

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 415

CT/2169/2011

**Tender for the Provision of Security Services to all MCAST sites**

This call for tenders was published in the Government Gazette on the 28<sup>th</sup> October 2011. The closing date for this call – which attracted no fewer than six (6) tenderers - with an estimated budget of € 360,000 was the 20<sup>th</sup> December 2011.

Global Security Services Ltd filed an objection on the 2<sup>nd</sup> April 2012 against the decision of the Contracts Department to recommend the award of the tender to Kavallier Security Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Monday 21<sup>st</sup> May, 2012 to discuss this objection.

Present for the hearing:

### **Global Security Services Ltd**

Dr Jan Karl Farrugia	Legal Representative
Mr Mario Cardona	Representative
Ms Patricia Borg	Representative

### **JF Security and Consultancy Services Ltd**

Dr Adrian Delia	Legal Representative
Not. Matthew Paris	Representative
Mr Peter Formosa	Representative
Mr Matthew Formosa	Representative

### **Kavallier Security Services Ltd**

Dr Paul Farrugia	Legal Representative
Mr Joseph Debono	Representative

### **Malta College of Arts, Science and Technology**

Dr Peter Fenech	Legal Representative
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### **Evaluation Board**

Mr Oscar Borg	Chairman
Mr Stephen Vella	Member
Mr Mr Saviour Grech	Member
Mr Stephen Caruana	Member

### **Contracts Department**

Ms Joelle Mifsud Bonnici

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Jan Karl Farrugia, legal representative of Global Security Services Ltd, the appellant company, stated that by letter dated 23<sup>rd</sup> March 2012, the Department of Contracts had informed his client that (a) the company's offer was not successful as it was not the cheapest offer and (b) the tender was recommended for award to Kavallier Security Services Ltd, as the cheapest priced offer satisfying the administrative and technical criteria;

#### A) Hourly Rate

Dr Jan Karl Farrugia submitted that:-

- i. as per clause 32.1 of the tender document (page 13) the sole award criterion was the price, following administrative and technical compliance;

and

- ii. contrary to what the contracting authority stated, according to the Financial Schedule, it was evident that his client's offer of €5.60 per hour was the cheapest and, compared to the recommended offer, €0.30 cheaper.

Dr Delia, legal representative of JF Security and Consultancy Services Ltd, submitted that:-

- a. it was his client's contention that of all the tenderers participating in this tendering process, his client's offer was the cheapest permissible at law;
- b. para 3 of Form 1 'Statement on Conditions of Employment' of Volume 1 Section 4 (page 21 of the tender document) stated that:

*"MCAST reserves the right not to award the bid to the cheapest tenderer if, after a verification exercise, it transpires that the hourly rate proposed to be paid by the bidder to its employees either is less than the minimum wage when including in it the payment for pro rata benefits and entitlements or the hourly basic rate does not include payment for pro rata benefits and entitlements";*

- c. it was correct that the recommended offer of €5.90 and the appellant company's (cheapest) offer of €5.60 were both cheaper than his client's offer of €6.31 but it was equally correct to declare that those offers were below the minimum hourly rate established by legislation;
- d. if offers did not cover the minimum requirements for the payment of wages to employees then the contracting authority reserved the right to reject those offers;



- e. according to regulations, the minimum hourly rate applicable for 2011 - the closing date of this call for tenders was December 2011 - was €5.94 broken down as follows:-

€  
3.84 - basic rate  
0.35 - vacation leave  
0.25 - statutory bonuses  
0.21 - public holidays  
0.38 - national insurance  
5.03  
0.91 - VAT  
5.94

- f. the comparable applicable hourly minimum rate for 2012 was €5.19 and, including VAT, €6.12;

and

- g. his client stood by these workings and, if need be, the Department for Industrial and Employment Relations could be asked to either confirm or dismiss them.

Dr Peter Fenech, legal representative of the Malta College of Arts, Science and Technology, submitted that:-

- a. one had to keep in view a number of variables in the computation of the hourly rate, e.g. the engagement of full-timers or part-timers, sub-contracting and the like;
- b. the contracting authority deemed that the responsibility to ensure that employees were paid their wages according to legislation rested with the employer and not with the contracting authority and the public entity that was charged with that supervision was the Department of Industrial and Employment Relations;
- c. the contracting authority would, however, terminate the contract should it result to it that the contractor was not meeting the legal obligations towards the employees in the payment of wages – Form 1 at page 21;
- d. the appellant company was not correct to state that his client's offer at €6.31 was the cheapest offer allowed by regulations because, according to the workings undertaken by the adjudicating board, the following data emerged the year basis 2012:

€  
3.95 – i.e. €158.11 minimum wage per week which included vacation leave;  
0.25 – €512.46 annual bonuses  
0.39 – €822.17 National Insurance Contributions (NI) per annum  
4.59 or €9,556.35/52/40 = €4.59



- e. on the basis of the 2012 minimum wage, which included the annual bonuses and NI, the resulting *pro rata* minimum hourly rate was €4.95, and, as a consequence, the recommended offer and the appellant company's offer of €5.90 and €5.60 respectively were above the minimum permissible by legislation, and if one were to base the workings on the 2011 minimum weekly wage of €153.45 the minimum hourly rate would be less.

Dr Delia:-

- i. argued that the workings undertaken by the contracting authority took into account the wages of an employee as if that employee was on secondment with the contracting authority by dividing the annual wages of €9,556.35 by 52 weeks and by 40 hours giving an hourly rate of €4.59 thus excluding vacation leave and public holidays which, in the computation of the hourly rate, one had to take them into account since the contractor would have to provide a substitute whenever that employee would be on vacation leave.
- ii. requested the Public Contracts Review Board to seek a confirmation from the Department of Industrial and Employment Relations especially with regard to the inclusion of vacation leave and public holidays in the computation of the minimum hourly wage rate in connection with a 24x7 contract;  
  
and
- iii. submitted that a bidder could not offer rates which were not commercially acceptable or not according to good practice or below minimum standards determined by law otherwise public entities would become an accomplice in the violation of labour laws and, as a result, rates below the minimum wage had to be discarded from the outset

Dr Paul Farrugia, legal representative of Kavallier Security Services Ltd, the preferred bidder, pointed out that:-

- a. the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' and did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and the employees and not between the bidder and the contracting authority;
- b. according to the tender document, if a tenderer undertook to abide by labour regulations in the payment of wages to the company's employees then the tenderer was compliant;
- c. the rate offered by the bidder to the contracting authority had nothing to do with the bidder's undertaking to pay the company's employees according to statutory rates as per Form 1 in Volume 1 Section 4;
- d. at no point did the tender document require the contracting authority to go into the details of the hourly rate that the tenderer paid to his employees;

- e. whilst the fact that one was taking 2011 as the basis year to arrive at the hourly rate was itself defective because this was a 3 year contract and the minimum wage could increase in the next 3 year period, yet no allowance was being made to cover such likely wage increases as the bidder was bound for the duration of the contract by the price offered;

and

- f. such variables as future wage increases were commercial risks taken by the bidder when submitting the company's offer which offer was binding for the duration of the contract period

Dr Jan Karl Farrugia held that if one were to go into details then one had to take into account such considerations as to whether

- a. a person was employed under a scheme of the Employment and Training Corporation whereby the said Corporation would fork out part of the wages
- b. one employed a person on a part-time basis whose NI contributions were paid from his main employment, the sick leave that could be availed of by the employee

and

- c. the bidder was prepared to operate a particular contract even at a loss for commercial considerations

Dr Farrugia argued that it was not up to the contracting authority to enter into such merits but what mattered was that the bidder had committed itself to observe labour legislation as outlined in Form 1 'Statement on conditions of employment'.

The Chairman Public Contracts Review Board remarked that:-

- a. in the past the Public Contracts Review Board had taken the stand in similar instances that it was the responsibility of the contractor to see to it that he observed labour legislation *vis-a-vis* the payment of wages to one's employees, with the Industrial and Employment Department exercising its supervisory role in that respect;

and

- b. one should not eliminate the commercial risk taken by bidders but, then again, the tender document itself seemed to condition, to a certain extent, the commercial risk by linking it to the observance of labour legislation, namely the commercial risk should come into play with the departing point being the minimum wage standard;

At this point the Public Contracts Review Board conceded a few days for JF Security and Consultancy Services Ltd to obtain from the Industrial and Employment Relations Department a

confirmation of the breakdown of the 2011 minimum wage hourly rate. At the point of drawing up this report no such confirmation was forthcoming from JF Security and Consultancy Services Ltd.

## B) Experience

Dr Jan Karl Farrugia submitted that:-

- i. from informal emails provided by the Contracts Department his client was informed as follows, namely that the company's

*"offer was found to be administratively non-compliant as you did not have the required experience requested as per clause 6.1.2 Volume 1 Section 4 Form 2"*

- ii. clause 6.1.2 and Volume 1 Section 4 Form 2 requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum;
  - iii. in Volume 1 Section 4 Form 2 'Experience as Contractor' his client listed a number of contracts, the most relevant concerned the services provided to the Malta Fairs and Conventions Centre and to the Malta Football Association which did satisfy the required experience;
  - iv. whilst it could be the case that the contracting authority misinterpreted the information given by his client by taking the listed contracts as monthly contracts rather than annual contracts, i.e. Malta Fairs and Conventions Centre January 2008 €82,000 and Malta Football Association February 2007 €67,000 were interpreted as an €82,000 contract executed on behalf of the Malta Fairs and Conventions Centre in the month of January 2008 and a €67,000 contract executed on behalf of the Malta Football Association in the month of February 2007, yet, that interpretation was incorrect even when considering that such monthly contracts/payments were evidently excessive in the local scenario;
  - v. the Malta Fairs and Conventions Centre and the Malta Football Association contracts referred to contracts worth at least €82,000 and €67,000 annually, respectively, covering the 3 year period 2008-2010 – starting dates indicated were 2008 and 2007;
  - vi. although the contracts data as presented seemed quite clear, the contracting authority could have sought a clarification in that regard;
- and
- vii. unfortunately, his client's representative did not have the relevant information with him at the hearing and, as a consequence, he requested the Public Contracts Review Board to grant him the opportunity to submit further evidence to clarify this point

On his part Dr Fenech submitted that:-

- a. clause 6.1.2 at page 5 of the tender document requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum;
  - b. for evaluation purposes the 3 year period mentioned in clause 6.1.2 referred to 2008-2010;
  - c. the appellant company's tender submission referred to the two relevant contracts as January 2008, €82,000 and February 2007, €67,000;
  - d. whilst the appellant company had just explained that the value of these two contracts was €82,000 each year for the period commencing January 2008 till 2010 and €67,000 each year for the period 2007 to 2010, yet the adjudicating board did not interpret the information as presented in that same manner;
- and
- e. if the appellant company could provide more evidence to clarify the issue, the contracting authority would raise no objection.

The Public Contracts Review Board granted Global Security Services Ltd the opportunity to provide further documentary evidence including existing contracts to clarify the issue concerning the contracts it presented to demonstrate its experience.

*Following the public hearing, Global Security Services Ltd submitted two declarations, (a) one dated 22<sup>nd</sup> May 2012 from MFCC attesting that Global Security Services Ltd had been providing it with security services for the previous 5 years to the value of €82,000 to €85,000 annually, and (b) another dated 22<sup>nd</sup> May 2012 from MFA attesting that Global Security Services Ltd had been providing it with security services for the previous 15 years to the value of €65,000 to €67,000 annually.*

Dr Paul Farrugia submitted that:-

- a. with regard to the past contracts submitted by the appellant company to demonstrate the company's experience he tended to agree with the interpretation given by the adjudicating board, namely that in its submission the appellant company referred to February 2007 and January 2008 as a 'period of execution' and not a period of execution starting from as certain date to another subsequent date;
- and
- b. his client objected to the provision of contracts and/or other documentary evidence at appeal stage because at that stage one had to review what had already been submitted by

the bidders, which evidence was at the disposal of the adjudicating board during the evaluation process.

The Chairman Public Contracts Review Board made it clear that any submissions made would only be considered for the purpose of clarifying a point or a manifest misunderstanding.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 1<sup>st</sup> March 2012 and also through their verbal submissions presented during the hearing held on the 21<sup>st</sup> May, 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 23<sup>rd</sup> March 2012, the Department of Contracts had informed the appellant company that (1) its offer was not successful as it was not the cheapest offer and (2) the tender was recommended for award to Kavallier Security Services Ltd, as the cheapest priced offer satisfying the administrative and technical criteria, (b) as per clause 32.1 of the tender document (page 13) the sole award criterion was the price, following administrative and technical compliance, (c) contrary to what the contracting authority stated, according to the Financial Schedule, it was evident that the appellant company's offer of €5.60 per hour was the cheapest and, compared to the recommended offer, €0.30 cheaper, (d) the contracting authority would, however, terminate the contract should it result to it that the contractor was not meeting the legal obligations towards the employees in the payment of wages – Form 1 at page 21, (e) the appellant company was not correct to state that its offer at €6.31 was the cheapest offer allowed by regulations, (f) on the basis of the 2012 minimum wage, which included the annual bonuses and NI, the resulting *pro rata* minimum hourly rate was €4.95, and, as a consequence, the recommended offer and the appellant company's offer of €5.90 and €5.60 respectively were above the minimum permissible by legislation, and if one were to base the workings on the 2011 minimum weekly wage of €153.45 the minimum hourly rate would be less, (g) if one were to go into details then one had to take into account such considerations as to whether (1) a person was employed under a scheme of the Employment and Training Corporation whereby the said Corporation would fork out part of the wages and (2) one employed a person on a part-time basis whose NI contributions were paid from his main employment, the sick leave that could be availed of by the employee and (3) the bidder was prepared to operate a particular contract even at a loss for commercial considerations, (h) from informal emails provided by the Contracts Department the appellant company was informed that the company's "*offer was found to be administratively non-compliant as you did not have the required experience requested as per clause 6.1.2 Volume 1 Section 4 Form 2*", (i) clause 6.1.2 and Volume 1 Section 4 Form 2 requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum, (j) in Volume 1 Section 4 Form 2 'Experience as Contractor' the appellant company listed a number of contracts, the most relevant concerned the services provided to the Malta Fairs and Conventions Centre and to the Malta Football Association which did satisfy the required



experience, (k) whilst it could be the case that the contracting authority misinterpreted the information given by the appellant company by taking the listed contracts as monthly contracts rather than annual contracts, i.e. Malta Fairs and Conventions Centre January 2008 €82,000 and Malta Football Association February 2007 €67,000 were interpreted as an €82,000 contract executed on behalf of the Malta Fairs and Conventions Centre in the month of January 2008 and a €67,000 contract executed on behalf of the Malta Football Association in the month of February 2007, yet, that interpretation was incorrect even when considering that such monthly contracts/payments were evidently excessive in the local scenario, (l) the Malta Fairs and Conventions Centre and the Malta Football Association contracts referred to contracts worth at least €82,000 and €67,000 annually, respectively, covering the 3 year period 2008-2010 – starting dates indicated were 2008 and 2007, (m) although the contracts data as presented seemed quite clear, the contracting authority could have sought a clarification in that regard and (n) unfortunately, the appellant company's representative did not have the relevant information with him at the hearing and, as a consequence, he requested the Public Contracts Review Board to grant him the opportunity to submit further evidence to clarify this point;

- having considered the contracting authority's representatives' reference to the fact that (a) one had to keep in view a number of variables in the computation of the hourly rate, e.g. the engagement of full-timers or part-timers, sub-contracting and the like, (b) the contracting authority deemed that the responsibility to ensure that employees were paid their wages according to legislation rested with the employer and not with the contracting authority and the public entity that was charged with that supervision was the Department of Industrial and Employment Relations, (c) clause 6.1.2 at page 5 of the tender document requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum, (d) for evaluation purposes the 3 year period mentioned in clause 6.1.2 referred to 2008-2010, (e) the appellant company's tender submission referred to the two relevant contracts as January 2008, €82,000 and February 2007, €67,000, (f) whilst the appellant company had just explained that the value of these two contracts was €82,000 each year for the period commencing January 2008 till 2010 and €67,000 each year for the period 2007 to 2010, yet the adjudicating board did not interpret the information as presented in that same manner and (g) if the appellant company could provide more evidence to clarify the issue, the contracting authority would raise no objection;
- giving also considered the representatives of the interested party's reference to various issues, especially the fact that (a) it was the company's contention that of all the tenderers participating in this tendering process its offer was the cheapest permissible at law, (b) para 3 of Form 1 'Statement on Conditions of Employment' of Volume 1 Section 4 (page 21 of the tender document) stated that "*MCAST reserves the right not to award the bid to the cheapest tenderer if, after a verification exercise, it transpires that the hourly rate proposed to be paid by the bidder to its employees either is less than the minimum wage when including in it the payment for pro rata benefits and entitlements or the hourly basic rate does not include payment for pro rata benefits and entitlements*", (c) whilst it was correct that the recommended offer of €5.90 and the appellant company's (cheapest) offer of €5.60 were both cheaper than its offer of €6.31, yet it was equally correct to declare that those offers were below the minimum hourly rate established by legislation, (d) if offers did not cover the

minimum requirements for the payment of wages to employees then the contracting authority reserved the right to reject those offers, (e) according to regulations, the minimum hourly rate applicable for 2011 - the closing date of this call for tenders was December 2011 - was €5.94, (f) the comparable applicable hourly minimum rate for 2012 was €5.19 and, including VAT, €6.12, (g) the workings undertaken by the contracting authority took into account the wages of an employee as if that employee was on secondment with the contracting authority by dividing the annual wages of €9,556.35 by 52 weeks and by 40 hours giving an hourly rate of €4.59 thus excluding vacation leave and public holidays which, in the computation of the hourly rate, one had to take them into account since the contractor would have to provide a substitute whenever that employee would be on vacation leave and (h) a bidder could not offer rates which were not commercially acceptable or not according to good practice or below minimum standards determined by law otherwise public entities would become an accomplice in the violation of labour laws and, as a result, rates below the minimum wage had to be discarded from the outset;

- having considered the recommended tenderer's representatives' reference to the fact that (a) the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' and did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and the employees and not between the bidder and the contracting authority, (b) according to the tender document, if a tenderer undertook to abide by labour regulations in the payment of wages to the company's employees then the tenderer was compliant, (c) the rate offered by the bidder to the contracting authority had nothing to do with the bidder's undertaking to pay the company's employees according to statutory rates as per Form 1 in Volume 1 Section 4, (d) at no point did the tender document require the contracting authority to go into the details of the hourly rate that the tenderer paid to his employees, (e) whilst the fact that one was taking 2011 as the basis year to arrive at the hourly rate was itself defective because this was a 3 year contract and the minimum wage could increase in the next 3 year period, yet no allowance was being made to cover such likely wage increases as the bidder was bound for the duration of the contract by the price offered, (f) such variables as future wage increases were commercial risks taken by the bidder when submitting the company's offer which offer was binding for the duration of the contract period, (g) it was not up to the contracting authority to enter into such merits but what mattered was that the bidder had committed itself to observe labour legislation as outlined in Form 1 'Statement on conditions of employment', (h) with regard to the past contracts submitted by the appellant company to demonstrate the company's experience he tended to agree with the interpretation given by the adjudicating board, namely that in its submission the appellant company referred to February 2007 and January 2008 as a 'period of execution' and not a period of execution starting from as certain date to another subsequent date and (i) the recommended company objected to the provision of contracts and/or other documentary evidence at appeal stage because at that stage one had to review what had already been submitted by the bidders, which evidence was at the disposal of the adjudicating board during the evaluation process,

reached the following conclusions, namely:

1. The Public Contracts Review Board agrees in principle with the interested party's claim, namely that a bidder cannot offer rates which are not commercially acceptable or not according to good practice or below minimum standards determined by law as, otherwise, public entities would become an accomplice in the violation of labour laws and, as a result, rates below the minimum wage would have to be, ideally, discarded from the outset. Nevertheless, this Board opines that the responsibility to ensure that employees are paid their wages according to legislation rests with the employer and not with the contracting authority and the public entity that is charged with that supervision is the Department of Industrial and Employment Relations. Furthermore, the Public Contracts Review Board agrees with the recommended tenderer's argument which placed emphasis on the fact that the statement signed by the tenderer in Form 1 of Volume 1 Section 4 concerned the company's commitment to pay wages to its employees according to labour regulations in force so much so that para. 3 referred to '*the hourly rate proposed to be paid by the bidder to its employees*' and did not concern the hourly rate that the bidder would charge the contracting authority and so this form referred to the relationship between the bidder and the employees and not between the bidder and the contracting authority. As a result, this Board argues that it is correct to interpret existing parameters in similar tender documents as allowing for the fact that the rate offered by a bidder to the contracting authority may have nothing to do with the bidder's undertaking to pay the company's employees according to statutory rates as found, for example, in Form 1 in Volume 1 Section 4. As a consequence, this Board believes that one would be correct to interpret the fact that, according to the tender document, if a tenderer undertook to abide by labour regulations in the payment of wages to the company's employees then the tenderer had to be considered as being compliant. Needless to say that any tenderer will have to bear the legal consequences of making false declarations '*ab initio*'. This Board has, in the past, verbally recommended during hearings that tender documents should specify a minimum threshold in respect of hourly rates payable to employees below which no bidder should quote in a bid. It is the opinion of this Board that, by doing so, all will be less conducive to subjective interpretation and definitely more transparent – competitiveness should be aimed at via the provision of an excellent service and not largely based on fine tuned employee hourly rates conveniently quoted.
2. The Public Contracts Review Board has taken cognizance of the fact that despite the fact that it conceded a few days for JF Security and Consultancy Services Ltd to obtain from the Industrial and Employment Relations Department a confirmation of the breakdown of the 2011 minimum wage hourly rate, yet no such confirmation was ever submitted to this Board by JF Security and Consultancy Services Ltd's representatives.
3. The Public Contracts Review Board feels that, whilst the fact that one was taking 2011 as the basis year to arrive at the hourly rate was, *per se*, defective because this was a 3 year contract and the minimum wage could increase in the next 3 year period, yet no allowance was being made to cover such likely wage increases as the bidder was bound for the duration of the contract by the price offered. Furthermore, this Board argues that one should not eliminate the commercial risk taken by bidders. Also, within this same context, the tender document itself seemed to condition, to a certain extent, the commercial risk by linking it to the observance of labour legislation, namely placing a more than subtle emphasis on the fact that

the commercial risk should come into play with the departing point being the minimum wage standard set at national level.

4. The Public Contracts Review Board has also considered the fact that (a) clause 6.1.2 and Volume 1 Section 4 Form 2 requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum, as well as (b) in Volume 1 Section 4 Form 2 'Experience as Contractor' the appellant company listed a number of contracts, the most relevant concerned the services provided to the Malta Fairs and Conventions Centre and to the Malta Football Association.

This Board needed to analyse the claim made by the appellant company, namely that it could be the case that the contracting authority misinterpreted the information given by the appellant company by taking the listed contracts as monthly contracts rather than annual contracts, i.e. Malta Fairs and Conventions Centre January 2008 €82,000 and Malta Football Association February 2007 €67,000 which, allegedly, were erroneously interpreted as an €82,000 contract executed on behalf of the Malta Fairs and Conventions Centre in the month of January 2008 and a €67,000 contract executed on behalf of the Malta Football Association in the month of February 2007 when, according to the appellant company, both the Malta Fairs and Conventions Centre and the Malta Football Association contracts referred to contracts worth at least €82,000 and €67,000 annually, respectively, covering the 3 year period 2008-2010 – starting dates indicated were 2008 and 2007.

In view of the fact that the appellant company's representative did not have the relevant information with him at the hearing, having also established that whilst

- a) the contracting authority claimed that if the appellant company could provide more evidence to clarify the issue it would raise no objection
- b) the recommended company objected to the provision of contracts and/or other documentary evidence at appeal stage let alone after the hearing because, at that stage, one had to review what had already been submitted by the bidders, which evidence was at the disposal of the adjudicating board during the evaluation process

the Public Contracts Review Board granted the appellant company the opportunity to submit further evidence solely to clarify its claim making it clear in the process that no rectification would be allowed.

The appellant company presented the following documents, viz:

- a. a copy of an operational agreement (Global Security Services Limited and Malta Fairs & Convention Centre) dated 9<sup>th</sup> May 2008 valid for a period of one (1) year renewable by further periods of one (1) year thereafter. The original version of this agreement was (a) submitted under oath on 6<sup>th</sup> June 2012 by Ms Patricia Borg (ID 399762), Company Director and (b) duly verified for correctness and authenticated by Jean Pierre Busuttill B.A. (Law), LP;



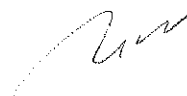
- b. a letter dated 22<sup>nd</sup> May 2012 and duly signed by Mr Reuben Caruana, Business Development Director, Malta Fairs and Convention Centre. The original version of this agreement was (a) submitted under oath on 6<sup>th</sup> June 2012 by Ms Patricia Borg (ID 399762), Company Director and (b) duly verified for correctness and authenticated by Jean Pierre Busuttil B.A. (Law), LP \*;
- c. a letter dated 16<sup>th</sup> January 2008 and duly signed by Mr Victor Mifsud, General Manager, Malta Football Association. The original version of this agreement was (a) submitted under oath on 6<sup>th</sup> June 2012 by Ms Patricia Borg (ID 399762), Company Director and (b) duly verified for correctness and authenticated by Jean Pierre Busuttil B.A. (Law), LP \*;
- d. a letter dated 22<sup>nd</sup> May 2012 and duly signed by Mr Bjorn Vassallo, CEO, Malta Football Association. The original version of this agreement was (a) submitted under oath on 6<sup>th</sup> June 2012 by Ms Patricia Borg (ID 399762), Company Director and (b) duly verified for correctness and authenticated by Jean Pierre Busuttil B.A. (Law), LP \*;
- e. a letter dated 26<sup>th</sup> March 2012 and duly signed by Mr Joseph Gauci, General Secretary, Malta Football Association. The original version of this agreement was (a) submitted under oath on 6<sup>th</sup> June 2012 by Ms Patricia Borg (ID 399762), Company Director and (b) duly verified for correctness and authenticated by Jean Pierre Busuttil B.A. (Law), LP \*;

\* Copies of (b) – (e) form part of this decision

Having gone through the content of all documents submitted, this Board feels that with regard to document referred in to as

- (1) (a) A copy of an operational agreement reference is made to the time frame but not to the actual annual commercial value of the same contract.
- (2) (b) A letter dated 22<sup>nd</sup> May 2012 reference is made to the time frame involved as well as to the “average sales” (*per annum*) including functions and services provided by appellant company to client. This Board observed that the claim made by client (Malta Fairs & Convention Centre) still does not properly elucidate third parties enough as, after all, this Board cannot associate the term “average sales including functions and services” within the scope of this tender which is “the Provision of Security Services”. Whilst this Board takes cognizance of the fact that, earlier in the same letter, reference is made to the fact that “Global Security Services Limited has been in contract for providing security services for the past five years”, yet the use of the term “functions” is inappropriate and out of context leaving this Board still unsure as to the mix of the actual competencies of the appellant company *vis-a-vis* its client. Also, this Board notices that the document was presented under oath by the appellant company director (Ms Patricia Borg). Undoubtedly, this is unacceptable as a document has to (a) be submitted (b) have its content verified for its authenticity and correctness by the person issuing such document in the first place which, in this case, meant Mr Reuben Caruana (Business Development Director - Malta Fairs and Convention Centre) .





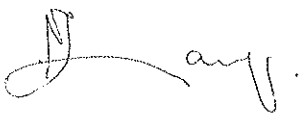
- (3) *(c) A letter dated 16<sup>th</sup> January 2008* reference is made to Mr Cardona's (on behalf of Global Security Services Ltd) work at MFA's National Stadium (Ta' Qali) carried out in connection with security services and crowd control over a nine year time frame prior to the date of the said letter. This Board, once again, notices that the document was presented under oath by the appellant company director (Ms Patricia Borg). Undoubtedly, this is unacceptable as a document has to (a) be submitted (b) have its content verified for its authenticity and correctness by the person issuing such document in the first place which, in this case, meant Mr Victor Mifsud (General Manager - Malta Football Association).
- (4) *(d) A letter dated 22<sup>nd</sup> May 2012* reference is made to the time frame involved as well as to the fact that "average total in all the services provided to the MFA including cash in transit and security services in all MFA stadiums amounts to €65,000 to €67,000 per annum." This Board, once again, notices that the document was presented under oath by the appellant company director (Ms Patricia Borg). Undoubtedly, this is unacceptable as a document has to (a) be submitted (b) have its content verified for its authenticity and correctness by the person issuing such document in the first place which, in this case, meant Mr Bjorn Vassallo (CEO - Malta Football Association).
- (5) *(e) A letter dated 26<sup>th</sup> March 2012* reference is made to the time frame but not to the actual annual commercial value of the same contract. This Board, once again, notices that the document was presented under oath by the appellant company director (Ms Patricia Borg). Undoubtedly, this is unacceptable as a document has to (a) be submitted (b) have its content verified for its authenticity and correctness by the person issuing such document in the first place which, in this case, meant Mr Joseph Gauci (General Secretary - Malta Football Association).
5. Having thoroughly examined the documentation requested, this Board considered all within the context of clause 6.1.2 and Volume 1 Section 4 Form 2 which requested a minimum of 2 projects of a similar scope/nature completed in the last 3 years which should not be less than €50,000 per annum. The Public Contracts Review Board opines that it is still unsatisfied as to the content of the documents submitted by the appellant company. As a result, this Board also feels that the:
- a. claims made by officials of both the Malta Fairs and Convention Centre and the Malta Football Association need to be authenticated and verified through the administration of pertinent oaths by those issuing the documents in the first place and not by any of the appellant company's officials
  - b. the appellant company needs to provide further authenticated tangible evidence (covering related services carried out by the appellant company in the period under review) through the corroboration of claims made regarding value of contracts and payments effected as a result (e.g. copies of cheques, authenticated proof of payment by bank, receipts etc.) by

both entities in question, namely the Malta Fairs and Convention Centre and the Malta Football Association within the period under review, i.e. 2008-2010.

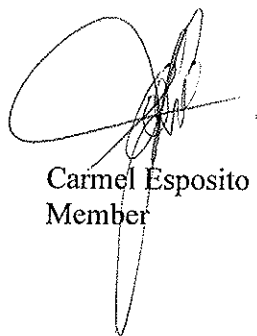
6. The Public Contracts Review Board feels that the evidence provided by the appellants after the hearing, albeit not clear enough for it to reach a definite conclusion, yet, need to be further investigated by the contracting authority. This Board is not encouraging a rectification of the tender document originally submitted by the appellant company but it feels that pertinent clarifications along the line as this Board has tried to carry out after the hearing could have easily been carried out by the evaluation Board itself at deliberation stage. The Public Contracts Review Board agrees in principle with the claim made by the appellant company that it could have been the case that the contracting authority misinterpreted the information given by the said company when it took the listed contracts as monthly contracts rather than annual contracts, namely Malta Fairs and Conventions Centre January 2008 €82,000 and Malta Football Association February 2007 €67,000 which were interpreted as an €82,000 contract executed on behalf of the Malta Fairs and Conventions Centre in the month of January 2008 and a €67,000 contract executed on behalf of the Malta Football Association in the month of February 2007. This Board acknowledges that such interpretation – albeit unintentionally – could have been incorrect even when considering that such monthly contracts/payments were evidently excessive in the local scenario. As a result it seems evident to the Board that, under these circumstances, the evaluation board could have exercised its right to seek clarification of facts submitted rather than treating this issue as a potential rectification.

In view of the above, this Board finds in favour of the appellant company and recommends that, apart from being reintegrated in the evaluation process, the claims made with regard to the value contracted with the referred entities be thoroughly analysed in line with indications given in 5 (a) and (b) above.

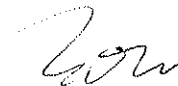
This Board also recommends that the deposit paid by the said appellant company to lodge the appeal should be reimbursed.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Joseph Croker  
Member

21<sup>st</sup> June 2012