

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 997 – MCST/67/2015/R – Call for Tenders for the Provision of Security Services at Esplora Science Centre, Kalkara (Re-Issue)**

The Publication Date of the Call for Tenders was 27 October 2015 whilst the Closing Date for Call of Tenders was 10 November 2015. The Estimated Value of the Tender, (Exclusive of VAT) was € 70,000.

Eight (8) Bidders have submitted offers for this Tender.

On 25 July 2016, Executive Security Services Ltd filed an Objection against the decision of the Malta Council for Science and Technology to award the Tender to JF Security & Consultancy Services Ltd, G4S Security Services (Malta) Ltd and Signal 8 Security Services Malta Ltd for the price of € 70,000 (Exclusive of VAT) against a deposit of € 400.

On 20 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Kerber Security Ltd**

Mr Ronald Axisa	Representative
Mr Stefan Axisa	Representative
Dr Robert Galea	Legal Representative

#### **Recommended Bidder 1 – JF Security & Consultancy Services Ltd**

No Representative was present on behalf of this company for this Public Hearing.

#### **Recommended Bidder 2 – G4S Security Services (Malta) Ltd**

No Representative was present on behalf of this company for this Public Hearing.

#### **Recommended Bidder 3 – Signal 8 Security Services Malta Ltd**

No Representative was present on behalf of this company for this Public Hearing.

#### **Contracting Authority – Malta Council for Science and Technology**

Ms Karen Micallef	Chairperson, Evaluation Board
Ms Sylvana Tirchett	Secretary, Evaluation Board
Mr Carmel Attard	Member, Evaluation Board
Mr Mauro Calleja	Member, Evaluation Board
Mr Mark Sciberras	Member, Evaluation Board
Mr Mario Borg	Representative
Ms Laura Sue Mallia	Representative

#### **Witness Present for This Public Hearing**

Mr Clayton Bartolo	Accountant
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Robert Galea, Legal Representative for Kerber Security Ltd asked this Board whether he could cross-examine a witness prior to his submissions for which the latter agreed.

At this point, Mr Clayton Bartolo, ID 252887 M was called to submit under oath. Mr Bartolo is an accountant and is also in charge of submitting Tenders on behalf of the Appellant.

Dr Anthony Cassar, Chairman Public Contracts Review Board, asked Mr Bartolo whether he was part of the Evaluation Board for which the witness has stated that his only involvement in this Tender was with Kerber Security Limited.

Dr Robert Galea, Legal Representative for the Appellants asked the witness how exactly he was involved with this Tender for which the latter replied that he met Kerber Security Limited's representatives to see what service were they going to offer for this Tender. The information was then compiled and submitted online on the e-Tendering system where the client was registered through the e-id system. This system allows the latter to submit the necessary documentation according to the Tender Structure determined by the Contracting Authority.

Dr Galea then asked what developments there were following the discussions and meetings which were held between Mr Bartolo and Kerber Security Limited's representative for which the witness replied that an acknowledgement was received on submission of offers and then one had to wait for the Evaluation Process to get under way.

After some time, continued Mr Clayton Bartolo, they received a Request for Clarification from the E-Tendering System wherein the Appellants were requested to clarify, "*how the rates stipulated in the breakdown of the Minimum Hourly Worker Costs for the year 2016 were arrived at your end*".

Dr Robert Galea then continued to refer to the same document where under the heading "*Status*" there was a sign of a flag. He then asked for a definition of this latter sign for which Mr Bartolo replied that in the E-Tendering System, there were two flag signs which signal whether the Clarification was answered or not. The flag which was being shown under the heading "*Status*" in this document meant that the Clarification was answered.

Dr Galea continued his examination by querying whether the deadline to submit the Clarification, namely noon on Tuesday 3 May 2016 was respected for which the witness confirmed. Dr Galea then asked when the submission was made. The witness replied that the submission was made prior to the deadline although he was not sure of the exact date. If the clarification was replied after the submission deadline, the e-Tendering system would show that the latter was being unanswered.

Dr Robert Galea, Legal Representative Kerber Security Ltd then asked what was needed and what was actually done in the Clarification for which Mr Clayton Bartolo asked that after submitting the Tender, they had realised that the 2016 amount according to the Circular 4/2015 issued by the Department of Contracts on 5 February 2015, the minimum amount per hour was € 8.22, which was the same amount submitted by the Appellants, hence being in line with the same Circular but there were some mistakes in the figures.

Dr Robert Galea then queried in what the rate of € 8.22 per hour consists for which the witness replied that this included the minimum workers' cost of Basic Wage, National Insurance, Leave, Sick Leave and Public Holidays. The mistake was in one of the categories where a lesser amount was allocated on one side and a greater amount was allocated on another category.

Mr Bartolo continued that once that the closing date for Tender Submission has passed; any option for Clarifications has to be given by the Contracting Authority. The Tender Document has given an option for Rectification but the Malta Council for Science and Technology decided not to use it.

Dr Anthony Cassar, Chairman Public Contracts Review Board, then asked the witness to confirm whether there were changes in some figures for which the witness insisted that the total rate submitted was of € 8.22/hour.

Dr Robert Galea, Legal Representative Kerber Security Limited then asked the witness to explain what the document which the Appellants submitted was. Mr Clayton Bartolo replied that when you submit the documents in the system, there is a window where you can explain what are you submitting and there is also a place where you can attach the submitted documentation. The attachment submitted was basic and self explanatory.

Dr Galea then asked why the Appellant was not in a position to make a rectification for which the witness replied that it was the Contracting Authority who can give you the chance to rectify against a € 50 payment.

Dr Anthony Cassar, Chairman Public Contracts Review Board asked whether in this case there was an opportunity to rectify the documents submitted. Mr Clayton Bartolo replied in the negative.

Ms Karen Micallef, Chairperson of the Evaluation Board said when evaluating the Tenders, it resulted that the figures presented by Kerber Security Limited were not in line with the Circular 4/2015 issued by the Department of Contracts. The Malta Council for Science and Technology asked then for a clarification but instead the Appellants have sent them a new document. The Evaluation Board felt that Kerber Security Limited had willingly made a rectification.

Mr Mario Borg on behalf of the Malta Council for Science and Technology said that at the stage where they were at the time and the Evaluation Board was uncertain on some issues, they can ask only for a clarification. The Bidder in question can only reply against an Administration Fee of € 50 which in this case was not paid.

Ms Karen Micallef, Chairperson of the Evaluation Board argued that even if the Appellants wanted to rectify, the latter had to ask permission from the Departmental Contracts' Committee.

Dr Robert Galea, Legal Representative, Kerber Security Limited continued then his cross-examination to the witness where this time he asked him to state what options he had when submitting the clarification requested. Mr Clayton Bartolo replied that he could not ask for a Rectification as it was only the Contracting Authority who can do so as per Tender Document. The witness also added that they were not requested to pay for submitting a Clarification.

Ms Karen Micallef, Chairperson of the Evaluation Board said that as Mr Bartolo confirmed, the reason why the Council sought a Clarification was since the breakdown of the amount did not respect the directives of the Circular 4/2015. The Clarification reply was submitted within the deadline but in it the Appellants invited the Evaluation Board to contact them if any further queries arose. The Evaluation Board insisted that they sought for a clarification not rectification.

Dr Robert Galea for Kerber Security Limited referred to the Reasoned Letter of Reply dated 9 September 2016 signed by Mr Mario Borg wherein it was stated that “*The Board never stated that Kerber Securities did not submit the necessary information in time*”. If one had to look at the documents B and C which were submitted with the Letter of Objection dated 28 July 2016, these were both dated 22 July 2016 and signed by Mr Mario Borg, both related this Tender, both stated that the bid was not compliant but the reasons given to his clients were not the same.

The first Letter stated that, “*The Bidder did not submit the clarification within the time requested*”, while the second one said that the documents were submitted in time and the print screen indicates that the Appellant had made his submissions by noon of 26 April 2016, which was the deadline for submissions. This already contradicts the argument that Kerber Security Limited submitted their offer late.

Dr Galea then added that as the witness said, the submission was made through the E-Tendering Process. In order for clarifications to be made, one had to be invited to do so from the Contracting Authority. Document A of the Letter of Objection filed by his clients say that the Recommended Bidders were awarded the Tender with the rate of € 8.22/hour which was the same rate which the Appellants gave both at first instance and after the clarification was done.

When making the clarification, the witness had clearly testified, continued Dr Galea, which indicated that the amount was not changed. It was impossible for a Bidder to submit an offer which went against the directives given in the Circular 04/2015 issued by the Department of Contracts.

Mr Mario Borg for the Malta Council for Science and Technology said that the Evaluation Board never doubted the rate submitted but that the Evaluation Board’s difficulty was on how the rate of € 8.22 was reached and that it was going against the Precarious Employment Regulations. The Evaluation Board has sought a Clarification in order for Kerber Security Limited to explain why they went against the directive.

Dr Robert Galea for Kerber Security Limited concluded by saying that this was an arithmetical and an administrative mistake and that the Tender Conditions were not violated.

At this stage, the Public Hearing was closed.

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**This Board,**

**Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 25 July 2016 and also their verbal submissions during the Public Hearing held on 20 October 2016 had objected to the decision taken by the Pertinent Authority, in that:**

- a) **Kerber Security Limited contends that it had submitted its offer which was in line with Circular 4/2015 issued by the Department of Contracts. In the breakdown of € 8.22 which is the Hourly Rate, there was a slight mistake in one of the sections of the price. However, the total of € 8.22 per hour was correct.**

**The Appellant was asked for a Clarification on this particular Breakdown and they replied by adjusting the wrong figure contained in the breakdown of € 8.22 per hour. In this regard, the Appellant maintains that since the Total of the Original Breakdown added up to € 8.22, which was correct, his offer should not have been discarded.**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 9 September 2016 and also their verbal submissions during the Public Hearing held on 20 October 2016, in that:**

**a) The Malta Council for Science and Technology maintains that when the Evaluation Board had asked for a Clarification on a particular figure in the Breakdown of the Hourly Rate of € 8.22 per hour, the Appellant amended/rectified the figure. This was not a reply to the Clarification but a Rectification, the latter of which is not permissible.**

**Reached the following conclusions:**

- 1. With regards to the Reply given by Kerber to the Clarification made by the Contracting Authority, this Board opines that, the figure of € 8.22 hourly rate had to be broken down into National Insurance, Leave, Sick Leave and Public Holidays.**

**The mistake which was made, was in one of these categories wherein in one of the Categories was shown to be less than the minimum as dictated in Contracts Circular 4/2015.**

**A clarification is made on the actual submissions of a Particular Tender and this Board opines that since the original breakdown was not in conformity with Contracts Circular 4/2015 any reply to the Clarification made should not constitute an**

**Amendment/Rectification to the original submitted figure. In this regard, this Board does not uphold the Appellant's Contention that since the addition of the broken down categories was correct in arriving at the Total of € 8.22; such a minor mistake would not justify the discarding of his offer.**

**2. However this Board would respectfully refer to “*Procurement Policy Note 25*” and “*Circular 6/2016*” both issued by the Department of Contracts. This Board opines that, in the present case, these policies/circular should be examined, as this same Board justifiably feels that they should apply to this Appeal, as follows:**

**i) Procurement Policy Note 25**

**The Procurement Policy Note 25 informs all Contracting Authorities that the priorities and weighting of a Tender depends on the type of services/works being offered.**

**It is to guide the Contracting Authorities on issues relating to precarious working conditions by tackling contracts in a more holistic manner. In other words, the price factor is not the most important issue in the weighting and/or award of the Tender.**

**Through this guideline, the Authority may establish the best “Value for Money” policy by optimising a combination between cost related and non-cost related criteria.**

**This Board notes that these guidelines were effective from 2 May 2016, whilst the publication date of the Tender was 27 October 2015 with a closing date of 10 November 2015. However, the Publication Date of the Notice of Award was 22 July 2016.**

**This Board opines that since the contents of this Procurement Notice were known on 25 April 2016 and the Tender Document was issued well before that date (27 October 2015), the contents which would have established the Award Criteria could not be included in the Tender issued.**

**In this regard, this Board opines that the Malta Council for Science and Technology could not have included the instructions as per Procurement Policy Note 25.**

**ii) Contracts Circular 06/2016**

**This Circular specifies that with regards to Contracts relating to Cleaning Services, Care Worker Services, Clerical Workers and Security Services; such contracts shall not be for a period of less than one year. In this particular instance, the Contracting Authority acted within these instructions.**

**The above mentioned Circular also states that where fully compliant operators bid with exactly the same prices for the same Contract and the latter is subdivided between a number of operators, apart from this being non permissible, the Price Factor will not be the sole criterion for award.**

**At the same instance, where such conditions arise, the policies which may be adopted are described clearly in Procurement Policy Note 25. This means that there exists a correlation between the Note and Contracts' Circular 6/2016. In this particular case, the latter was to be applied due to the fact that there was ample time for the Evaluation Board to implement the directive of the Circular due to the following facts:**

<b>Date</b>	<b>Details</b>
10-Nov-15	Opening of the Tenders

15-Feb-16	1st Meeting of the Evaluation Board
08-Mar-16	2nd Meeting of the Evaluation Board
30-May-16	3rd Meeting of the Evaluation Board
09-Jun-16	4th Meeting of the Evaluation Board
22-Jun-16	5th Meeting of the Evaluation Board

**The Evaluation Process took enough time for the Evaluation Board to be fully aware of the Circular 6/2016 issued by the Department of Contracts on 28 April 2016. In this regard, this Board justifiably opines that the Evaluation Board should have adopted the Circular's instructions whereby this particular Tender was to be evaluated in accordance with Contracts Circular 6/2016.**

**In this regard, the Circular is quite clear, in that such an award is not permissible and there was enough time for the Evaluation Board to abide by the Circular's instruction. This Board upholds the Appellant's Grievance.**

**In view of the above, this Board finds in favour of Executive Security Services Ltd and recommends that:**

**i) The Tender is to be re-issued to reflect the Guidelines and instructions in both the Procurement Policy 25 and the Contracts Circular 06/2016;**

**ii) The deposit paid by the Appellants should be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*24 October 2016*