

PUBLIC CONTRACTS REVIEW BOARD

Case 1041 – CT 2183/2016 – Tender for the Provision of Seaman Services to Work on Board Gozo Channel (Operations) Ltd Vessels (Framework Agreement)

The Publication Date of the Call for Tenders was 7 October 2016 whilst the Closing Date for Call of Tenders was 17 November 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 2,280,000.

Two (2) Bidders have submitted offers for this Tender.

On 24 March 2017, JF Services Ltd filed an Objection against the decision of Gozo Channels (Operations) Ltd to award the Tender to Ozo Gozo Ltd for the price of € 848,053.76 (Exclusive of VAT) against a deposit of € 17,100.

On 25 April 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – JF Services Ltd

Mr Matthew Formosa	Representative
Ms Martina Pace	Legal Trainee
Dr Matthew Paris	Legal Representative

Recommended Bidder – Ozo Gozo Ltd

Mr Fabio Muscat	Representative
Mr Mario Muscat	Representative
Dr Tonio Cachia	Legal Representative

Contracting Authority – Gozo Channel (Operations) Ltd

Ms Jacqueline Mizzi	Chairperson, Evaluation Board
Mr John Muscat	Member, Evaluation Board
Mr Mark Formosa	Member, Evaluation Board
Mr Anthony Mizzi	Member, Evaluation Board
Dr Georgine Schembri	Legal Representative

Department of Contracts

Ms Graziella Calleja	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Matthew Paris, the Legal Representative for JF Services Ltd opened by referring to the Letter of Rejection issued by the Department of Contracts on 14 March 2014 wherein *inter alia* it was stated that,

“Thank you for participating in the above-mentioned Tender procedure. However, I regret to inform you that the Tender submitted by your company was found to be administratively non-compliant as per Annex 1.

The criterion for award of this Tender was the cheapest priced offer satisfying the administrative and technical criteria.”

He then referred to Clause 9.1 of the Tender Document which *inter alia* stated that,

“The contract will be awarded to the Most Economically Advantageous Tender (MEAT) in accordance with the below.

Each Technical offer will be evaluated in accordance with the Award Criteria and the associated weighting as detailed in the Evaluation Grid of this Tender Document (Article 9.3). No other award criteria will be used. The award criteria will be examined in accordance with the requirements as indicated in the Technical Specifications.

The (MEAT) is established by weighing technical quality against price on a 60/40 basis respectively. This is done by multiplying:

- *the technical scores awarded to the offers by 0.60*
- *the financial scores awarded to the offers by 0.40”*

Dr Paris continued by saying that one is finding a discrepancy when comparing these two statements against each other. He continued by referring to Point 12 of the Reasoned Letter of Reply issued by the Department of Contracts and Gozo Channel (Operations) Ltd dated 3 April 2017 which *inter alia* stated,

“The first argument raised by the Appellant in which there is an alleged change in the award criteria. The defendants humbly contend that the letter to unsuccessful contains a mistake....”

From this statement the Contracting Authority is recognising the fact that there was a discrepancy. JF Services Ltd objected to the Letter of Rejection issued by the latter which said that the Tender was awarded to the cheapest compliant Bidder. According to the Electronic Public Procurement System the mechanism with which this Tender was awarded was according to the best price-quality ration.

The Appellants continued to refer to the Reasoned Letter of Reply dated 3 April 2017, this time to point 13 which *inter alia* stated that,

“...in order to extinguish the Objector's claim on this merit, the reference to Best Quality Ratio in the E-Portal for E-Tendering is just another name for Most Economic Advantageous Criteria.”

Dr Matthew Paris did not agree with this statement but also referred to a study made by the European Commission which said that the best price-quality ratio was quality divided by price. The formula indicated on Page 10 of the Tender Document was a completely different one.

JF Services Ltd was arguing that there were three criteria for award:

- a) The Most Economic Advantageous Tender;
- b) The Cheapest Compliant;
- c) The Best Price-Quality Ratio

The Appellants' Legal Representative referred also to previous cases with similar grounds of Objection decided by the Public Contracts Review Board which decided to cancel the Tender since there were similar ambiguities which led to uncertainty and which went against the spirit of the Public Procurement Regulations.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that the Award Criteria for this Tender was the Most Economic Advantageous Tender one. This Tender was issued under the Public Procurement Regulations which came in effect on 1 June 2010 and the nomenclature on the Electronic Public Procurement System was found to be different since it had to satisfy the new Public Procurement Regulations which came in effect on 28 October 2016. The rules imposed for this Tender were the MEAT ones at the end of the day.

The Contracting Authority continued by saying that the Public Contracts Review Board can refer to the Evaluation Report where it can find that all workings and Evaluations can be done according to what was written in the Tender Document. It was true that the Letter of Rejection issued by the Department of Contracts on 14 March 2017 had the word "*cheapest*" included in it and Dr Mizzi admitted that this was a mistake. He requested the Public Contracts Review Board to pronounce itself on the matter by saying that this was a mistake while reiterating that neither Gozo Channel Ltd nor the Department of Contracts did anything to vary the goal posts.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Evaluation was made through the MEAT criteria for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied in the affirmative.

Dr Matthew Paris, the Legal Representative for JF Services Ltd appreciated the admission made by Dr Mizzi regarding the wording mistake but disagreed with him on two issues. Firstly, the procedure in itself was being prejudiced. It was mandatory that anyone who does not respect the procedure was to be eliminated from the Award according to the Public Procurement Regulation.

In this case, there were three elements which led to misunderstandings. Dr Paris did not exclude the fact that the Evaluation was made with the MEAT criteria but there were doubts which came out from the same documents which should lead to the cancellation of the Tender. The Public Procurement Regulations was enforced to remove any similar doubts which one might have.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts stated that the mistake was only made in the Letter of Rejection issued to JF Services Ltd. The other Letters were issued correctly.

Dr Georgine Schembri, the Legal Representative for Gozo Channel (Operations) Ltd added that one has to see what interest does the Appellant have to raise this issue once he was not disqualified for this matter. Since JF Services Ltd was still going to be disqualified anyway, they did not have any juridical interest to raise this point of lack of procedure since he was not affected from this matter.

Dr Matthew Paris, the Legal Representative for Gozo Channel (Operations) Ltd continued submitting that their Second Grievance was the failure to disclose material information. This was a very important point for them since they were going to discuss the substance of their Appeal. Here the discussion centred on the rates which the Bidder was obliged to submit in this Tender.

Bill A of the Appellant's offer showed that the hourly rate offered between Mondays and Saturdays was of € 9.72/hour. Bill B which was the rate offered for Public Holidays was € 13.26. Bill C, the hourly rates for Sundays which also included the overtime was € 16.79 while Bill D, the overtime rate for Mondays till Saturdays excluding Public Holidays was of € 10.61. Here one has four different rates which should relate between one another.

The Appellants continued by saying that the rates which they offered were in line with the Wage Regulation Order and the related Circulars issued by the Department of Contracts. JF Services Ltd were surprised to learn, in the Letter of Rejection issued on 14 March 2017 by the Department of Contracts, about an agreement which there was between the Contracting Authority and the Department of Industrial Employment Relations which, as per Annex 1 of the same, *inter alia* stated that,

“The rate of € 9.72 was agreed by DIER as the minimum rate to be applied for this type of work.”

Dr Paris continued by saying that it was only then that his clients were aware of this agreement as the Tender Document did not explain it. If Gozo Channel (Operations) Ltd was in possession of this information and had an agreement with another Regulatory Entity, they were obliged to indicate it in the Tender Document and not in the Letter of Rejection.

The Appellant's Legal Representative argued that this agreement was not even mentioned in the Reasoned Letter of Reply issued by the Department of Contracts and Gozo Channel (Operations) Ltd on 3 April 2017 which on Point 21, *inter alia* stated that,

“The defendants would also like to reiterate that the default rate akin to the “Minimum Hourly Workers' Cost” Form is the basic rate, being that stipulated at € 9.72 in the Financial Bid Form.”

This information was given to the Appellants when it was too late and it is also because of this reason that the Tender had to be cancelled.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that the Financial Offer was clearly indicating that the offer should not be less than € 9.72 per hour.

Dr Matthew Paris, on behalf of JF Security Ltd, replied that Article 38 (1) of the Public Procurement Regulations state that Tenders issued shall be clear and without any form of ambiguity. He agreed with what the Chairman of the Public Contracts Review Board was saying but added that all four bills had the same level and strength. The base rate offered must be related to everything.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board questioned whether there was the need of a base rate at this point in time.

Dr Matthew Paris, the Legal Representative for JF Security Ltd replied that if one had to look at the Tender and at their Financial Offer, the rate indicated was of € 9.72 per hour. His clients did what was requested from them by both the Tender Document and the Department of Contracts. The Appellants added that on 12 December 2016, they received a letter from Gozo Channels (Operations) Ltd which *inter alia* stated that,

“The Evaluation Committee noted the following shortcomings with regard to your submission:

Minimum Hourly Workers’ Cost Form. Kindly re-submit form to be in line with hourly workers figure for year 2016 as indicated with the Financial Offer Form.”

JF Security Ltd replied with another Letter on 19 December 2016 where *inter alia* they have wrote,

“Furthermore, the Financial Offer Form has four different Bills identified as A, B, C, D whereby, we were required to present different rates for the respective Bill, which, Bills fail to provide a rate with which we would arrive at an identical basic rate.”

In this Letter, the Appellants were asking for which rate the Contracting Authority was referring to. In return, the latter sent the Letter of Rejection on 14 March 2017.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that there was no reply from the Appellants to the first Letter.

Dr Matthew Paris, the Legal Representative for the Appellants replied that his clients have submitted a compliant bid. From then, they have received a request for Rectification for which the Appellants asked for which Tender they were referring to.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board then asked whether there was a change in the Clarification Period for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that the Clarification Period was for 5 working days but there was a weekend in between.

Dr Matthew Paris, for JF Security Ltd, argued that the request made by the Contracting Authority was not clear since there was no relationship between the rates and their request was in line with the Public Procurement Regulations since the Department of Contracts said that when there was a request for Rectification, there can be an exchange of information but there shall be no attempt to influence the Evaluation Board.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts explained that Bills A till D were Financial Bid Forms which show the rates which the Bidder was charging Gozo Channels (Operations) Ltd. The issue was raised on the Minimum Hour

Workers Cost which was a declaration on how much will the Contractor be paying his employees.

The Minimum Hourly Work Rate had to agree with the Financial Bid Form and the Appellant had nothing restraining him from submitting a form for each Bill. The relationship between the four Bills was explained in the Tender Document. The € 9.72 per hour is a compounded rate which includes the Basic, National Insurance, Leave, Sick Leave etc. This is found as Item 3 in each Bill.

One had to understand that one of the rates was the Basic Rate. Bills B, C and D were exceptions such as overtime and Public Holidays. The Minimum Hour Workers Cost could have been entered for all the four Bills but most appropriately Bill A had to be entered since it is the Basic.

Dr Mizzi added also that he had a Witness from the Department of Industrial and Employment Relations who he wanted to testify to explain the relationship between the € 9.72 per hour, what was concerning Gozo Channel (Operations) Ltd and what agreement there was between the latter and the Department of Industrial and Employment Relations.

Dr Matthew Paris, the Legal Representative for JF Security Ltd said that his concern at this stage was the fact that Gozo Channel (Operations) Ltd was obliged to inform all Bidders about the agreement which was reached with the Department of Industrial and Employment Relations and he couldn't say anything about this agreement since he was unaware of it.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there was an agreement that the Basic Rate was more than € 6.92 per hour for which Ms Georgine Schembri, the Legal Representative for Gozo Channel (Operations) Ltd replied in the affirmative.

The Chairman of the Public Contracts Review Board then asked whether this rate was notified in the Tender Document for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that there was a part of it at the Special Conditions which the Witness was going to explain in his testimony and it was also shown in the Financial Bid Form.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, then asked where the Minimum Hourly Cost was to be found and whether the rate which had to be paid was in accordance with the relevant circulars issued by the Department of Contracts regarding the matter. Dr Christopher Mizzi, for the latter replied that this was a different service than the one mentioned in these circulars.

The Chairman of the Public Contracts Review Board then asked whether this agreement was specified in the Tender Document for which Dr Matthew Paris, the Legal Representative for JF Security, replied that they were only aware of this agreement in the Letter of Rejection. Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that he was mentioning the Circulars issued since in a way the latter has a connection since it was done to prevent any attempts of precarious employment.

Dr Christopher Mizzi on behalf of the Department of Contracts replied that the € 9.72 rate was mentioned in Bill A but the words "*Hourly Workers Cost*" were there in Items 3 and 5 for a reason.

Mr Carmel Esposito, a member of the Public Contracts Review Board pointed out that there was no formula present for this rate.

Dr Matthew Paris, the Legal Representative for JF Security Ltd said that there was a formula which specifies how much the Bidders will pay their employees. It was a form which the Appellants have filled up specifying that they were going to pay € 6.92 per hour.

At this point Mr Brandon Lee Magri, a Work Inspector within the Department of Industrial Relations holding ID Card Number 261293 M was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

At the end of the Witness' Testimony, Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Board can see the Minimum Hours Cost Form for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that that was a form which serves as a declaration of how much the Bidder was going to pay his employees.

Mr Matthew Formosa representing JF Services Ltd replied that they got the rates from the information found in the Wage Regulation Order.

Dr Matthew Paris, the Appellant's Legal Representative added that Gozo Channel (Operations) Ltd were obliged to pass the information on the agreement to the Bidders since it was impossible to make any calculations without being aware of the latter. The first and only time which they knew about this agreement was in Annex 1 of the Letter of Rejection issued on 14 March 2017.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the Financial Offer could be seen through the Hourly Workers Cost while asking whether the rate could not be less than € 9.72 or not.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that at one was not supposed to be working at a profit with the rate of € 9.72 per hour.

Dr Matthew Paris for JF Security Ltd countered that the whole question was that the Tender could not resume since an information which was deemed to be fundamental was not notified to all parties. When his clients requested this information, they were disqualified for the Tender by the Appellants.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that there was no reason why the Government of Malta was bound to charge an expensive rate. The fact that the Collective Agreement was not published shows that the € 9.72 per hour rate was not mentioned in the Financial Bid.

This rate should have been mentioned at each and every bill in the Minimum Hourly Workers Cost and in the Contracting Authority's opinion the rate of € 9.72 existed to respect rates which were already established.

Dr Georgine Schembri, the Legal Representative for Gozo Channel, submitted that if the Appellants had any doubts, they should have asked for a clarification which in this case they didn't. Dr Schembri then referred to the Letter of Rectification which they have sent on 12 December 2016 to JF Security which *inter alia* stated,

“Minimum Hourly Workers’ Cost Form. Kindly re-submit form to be in line with hourly workers figure for year 2016 as indicated with the Financial Offer Form”

The request here was a clear one. Dr Schembri continued by saying that she was not seeing what, on the other hand, Dr Matthew Paris was indicating that on the Letter which his clients sent on 19 December 2016 they were asking for which Bill the Contracting Authority was referring to. She referred to this letter which *inter alia* stated that,

“Furthermore, the Financial Offer Form has four different Bills identified as A, B, C, D whereby we were required to present different rates for the respective Bill, which, Bills fail to provide a rate with which we would arrive at an identical basic rate.”

Dr Matthew Paris, the Legal Representative for the Appellants countered by saying that the Letter which they wrote on 19 December 2016 indicated clearly the request which his clients made on which rate they were referring to.

Dr Georgine Schembri, the Legal Representative for the Contracting Authority replied that the Letter which her clients sent on 12 December 2016 indicates clearly that there were 4 forms and in each form one had to indicate its own figures. JF Security could have sent four rates, one for each bill.

Dr Matthew Paris for the Appellants replied that the Witness which Gozo Channel (Operations) Ltd and the Department of Contracts have brought could not find the amount which had to be indicated in the Minimum Hourly Rate since they did not pass the information which they were supposed to pass on. The Law requires Contracting Authorities to be crystal clear in their requirements.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked whether there were one or four cost forms for which Dr Christopher Mizzi, the Legal Representative for the Department of Contracts replied that there was one which was empty.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the purpose of this was.

Dr Matthew Paris, the Legal Representative for the Appellants replied that this was made to safeguard the employee and to declare that one was not paying less than the minimum amount. For the Contracting Authority’s argument to be valid 4 different forms had to be submitted and whoever did not do so had to be excluded.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Appellants had submitted four different forms for which Dr Christopher Mizzi, the Legal Representative of the Department of Contracts replied that the Evaluation Board was happy with the Minimum Hourly Work Form and its basic rate.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that mathematically this was not present.

Dr Christopher Mizzi for the Department of Contracts replied that the rate of € 9.72 comes out from the Basic, National Insurance, Sick Leave, Bonus etc whilst the rate of € 7.07 was the component from which the rate had to be built up.

Dr Tonio Cachia, the Legal Representative for Ozo Gozo Ltd submitted that from the information which he has both Bidders had the same information. From this information, the workings had to be made in a logical way. If the Public Contracts Review Board had to see the workings submitted by his clients, it would show how that there was enough information in the Tender Document.

If one had to work the base rate, one would arrive at all the other rates. Ozo Gozo Ltd had no more information than the other Bidders while JF Security had a Letter of Rectification which had to explain clearly what they had to further submit or not.

Dr Cachia added that this was not the first time that both Bidders had submitted Tenders to Gozo Channel (Operations) Ltd and that the Previous two Tenders were awarded to JF Security Ltd.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board referred to the Letter of Rectification sent by Gozo Channel (Operations) Ltd to JF Security Ltd on 12 December 2016 where *inter alia*, it was stated,

“Kindly re-submit form to be in line with hourly workers figure for year 2016 as indicated with the Financial Offer Form”.

This meant that the Bidders had to send four cost forms.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts concluded that if the Bidders submitted one form, which regarded the Basic Rate that would be enough. If the Appellants had any problem they could have submitted the four forms which was not the reason why the Evaluation Board disqualified JF Security Ltd.

At this stage, the Public Hearing was adjourned to Tuesday 9 May 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by JF Services Ltd (herein after referred to as the Appellant) on 24 March 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2183/2016 listed as Case No 1041 in the records of the Public Contracts Review Board,

awarded by Gozo Channel (Operations) Ltd (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Christopher Mizzi

Dr Georgine Schembri

Whereby, the Appellant contends that:

- a) **From correspondence dated 14 March 2017, the Contracting Authority confirmed that the “Award Criteria” has been changed from “Meat” to the “Cheapest Compliant Bid”.**

In this regard, the Appellant insists that the Contracting Authority went against the spirit of the Public Procurement Regulations by creating such ambiguities;

- b) **JF Security Ltd refers to his main contention, in that, Gozo Channel (Operations) Ltd is alleging that the Appellants failed to disclose material information.**

In this regard, the Appellant refers to the “*Minimum Hourly Workers*” cost form and is insisting, that upon the request of a Clarification from the Contracting Authority, the latter did send the requested any information.

At the same instance, the Appellant maintains that he was not made aware of the existence of a Collective Agreement between the Contracting Authority and the Union of Seamen in so far as different minimum rates applicable under the said agreement.

c) In view of points a) and b) above, JF Security Ltd contend that either his offer is to be re-integrated in the Evaluation Process or else the Tender is to be cancelled. In either case, the Appellants are requesting that the deposit paid is to be refunded.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 3 April 2017 and its verbal submissions during the Public Hearing held on 25 April 2017, in that:

a) The “*Award Criteria*” as stated in the “*Letter of Rejection*” dated 14 March 2017 contained an error. Although it was stated that the “*Award Criteria*” was the “*Cheapest Compliant Bid*”, in actual fact,

the “Award Criteria” adopted was the Most Economic Advantageous Tender as stated in the Tender Document.

Although such a mistake is regretted, Gozo Channel (Operations) Ltd insists that it had no negative effect on the Evaluation Process.

- b) The Contracting Authority maintains that it had requested material information consisting of the “Minimum Hours Workers Cost” which the Contractor will be paying his employees. This information had to be submitted in the form of a breakdown to arrive at the dictated hourly rates, as shown in the Financial Offer.**

In this regard, Gozo Channel (Operations) Ltd contends that upon request of such information, the Appellant asked for more information rather than submitting the necessary form. At that stage, the Contracting Authority was also precluded from entering into discussion

This same Board also noted the Testimony of the witness namely, Mr Brandon Lee Magri duly summoned by Gozo Channel (Operations) Ltd.

This Board, after having treated the merits of this case, arrived at the following conclusions:

1. With regards to the Appellant's First Grievance, this Board after having examined the relevant documentation and heard the submissions of all the parties concerned, justifiably notes that Gozo Channels (Operations) Ltd admitted the inadvertent mistake in the "Letter of Rejection" dated 14 March 2017, wherein instead of quoting the "Award Criteria" as being that of the Most Economic Advantageous Tender, it was mistakenly quoted as the "Cheapest Fully Compliant Bid".

In this regard, this Board opines that such a mistaken reason given in the "Letter of Rejection" may have affected the Appellant's motive of objection. In this particular case, the main reason why JF Security's Bid was rejected referred to another issue which will be considered later on.

In this respect, this Board noted that the actual "Award Criteria" adopted by the Evaluation Board was the Most Economic Advantageous Tender as properly dictated in the Tender Document. This Board also notes that the mistaken quote referring to the "Award Criteria" in the "Letter of Rejection" did not affect the Evaluation process and each Bidder was treated on the same level playing field.

However, in this regard, this Board upholds the Appellant's First Grievance, in that in the "*Letter of Rejection*" which was sent to them, a change of "*Award Criteria*" was indicated, whilst in actual fact, was not the case.

2. With regards to JF Security Ltd's Second Grievance, which represents their major contention, namely to submit the material information requested through the letter issued by Gozo Channel (Operations) Ltd on 12 December 2016, the Appellant is claiming that he was not in a position to submit the information prior to the reply to his request for further information from the Contracting Authority.

This Board would like to, first and foremost, refer to the Rectification Notice dated 12 December 2016 sent by Gozo Channel (Operations) Ltd so as to establish what the requested information consisted of. The Contracting Authority requested the submission of the "*Minimum Hourly Workers Cost Form in line with hourly workers figure for the year 2016 as indicated with the Financial Offer form*".

On 19 December 2016, JF Security Ltd informed the Contracting Authority that they had applied Government Scale 19 as a baseline to

arrive at the rate which is to be included in the “*Minimum Hourly Workers Cost Form*”.

The “*Minimum Hourly Workers Cost Form*” consisted of a breakdown of the minimum wage which is to be paid to the Bidder’s Employees broken down into:

- a) **Basic Rate;**
- b) **National Insurance;**
- c) **Vacation Leave;**
- d) **Bonuses and Allowances;**
- e) **Public Holidays;**
- f) **Sick Leave**

These should have been represented in a form of declaration by the Bidder showing that they will pay such minimum rates to his employees.

The Rectification note sent by Gozo Channel (Operations) Ltd indicated that this form is to be in line with the Hourly Workers Figure for 2016 as shown in the “*Financial Offer Form*”. In this regard, this Board notes that the latter, under the Headings of

“Hourly Workers Cost” stated that the Minimum wage for the Seamen for 2016 shall not be less than € 9.72 per hour.

This means that the Contracting Authority, in its rectification note, referred to the minimum rate as indicated in the Financial Offer for 2016, so that the ***“Minimum Hourly Workers Cost Form”*** had to submit the composite of the Minimum Hourly Rate of € 9.72.

The fact that the latter minimum hourly rates was established and not the Minimum Wage as stipulated in the ***“Wage Regulation Order”*** or the Government Circular, does not change or alter the specific requisite and in this regard, during the submissions, it was credibly established that the dictated minimum rates were in accordance with a collective agreement, which this Board will not enter into. In this case, this Board finds that JF Security Ltd was made aware of what the minimum rate was, i.e. ***“Not less than € 9.72”***.

This Board also notes that on 19 December 2016, JF Security Ltd sent the requested form explaining as to how the ***“Minimum Hourly Rate”*** was computed. This was not in line with what was requested. The submitted ***“Minimum Hourly Workers Cost Form”*** indicated a figure way below the Minimum Hourly Workers Rate of € 9.72, as indicated and requested in the ***“Financial Offer Form”***.

In this regard, this Board opines that there were enough indications given by Gozo Channel (Operations) Ltd to guide the Appellant as to what minimum rates, this form related to. On the other hand, this Board notes that, if the Appellant had any doubt as to what base rate should be applicable to substantiate “*The Minimum Hourly Workers Cost*”, they had the opportunity to seek clarification, at Tendering Stage. In this context, this Board notes that JF Security Ltd did not avail themselves of such a remedy.

This Board would also point out that although the Rectification Note dated 12 December 2016 did indicate that the minimum rate must be in line with the Hourly Workers Figure for 2016, (as in the Financial Offer Form), a sort of “*Link Note*” should have been included in the “*Minimum Hourly Workers Costs*” form, indicating the Minimum Rate in line with that stipulated in the Financial Offer.

In this regard, this Board would justifiably expect more due consideration to be taken by the Tender compiler in order to ensure that any requested attached documentation which forms part of the Tender Document are clearly considered and linked to the appropriate requisites as dictated in the Tender Document.

In view of the above, this Board confirms the decision taken by Gozo Channel (Operations) Ltd and recommends that:

a) The Tendering Process is to be continued;

b) For Reasons which were considered above, the deposit paid by JF Security Ltd should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

2 May 2017