved on the 'structure' that the local council is requesting. But this is something which the appellant can easily get in line with. It is not something that is impossible to abide to.
- b) The tender document is clearly requesting a replacement in cases where the employee would be on sick leave, not available due to industrial action etc. This since the service being requested is a necessity. If the appellant wants to participate in the tender process as a 'self-employed' it is clear that these pre-requisites cannot be adhered to.
- c) The Contracting Authority is also reserving the right to increase the number of cleaners required, again something which a self-employed person with no employees cannot adhere to.
- d) Same can be said for the requirement of a 'supervisor'

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) Initially this Board agrees with arguments brought forward by the Appellant, in the sense that at first glance, one is induced to think that a self-employed person with no employees, subcontractors etc, would have enough resources to satisfy and meet the requirements of the tender procedure. This is due to the fact that what is being requested is the service of a cleaner for 24 hours per week.
- b) However, this Board opines, this is not the case as certain sections of the tender dossier, more specifically Section B2 Contingency Plan (Mandatory Criteria) – page 8 and Paragraph 2.1 of Section 3 – page 22 are requesting, amongst other items, that there would be "*immediate replacement of personnel....*" whilst also reserving the right to "*increase the number of cleaners*".

- c) What the appellant is advocating to be discriminatory, is in this Board's opinion not discriminatory at all. The Local Council is well within its rights to request "*the immediate replacement of personnel*" if and when the cleaner would not be available for work due to a variety of reasons. Moreover, all economic operators wishing to participate in this tender process are also well within their rights and have the necessary timeframe, to 'build' an operating structure which would suit and meet the technical and administrative requirements of this tender process. This can easily be done in a variety of ways. Some examples would include i) the registration of the self-employed person with the relative authorities e.g. Jobs Plus in order to employ a part timer or a casual worker, and ii) to submit an offer in this tender procedure as a Joint Venture, i.e. amalgamating resources with another self-employed with no employees.
- d) Even though, the appellant asked the question "*Why is there the need for a supervisor in a simple cleaning job?*", this Board is of the opinion that:
- i. The employees and visitors of the Local Council are entitled to clean premises, i.e. a continuous service which is not interrupted due to lack of resources.
 - ii. The requirements as are being imposed in the tender procedure are there to reach certain objectives and re-enforce employment law standards, e.g. the need to have salaries paid by direct debit and hence removing salary cash payments and for the employees to have a written employment contract. These are all improvements in the enforcement of our legal system that need not be taken for granted.

Therefore, this Board does not uphold the Appellant's grievances.

The Board,

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

- a) Does not uphold the Appellant's concerns and grievances;
- b) that the deposit is not to be refunded to the Appellant.
- c) To amend the closing date of the call for tenders at the discretion of the Contracting Authority.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Ms Stephanie Scicluna Laiviera
Member