

PUBLIC CONTRACTS REVIEW BOARD

Case 1531– CT 2197/2020 – Tender for the Provision of Security Services at the Ministry for Finance and Financial Services and its Line Departments (LOT 2)

The tender was published on the 29th May 2020 and the closing date of the tender was the 30th June 2020. The estimated value of the tender (exclusive of VAT) for the four Lots was € 1,090700.17.

On the 10th December 2020 Kerber Security Ltd filed an appeal against the Ministry for Finance and Financial Services as the Contracting Authority objecting to their disqualification on the grounds that they failed to satisfy the criterion for award

A deposit of € 2,529 was paid in relation to Lot 2.

There were five (5) bidders.

On 11th January 2021 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Kerber Security Ltd

Dr Shaheryar Ghaznavi	Legal Representative
Dr Lara Chetcuti	Legal Representative
Ms Lindsey Axisa	Representative

Contracting Authority – Ministry for Finance and Employment (formerly Ministry for Finance and Financial Services)

Dr Ivan Sammut	Legal Representative
Ms Josette Galdes	Chairperson Evaluation Committee
Mr George Camilleri	Secretary Evaluation Committee
Mr Kevin D’Ugo	Member Evaluation Committee
Mr Raphael Aquilina	Member Evaluation Committee
Mr Brian Degabriele	Member Evaluation Committee

Recommended Bidder (1) – Executive Security Services Ltd

Mr James Spiteri Staines	Representative
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Recommended Bidder (2) – Signal 8 Security Services Ltd

Dr Carlos Bugeja	Representative
Mr Keith Borg	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Lara Chetcuti Legal Representative for Kerber Security Ltd stated that prior to making any submission she requested permission for witnesses to be heard.

Mr Ramon Francalanza (158177M) called as a witness by Appellants testified under oath that he is the Employment Relations Manager of the trade union known as UHM. He went on to explain the process in formulating and implementing a collective agreement (agreement). Once agreed and signed by both parties this agreement is forwarded to the Department for Industrial and Employment Relations (DIER) to be registered. The current agreement was signed on 5th October 2020, effective for three years, and submitted to the DIER two days later.

Ms Beverley Agius (158177M) called as a witness by Appellants testified on oath that she is a Senior Clerk at the DIER. Her role includes registering agreements. She confirmed that she received the first three-year agreement in May 2017 and a later one in May 2020 – the latter was registered in May 2020. In reply to a question witness stated that the DIER does not issue a letter confirming that an agreement had been registered. This only happens if a particular employer requests such a letter.

In reply to further questions witness said that the Department's records show that the agreement in question was registered on the 8th May 2020 following which a letter was sent acknowledging receipt and requesting number of employees. This is done for statistical purposes and in line with legislation to that effect. Witness read out the wording of the letter sent to Appellants.

Dr Chetcuti referred to the letter of the 4th December 2020 from the Contracting Authority which referred to the four lots which Appellants had bid for and which had all failed to meet the tender criteria for the same and only reason, namely that although a valid agreement had been submitted there was no confirmation letter from the DIER that the agreement was registered. The tender criteria for award only asked for a copy of a valid agreement registered with the DIER, and what Appellants submitted tallied with this. The Contracting Authority was requesting something that was not requested in the tender. It is clear that the valid agreement submitted was confirmed by the Authority, and if there was any doubt or ambiguity they were in duty bound to seek a clarification.

The stance taken by the Authority was totally against the principle of proportionality and reference was made to PCRB Cases 1222 and 772 as well as the case R (Hoole & Co) vs Legal Services Commission UK which all dealt with circumstances where clarification should have been sought. On behalf of Appellants she requested the Board to order a reconsideration of their bid.

Ms Josette Galdes (388865M) called as a witness by the Contracting Authority testified under oath that she was the Chairperson of the Evaluation Committee. She stated that the tender required the submission of a valid agreement and proof had been registered with the DIER. In this respect the only proof submitted was a document dated 2019. There was also conflicting dates shown in the agreement but this was accepted as a misprint. Witness stated that according to Note 3 the evaluation committee could not seek a clarification on this point.

At this stage the Chairman pointed out to witness that the tender simply asked for a valid agreement which had been registered with the DIER but did not ask for any further confirmation document proving registration. Also Note 3 does not allow rectification but fully allows clarification on submitted documents.

In reply to questions witness stated that in the evaluation committees' view this was a matter of rectification not clarification as Appellants had sent a document dated 2019 instead of 2020, and agreed that the tender did not request specific confirmation from the DIER that the agreement was registered with them.

Mr George Camilleri called as a witness by the Authority testified on oath that he was the Secretary of the Evaluation Committee. He stated that Appellants had submitted a letter dated 2019 confirming registration of the agreement with DIER whilst the agreement commenced in 2020. Note 3 did not allow rectifications and according to Clause 3.2 of the Standard Operating Procedures (SoP) Appellants' offer should be considered non-compliant. Despite this, instead of disqualifying Appellants' bid the committee had awarded them the minimum mark.

Replying to questions witness stated that no attempt was made to contact DIER or to seek any clarification – the committee merely insisted that they required confirmation that the agreement was registered.

Mr Kevin D'Ugo (367586M) called as a witness by the Authority testified on oath that he was one of the Evaluators. He stated that under clause 3.2 of the SoP they could not seek rectification.

In reply to questions witness agreed that the tender did not state that confirmation of registration was required but the Authority required proof of registration otherwise they could not ascertain that the agreement was registered.

Mr Mario Bugeja (515974M) called as a witness by the Authority testified on oath that he is Assistant Director in the Corporate Services Directorate. He stated that the Authority passed the evaluation report to the Department of Contracts which was assessed by the General Contracts Committee which was asked if the submitted documents were valid. The GCC ruled that at the time of the evaluation of the

tender the agreement was not registered as the letter from DIER submitted late by Appellants was dated August 2020.

Dr Shaheryar Ghaznavi Legal Representative for Kerber Security Ltd pointed out to witness that he had been present when other witnesses had testified that there was a valid agreement registered in May 2020. Witness agreed that testimony had been given that the agreement was registered in May 2020.

In reply to further questions witness said that Appellants understood the requirement to submit confirmation but had submitted a letter referring to a different period. No evidence had been provided that the document was registered with the DIER. Witness confirmed that the tender did not request proof that the agreement was registered.

Dr Carlos Bugeja Legal Representative for Signal 8 Security Services Ltd said that since the tender did not request proof of registration Appellants were assuming that it was not required, when it would have been a simpler process to submit proof. The wording in the tender was not clear but neither were the actions of the Appellants. The Authority felt it could not verify registration but neither could it assume registration which could have led to a dangerous situation. Overall it was clear that the tender requisite had not been satisfied.

Dr Ghaznavi stated that the tender did not specify a certain element. Instead of asking for clarification the committee took it upon themselves to decide what was required, when in fact the registration letter was not required. If the Authority wanted evidence they should have asked for it. The reference to inability to ask for further documents due to SoP Clause 3.2 is misleading as the tender did not require further documents, and therefore the Authority was not entitled to ask for them. The evaluation committee interpreted the wording of the tender as they saw fit and inadvertently they reached the wrong interpretation. In any instance the letter submitted in August 2020, albeit late, confirms that in May 2020 the agreement was registered.

Dr Ivan Sammut Legal Representative for the Ministry for Finance and Employment said that the tender had two requisites – a collective agreement and registration. The fact that Appellants submitted an out of date letter was an indication that they were aware of the registration requirement. No rectification was possible due to the restrictions of SoP regulations but instead of disqualification Appellants were awarded the minim mark. Regulation 39.2 of the Public Procurement Regulations had been followed and there was no point in Appellants' appeal.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Kerber Security Ltd (hereinafter referred to as the Appellants) on 10th December 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2197/2020 (Lot 2) listed as case No. 1530 in the records of the Public Contracts Review Board recommended for award by Ministry for Finance and Employment (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Shaheryar Ghaznavi

Dr Lara Chetcuti

Appearing for the Contracting Authority: Dr Ivan Sammut

Appearing for Department of Contracts: Mr Nicholas Aquilina

Appearing for the Recommended Bidder (1): Mr James Spiteri Staines

Appearing for the Recommended Bidder (2): Dr Carlos Bugeja

Whereby, the Appellants contend that:

- a) Their main concern refers to the fact that, the Authority, on its own assumption deemed the ‘Collective Agreement’ submitted as not duly registered with the Department of Industrial and Employment Relations without requesting any clarification regarding the submitted document.**
- b) In accordance with article 3 of ‘Notes to Clauses’, the Authority had the obligation to obtain such a confirmation of the registration of the ‘Collective**

Agreement’, through a clarification request which would have assured the Authority that such an agreement was duly registered with the appropriate Authority, as requested in the tender document.

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 23rd December 2020 and its verbal submissions during the virtual hearing held on 11th January 2021, in that:

- a) The Authority maintains that, the tender document requested a valid collective agreement with proof that such an agreement had been registered with the Department of Industrial and Employment Relations (DIER) and in this regard, Appellants submitted a document dated 2019, as proof of registration which did not relate to the ‘Collective Agreement’ which was submitted in their offer.**
- b) With regard to Appellants’ second contention, the Authority insists that through clause 3.2 of the ‘Standard Operating Procedures’ (SOP), Appellants’ offer had to be considered as non-compliant. Furthermore, Article 3 of ‘Notes to Clause 5’ did not allow for any clarifications.**

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

Mr Ramon Francalanza duly summoned by Kerber Security Ltd

Ms Beverley Agius duly summoned by Kerber Security Ltd

Ms Josette Galdes duly summoned by Ministry for Finance and Employment

Mr George Camilleri duly summoned by Ministry for Finance and Employment

Mr Kevin D’Ugo duly summoned by Ministry for Finance and Employment

Mr Mario Bugeja duly summoned by Ministry for Finance and Employment

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines that, the issues that deserve consideration are two-fold namely:

- a) The Collective Agreement submitted by Appellants and**
- b) Clarification request by the Authority**

1. Submitted Collective Agreement

1.1. First and foremost, it must be pointed out that, the conditions and specifications stipulated in the tender dossier must be respected and abided by, at all times. Furthermore, the Evaluation Committee must adhere strictly to the principle of ‘Self-Limitation’ during the evaluation process.

1.2. This Board would refer to item 4c 2 (vii) of the ‘Evaluation Grid’ which states the following:

“(vii) The Economic Operator is to submit a copy of a Valid Collective Agreement that is in place and registered with the Department of Industrial and Employment Relations (add-on) (Max of 3 points) Max of 3 points – 100% or 1% as a minimum”.

Through the above-mentioned article, the Authority requested a copy of a valid collective agreement that is registered with the DIER and in this respect, Appellants submitted the most recent Collective Agreement.

- 1.3. It must be noted that the Authority, quite appropriately is requesting a copy of the agreement and it does not stipulate that the bidder must also submit a document to confirm that such an agreement is registered, by the DIER. At the same instance, the Authority does not indicate how such a confirmation of registration with the DIER is to be presented and submitted by the tenderer.**
- 1.4. From the testimony of Ms Beverly Agius, senior clerk at the DIER, it was established and confirmed that, the DIER does not issue a confirmation notice that the agreement has been registered unless specially requested.**
- 1.5. This Board also took into consideration the testimony of Ms Josette Galdes , Chairperson of the Evaluation Committee and Mr Kevin D’Ugo, an evaluator, both of whom confirmed that, the tender document with special reference to item 4c 2(vii), did not request a specific document confirming that the ‘Collective Agreement’ is registered with the DIER.**

1.6. From the testimony of the witness representing the DIER, this Board is comfortably convinced that, as at the date of submission of their offer, Appellants had a valid ‘Collective Agreement’ in place.

1.7. At this particular stage of consideration, this Board would also point out that Appellants did submit a declaration that they are in conformity with criterion 1.24, as follows:

“ *Submission in respect of Criterion 1.24*

Tender Requirements:

- *The Economic Operator is to submit a copy of a Valid Collective Agreement that is in place and registered with the Department of Industrial and Employment Relations.*

Submissions by Kerber Security Ltd:

I hereby submit copy of valid Collective Agreement signed between UHM and Kerber Security Ltd. the attached collective Agreement is registered with the Department of Industrial and Employment Relations.

Signed

Kerber Security Ltd”

1.8. It is evident that, the issue of the proof of the registration of the ‘Collective Agreement’ arose through the correspondence dated 21st October 2019 issued by the DIER, confirming that as at that date,

Appellants had a valid Collective Agreement registered with the Authority, as follows:

“Dear Ms Axisa

21st October 2019

This is to confirm that Kerber Security Ltd has a valid Collective Agreement in place, which Collective Agreement is registered with the Department of Industrial Relations. Employees in the following grades: Cleaners offices, Cleaners Hospital/Homes for the Elderly, Careworkers and General Security, have their conditions of employment regulated by the said Collective Agreement.

Alexandra Gatt

Director

Industrial & Employment Relations”

It is at this point in time, that the Evaluation Committee should have requested a clarification to confirm that, the ‘Collective Agreement’ so submitted, represents a further continuation of the previous agreement registered with the DIER, and thus establishes that the recent agreement is so registered.

2. Clarification Request

- 2.1. This Board would respectfully refer to Note 3 of ‘Notes to Clauses 5’ which states that:**

“No rectification shall be allowed only clarification on the submitted information may be requested”

The above-mentioned clause gives the remedy to the Evaluation Committee to clarify any misunderstanding or ambiguous issues contained in the tender’s submissions. Such clarifications should not, in any way whatsoever, rectify or alter the original submission either in substance or in form.

- 2.2. In this particular case, Appellants did submit a Collective Agreement which was, in fact, registered with the DIER, however, the Evaluation Committee, quite appropriately wanted to assure themselves that, the agreement for the period 2000 to 2003 was also registered and in this regard, the Authority should have asked for the necessary clarifications, on the submitted document.**
- 2.3. One must also point out that, it is the duty and obligation of the Evaluation Committee to endeavour to save an advantageous offer so that, the remedies available are to be availed of by the Authority, so long as such remedies do not breach the principles of Public Procurement.**
- 2.4. In this particular case, from the testimony of Ms Josette Galdes, this Board was made aware that, in the opinion of the Evaluation Committee, such a clarification request would have amounted to a rectification. In this regard, this Board would respectfully point out**

that, since the tender document did not ask for the submission of a confirmation from the DIER and which fact was also confirmed by Ms Galdes, the Evaluation Committee should have asked for a clarification to establish that the agreement submitted by Appellants was registered with the DIER.

2.5. After having examined the evaluation report and other relevant documentation, this Board noted that, on the 9th November 2020, at the time of closing the tendering procedure, the Authority requested confirmation from the DIER regarding Appellants' Collective Agreement. On the 10th November 2020, the Authority received the following information:

“With reference to the queries by Corporate Services (MFIN) below kindly note that:

Re question 1 – Ms Sandra Gatt has confirmed that DIER Certificate dated 21/10/2019 is true and correct (see email by Ms. Sandra Gatt below)

Re question 2 – DIER Certificate dated 21/10/2019 refers to CA – UHM Voice of the Workers – Kerber Security Ltd 2017-2020 dated 18th May 2017 – Ref Red 2032

Re question 3 – Collective Agreement 2020-2023 Red 2213 was registered with DIER on 08/05/20 and a letter to Kerber Security Ltd was issued on 19/08/20, please see attached letter.”

From such communications, this Board noted that, the Authority was aware of the fact that, Appellants' Collective Agreement was duly registered with the DIER, yet, such an issue was not reflected in the recommendation for award and neither indicated in the 'Letter of Rejection' dated 4th December 2020.

In conclusion, this Board opines that:

- a) The tender document with particular reference to item 4c 2(vii) of the evaluation grid, did not request documentation to confirm that the Collective Agreement was registered with such an Authority.**
- b) The Evaluation Committee had the remedy to clarify and establish the registration status of Appellants' Collective Agreement and should have availed themselves of Note 3 of 'Notes to Clause 5' to determine such an issue.**
- c) Appellants' Collective Agreement was registered with the DIER at the submission of their offer.**
- d) The Evaluation Committee were aware of the fact that Appellants' Collective Agreement was duly registered with the DIER prior to the Authority's submission of the 'Letter of Rejection' dated 4th December 2020.**

In view of the above, this Board,

- i. cancels the Contracting Authority’s decision in the recommendation of award of the tender,**
- ii. confirms that Appellants’ ‘Collective Agreement’ was duly registered with the DIER at the time of submission of their offer,**
- iii. directs that Appellants’ offer be reintegrated in the evaluation process, taking into consideration this Board’s findings,**
- iv. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
21st January 2021

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member