

PUBLIC CONTRACTS REVIEW BOARD

Case No. 951 – MGOZ T 1/2016: Tender for the Provision of Security Services at the Cittadella Visitors' Centre and at other Possible Sites at the Cittadella, Victoria, Gozo.

The Tender was published on the 19th February 2016. The closing date was on the 17th March 2016. The estimated value of the Tender is €87,792 (Exclusive of VAT).

Six (6) bidders had made offers for this Tender.

On the 4th April 2016 Signal 8 Security Services Malta Limited filed an Objection against the decision of the Contracting Authority finding its Tender non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 5th July 2016 to discuss the Objection.

Present for the hearing were:

Signal 8 Security Services Malta Limited:

Mr Joseph John Grech	Representative
Dr Keith Borg	Legal Representative

Executive Security Services Limited:

No representatives present

JF Security & Consultancy Limited:

No representatives present

Kerber Securities Limited:

Mr Stefan Axisa	Representative
Mr Clayton Bartolo	Representative

Ministry for Gozo:

Mr John Cremona	Chairperson Evaluation Board
Ms Amanda Cardona	Secretary Evaluation Board
Mr Philip Mifsud	Member Evaluation Board
Mr Joseph Portelli	Representative
Dr Tatiane Scicluna Cassar	Legal Representative

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

Dr Keith Borg on behalf of the Appellant asked for the testimony of Ms Carmen Ogilvie Galea to be heard first.

Ms Carmen Ogilvie Galea, ID No 117394M, the Director of Corporate Services at the Ministry for Gozo, under oath testified that after the award was published Mr Grech from Signal 8 Security Services Malta phoned her to claim that a mistake had been made in disqualifying Appellant's Tender since the rates quoted by the latter were according to the minimum allowed by law.

Ms Ogilvie Galea had checked and found that the rates for Sundays and Public Holidays as adjudicated were more advantageous than those allowed by law. The witness asked the caller why the matter was not raised before since if this had been done before she could have stopped the Tender and re-issued it according to the wage regulation order and not according to the Government Circular.

The present Tender was the first one involving the provision of services during Sundays and public holidays. The rates as awarded did not go against any law. The Appellant's offer was more advantageous for Sundays and Public Holidays. The Tender had fixed a minimum of €14.20 per hour for Sundays and public holidays and this amount was mandatory for the Tender.

Signal 8 Security Services Malta Ltd had offered the same rate for Sundays and public holidays as weekdays as per wage regulation order. Had the Appellants raised the matter pre-contractually maybe the Tender would have been amended. As it is the Tender as issued did not go against any law but was more advantageous to employees employed by the Tenderers.

The Chairman explained that once the Tender demanded a rate payable to employees on Sundays and holidays at €14.20 then that was the amount that the contractor had to pay his employees and the Contracting Authority should ascertain that this was followed.

Mr Joseph John Grech on behalf of the Appellant submitted that the Financial Bid Form was the last form to be filled when Tendering and there was no time to ask for clarifications. The Tender Document had listed a schedule of shifts and this according to the Wage Regulation Order for Security employees are to be paid at €5.98 per hour including Sundays and public holidays.

Nowhere does the Tender Document state that employers are bound to pay €14.20 to their employees. He insists that the rate will advantage the contractor.

Dr Keith Borg for Signal 8 Security Services Malta Ltd contended that the Contracting Authority could not declare his client's Tender to be financially non-compliant since it was not. The Wage Regulation Order For Security Services was followed when offering the rates.

Once the law was followed, the Appellant's Tender cannot be deemed to be financially non-compliant. The matter has now been rectified and future Tenders will reflect the regulation order circulars for security services. The rate of €8.22 takes into consideration the fact that

security guards work on a shift bases day and night. He insisted that his client cannot be declared to be non-compliant. It was the Tender Document that was non-compliant with the law.

Dr Tatiane Scicluna Cassar on behalf of the Contracting Authority submitted that the Tender was in order and that the Tender was not in breach of any law or regulation. The law is broken if a lower rate is accepted not if a more preferential rate is. The Tenderers had to clearly comply with the Tender specifications. The Evaluation Board had to reject the Appellant's Tender because it was not compliant with the Tender requirements. No precedent was created by this Tender's specifications, and the Appellant could have asked for a clarification before submitting the Tender.

Dr Keith Borg for the Appellant reiterated that his clients had ignored the Tender conditions because he preferred to abide and follow the security services wage regulation order.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 4 April 2016 and also through their verbal submissions during the Public Hearing held on 5 July 2016, and had objected to the decision taken by the Pertinent Authority, in that:

- a) Signal 8 Security Services Malta Ltd's main contention is that this offer was discarded due to the fact that the latter had quoted a rate in line with the Wage Regulation Order for security employees but which was lower than that stipulated in the Tender Document for Sundays and Public Holidays. In this regard, the Appellants are maintaining that their offer could not be considered as financially non-compliant;**

Having considered the Contracting Authority's "*Letter of Reply*" dated 24 March 2016 and also their verbal submissions during the Public Hearing held on 5 July 2016, in that:

- a) The Contracting Authority maintains that the conditions laid down in the Tender Document with regards to the Wage Rate to be applicable for Sundays and Public Holidays was in order and legal. In this regard, Signal 8 Security Services Malta Ltd did not abide by this Mandatory Request, so that this offer was found to be financially non-compliant, hence discarded.**

Reached the following conclusions:

- 1. With regards to the Appellant's Grievance, this Board after having examined all the relative documentation and submissions made by all parties concerned, would like to justifiably opine that the Appellant's Grievance should be treated under two main headings, namely, the Wage Regulation Order/Government Circular and the Conditions laid out in the Tender Document, as follows:**

- i) Wage Regulation Order/Government Circular**

This Board credibly notes that the fact that Signal 8 Security Services Malta Ltd ignored the dictated wage and quoted the same in accordance with the Wage Regulation Order/Government Circular, does not in any particular way justify the non-adherence to a Legal Mandatory Condition in a Tender Document.

Both the quoted Wage Regulation Order and the Government Circular impose a Minimum Wage Rate and not a dictated rate, as long as this does not fall below the minimum rates. The conditions laid out with regards to the latter which is to be payable on Sundays and Public Holidays are valid and legal.

In this regard, this Board credibly notes that the Appellant did not adhere to what was legally dictated in the Tender Document and does not uphold the Appellant's Grievance.

ii) Conditions Laid Out in a Tender Document

With regards to this concept, this Board would like to first of all acknowledge the fact that the hourly rate of € 14.20 is not illegal. The Appellant Company, if in doubt, had the remedy of filing a “Pre-

Contractual Concern” wherein the arguments submitted before this Board could have been treated in that respect.

It is this Board’s opinion that the Appellant’s argument that “*Since the Financial Form is the Last Document to be filled in, there was not enough time to enquire, if in doubt*” is totally not credible. In this context, this Board strongly maintains that it is the onus of the prospective bidder to ensure that prior to a submission of the Tender Document, the Appellant must ensure that all conditions as stated in the Tender Document have been duly compiled with.

If a situation arises wherein, the Bidder is somewhat doubtful about certain conditions, he has the remedy of requesting clarifications and if he is still not convinced or satisfied, he can file a Pre-Contractual Remedy. This Board notes that none of these remedies were availed for by the Appellants and therefore, does not uphold the latter’s contention in this regard.

In view of the above, this Board finds against Signal 8 Security Services Malta Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

13 July 2016