

PUBLIC CONTRACTS REVIEW BOARD

Case 1785 – SPD2/2021/074 – Tender for Security (including Messenger and Reception) Services at Various Departments and Entities within the Ministry for Home Affairs, Security Reforms and Equality.

19th September 2022

The Board,

Having noted the letter of objection filed by Dr Albert Zerafa on behalf of AZ Legal acting for and on behalf of Signal 8 Security Services Malta Limited, (hereinafter referred to as the appellant) filed on the 28th July 2022;

Having also noted the letter of reply filed by Dr Daniel Inguanez and Dr Miguel De Gabriele acting for and on behalf of Ministry for Home Affairs, Security, Reforms and Equality (hereinafter referred to as the Contracting Authority) filed on the 3rd August 2022;

Having heard and evaluated the testimony of the witness Mr Mark Seychell (Chairperson Evaluation Committee) as summoned by Dr Albert Zerafa acting for Signal 8 Security Services Malta Limited;

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 15th September 2022 hereunder-reproduced.

Minutes

Case 1785 – SPD2/2021/074 – Tender for Security (including Messenger and Reception) Services at various Departments and Entities within the Ministry for Home Affairs, Security, Reforms and Equality

The tender was issued on the 4th May 2022 and the closing date was the 10th June 2022. The estimated value of the tender, excluding VAT, was € 445,156.

On the 28th July 2022 Signal 8 Security Services Malta Ltd filed an appeal against the Ministry for Home Affairs, Security, Reforms and Equality as the Contracting Authority objecting to its disqualification on the grounds that it failed to satisfy the criteria for award.

A deposit of € 2,227 was paid.

There were six (6) bids.

On the 15th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Signal 8 Security Services Malta Ltd

Dr Albert Zerafa	Legal Representative
Dr Natalino Caruana De Brincat	Legal Representative
Mr Jovan Grech	Representative

Contracting Authority – Ministry for Home Affairs, Security, Reforms and Equality

Dr Daniel Inguanez	Legal Representative
Dr Miguel De Gabriele	Legal Representative
Mr Mark Seychell	Chairperson Evaluation Committee
Ms Stephanie Kent	Member Evaluation Committee
Ms Marie Claire Rizzo Jones	Member Evaluation Committee
Mr Andrea Cardona	Member Evaluation Committee
Mr Clive Borg	Secretary Evaluation committee

Preferred Bidder – Gold Guard Security Services Ltd

Dr Alessandro Lia	Legal Representative
Ms Giorgina Florina Lupu	Representative

Director of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Albert Zerafa Legal Representative for Signal 8 Security Services Malta Ltd requested that witnesses be heard first.

Mr Mark Seychell (56983M) called as a witness by Appellant testified on oath that Item 4.2 in the tender set the criteria for a driver duty with a methodology requested to explain how this was satisfied. This was a BPQR tender and therefore quality was important. The Evaluation Committee (EC) expected some explanation of how the driver would carry out his duties or at least some reference to it. The lack of even a mention of driving duties gave no comfort to the EC and consequently marks were deducted. The application of Regulation 62.2 did not come into it as the terms of reference came under note 3.

Questioned by Dr Daniel Inguanez Legal Representative for the Ministry for Home Affairs witness stated that the EC evaluated the quality of the write-ups and nowhere in Appellant's submissions was there any reference to driving duties.

In reply to questions from Dr Alessandro Lia Legal Representative for Gold Guard Security Services Ltd witness said that there were other shortcomings, apart from driver duties, in Appellant's submissions namely that the collective agreement registration with Department of Industrial Relations and Employment (DIER) was out of date.

This latter point was also confirmed to Dr Inguanez.

Further questioned by Dr Zerafa witness said that the registration of the collective agreement with DIER expired before the date of the tender submission. However correspondence with the General

Workers Union indicated that negotiations for a renewal were under way and that in the meantime the existing agreement was still running as far as the GWU was concerned.

This concluded the testimony of Mr Seychell.

Dr Zerafa said that Appellant had two grievances. The first dealt with the driving methodology and in this context Clause 4.2 earlier referred to simply states 'may' and was therefore not obligatory and there was no requirement to provide a methodology as it states simply 'driver-messenger'. In the short 200 word description there was not enough room to go into the details that the EC was expecting. The provision of a copy of the driving licence was sufficient to cover this point. As regard the collective agreement the letters submitted indicating that although lapsed the agreement was still effective were enough to fulfill this requirement. On the aspect of proportionality the EC should have sought further information as allowed under Regulation 62.2 of the PPR and in this they failed.

Dr Lia said that here were two arguments regarding the driving requirement – the requisite of the tender and the EC's right to deduct marks in a separate section regarding driving. In PCRB Case 1632 it was held that the argument that a requisite had been dealt with in another section of the tender was not valid. As regard the collective agreement Appellant claims that renewal of registration was in process. If one referred to PCRB Case 1476 one would find that it was confirmed by the Court of Appeal that application for a certificate not completed by the time of the tender led to a disqualification.

Dr Inguanez said that central to this appeal was the claim of leeway in the quality of submissions in a BPQR tender. Having a driving licence is not equivalent to satisfying the tender requirement and the point of the exercise is to allot marks according to the spectrum of submissions. Methodology is the offer in itself and indicates the element of quality. The letter from the DIER makes it clear that there was no valid registration on that particular date and the decision to deduct points on this matter was correct.

Dr Lia, in a final comment, pointed out that if only one point is dealt with, it would have no overall effect on the final outcome of the tender.

There being no further submissions the Chairman declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 15th September 2022.

Having noted the objection filed by Signal 8 Security Services Malta Limited (hereinafter referred to as the Appellant) on 28th July 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD2/2021/074 listed as case No. 1785 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Albert Zerafa
Appearing for the Contracting Authority:	Dr Daniel Inguanez and Dr Miguel De Gabriele
Appearing for the Preferred Bidder:	Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) *“B1 (ii) Overall Coordination Strategy and Contract Infrastructure- A list of measures to ensure adequate level of service as per Article 4.2 and 8.1 of the Terms of Reference- Economic operator provided detailed list of measures however there was no reference to the requested specification that the security officer may be requested to do driver-messenger duties as per Article 4.2 of the Terms of Reference.” and “B4- Support Services - Inspections (Mandatory)- Economic Operator provided a detailed report however it lacked to make reference to the driving duties as outlined in Article 4.2 of the Terms of Reference”*

Article 4.2 entitled “Specific Activities” within Section 3 - TERMS OF REFERENCE which is comprehensively denoted as Note 3, stipulates as follows in relation to driver duties: *“The Security officer may be requested to do driver-messenger duties to transport officers and items.”*

The Objector noted that this is the only reference made to driver duties within the entire Article 4.2, which activity is not of an obligatory nature, provided that the term "may be requested" is being utilised by the Contracting Authority in the Tender Document.

Furthermore, the only other reference to a driving licence within the entire Tender Document is in Article 6.1.1. - relating to the Requirements for Security Officers, which Article states as follows:

6.1- Personnel 6.1.1

Personnel Security Officers as follows:

- a) The contractor shall give security training.....*
f) If the officers need to have a driving license category ‘B’ please include here.

Hence, it is amply clear that the Tender Document never specifically requested nor was it subject to a clarification the requirement that the officers need to have a driving licence category ‘B’, or any other licence category and this was. Furthermore, the Tender Document or Literature List never requested the bidder to provide a copy of the officers' driving licences, since this was never a Note 3 requirement in the Tender. When the Contracting Authority necessitated a copy of a document, it has clearly stipulated it, as seen under article 6.1 (d) and therefore this can create a sense of ambiguity as to what is being expected from the objector. It is therefore being argued that the Objector should not have been penalised by the Evaluation Committee for not providing reference to the specification that the security officer may be requested to do driver-messenger duties as per Article 4.2 of the Terms of Reference, in its list of measures, given that the specification referred to was not an obligation imposed by the Contracting Authority by means of the Tender Document.

Without any prejudice to the above, the objector reiterates that a declaration that all employees employed by the company have a valid driving license was provided.

- b) *“C2 - Employment Conditions (vii) - Collective Agreement submitted is valid up to 31st May 2022. New agreement not provided and also not registered with DIER.”*

The Contracting Authority, by means of the Tender document requested that the Bidder provide the following: *“A Collective Agreement is in place and registered with the Department of Industrial and Employment Relations (or an equivalent foreign Authority if the Economic Operator is registered abroad). In all instances, the Collective Agreement must include the minimum criteria of Employment Law conditions as set by Employment and Industrial Act (EIRA) CAP 452 and subsidiary applicable legislations. EIRA CAP 452 may be accessed from <http://www.justiceservices.gov.int/DownloadDocument.aspx?app=lomitemid=8918&l=1> Economic Operators are to provide a copy of a Valid Collective Agreement an attestation of the above. It is the responsibility of the Economic Operator to provide valid proof that the collective agreement was duly registered with the DIER. In addition, if a company is registered in a foreign country and has a Collective Agreement in place, the Economic Operator shall also submit a Self-Declaration whereby it is declared that such agreement includes the minimum criteria of Employment Law as described above.”*

The Objector, when placing the bid, provided all the requested documentation in this Section. The Objector provided:

- i. A Letter of guarantee, signed by the Managing Director and CEO of Signal 8 Security Services Malta Limited, Mr Joseph John Grech, guaranteeing that it does and will continue to abide by all employment legislation currently in force in Malta, and confirms that all personnel employed within the company are covered by a collective agreement signed with the General Workers' Union (GWU) as the Union representing the employees, which agreement came into effect on the 1st June 2020 and was to end on 31st May 2022. Additionally the objector submitted a declaration by the General Workers Union confirming that the Collective Agreement shall remain in vigore until a new Collective Agreement is signed together with the guarantee letter.
- ii. A Letter by the Director General for the Department for Industrial and Employment Relations (DIER), Ms Diane Vella Muscat, was provided by the objector, as valid proof that the Collective Agreement was registered with DIER, wherein Ms Muscat states that: *“This is to confirm that at present there is an existing Collective Agreement between Signal 8 Security Services Malta Ltd and GWU for the class of Security guards.”*
- iii. A Confirmation Letter by the Secretary Disciplined Forces, Security and Law Enforcement Officers Section within the General Workers' Union, Mr Theo Vella, confirming that the Collective Agreement signed between the Company (the Objector) and the General Worker Union covering years 2020-2022, was to expire on the 31st May 2022, however through mutual agreement, the Collective Agreement was being extended and is to remain in vigore until a new agreement is finalised and signed.

iv. The Collective Agreement between Signal 8 Security Services Malta Limited and Disciplined Forces, Security and Law Enforcement Officers Section General Workers' Union, wherein Clause 4 of the Collective Agreement states as follows: *“At any time after 1st September 2022, either party may give notice in writing expressing its wish that this agreement remains in force for a definite period and/or its intention to negotiate a new one. In the latter case, both parties shall engage in discussions on the terms and conditions of a new collective agreement. During negotiations, and until a new collective agreement is signed, the provisions of this Agreement shall remain in force. In case that no notice for revision is made, the probationary provisions of this Agreement shall remain in force for an indefinite period or until notice is finally given and a new collective agreement eventually signed.”*

The Objector therefore reiterates that the documentation requested in Part C2 of the Tender Document was in fact provided in its entirety by the Objector and the Collective Agreement was in fact valid since it provided Clauses for the automatic extension of the Collective Agreement until a new agreement is signed. The Objector also presented sufficient proof and assurance to the Contracting Authority that the General Workers Union were in fact in agreement that the Collective Agreement was still in vigore and that the same Collective Agreement was validly registered with DIER.

- c) Proportionate Manner - The Treaty on the Functioning of the European Union (the "TFEU"), when delving into the common internal market and ensuring free movement of goods and services, has required that Member States comply with the principles of proportionality, transparency, equal treatment and non-discrimination. The contracting authority has failed to act in a proportionate manner with respect to Signal 8 and its bid as required not only by general principles as emerging from the EU treaties, Directive 2014/24 but specifically by Regulation 39(1) of the Public Procurement Regulation. The reasons for rejection or reduction of points in relation to the bid submitted by the Signal 8, which have eventually resulted in the objector not becoming the selected bidder 'exceed the limits of what is appropriate and necessary,' to achieve competition for Government procurement needs.

Additionally, there is an element of ambiguity, in the request for documentation as presented by the contracting authority, as has been outlined in the submissions presented above. However, should it be argued that the request from the Contracting Authority, were clear in nature, Regulation 62(2) of the Public Procurement Regulation and Article 56(3) of the Directive 2014/24 provides that: *“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. Provided that such requests are made in full compliance with the principles of equal treatment and transparency”*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 3rd August 2022 and its verbal submission during the virtual hearing held on 15th September 2022, in that:

a) First Ground of Objection - Sections B1(1) and B4:

The first ground of objection relates to: B1 - Overall Coordination Strategy and Contract Infrastructure - (ii) *A list of measures to ensure adequate level of service as per Articles 4.2 and 8.1 of the Terms of Reference*; and B4- Support Services - Inspections (Mandatory) - *The Economic Operator is to submit a proposed methodology in approximately 200 words demonstrating how the economic operator shall ensure that the employees on site provides the expected level of service as per Terms of Reference Article 4.2.*

The objector has pointed out that as per Art. 4.2 within Section 3 - Terms of Reference, "*The Security officer may be requested to do driver-messenger duties to transport officers and items*" and that the term "*may be requested*", implies that this activity is not of an obligatory nature.

The Contracting Authority agrees that the term "*may be requested*" implies that this activity is not certain, in the sense that once the contract is awarded security officer may be requested to perform driver-messenger duties. However, making contingency for this possibility in the tender was obligatory. The Bidder was requested to submit "*A list of measures to ensure adequate level of service as per Articles 4.2 and 8.1 of the Terms of Reference*". The phrase "*The Security officer may be requested to do driver-messenger duties to transport officers and items*", was part of the list of duties in Article 4.2. The Contracting Authority was therefore obliged to evaluate such duty, as clearly stated in B4 Methodology (Mandatory Criteria) of the Tenderer Technical Offer.

The Letter of Objection states that: "*The Objector noted that this the only reference made to driver duties within the entire Article 4.2 provided the term "may requested" is being utilised by the Contracting Authority in the Tender Document*". From this statement, it can be observed that the Objector fully understood that driver duties were part of the duties listed in Article 4.2.

Therefore, the Tender Technical Offer was clear in that the submission of such measures was required. In light of the principles enunciated by the Court of Appeal in Case 205/2021/1 Executive Services Ltd v. Agenzija Servizz. Gov et it was the Objector's obligation to make sure that the possibility of having to perform driver duties was covered in its tender offer.

The requirements for both B1(ii) and B4 clearly emphasise the provision of an adequate level of service as per the Terms of Reference of Article 4.2. The provision of an adequate level of service had to be evaluated by the Tender Evaluation Committee on the methodology provided by the Objector. In this case, the Objector's offer lacked a sufficient and appropriate methodology in line with Article 4.2 of the Terms of Reference for the possibility that the security may be requested to do driver-messenger duties to transport officers and items.

For these reasons, points were allotted proportionally to reflect the information submitted by the Objector in line with the subjectivity afforded to the Contracting Authority in the tender document itself, In both Sections B1(ii) and B4 the tender document indicates that: "*The scores shall be given within a spectrum from 0 to 100%. If a '0' score shall be allotted the bidder shall be disqualified.*"

b) Second Ground of Objection - Section C(vii):

The Objector has pointed out that the documentation requested in C2(vii) of the Tender Document was provided in its entirety and that the Collective Agreement was in fact valid since it provided clauses for its automatic extension until a new agreement is signed. The Objector also submitted in its tender offer a Confirmation Letter of the General Workers' Union attesting to the fact that the Collective Agreement was still in vigore.

However, the Objector's tender offer did not provide any information or proof that this Collective Agreement was duly registered with the Department of Industrial and Employment Relations (DIER) beyond 31st May 2022, as required in Section C2 (vii).

Hence, even if extended by the General Workers Union, sufficient and appropriate proof of a valid collective agreement registered with DIER as stipulated by C2 (vi) was not provided as an attestation of the above requirement.

For these reasons, points were deducted to reflect the information submitted by the Objector in line with the subjectivity afforded to the Contracting Authority in the tender document itself. In Sections C2(vii) the tender document indicates that the points for this section can be a *"100% or 1% as a minimum"*

c) Third Ground of Objection -proportionality:

In its third ground of objection the Objector firstly argues that the tender document is ambiguous and, secondly and alternatively, it argues that clarifications should have been sought by the Contracting Authority. Regarding the first argument on the ambiguity of the tender document it is sufficient to simply recall that where a tenderer feels that the tender document has errors or ambiguities it should lodge an application for a remedy before closing date of a call for tenders under regulation 262 (1) (d) of the Public Procurement Regulations. The Objector did not do so but decided voluntarily to participate in the call for tenders as issued and published. The Objector has thus bound itself to the terms and conditions of the tender document and cannot now call into question its correctness or clarity. Entertaining such an argument would surely prejudice the other tenderers participating in the same call for tenders who have likewise bound themselves to the tender document as is; the tender specifications cannot be amended once the deadline for submission of tenders has passed.

What the Objector fails to specify is that the ECJ held that: *"the principle of equal treatment does not preclude the correction or amplification of details of a tender, where it is clear that they require clarification or where it is a question of the correction of obvious clerical errors, subject, however, to the fulfilment of certain requirements"* (paragraph 29 of the judgment); *"that request may not lead to the submission by a tenderer of what would appear in reality to be a new tender"* (paragraph 31 of the judgment); *"A request for clarification cannot, however, make up for the lack of a document or information whose production was required by the contract documents,"* (paragraph 33 of the judgment); and *"the contracting authority being required to comply strictly with the criteria which it has itself laid down"* (paragraph 33 of the judgment).

In the present case the Terms of Reference are marked Note 3 meaning that: *“Only clarifications on the submitted information may be requested.”* (see page 7 of the tender document). As is already clear from what has been submitted in defence to the first and second grounds of objection, points have been deducted from the Objector's tender offer due to the lack of information and not due to some obvious clerical error.

Under Sections B1(ii) and B4 points were deducted since the Objector did not provide any information whatsoever as to how it would deal with requests to provide driver-messenger duties if any such request is made. Under Section C2(vii) the Objector did not provide sufficient information or documentation to allow the Contracting Authority to be assured that the Collective Agreement as extended is duly registered with the DIER.

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 witness duly summoned, will consider Appellant's grievances as follows:

- a) The Criteria for Award of this tender is as per article 6.1 of Section 1 of the tender dossier which stipulates *“The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio (BPQR)”* The BPQR was established by weighing technical quality against price on a 60/40 basis respectively. Hence this Board notes the ‘greater’ emphasis placed by the Contracting Authority on the Technical aspect of the prospective bids.
- b) It is henceforth, being immediately noted that the preferred bidder has been awarded the full possible points in both the technical and financial criteria. The appellant, whilst being awarded full points on the financial criteria, has not been awarded full points on the technical criteria mainly due to two issues. These relate to the ‘driving duties’ and the ‘collective agreement’.
- c) **Driving duties** – this Board agrees with the Appellant that the wording used in the tender dossier, specific reference to the Terms of Reference (Section 3), is *“the security officer may be requested to do driver-messenger duties”* and *“If the officers need to have a driving license”*, however it also agrees with the Contracting Authority and Evaluation Committee's assessment that no reference to the requested specification was made. Considering that this is to be a BPQR awarded tender, with a higher emphasis on the technical aspect, it cannot but ascertain and confirm the Evaluation Committee's assessment. Moreover, on the issue of cross referencing, whereby driving duties could have been referred to in other criteria, reference is made to PCRB Case 1632 whereby it was held *“.....That on various criteria the issue of cross referencing (or the lack of) emerged during the hearing. This Board notes that the Appellant did not cross reference any information within its bid but for certain criteria mentions in its letter of objection that information was present elsewhere within its bid. This Board opines that considering how the Tender was structured, i.e. bidders had to pass section 1 of the technical evaluation before proceeding to the next stages, that the evaluation committee would have been going against the concept of Self Limitation had it taken /*

used information from other sections such as 4.6 and 5.8 of the bid to be used for section 1.2. This for two reasons. First because there was no cross-referencing. Secondly and more importantly, because the bid needs to firstly pass the compliance evaluation of section 1 before proceeding to the next sections. It is to be noted that the Appellant did not achieve a high enough score to pass Section 1 of the technical evaluation.....” Even though in this specific tender, there was no requirement to ‘pass’ an initial section in order to proceed to the next technical assessment sections, it is still this Board’s opinion that any cross referencing, if any, should have been duly done by the Appellant at bidding stage. The Evaluation Committee cannot be expected to use, and / or interpret submissions for other sections to be applicable for the criteria they would be assessing (unless proper cross-refencing is being utilised).

Therefore, this Board does not uphold the Appellant’s first grievance.

- d) Reference is made to point (b) above and the final submissions of Dr Alessandro Lia on behalf of the preferred bidder, whereby both grievances would need to be upheld in order to have a relevant effect on the outcome of this tender. Bearing in mind that the first grievance has not been upheld, this Board will not be delving any further on the issue of the Collective Agreement.

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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member