

PUBLIC CONTRACTS REVIEW BOARD

Case 1826 – SPD7/2022/038 – Services – Tender for the Provision of Security Services, at the Malta Financial Services Authority (MFSA)

20th December 2022

The Board,

Having noted the letter of objection filed by Dr Albert Zerafa and Dr Natalino Caruana De Brincat 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 17th November 2022;

Having also noted the letter of reply filed by Mr Reuben Camilleri acting for Malta Financial Services Authority (hereinafter referred to as the Contracting Authority) filed on the 25th November 2022;

Having heard and evaluated the testimony of the witness Mr Melvyn Darmanin (Financial Advisor to Signal 8 Security Services Malta Limited) as summoned by Dr Albert Zerafa acting for Signal 8 Security Services Malta Limited;

Having heard and evaluated the testimony of the witness Mr Eric Frantz (Insurance Broker) as summoned by Dr Albert Zerafa acting for Signal 8 Security Services Malta Limited;

Having heard and evaluated the testimony of the witness Mr Ivan Buttigieg (Insurance Broker) as summoned by Dr Albert Zerafa acting for Signal 8 Security Services Malta Limited;

Having heard and evaluated the testimony of the witness Mr Gilbert Camilleri (Chairperson of the 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 December 2022 hereunder-reproduced.

Minutes

Case 1826 – SPD7/2022/038 – Tender for the Provision of Security Services, at the Malta Financial Services Authority (MFSA)

The tender was issued on the 7th August 2022 and the closing date was the 7th September 2022. The estimated value of the tender excluding VAT, was € 556,355.44.

On the 17th November 2022 Signal 8 Security Services Ltd filed an appeal against the Malta Financial Services Authority as the Contracting Authority objecting to their disqualification on the grounds that their offer failed to satisfy the BPQR criterion for award.

A deposit of € 2781.77 was paid.

There were five (5) bids.

On the 15th December 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public 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
Mr Jovan Grech	Representative

Contracting Authority – Malta Financial Services Authority

Mr Reuben Camilleri	Representative
Mr Gilbert Camilleri	Chairperson Evaluation Committee
Ms Jeanie Borg	Evaluator (online)
Mr Miguel Scerri	Evaluator (online)
Mr Chris Borg	Evaluator (online)
Mr Gordon Scicluna	Representative

Preferred Bidder – G4S Security Services Malta Ltd

Mr Julian Dimech	Representative
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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 and asked the parties to note that Board Member Ms Scicluna Laiviera will be participating in the meeting virtually.

Dr Albert Zerafa Legal Representative for Signal 8 Security Services Malta Ltd said that Appellant has two grievances on this matter – the alleged lack of an Employers Medical Insurance (EMI) and the failure on the part of the Contracting Authority to request a clarification to check if Appellant’s bid was compliant.

Mr Reuben Camilleri Representative for the Malta Financial Services Authority (MFSA) said that a clarification would not have resolved the problem as rectification was what was required in this case.

Mr Melvyn Darmanin (430085M) called as a witness by the Appellant testified on oath that he has been in the Financial Advisory Service industry for nine years and assisted in preparing the tender submission on behalf of Appellant. The tender required the production of EMI and Appellant submitted two documents – Employers Liability Insurance and Health Policy. The terminology used in the tender document (Section 13.2) was not correct in the use of technical terms.

Mr Eric Frantz (122381M) called as a witness by Appellant testified on oath that he is FCI qualified and has been employed by AIB Insurance Brokers for 20 years. The term EMI is not used in the insurance market and does not exist in insurance terms – the use of Health Insurance is common as a means of

providing employers with benefits. Witness referred to the documents submitted in the tender, namely the Health, the Public Liability and the Employers Liability policies and explained the purpose of each. He confirmed that the Health Policy Schedule exhibited is sufficient proof of cover of a health policy.

In reply to questions from Mr Camilleri witness stated that Health policy covers the medical requirements and the method of assessing the medical insurance needs either for personal or company (Group Health) requirements. A cover note outlines the salient points of a policy whilst the actual policy itself details all points and usually covers standard wording. The document presented in the submission is a sample of individual cover and such document provides people knowledgeable in the insurance world with all the information they need.

Mr Ivan Buttigieg (149480M) called to testify by the Appellant stated on oath that he is an Insurance brokers of 28 years' standing and confirmed that the term EMI is never heard in the insurance world – alternative terminology is used. If he were asked for EMI he would offer Health or Medical Insurance. Witness explained the difference between liability and medical cover.

Mr Gilbert Camilleri called as a witness by the Appellant testified on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). Prior to his involvement in the tender he had never heard of the term EMI and had doubts as to what it meant. He was advised that EMI is a health insurance policy. According to the witness the schedule and its covering letter presented by Appellant which he had seen does not provide cover. No rectification was possible as this was a Note 3 requirement.

This concluded the testimonies.

Dr Zerafa said that it has been proven that the terminology EMI is not used in the insurance world. Appellant has submitted health insurance and from the exhibited documents it is obvious that there is the cover of a policy with the individual names deleted for obvious reasons and fully satisfies the requirements of the tender. If there was any doubt in the minds of the TEC why did they not apply Regulation 62.2 of the PPR to clarify their doubts? This was not a question of submitting new documents but simply of clarifying existing ones.

Mr Camilleri said that the TEC was looking for insurance cover. EMI had to be interpreted as Health Insurance cover and this could not be substituted by providing part cover through schedules. A full cover provides details with no individual names and it was this full cover that the Authority wanted and not the schedules provided. Clarification was not possible as the whole of the evaluation grid came under Note 3 and only rectification could have solved the problem.

In a final comment Dr Zerafa said that it must be borne in mind that EMI is something that is impossible to provide since it does not exist.

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

End of Minutes

Hereby resolves:

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

Having noted the objection filed by Signal 8 Security Services Malta Limited (hereinafter referred to as the Appellant) on 17th November 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD7/2022/038 listed as case No. 1826 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Albert Zerafa

Appearing for the Contracting Authority: Mr Reuben Camilleri

Whereby, the Appellant contends that:

- a) Employers' Medical Insurance - According to the evaluation committee the objector failed to provide a copy of an Employers' Medical Insurance cover. That whilst the objector affirms that it provided all the necessary documentation as stated/requested under Section C - Social Aspect. C2: Employment Conditions, the reason given by the evaluation committee for deducting the points which had to be allotted to this section, (ergo that *"The bidder provided an example of a health policy schedule but did not submit the Employers' Medical Insurance cover as was required in the BPQR criterion"*), are somewhat erroneous and not reasonable considering that the objector not only fulfilled the requirements but gave a sample of the coverage so as to explain to the evaluation committee the coverage which the employees would be benefitting from. It is imperative to point out that term Employers' Medical Insurance does not exist within the insurance industry but rather the proper terminology is Employer' Health Insurance. Therefore, the objector fulfilled all the requirements specified under the Section C - Social Aspect. C2: Employment Conditions. 1. Thus presented Copy of the Medical (ergo Health) Insurance cover and a copy of an Employers' Medical (ergo Health) Insurance cover is to be provided.
- b) Proportionate Manner - Without prejudice to the above, the evaluation committee should have applied Regulation 62(2) of the Public Procurement Regulation which states :- *"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:"*. 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 Security Services Malta Limited (C54368) 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.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th November 2022 and its verbal submission during the hearing held on 15th December 2022, in that:

- a) Preliminary Information - Upon evaluating the submission, the TEC found two pdf documents in a zip file. One of which contained evidence of active covers pertaining to Employers' Liability and Public Liability. Additionally, the same pdf contained evidence of an expired Employers' Liability cover and an expired Public Liability cover. Both the active and expired covers were irrelevant to the evaluation as the criterion solicited a copy of an Employer's Medical Insurance cover. The second pdf file contained two documents of note, both titled "Health Policy Schedule" The documents were redacted as they seem to have contained personal information pertaining to individuals. Moreover, the documents in question stipulate a payment. The two, one-page documents were in stark contrast to the Employers' Liability and Public Liability covers provided by the same bidder. They lacked evidence of who, and for what they were insured. Furthermore, there was no mention of limits or validity periods. The above findings prompted a discussion within the TEC. It was reasoned that the only option available, that of issuing a clarification would not be used, as a written clarification reply with respect to the submitted documentation would have never resolved the problem. This being a technical submission under Note 3, a rectification was not possible.
- b) Arguments of the Contracting Authority - The objector is contesting the existence of the term Employers' Medical Insurance cover. Apart from the fact that the Department of Contracts has been using the term in the General Conditions for Services (Article 13) for some time, it is understood that the Insurance market is familiar with the term. In addressing the objector's letter, Regulation 62(2) must be read in conjunction with the General Rules Governing Tenders, in particular Article 16. As explained above, the Tenderer's Technical Offer/Organisation and Methodology falls under Note 3. Principles of proportionality, transparency, equal treatment and non-discrimination were upheld. It rests upon the objector to present evidence to the contrary. The objector has claimed that "the Contracting Authority has failed to act in a proportionate manner" whilst attempting to bolster said claim by vaguely referring to the EU Procurement directive and Regulation 39(1) of the PPR. Subsequently, no evidence to support such a claim was articulated.

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, will now consider Appellant's grievances.

- a) Reference is made to:
 - i. Criterion C2 (1) of the Evaluation Grid within the tender dossier states *"A copy of (an Employers' Medical Insurance cover is to be provided. Add-on"*
 - ii. Testimony under oath of Mr Eric Frantz who stated *"The term EMI is not used in the insurance market and does not exist in insurance terms"* and *".....confirm that the Health Policy Schedule exhibited is sufficient proof of cover of a health policy"*
 - iii. Testimony under oath of Mr Ivan Buttigieg who stated *"the term EMI is never heard in the insurance world"*
 - iv. Testimony under oath of Mr Gilbert Camilleri who stated that prior to his involvement in the tender he had never heard of the term EMI and had doubts as to what it meant.
- b) From all of the above, it is clear in the Board's opinion that the term used in the tender document is somehow misleading. Two (2) separate experts in the field confirmed that the term 'EMI' is not used in the insurance world.
- c) Even though, the Appellant failed to make a clarification request on the matter to ascertain what was actually required, which could have easily solved this issue, it none-the-less acted, in the opinion of this Board, in a diligent manner. This for the following reason. Along with their submission, four (4) separate type of documentations were submitted. These being,
 - i. A declaration of Employers' Liability Insurance Policy
 - ii. A 'Cover Note' to attest to point (i) above
 - iii. A declaration of Medical Insurance cover
 - iv. A 'Health Policy Schedule' to attest to point (iii) above.
- d) The Board again makes reference to the testimony of Mr Eric Frantz who stated *"...that the Health Policy Schedule exhibited is sufficient proof of cover of a health policy"*. Within it, the Board notes that there are details covering the i) Policy Number, ii) type of plan (cover), iii) insurance period and iv) annual maximum limit for each person insured.
- e) Therefore, in the Board's views, given the ambiguity of the term as used / drafted in the tender document, and the complete and detailed submissions made by the economic operator, this should not even be a case for a clarification and / or rectification. The Appellant submitted full disclosure as regards to both Medical Insurance cover and Employers Liability cover which is deemed enough to satisfy this specific criterion.

Therefore, this Board upholds appellant's grievances.

The Board,

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

- a) Uphold Appellant's Letter of Objection and contentions,
- b) To cancel the 'Notice of Award' letter dated 7th November 2022;
- c) To cancel the Letters of Rejection dated 7th November 2022 sent to Signal 8 Security Services Malta Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Signal 8 Security Services Malta Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member