

PUBLIC CONTRACTS REVIEW BOARD

Case 1281 – MHAS/280/2018 – Tender for the Provision of Clerical Assistance within the Ministry for Home Affairs and National Security

The publication date of the call for tenders was the 16th October 2018 whilst the closing date of the call for tenders was 20th November 2018. The estimated value of the tender (exclusive of VAT) was € 247,104.

On the 8th February 2019 Kerber Security Ltd filed an appeal against the Ministry for Home Affairs and National Security as the Contracting Authority objecting that their bid was not successful as it did not meet the criteria for the award. A deposit of € 1,235 was paid.

There were four (4) bidders.

On 14th March 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Kerber Security Ltd

Dr Shaheryar Ghaznavi	Legal Representative
Ms Lindsey Axisa	Representative
Mr Paul Axisa	Representative

Recommended Bidder – Signal 8 Security Services (Malta) Ltd

Dr Carlos Bugeja	Legal Representative
Mr John Joseph Grech	Representative

Contracting Authority – Ministry for Home Affairs and National Security

Dr Abigail Caruana Vella	Legal Representative
Ms Stephanie Farrugia	Chairperson Evaluation Committee
Ms Doreen Seracino	Member Evaluation Committee

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

Dr Shaheryar Ghaznavi Legal Representative for Kerber Security Ltd stated that there were several grounds for appealing the decision of the evaluation committee and he sought to call witnesses to support his claim.

Ms Stephanie Farrugia (18083M) called as a witness by the Appellants testified on oath that she was the Chairperson of the evaluation committee. She said that the hourly wage rate used in the evaluation was that set down in the tender document and was in line with a Government Circular.

Dr Franco Agius (496577M) called as a witness by the Contracting Authority testified on oath that he is an Assistant Director at the Department of Contracts. He stated that on occasions when there were changes in the budget in the interim period following issue of a tender, the latter was awarded on the published terms and a request for variations (under part 3 Regulations) was requested. Article 30 of the General Conditions of Contracts Regulations allowed revisions on awarded contracts.

Ms Doreen Seracino (237768M) called as a witness by the Contracting Authority testified on oath that she is the Assistant Director of the MPU and was involved in the drafting of the tender. At the drafting stage she contacted the Department of Industrial and Employment Relations (DIER) to ascertain the hourly wage rate for 2018 and was informed that it was € 7.92. The tender was published on 16th October 2018. The budget statement awarding an additional days' holiday was on the 22nd October, but the quoted rate in the tender was not changed. She confirmed that the grade mentioned in the tender was according to the directives from the Office of the Prime Minister (OPM).

Mr Brandon Lee Magri (261693M) called as a witness by the Contracting Authority testified on oath that he was the Manager at the DIER. His remit was to ensure that all workers were paid at the correct rate. He stated that he had received an email from Ms Seracino requesting rates of hourly pay and he had provided tables showing the applicable rate for 2018, based on the Government Collective Agreement.

Questioned by Dr Ghaznavi witness stated that the OPM supplied the various grades of employees. The particular grade specified in the tender was included in a 2018 amendment to the Department of Contracts circular. The DIER followed the schedule of grades issued by the OPM. Witness confirmed that the minimum wage hourly rate was € 4.39.

At this stage the Chairman pointed out that the arguments which Dr Ghaznavi was raising were more of a precontractual nature as they were related to matters which preceded the award of the tender. It was the Public Contracts Review Board which decides the legality of tenders.

Dr Ghaznavi said that the point about a precontractual remedy does not mean that the tender cannot be challenged later. The PCRB can evaluate the merits of the points raised during the hearing. Decisions must be based on the law and it was obvious that the law had not been consulted in this case. There could not be a collective agreement regarding the Assistant Clerical (Support) Worker in 2018 because the grade did not exist (reference was made to Chap 497 of the Laws of Malta). The Director of Contracts cannot anticipate a ministerial 'fiat' on a request for a variation in a tender award.

Dr Abigail Caruana Vella Legal Representative of the Ministry for Home Affairs and National Security said that the first contention of Appellants is that the hourly wage rate in the tender

should be € 7.95 – this rate only became applicable after the issue of the tender, and it is incorrect to claim that the rate of € 7.92 was below the rate allowed by law then. Witness Ms Seracino had confirmed that this rate, and how it was made up, was established by a competent authority.

Dr Carlos Bugeja Legal Representative for Signal 8 Security Services (Malta) Ltd said that criticising the terms of the tender at this stage was futile and a remedy was available prior to submitting a bid. The tender was issued on the 16th October and the budget was on the 22nd October – there was a month to the closing date of the tender in which to seek a clarification. He referred to a Court of Appeal case stating that a bidder was bound by the terms once he submitted an offer. In this instance there had been no appeal before the submission of the tender.

Dr Ghaznavi re-iterated that the law had not been consulted and the tender had been issued in violation of the law both in the grade and the hourly rate.

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

This Board,

having noted this Objection filed by Kerber Security Limited (herein after referred to as the Appellants) on 8 February 2019, refers to the claims made by the same Appellants with regard to the Tender of reference MHAS/280/2018 listed as Case No 1281 in the records of the Public Contracts Review Board, and awarded by the Ministry for Home Affairs and National Security (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Shaheryar Ghaznavi

Appearing for the Contracting Authority:

Dr Abigail Caruana Vella

Whereby, the Appellants contend that:

a) the Tender Document imposed hourly rates of Assistant Clerical Workers which were not in conformity with the Law. At the same instance, the Appellants contend that the grade of Assistant Clerical Worker did not exist at the time the tender was issued.

This Board also noted the Contracting Authority's 'Letter of Reply' dated 15 February 2019 and its verbal submissions during the hearing held on 14 March 2019, in that:

a) The Contracting Authority insists that all the hourly rates quoted in the Tender Document were in accordance with local labour laws and conform with all the minimum rates payable, as issued, from time to time, by the Government. The Contracting Authority also maintains that, it is irrelevant whether the post of Assistant Clerical Worker existed or not, the latter grade's hourly rate is in conformity with local labour laws.

This same Board also noted the testimony of the following witnesses namely:

- 1. Ms Stephanie Farrugia who was duly summoned by Kerber Security Limited;**
- 2. Dr Franco Agius who was duly summoned by the Ministry for Home Affairs and National Security;**

- 3. Ms Doreen Seracino who was duly summoned by the Ministry for Home Affairs and National Security;**
- 4. Mr Brandon Lee Magri who was duly summoned by the Ministry for Home Affairs and National Security.**

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issues that must be considered are twofold namely:

- a) The Legality of the Tender Document**
- b) The post of Assistant Clerical Workers**

1. With regards to the Appellants' claim that, since the hourly rates quoted in the Tender Document, were not in conformity with the law, the Tender should be declared illegal, this Board would respectfully refer to article 7d (ii) – Instructions to Tenderers, as follows:

“(ii) A filled-in Financial Bid Form (as per document available to download online from www.e.tenders.gov.mt) as per Tender Response Format. (Note 3)

Bidders are to note that as per rates established by the Department of Industrial and Employment Relations rates submitted shall not be less than the following:

€ 7.74 per assistance office clerical support worker per hour for the year 2018

€ 7.92 per assistance office clerical support worker per hour for the year 2019
€ 8.06 per assistance office clerical support worker per hour for the year 2020
€ 8.26 per assistance office clerical support worker per hour for the year 2021.”

The above mentioned rates were clearly denoted and such rates were based on those agreed through the collective agreement 2017-2024.

- 2. This Board would respectfully point out that collective agreements are legal obligations established and agreed by the parties thereto and the hourly rates quoted in such agreements conform with local labour rules so that, this Board cannot find or detect any justifiable cause to deem such hourly rates as being illegal. At the same instance, this Board would also refer to the testimony of Mr Brandon Lee Magri, Manager, Department of Industrial and Employment Relations, wherein he confirmed that the rates quoted in the Tender Document were the correct hourly rates payable to Assistant Clerical Workers.**
- 3. With regards to the Appellants’ alleged claim that the post of Assistant Clerical Worker did not exist at the time of the publication of the Tender, this Board would pertinently point out that this issue has no bearing, in any way, on the legality of the Tender. In this regard, this Board notes that, if the Appellants felt aggrieved by such an issue, they had the remedy to enquire or object prior to the closing date of the**

Tender and in this respect, the Appellants failed to avail themselves of such a remedy.

- 4. With regards to the Appellants' claim that although they did not apply for a "Call for Remedy", they still had the right to raise issued during the Public Hearing, this Board would respectfully remind the Appellants that, the remit and jurisdiction of this Board entails strict adherence to the Public Procurement Regulations under which there are stipulated remedies available to Bidders. Such remedies were not capriciously stipulated but were made available so that, at each stage of the Tendering process, the rights of Bidders are properly safeguarded. On the other hand, this Board would also point out that, it is not correct and proper to raise issues about the legality of the Tender Document and other related matters, at this particular stage, especially when this same Board notes that the Appellants participated in the Call for Competition without raising any concern prior to their submissions.**

In conclusion, this Board opines that:

- a) the Tender Document quoted hourly rates for the guidance of the Bidders, which rates were legally established and in no way contained any illegal factor or element;**

- b) the issue whether the post of Assistant Clerical workers existed or not during the Publication of the Tender, has no relevance to the legality of the “*Call for Competition*”.**
- c) the Evaluation Committee carried out the Evaluation process in a fair, just and transparent manner;**
- d) the Appellants, if in doubt or disagreement with any condition stipulated in the Tender Document, had the opportunity to seek prior remedies yet this was not availed of by the same.**

In view of the above, this Board,

- i) does not uphold the contentions made by Kerber Security Limited;**
- ii) upholds the decision taken by the Ministry for Home Affairs and National Security in the award of the Tender;**
- iii) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

21st March 2019