

CfT CA Unique ID: VLC/01/2023



Objection:

Service Tender for Street Sweeping Services in Victoria, Gozo using Environmentally Friendly Practices

In the Names:

IBS / INNOVATIVE BUSINESS SOLUTIONS

-vs-

VICTORIA LOCAL COUNCIL

Reasoned Reply by the Victoria Local Council to Objection the Objection VLC/01/2023 - Service Tender for Street Sweeping Services in Victoria, Gozo, Using Environmentally Friendly Practices filed by Innovative Business Solutions.

Respectfully submits:

That contrary to Objector's submissions the adjudication is correct and the tender has been adjudicated and awarded according to law and consequently this Board should reject the Objector's application AND instead confirm the Local Council's decision.

1. Preliminary it must be outlined that the Contracting Authority is bound by the conditions outlined in the Tender documentation, this has been reaffirmed by the Court of Appeal:

"Ghandu jinghad in principju li kull min huwa involut fil-process ta' sejha pubblika, inkluz ukoll daww li huma mgħobbija bl-oneru li jiggudikaw is-sejha, huma kollha marbutin bil-kundizzjonijiet li jkunnu mnizzla fid-dokumentazzjoni tas-sejha"¹.

Secondly, it must be noted that the Objector's grievances are associated with his submissions for the Technical Offer. In this tender, the Technical Offer (as in all other instances) is classified under Note 3. Consequently, the Contracting Authority

¹ "SR Environmental Solutions Limited v. Dipartiment tal-Kuntratti" decided 6/2/2015

and/or the Evaluation Board could not consider any requests for rectification from the Objector. This point is emphasised due to the nature and type of grievances raised by the same Objector.

Thus, the Contracting Authority does not have any discretion to save seemingly non-compliant tenders for parts of the submissions falling under 'Note - 3'. The principle of equal treatment and the corollary transparency requirements establish clear constraints on what a contracting authority can accept by way of tender correction, supplementation or clarification. This results from CJEU case law that has determined the following:-

"... the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers"² ;

and

"... [t]hat requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions [...] except where those terms expressly allow them to do so"³..

Therefore, in line with the CJEU's interpretation, although a contracting authority is allowed to request clarification, this remains a discretionary power and not duty on the contracting authority.

The Technical Offer for this tender, comprising the 'Technical' Part of the Award Criteria of the BPQR, enables new market entrants to participate in the tendering

² See Judgment of 22 June 1993, Commission v Denmark (Storebaelt), C-243/89, EU:C:1993:257, paragraph 37.

³ See Storebaelt, EU:C:1993:257, paragraph 40.

process aiming to be selected as the preferred bidder by the Contracting Authority. Notably, for several criteria within the Technical Offer, prospective bidders without employees may opt for a self-declaration of compliance without facing any penalties for such a choice.

However, it is paramount for the Contracting Authority to outline and highlight to the PCRB the lack of consistency and coherence in the Objector's submissions and documentation regarding his employee status. Which fallings **could not** be rectified, this as outlined above. For instance:

i) The Objector did not submit a specific declaration stating that currently he has no employees. While in some instances the Objector did submit declarations, these were insufficient. They failed to adequately emphasise that should employees be engaged during the contract duration, he would comply with the legal requirements. Instead, his declarations were vague, merely asserting his commitment at a high level without the detailed assurances required by the tender specifications;

ii) The documentation submitted by the Objector connotes the fact that the Objector actually has employees (at the time of the tender submission). In Document C2 viii Health and Safety Resources the Objector states that:

“Our health and safety strategy is underpinned by regular training sessions for all employees, designed to keep them informed of the latest safety protocols and best practices. This training ensures that every team member is not only equipped with the physical tools they need to work safely but also the knowledge to identify risks and take appropriate preventive measures.”

The statement suggests that the company already has employees and conducts regular training sessions to keep them informed of safety protocols and best practices. It doesn't imply that the employees are currently trained, but rather that training sessions are a part of their existing operational strategy for its workforce.

The phrase "for all employees" indicates that there are already existing employees who are receiving these training sessions.

If the Objector wanted to convey that training would be provided for future employees, the statement should have been modified as follows: "Our health and safety strategy is underpinned by regular training sessions for all employees, which will be designed to keep them informed of the latest safety protocols and best practices."

iii) For Clause C1 (i), bidders were required to provide proof that they meet the legal requirements for the employment of disabled people. Bidders with employees needed to submit an undertaking or declaration issued by JobsPlus, while bidders without employees were required to submit a self-declaration of compliance. In this instance, the Objector submitted a declaration from JobsPlus instead of a self-declaration. This document should have affirmed his commitment to meeting the legal requirements should he employ staff during the contract term.

Furthermore, the Objector failed to provide a specific declaration stating that he currently has no employees. The document issued by JobsPlus muddled the Objector's bid. On one hand, he attempts to present himself as a self-employed contractor with no staff, yet on the other, he submitted documentation that suggests the contrary. This inconsistency has led to confusion throughout the bidding process

and even into his appeal. By not providing a self-declaration, the Objector did not adhere to the tender requirements, which explicitly required such a declaration to ensure full compliance with this specific clause. Therefore, the Contracting authority in this very case had no option but to deem the objector's offer as non-compliant.

Throughout its entire evaluation process, the contracting authority and the evaluation board acted fairly and equally with all bidders. Therefore, the Contracting Authority's hands were tied. Ultimately, it was the responsibility of the objector to provide the correct documentation at the first instance.

2. Although the basis for the cancellation communicated to the Objector, it also transpires that since the cancellation the Contracting Authority has also changed the tender's parameters. As can be confirmed from the last Council's meeting minutes, during the Council meeting the Local Council decided the following:

"Il-membri qablu li terġa tinħareġ l-offerta. Is-Sindku ssuġerixxa li tizdied kins kull nhar ta' Hadd filgħodu fi Pjazza Indipendenza. Il-membri qablu."

3. Following the adjudication, it became apparent that the Objector's bid is flawed and inaccurate, containing declarations that render the entire submission inadmissible and compromised as will be comprehensively addressed during the hearing of this case.

The Victoria Local Council reserves the right to raise further pleas and evidence during the hearing.

For the above-mentioned reasons it is humbly requested that the appeal filed by Innovative Business Solutions' (IBS) is rejected with costs.



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IN THE PUBLIC CONTRACTS REVIEW BOARD

CfT CA Unique ID: VLC/01/2023

Objection:

Service Tender for Street Sweeping Services
in Victoria, Gozo using Environmentally
Friendly Practices

In the Names:

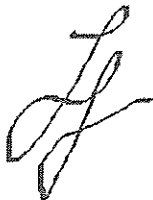
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List of witnesses:

- (i) All witnesses indicated by the Appellant;
- (ii) The Objector;
- (iii) Representatives from the Department of Contract, Government Departments, Governmental Entities and Governmental Authorities
- (iv) Members of the Evaluation Committee and all related parties;
- (v) Representatives of the Contracting Authority;
- (vi) Other witnesses which the Contracting Authority is not aware of, therefore they are being reserved;
- (vii) Other witnesses permissible by Law, therefore they are being reserved;



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D Amato Ritianne at PCRB

From: Dr. Larry Formosa <formosalarry@gmail.com>
Sent: Wednesday, 24 April 2024 09:40
To: D Amato Ritianne at PCRB
Cc: Zarb Raymond at PCRB; Harry Fenech; Zerafa Tanya at MFIN; Grech Raymond 1 at MFIN; Info at PCRB; Rabat Gozo Local Council at Victoria Local Council; Schembri Josef at MGP-Services; Jonathan Mintoff
Subject: Objection 440- VLC/01/2023-Service Tender for the Street Sweeping Services in Victoria, Gozo using Environmentally Friendly Practices
Attachments: VLC - PCRB IBS.pdf

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Dear Ms D'Amato,

I write on behalf of the Victoria Local Council with reference to the above subject. Attached please find the Council's reply.

Kindly acknowledge receipt of this email.

Best regards,

Dr. Larry Formosa LL.D.



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