

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1721 – SPD2/2021/050 – Framework Agreement for the Provision of Security Services at the Local Enforcement System Agency (LESA)**

**13<sup>th</sup> May 2022**

The Board,

Having noted the call for remedies filed by Dr Alessandro Lia on behalf of Lia Aquilina Advocates acting for and on behalf of Executive Security Services Limited, (hereinafter referred to as the appellant) filed on the 23<sup>rd</sup> March 2022;

Having also noted the letter of reply filed by Dr Ryan Ellul acting for the Local Enforcement System Agency (hereinafter referred to as the Contracting Authority) filed on the 4<sup>th</sup> April 2022;

Having also noted the letter of reply filed by Dr Ryan C. Pace acting for Kerber Security Limited (hereinafter referred to as the Preferred Bidder) filed on the 19<sup>th</sup> April 2022;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 10<sup>th</sup> May 2022 hereunder-reproduced.

### **Minutes**

#### **Case 1721 – SPD2/2021/050 – Framework Agreement for the Provision of Security Services at the Local Enforcement System Agency (LESA)**

The tender was issued on the 26<sup>th</sup> August 2021 and the closing date was the 17<sup>th</sup> September 2021. The value of the tender, excluding VAT, was € 68,962.32.

On the 23<sup>rd</sup> March 2022 Executive Security Services Ltd filed an appeal against the Local Enforcement System Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not compliant.

A deposit of € 400 was paid.

There were five (5) bids.

On the 10<sup>th</sup> May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Executive Security Services Ltd**

Dr Alessandro Lia Legal Representative

**Contracting Authority – Local Enforcement System Agency**

Dr Ryan Ellul	Legal Representative
Mr Claudio Tonna	Chairperson Evaluation Committee
Mr Joseph Abela	Member Evaluation Committee
Mr Joseph Zerafa	Member Evaluation Committee
Mr Svetlick Flores	Representative
Ms Sarah Bondin	Representative

**Preferred Bidder – Kerber Security Ltd**

Dr Ryan Pace Legal Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Alessandro Lia Legal Representative for Executive Security Services Ltd stated that put simply Appellants claim deals with one point – unsigned declaration forms in several places. Since digitalisation the amount of paper work has been reduced and it is no longer necessary to sign all documents. This lack of signing has happened in other documents and has not been asked for. The tender is a pre-contract and not an actual contract and only becomes binding when the contract is actually awarded. The tender does not state anywhere that signatures are required and this requirement has been born out of nowhere. The Case referred to by the Authority deals with unsigned documents which were part and parcel of the agreement and the Court decreed that the signature will not change the tender. Nowhere in the tender is it mandatory to sign the forms and there is no indication on the forms themselves that a signature is required – even if so, the Authority could have asked for rectification as this would not have changed anything in the bid. In the Allclean Services Case the Court held that the evaluation grid was to be given as of right even though the Appellant was disqualified on mandatory grounds.

Dr Ryan Ellul Legal Representative for the Local Enforcement System Agency said that the Contracting Authority could not assume that everything was in order without signed declarations. The Evaluation grid had not been requested by the Appellant.

Dr Ryan Pace Legal Representative for Kerber Security Ltd viewed the argument as a simple one since it was dealing with the obvious. Digitalisation does not mean that documents are exempt from being signed. Appellant is not contesting that documents were not signed which confirms that the TEC's decision was correct. It would be abusive to award a contract on submitted documents which were not signed and which are tantamount to being no declarations at all. Page 11 of the tender dossier explains what is mandatory and mandatory criteria which if not followed would lead to a zero mark being awarded and an automatic

disqualification. The TEC followed the correct procedure. Since Appellant did not match the tender criteria and was disqualified the TEC did not provide the Evaluation grid.

Dr Lia said that the point at issue is the interpretation of the declarations submitted since the link between a submission and the ESPP is in itself binding. In several calls all that is asked for is the ticking of boxes without a mandatory request for signatures.

Dr Ellul pointed out that the ticking of boxes should not be confused with a declaration which is a form of statement.

Dr Pace noted that Appellant was expecting the Board to rectify a shortcoming.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 10<sup>th</sup> May 2022.

Having noted the call for remedies filed by Executive Security Services Limited (hereinafter referred to as the Appellant) on 23<sup>rd</sup> March 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD2/2021/050 listed as case No. 1721 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Ryan Ellul

Appearing for the Preferred Bidder: Dr Ryan Pace

Whereby, the Appellant contends that:

- a) The Contracting Authority in all five criterion, being A(A1)(a); A(A1)(b); A(A1)(c); C(C2)(f); C(C2)(g); specify the same reason for technical non-compliance. This being *“Criteria not met. Declaration must be signed. Unsigned declaration is not a declaration. The signatures required in bids for tenders are important because a tender is a form of a contract and the signature make those parts of the tender binding”*.

- b) The Contracting Authority is making 'post award' criteria as if they are the same as those at 'tendering stage'.
- c) Nowhere in the tender dossier was it a pre-requisite that signatures were a requirement.
- d) If one were to go through what the tender dossier listed in these criterion, nowhere is a signature mentioned.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 4<sup>th</sup> April 2022 and its verbal submission during the virtual hearing held on 10<sup>th</sup> May 2022, in that:

- a) The offer made by an economic operator is part of the contract and the signature is what makes it binding.
- b) The Contracting Authority would not be acting proportionately if it were to assume that such criteria are to be implemented if the economic operator is not binding himself through such signed declarations.
- c) These declarations fell under Note 3 hence no rectifications were possible.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 19<sup>th</sup> April 2022 and its verbal submission during the virtual hearing held on 10<sup>th</sup> May 2022, in that:

- a) Nowhere does the Appellant challenge the statement made by the Evaluation Committee in its Rejection Letter.
- b) The appellant in their very own Letter of Appeal, recognises the fact that the Contracting Authority requested such declarations to ascertain that certain parameters would be met by the economic operators.
- c) Without the necessary and relevant signature, the declaration is not binding on the economic operator.
- d) The criteria that made the Appellant's bid technically non-compliant were all listed as 'mandatory criteria' i.e. *"For Mandatory requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provide or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified."* Hence, the Evaluation Committee's hands were tied and they were obliged to confirm a score of '0'. These also fell under Note 3.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances as follows:

- a) This Board opines that the declarations requested in criteria A(A1)(a); A(A1)(b); A(A1)(c); C(C2)(f); C(C2)(g) are documents wherein the prospective bidder is confirming that the relevant parameters will indeed be provided and met. A declaration is not the same as a pre-prepared template or form where the Contracting Authority would provide guidance on what information is to be filled in, such as the requirement or not of a signature. Therefore, in the opinion of this Board an unsigned declaration is not a declaration.
- b) The argumentation brought forward by the Appellant that digitalisation has reduced the amount of paperwork does not impinge on the requirement of a signature. With today's technology, electronic signatures are very much readily available.
- c) Once it was decided that the declarations as provided by the appellant did not meet the requirements of the tender dossier, and considering that all these requirements are listed as 'Mandatory', than the evaluation committee had no other option than to disqualify the bid of the appellant as per page 11 of the tender dossier which stated *"For Mandatory requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provide or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified."*

Hence, this Board does not uphold the Appellant's grievance.

### **The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Ms Stephanie Scicluna Laiviera**  
Member