

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1336 – GCOL T 04/2019 – Tender for the Provision of Service Desk Personnel to Gozo Channel (Operations) Ltd**

The publication date of the call for tenders was the 5th March 2019 whilst the closing date of the call for tenders was 26<sup>th</sup> March 2019. The estimated value of the tender (exclusive of VAT) was € 42,670.

On the 13<sup>th</sup> May 2019 Centrecom Ltd Malta filed an appeal against Gozo Channel (Operations) Ltd as the Contracting Authority contesting the decision to disqualify them as their bid was technically non-compliant and against the subsequent cancellation of the tender. A deposit of € 400 was paid.

There was one (1) bidder.

On 6<sup>th</sup> August 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Centrecom Ltd Malta**

Dr Adrian Mallia	Legal Representative
Dr Michael Carbone	Legal Representative
Ms Cristina Abela Misarios	Representative
Ms Maria Micallef	Representative

#### **Contracting Authority – Gozo Channel (Operations) Ltd**

Dr Georgine Schembri	Legal Representative
Mr John Muscat	Secretary Evaluation Committee
Mr Mario Saliba	Member Evaluation Committee
Ms Mary Ann Pace	Member Evaluation Committee
Ms Alessandra Haber	Member Evaluation Committee

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Adrian Mallia Legal Representative of Centrecom Ltd said that the reason why his clients bid had been rejected was the lack of a collective agreement at the work place and that there is no trade

union membership at Centrecom Ltd. Subsequent to the submission of the letter of appeal Gozo Channel have conceded that the collective agreement was not compulsory and this objection had been withdrawn.

This left the lack of trade union membership as the point of disagreement. All that the tender document sets out is to ensure that it was mandatory that there was freedom of the employees to join any trade union. Both local and European legal systems granted the fundamental right of freedom of association. Conversely there was, therefore, the right of the freedom not to associate. A tender cannot force a bidder to breach a constitutional right to enable him to comply with the terms of that tender. The European Court of Human Rights afforded protection against such an event as evidenced in Doc 1 tabled (Trade Union Rights). His client was right to maintain that it had met the tender criteria.

Dr Georgine Schembri Legal Representative of Gozo Channel (Operations) Ltd said that her clients required a declaration that employees were free to join a trade union. All Centrecom had submitted was a declaration that it had an internal representative board but on further verification it was found that this board was not even registered. This declaration does not assert that the employees had freedom to join a trade union.

Dr Mallia commented that Gozo Channel had for reasons of expediency changed their submission. Originally they claimed that there was no trade union membership. It is evident that the employees of Centrecom are fully aware of their rights.

The Chairman noted that the Case turned on the interpretation of the declaration of the tenderer. He then thanked the parties for their submissions and declared the hearing closed.

**This Board,**

**having noted this objection filed by Centrecom Limited (herein after referred to as the Appellants) on 13 May 2013, refers to the claims made by the same Appellants with regard to the cancellation of tender reference GCOL T 04/2019 listed as case no 1336 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants:**

**Dr Adrian Mallia**

**Appearing for the Contracting Authority: Dr Georgine Schembri**

**Whereby, the Appellants contended that:**

- a) Appellants' offer was discarded by the Authority due to the simple fact that it was alleged that, their offer did not submit the requested declaration that, there exists freedom among the employees to join any Trade Union. In this regard, Appellants insist that their declaration included the fact that their employees are made aware of their full rights in accordance with the Industrial Relations Act (Cap 452) which includes the right of freedom to join any Trade Union.**

**This Board also noted the contracting Authority's 'Letter of Reply' dated 23 May 2019 and its verbal submissions during the hearing held on 6 August 2019, in that:**

- a) The Authority maintains that Appellants' offer did not include a confirmation that their employees are free to join a Trade Union.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, opines that the issue that merits consideration is the interpretation of the declaration duly submitted by Appellants, with regards to employees' freedom to join a Trade Union.**

1. This Board would respectfully refer to page 13 of the technical specifications where one of the requisites stipulates as follows:

<i>“Trade Union membership (freedom of employees to Join any trade union) (Mandatory). If this is not available a score of ‘0’ shall be allotted and the bid shall be disqualified – but if available and conformant to the requirements, 100% shall be allotted.”</i>	3
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The above criterion is requesting proof that employees of the economic operator, are free to join any Trade Union. In this regard, this Board refers to Appellants submission wherein the opening sentence clearly states that:

*“Centrecom ensures that employees are aware of their full rights and obligations in accordance with the Employment and Industrial Relations Act (Cap 452) and subsidiary legislation issued thereunder”.*

The fact that a declaration has been submitted by Appellants, confirming that, employees are aware of their rights in accordance with the ‘Industrial Relations Act (Cap 452) is ample proof that the employees are fully aware that they are free to join a Union. However, from Appellants’ submission it seems that the employees, although they

**do not pertain to a particular union, opted to elect a representation consisting of a panel of three employees. Such representation is aware of the possibility of joining a Union, however, they opted for an inhouse elected panel to represent their rights and obligations.**

- 2. The Authority's contention with regard to Appellants' submission is that, the declaration itself did not mention specifically that Appellants' employees are free to join a Trade Union. In this respect it is being acknowledged by this Board, that the Evaluation Committee has to abide by the principle of self-limitation, yet, at the same instance, this Board would point out that, the tender document did not specify in what form such a documentation should be submitted so that, any submission is subject to interpretation. The Industrial Relations Act does include the rights of employees to join any Trade Union and in this respect, this Board noted that Appellants, in their submission, did state that the employees are aware of the Industrial Relations Act. In this regard, this Board opined that Appellants' submission does satisfy the tender requirements.**

**3. This Board would also point out that, the Evaluation Committee in this deliberation should have delved into the relevant clauses of the Industrial Relations Act pertaining to the freedom of employees to join a Union. Appellants, in their submission, did commence their declaration in this regard, by citing the said Act and the Act itself does mention the freedom to join any Trade Union, so that, once Appellants were aware of such an Act, then their submission satisfied the tender requirements.**

**In conclusion, this Board opines that:**

- a) The tender should not be cancelled for the reasons given by the Authority for the rejection of Appellants' offer,**
  
- b) Appellants' declaration with regards to freedom of their employees to join any Trade Union, is sufficient proof that Appellants' offer is compliant.**

**In view of the above, this Board:**

- i) Does not uphold the Contracting Authority's decision to cancel the tender,**

**ii) Appellants' offer should be reintegrated in the evaluation process,**

**iii) Directs that the deposit paid by Appellants be fully reimbursed.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A. Matrenza  
Member

*13 August 2019*