

PUBLIC CONTRACTS REVIEW BOARD

Case 1153 – CT 2146/2017 Tender for the Provision of Security Services on the Campuses of the University of Malta & Junior College & Other University Designated Sites

The publication date of the call for tenders was the 6th September 2017 whilst the closing date of the call for tenders was the 10th October 2017. The estimated value of the tender (exclusive of VAT) was € 648,205.

There were nine (9) bidders on this tender.

Executive Security Services filed an appeal on 16th March 2018 against the Contracting Authority's decision to reject the tender on the grounds that Appellant had failed to satisfy the criterion for the award. A deposit of € 3,241 was paid.

On 10th April 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant: Executive Security Services ltd

Dr Matthew Brincat	Legal Representative
Dr Melhino Mercieca	Legal Representative
Mr Stephen Ciangura	Representative

Recommended Bidder – Signal & Security Services Malta ltd

Dr Carlos Bugeja	Legal Representative
Mr Joseph Jovan Grech	Representative

Contracting Authority – University of Malta

Dr Oriella De Giovanni	Legal Representative
Mr Tonio Mallia	Chairman Evaluation Board
Mr Elton Baldacchino	Secretary Evaluation Board
Mr Joseph Camilleri	Member Evaluation Board
Mr Lawrence Gellel	Member Evaluation Board

Department of Contracts

Dr Christopher Mizzi	Legal Representative
Mr Jonathan Bugeja	Procurement Manager

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and asked them to make their submissions.

Dr Matthew Brincat, Legal Representative of Executive Security Services Ltd, said that his clients' appeal was based on three sections of the tender where they had been underscored by the Contracting Authority. These were the direct payments system, union membership and Health & Safety policy. In doing so the Contracting Authority had not followed precedent, had not displayed uniformity in scoring and had been inconsistent.

The Contracting Authority claimed that Appellant did not have a 'direct credit' system in place. Although not requested in the tender document his clients had submitted bank statements to confirm the point that payment to employees was being done by a bank to bank system. The statement showed that the mechanism was in place to transfer variable amounts through bank transfers from clients business account.

Dr Mizzi, Legal Representative of the Department of Contracts, said that was insufficient. What was requested was a system where transfers of funds were triggered by a bank not by the employer.

There followed a long argument between the parties as to the difference between credits triggered by a bank and those originated by the employer. When it was suggested that Appellant was using his personal bank account to pay employees, the Chairman of the Board asked Mr Stephen Ciangura to testify.

Mr Stephen Ciangura (104377M) testified on oath that he was a 99% shareholder in, and part of the management of the Company (Executive Security Services Ltd). He confirmed that the bank statement evidencing payments to employees was that of the Company and he was an authorised signatory.

Dr Mizzi said that this evidence did not affect the evaluation since what was required by the Contracting Authority was proof of direct credits.

The next point dealt with by Dr Brincat regarding freedom to join a trade union. He said that the bulk of employees had chosen a particular union but that there were no restrictions on joining other unions.

Dr Mizzi pointed out that this issue was simple. Appellant had failed to present the requested declaration that there was freedom to join a union and the document they had presented, dated August 2016, was not only out of date but failed to meet the requested criterion. This was reiterated by Mr Tonio Mallia, Chairman of the Evaluation Board.

The Chairman of the Board pointed out, however, that the Appellant had not stated that the employees were not given a choice.

On the question of the Health & Safety declaration, which was the third point raised by Appellant, their Legal Representative, Dr Melhino Mercieca stated that a Health & Safety Policy was specific to a contract and could not therefore be signed in advance. H & S rules were not standard but related to specific sites and could only be signed after the award of a contract.

Dr Mizzi stated that on this point the issue was that the document had not been signed as specified in the tender documents. On a general note one could not argue on the basis of the precedent of previous tenders. Each tender was different – there were different entities and different evaluators entitled to their subjective judgement.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by Executive Security Services Limited, (hereinafter referred to as the Appellant) on 16 March 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of reference CT 2146/2017 listed as Case No 1153 in the records of the Public Contracts Review Board, awarded by the University of Malta, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Matthew Brincat

Dr Melhino Mercieca

Appearing for the Contracting Authority: Dr Oriella De Giovanni

Appearing for the Department of Contracts: Dr Christopher Mizzi.

Whereby, the Appellant contends that:

- a) **Their offer was not awarded equitable marks during the evaluation process with regards to the “*Direct Credit*” system as submitted by the Appellants;**

- b) **The same grievance refers to the items “*Union Membership*” and “*Health and Safety Policy*”, as duly described in their submissions.**

The Board also noted the Contracting Authority’s “*Letter of Reply*” dated 8 April 2018 and its verbal submission during the Public Hearing held on 10 April 2018, in that:

- a) The University of Malta insists that the Appellant's submission did not include a representation of a "*Direct Credit*" system but rather bank transfers instigated by the Appellants to the Employees' Bank Accounts;**
- b) The Contracting Authority also maintains that Executive Security Services Limited failed to submit a declaration that their employees were free to join a union;**
- c) With regards to the Health and Safety Declaration, the document submitted by the Appellants was not signed.**

This same Board also noted the testimony of the witness which it had duly summoned, namely, Mr Stephen Ciangura, Director, Executive Security Services Limited.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned by this same

Board, opines that the contentions presented by the Appellants merit consideration as follows:

1. Direct Credit System

Executive Security Services Limited maintain that their submissions does conform with the requirements so dictated, yet on the other hand, the University of Malta insists that the Appellants' submission represented only instructions for bank transfers from the latter's bank account to the employees' accounts, the control of which lies at the discretion of the Appellants.

In this regard, this Board would respectfully point out that the purpose of the inclusion of a "*Direct Credit*" system in the Tender Dossier, is twofold namely,

- (i) To ensure that employees are not paid in cash;**

In this regard, this Board is in agreement with the fact that the employees should be paid through a payment direct from the Bank system so that apart from the issue of non-cash payment, trace of such payments can be easily monitored to safeguard the employee's working conditions.

(ii) To ensure that funds are triggered by a bank and not by the employer.

In this regard, the University of Malta insists that payments to employees through a direct credit system should be adopted so that such funds are triggered by a bank and not the employer.

Regarding this particular issue, this Board would respectfully point out that the “*Direct Credit*” system, with regards to wages and salaries consist of instructions being given to the bank, by the employer as to the amounts due to employees for each particular month.

Executive Security Services Limited's payment method consisted of instructions being given to the bank to pay its employees with the amount dictated by the employer. In this respect, this Board opines that both systems depend upon the employer's instruction/discretion as to the amount so payable, and both systems instruct the bank to make the necessary transfers of these amounts to employees' bank accounts. In both systems, which in the opinion of this Board, there exist no difference, except for the designation of the system itself, Both satisfy the objectives of the requisite so dictated in the Tender Dossier. In this regard, this Board notes that the Evaluation Committee could not distinguish whether the transfer of wages was made from the Appellant's account or from the personal account of the director, namely Mr Stephen Ciangura. However, in this respect, Mr Ciangura, confirmed to this Board under oath, that funds to be transferred to the employees' accounts are effected through the Company's account, (the employer's account) and not from his personal

account. In this respect, this Board upholds Executive Security Services Limited's first Grievance and opines that the marks awarded under "*employment conditions*" do not reflect objectively the Appellants' submissions.

2. Freedom of Employees to Join a Trade Union

With regards to the Appellants' Second Contention, in that the employees should be free to join a union of their choice, this Board would respectfully refer to the General Workers' Union letter dated 22 August 2016, wherein, it was confirmed that the majority of the Appellant's employees have joined the said union. At this stage of consideration, this Board notes that the majority of the employees agreed to join the General Workers Union and this reflects that the employees, out of their choice and without undue duress, voted to join the said union and at the same instance, no evidence or proof was presented to suggest otherwise. This Board would also refer to the confirmation issued by the same Union on 22 August 2016

wherein the latter confirmed such membership. The fact, that such confirmation is dated August 2016 does not imply, in anyway whatsoever, that as at the date of the Appellants' submissions, employees did not have the opportunity to join a union of their choice. At the same instance, through a confirmation dated 17 August 2017, the Union asserted that a collective agreement was concluded and this covered the period between 2017 and 2019.

This Board also took into consideration the fact that the majority of employees joined the General Workers' Union so that there existed a minority of workers who opted not to join, and, it is quite evident that all the employees had an option of whether to join or not the said union. At the same instance, this Board would refer to the University of Malta's reason why the Appellants were disqualified. This stated,

“Employees were not given a choice, but to enrol with the union currently having the majority of workers at the company”.

In this respect, this Board opines that such comment does not justifiably represent the actual situation, with regards to the freedom which the Appellants' employees enjoy to join a union of their own choice. At the same instance, this Board was not presented with credible evidence that the said employees were precluded from joining a union of their choice. In this regard, this Board upholds Executive Security Services Limited's Second Grievance and opines that the marks awarded to their offer, under the item "*Employment Conditions*", do not reflect the relatively deserved allocation.

3. Health and Safety

With regards to the Health and Safety issue, this Board notes that the documentation submitted by the Appellants described the safeguards and policy which the latter adopts with regards to such a requirement. At this stage of consideration, this

Board would respectfully refer to the Tenders' requirement, in that the Tender Dossier dictated the following:

“Health and safety resources, (Quality Assurance Assistance employed by the Contractor to ascertain a good/safe working environment)”

The reason given by the University of Malta for allocating low marks to the Appellants' offer, under this item, is that the document submitted by the latter was not signed.

In this respect, this Board would refer to the very objective of the ESPD in that, the latter replaces the requirement for economic operators to provide upfront evidence or certificates by allowing them to self-declare that they meet the relative criteria and at the same time, reducing the administrative burden on economic operators to provide up front evidence or certificates by allowing them to self-declare that they meet the relative criteria, and at the same time, reducing the

administrative burden on economic operators so that the small and medium sized enterprises can participate in Public Procurement.

At the same instance, the ESPD does not exclude the mandatory submission of all documentation and certificates which are required, after the award of the contract for procurement, to a successful Bidder.

This Board, has noted in detail, the submissions of Executive Security Services Limited and is comfortably convinced that, Appellants had submitted more than sufficient information with regards to their policy and adherence to Health and Safety Regulations and the fact that the documentation, was not signed, does not, in any substantial way, discredit the validity of adherence to such a requirement, as stipulated in the Tender Dossier.

In this particular case, this Board also took into consideration that this situation does not imply missing documentation but unsigned ones. At the same instance, this Board also takes into consideration that it is a norm, under the European Single Procurement Document Conditions, that original and signed certificates/confirmations are to be provided after the award of the contract, as long as mandatory signed declarations are not so requested in the Tender Document which in this case are not. In this regard, this Board upholds the Appellant's Third Contention on this issue and opines that the allotted marks to their offer, under Health and Safety do not reflect a true and fair assessment.

In view of the above, this Board:

- a) Upholds the contentions made by Executive Security Services Limited;**

**b) Does not uphold the decision taken by the University of Malta
in the award of the Tender;**

**c) Orders that Executive Security Services Limited's offer is to be
re-assessed after taking into consideration this Board's
recommendations;**

**d) Recommends that the deposit paid by the Appellant is to be
fully refunded.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

19th April 2018