

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 416

CT/2169/2011

**Tender for the Provision of Security Services to all MCAST sites**

This call for tenders was published in the Government Gazette on the 28<sup>th</sup> October 2011. The closing date for this call – which attracted no fewer than six (6) tenderers - with an estimated budget of € 360,000 was the 20<sup>th</sup> December 2011.

JF Security and Consultancy Services Ltd filed an objection on the 30<sup>th</sup> March 2012 against the decision of the Contracts Department to recommend the award of the tender to Kavallier Security Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Monday 21<sup>st</sup> May, 2012 to discuss this objection.

Present for the hearing:

### **JF Security and Consultancy Services Ltd**

Dr Adrian Delia	Legal Representative
Not. Matthew Paris	Representative
Mr Peter Formosa	Representative
Mr Matthew Formosa	Representative

### **Global Security Services Ltd**

Dr Jan Karl Farrugia	Legal Representative
Mr Mario Cardona	Representative
Ms Patricia Borg	Representative

### **Kavallier Security Services Ltd**

Dr Paul Farrugia	Legal Representative
Mr Joseph Debono	Representative

### **Malta College of Arts, Science and Technology**

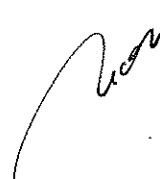
Dr Peter Fenech	Legal Representative
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### **Evaluation Board**

Mr Oscar Borg	Chairman
Mr Stephen Vella	Member
Mr Mr Saviour Grech	Member
Mr Stephen Caruana	Member

### **Contracts Department**

Ms Joelle Mifsud Bonnici



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Adrian Delia, legal advisor of JF Security & Consultancy Services Ltd, the appellant company, submitted that:-

- i. by letter dated 23<sup>rd</sup> March 2012, the Department of Contracts had informed his client that (a) his offer was not successful because it was not the cheapest offer and (b) the tender was recommended for award to Kavallier Security Services Ltd as the cheapest priced offer satisfying the administrative and technical criteria;
- ii. it is his client company's contention that of all the tenderers participating in this tendering process, its offer was the cheapest permissible at law;
- iii. para 3 of Form 1 'Statement on Conditions of Employment' of Volume 1 Section 4 (page 21 of the tender document) stated that:

*"MCAST reserves the right not to award the bid to the cheapest tenderer if, after a verification exercise, it transpires that the hourly rate proposed to be paid by the bidder to its employees either is less than the minimum wage when including in it the payment for pro rata benefits and entitlements or the hourly basic rate does not include payment for pro rata benefits and entitlements";*

and

- iv. it was correct that the recommended offer of €5.90 and the cheapest offer of €5.60 were both cheaper than his client's offer of €6.31 but it was equally correct to declare that those offers were below the minimum hourly rate established by legislation.

Dr Peter Fenech, legal representative of the Malta College of Arts, Science and Technology, submitted that:-

- a. one had to keep in view a number of variables in the computation of the hourly rate, e.g. the engagement of full-timers or part-timers, sub-contracting and the like;
- b. the contracting authority deemed that the responsibility to ensure that employees were paid their wages according to legislation rested with the employer and not with the contracting authority and the public entity that was charged with that supervision was the Department of Industrial and Employment Relations;
- c. the contracting authority would, however, terminate the contract should it result to it that the contractor was not meeting the legal obligations towards the employees in the payment of wages – Form 1 at page 21;



- d. the appellant company was not correct to state that his client's offer at €6.31 was the cheapest offer allowed by regulations because, according to the workings undertaken by the adjudicating board, the following data emerged the year basis 2012:

€  
3.95 – i.e. €158.11 minimum wage per week which included vacation leave;  
0.25 – €512.46 annual bonuses  
0.39 – €822.17 National Insurance Contributions (NI) per annum  
4.59 or €9,556.35/52/40 = €4.59

- e. on the basis of the 2012 minimum wage, which included the annual bonuses and NI, the resulting *pro rata* minimum hourly rate was €4.95, and, as a consequence, the recommended offer of €5.90 was above the minimum permissible by legislation.

Dr Paul Farrugia, legal advisor of Kavallieri Security Services Ltd, the recommended tenderer, submitted that:-

- i. at appeal stage one had to stick to the documentation which was available to the adjudicating board and the provision of fresh documentation was inadmissible at that stage;
- ii. in its letter of objection the appellant company simply declared that its offer was not compliant but did not indicate in which manner the recommended offer of €5.90 was not compliant;
- iii. the adjudicating board based its workings on the 2012 minimum wage whereas the basis year should have been 2011, which would be more favourable to his client's case, besides, he argued that the adjudicating board went beyond its call of duty in going into these calculations.

Dr Delia offered the following explanations:-

- i. whilst it was correct to state that it was the responsibility of the tenderer to ensure that labour legislation was adhered to as per tenderer's statement at Form 1, Volume 1, Section 4 (page 21), yet, if it would result to the contracting authority that the quoted hourly rates did not cover the minimum requirements for the payment of wages to employees then the contracting authority reserved the right to reject those offers;
- ii. one had to establish the minimum hourly rate according to regulations applicable for 2011 - the closing date of this call for tenders was December 2011 - which amounted to €5.94 broken down as follows:-

€  
3.84 - basic rate  
0.35 – vacation leave  
0.25 – statutory bonuses  
0.21 – public holidays

0.38 – national insurance  
5.03  
0.91 – VAT  
5.94

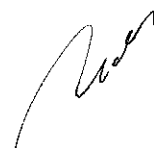
- iii. the comparable applicable hourly minimum rate for 2012 was €5.19 and, including VAT, €6.12;  
  
and
- iv. his client stood by these workings and, if need be, the Department for Industrial and Employment Relations could be asked to either confirm or dismiss them

Dr Peter Fenech remarked that:-

- a. the workings of the appellant company basically matched those of the contracting authority except for the inclusion of public holidays and vacation leave;
- b. with regard to vacation leave he insisted that that was already included in the basic rate whereas he had to see what the pertinent legal notice provided for with regard to public holidays;  
  
and
- c. whilst, during the adjudication process, the contracting authority carried out a *prima facie* analysis, yet it was up to the employer to observe labour legislation because there were a number of variables at play, for example commercial risks and economies of scale.

Dr Delia put forward the following arguments:-

- i. the workings undertaken by the contracting authority took into account the wages of an employee as if that employee was on secondment with the contracting authority by dividing the annual wages of €9,556.35 by 52 weeks and by 40 hours giving an hourly rate of €4.59 thus excluding vacation leave and public holidays which, in the computation of the hourly rate, one had to take them into account since the contractor would have to provide a substitute whenever that employee would be on vacation leave;
- ii. the contracting authority was requesting the hourly rate and not the services of an employee on secondment;
- iii. a cursory look at the 'Financial Schedule' one would note 6 offers ranging from €5.60 to €11.80 per hour and all 6 bidders were experienced firms providing security services;
- iv. it was not up to the contracting authority to go into the profit margin of the bidders but since one was dealing with public procurement then the minimum wage hourly rate established by law had to be respected;




- v. the items being contested were whether or not to include vacation leave and public holidays in the minimum wage hourly rate since the contracting authority considered only the annual cost of an employee on the minimum wage whereas his client's workings included also the cost of the employee's substitute whenever the employee would be on vacation leave or on public holidays especially once this contract called for a 24x7 services;
- vi. the call for tenders requested the hourly rate and not the secondment of employees;  
and
- vii. as far as public procurement was concerned, a public entity should not award a tender at a rate below that establish by law.

Dr Paul Farrugia pointed out that:-

- a. the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' but did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and his employees not between the bidder and the contracting authority;
- b. if a tenderer undertook to abide by labour regulations in the payment of wages to its employees then the tenderer was compliant according to the tender document;
- c. the rate offered by the bidder to the contracting authority had nothing to do with the bidding company's undertaking to pay its employees according to statutory rates as per Form 1 in Volume 1 Section 4;
- d. at no point did the tender document require the contracting authority to go into the details of the hourly rate payable by the tenderer to its employees;
- e. whilst the fact that one was taking 2011 as the basis year to arrive at the hourly rate was itself defective because this was a 3 year contract and the minimum wage could increase in the next 3 year period, yet no allowance was being made to cover such likely wage increases as the bidder was bound by the price offered;  
and
- f. such variables as future wage increases were risks taken by the bidder when submitting the company's offer which offer was binding for the duration of the contract period.

Dr Fenech pointed out that (a) it was very difficult to work out a rate as a benchmark for such a contract given the number of variables at play and (b) the various arguments put forward during the hearing were quite valid and could be included in the equation and that one could also make



an allowance for the number of days that an employee could be on sick leave or for other such entitlements during which, the contractor would have to provide a substitute.

Dr Delia on his part:-

- i. shared the concerns raised by the contracting authority but added that once the contracting authority or the Public Contracts Review Board detected from the very beginning that the hourly rates quoted by the bidders were in violation of labour laws, then they were entitled, or were even obliged, to take action at tender evaluation stage;
  - ii. amendments had recently been introduced so as to prevent 'employees' from being registered as self-employed unless they satisfy certain criteria;
- and
- iii. requested the Public Contracts Review Board to seek a confirmation from the Department of Industrial and Employment Relations, especially with regard to the inclusion of vacation leave and public holidays in the computation of the minimum hourly wage rate in connection with a 24x7 contract

The Chairman Public Contracts Review Board remarked that:-

- a. whilst in the past the Public Contracts Review Board had taken the stand in similar instances that it was the responsibility of the contractor to see to it that he observed labour legislation *vis-a-vis* the payment of wages to one's employees, with the Industrial and Employment Department exercising its supervisory role in that respect, yet, certain circumstances were emerging which necessitated a review of that stand so as to at least safeguard the minimum wage standard;
- and
- b. one should not eliminate the commercial risk taken by bidders but, then again, the tender document itself seemed to condition, to a certain extent, the commercial risk by linking it to the observance of labour legislation, namely the commercial risk should come into play with the departing point being the minimum wage standard;


At this point the Public Contracts Review Board conceded a few days for JF Security and Consultancy Services Ltd to obtain from the Industrial and Employment Relations Department a confirmation of the breakdown of the 2011 minimum wage hourly rate. At the point of drawing up this report no such confirmation was forthcoming from JF Security and Consultancy Services Ltd.

Dr Paul Farrugia expressed his objection to the provision of additional documentation at appeal stage because at that stage one had to review what had already been submitted by the bidders, which evidence was at the disposal of the adjudicating board during the evaluation process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 1<sup>st</sup> March 2012 and also through their verbal submissions presented during the hearing held on the 21<sup>st</sup> May, 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 23<sup>rd</sup> March 2012, the Department of Contracts had informed the appellant company that (1) its offer was not successful because it was not the cheapest offer and (2) the tender was recommended for award to Kavallier Security Services Ltd as the cheapest priced offer satisfying the administrative and technical criteria, (b) it is the appellant company's contention that of all the tenderers participating in this tendering process, its offer was the cheapest permissible at law, (c) para 3 of Form 1 'Statement on Conditions of Employment' of Volume 1 Section 4 (page 21 of the tender document) stated that "*MCAST reserves the right not to award the bid to the cheapest tenderer if, after a verification exercise, it transpires that the hourly rate proposed to be paid by the bidder to its employees either is less than the minimum wage when including in it the payment for pro rata benefits and entitlements or the hourly basic rate does not include payment for pro rata benefits and entitlements*", (d) it was correct that the recommended offer of €5.90 and the cheapest offer of €5.60 were both cheaper than the appellant company's offer of €6.31 but it was equally correct to declare that those offers were below the minimum hourly rate established by legislation, (e) whilst it was correct to state that it was the responsibility of the tenderer to ensure that labour legislation was adhered to as per tenderer's statement at Form 1, Volume 1, Section 4 (page 21), yet, if it would result to the contracting authority that the quoted hourly rates did not cover the minimum requirements for the payment of wages to employees then the contracting authority reserved the right to reject those offers, (f) one had to establish the minimum hourly rate according to regulations applicable for 2011 - the closing date of this call for tenders was December 2011 - which amounted to €5.94, (g) the comparable applicable hourly minimum rate for 2012 was €5.19 and, including VAT, €6.12, (h) the workings undertaken by the contracting authority took into account the wages of an employee as if that employee was on secondment with the contracting authority by dividing the annual wages of €9,556.35 by 52 weeks and by 40 hours giving an hourly rate of €4.59 thus excluding vacation leave and public holidays which, in the computation of the hourly rate, one had to take them into account since the contractor would have to provide a substitute whenever that employee would be on vacation leave, (i) the contracting authority was requesting the hourly rate and not the services of an employee on secondment, (j) a cursory look at the 'Financial Schedule' one would note 6 offers ranging from €5.60 to €11.80 per hour and all 6 bidders were experienced firms providing security services, (k) it was not up to the contracting authority to go into the profit margin of the bidders but since one was dealing with public procurement then the minimum wage hourly rate established by law had to be respected, (l) the items being contested were whether or not to include vacation leave and public holidays in the minimum wage hourly rate since the contracting authority considered only the annual cost of an employee on the minimum wage whereas the appellant company's workings included also the cost of the employee's substitute whenever the employee would be on vacation leave or on public holidays especially once this contract called for a 24x7 services, (m) the call for tenders requested the hourly rate and not the secondment of employees and (n) as far



as public procurement was concerned, a public entity should not award a tender at a rate below that established by law;

- having considered the contracting authority's representatives' reference to the fact that (a) one had to keep in view a number of variables in the computation of the hourly rate, e.g. the engagement of full-timers or part-timers, sub-contracting and the like, (b) the contracting authority deemed that the responsibility to ensure that employees were paid their wages according to legislation rested with the employer and not with the contracting authority and the public entity that was charged with that supervision was the Department of Industrial and Employment Relations, (c) the contracting authority would, however, terminate the contract should it result to it that the contractor was not meeting the legal obligations towards the employees in the payment of wages – Form 1 at page 21, (d) the appellant company was not correct to state that his client's offer at €6.31 was the cheapest offer allowed by regulations, (e) on the basis of the 2012 minimum wage, which included the annual bonuses and NI, the resulting *pro rata* minimum hourly rate was €4.95, and, as a consequence, the recommended offer of €5.90 was above the minimum permissible by legislation, (f) the workings of the appellant company basically matched those of the contracting authority except for the inclusion of public holidays and vacation leave, (g) with regard to vacation leave that was already included in the basic rate whereas one had to see what the pertinent legal notice provided for with regard to public holidays, (h) whilst, during the adjudication process, the contracting authority carried out a *prima facie* analysis, yet it was up to the employer to observe labour legislation because there were a number of variables at play, for example commercial risks and economies of scale, (i) once the contracting authority or the Public Contracts Review Board detected from the very beginning that the hourly rates quoted by the bidders were in violation of labour laws, then they were entitled, or were even obliged, to take action at tender evaluation stage and (j) amendments had recently been introduced so as to prevent 'employees' from being registered as self-employed unless they satisfy certain criteria;
- having considered the recommended tenderer's representatives' reference to the fact that (a) at appeal stage one had to stick to the documentation which was available to the adjudicating board and the provision of fresh documentation was inadmissible at that stage, (b) in its letter of objection the appellant company simply declared that its offer was not compliant but did not indicate in which manner the recommended offer of €5.90 was not compliant, (c) the adjudicating board based its workings on the 2012 minimum wage whereas the basis year should have been 2011, which would have been more favourable to the recommended tenderer's case, (d) the adjudicating board went beyond its call of duty in going into these calculations, (e) the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' but did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and his employees not between the bidder and the contracting authority, (f) if a tenderer undertook to abide by labour regulations in the payment of wages to its employees then the tenderer was compliant according to the tender document, (g) the rate offered by the bidder to the contracting authority had nothing to do with the bidding company's undertaking to pay its employees according to statutory rates as per Form 1 in Volume 1 Section 4, (h) at no point did the tender document require the contracting authority to go into the details of the hourly rate payable by the tenderer to its employees, (i) whilst the fact that one was taking 2011 as the basis year to arrive at the hourly rate was itself defective because



this was a 3 year contract and the minimum wage could increase in the next 3 year period, yet no allowance was being made to cover such likely wage increases as the bidder was bound by the price offered, (j) such variables as future wage increases were risks taken by the bidder when submitting the company's offer which offer was binding for the duration of the contract period and (k) one could not but express one's objection to the provision of additional documentation at appeal stage because at that stage one had to review what had already been submitted by the bidders, which evidence was at the disposal of the adjudicating board during the evaluation process,


reached the following conclusions, namely:

1. The Public Contracts Review Board opines that whilst one should not eliminate the commercial risk taken by bidders, yet, the tender document itself seemed to condition, to a certain extent, the commercial risk by linking it to the observance of labour legislation and, as a consequence, the commercial risk should come into play with the departing point being the minimum wage standard. This Board contends that the responsibility to ensure that employees were paid their wages according to legislation rested with the employer and not with the contracting authority and the public entity that was charged with that supervision was the Department of Industrial and Employment Relations.
2. The Public Contracts Review Board agrees with the argument raised by the recommended tenderer, namely that the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' but did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and his employees not between the bidder and the contracting authority where, *inter alia*, the terms submitted by a tenderer could include other variables such as risks and economies of scale.
3. This Board also agrees with the fact that if a tenderer undertook to abide by labour regulations in the payment of wages to its employees then the tenderer was compliant according to the tender document.
4. This Board acknowledges the fact that at no point did the tender document require the contracting authority to go into the details of the hourly rate payable by the tenderer to its employees.

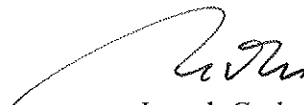
In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Joseph Croker  
Member

4<sup>th</sup> June 2012