

PUBLIC CONTRACTS REVIEW BOARD

Case 998 – GHRC 024/2016 – Leasing & Operation of Security Screening Equipment at the Grand Master’s Palace

The Publication Date of the Call for Tenders was 1 July 2016 whilst the Closing Date for Call of Tenders was 11 August 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 339,200.

Two (2) Bidders have submitted offers for this Tender.

On 26 September 2016, Kerber Securities Ltd filed an Objection against the decision of the Grand Harbour Regeneration Corporation to award the Tender to G4S Security Services (Malta) Ltd for the price of € 203,309 (Exclusive of VAT) against a deposit of € 2,544.

On 20 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Kerber Securities Ltd

Mr Ronald Axisa	Representative
Mr Stefan Axisa	Representative
Dr Cheryl Azzopardi	Legal Representative
Dr Michael Grech	Legal Representative
Dr Mark Vassallo	Legal Representative

Recommended Bidder – G4S Security Services (Malta) Ltd

No Representative was present on behalf of this company for this Public Hearing.

Contracting Authority – Grand Harbour Regeneration Corporation

Mr Dennis Vella	Chairperson, Evaluation Board
Ms Caroline Magri	Secretary, Evaluation Board
Mr Stanley Azzopardi	Member, Evaluation Board
Arch Mario Bonello	Member, Evaluation Board
Mr Ivan Abela	Representative
Dr Lydia Abela	Legal Representative

Witness Present For This Public Hearing

Dr Franco Agius	Procurement Manager, Department of Contracts
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Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Mark Vassallo, Legal Representative for Kerber Security Limited opened his submissions by declaring that he was withdrawing the Fourth Grievance made in the Letter of Objection dated 26 September 2016 regarding the Power of Attorney.

At this point, Dr Vassallo requested this Board to call Dr Franco Agius, ID 496577 M, Procurement Manager, Department of Contracts to be called to witness under oath.

Dr Vassallo asked Dr Agius to discuss and exhibit the Procurement Policy Note 13 issued by the Department of Contracts on 25 March 2015. The witness replied that this note was issued which applied to all entities under Schedule 1 of the Public Procurement Regulations.

In this note, the Department of Contracts was drawing the attention to the Contracting Authorities that the Director of Contracts was receiving many complaints from prospective Bidders regarding the Closing Date of Tenders fell in recess days like the "Santa Marija", Easter or Christmas period.

The Department of Contracts issued a policy note directing the Contracting Authorities to extend any Tenders which closed during the recess periods for seven days.

Dr Mark Vassallo then asked Dr Agius to read the second page of the policy note since the period which the former was talking about was the "Santa Marija" feast period. Dr Agius quoted the first paragraph of the second page of the Policy Note which stated:

"For instance, in 2015, where Easter Sunday will be falling on the 4th of April, any Tender which has its publication period spanning over the 29th of March and the 10th of April shall have same publication period extended by a minimum of seven calendar days."

Dr Mark Vassallo then asked whether he was correct when stating that the "Santa Marija" feast period for this year fell between 12 August and 24 August. Dr Franco Agius replied that an internal notification was circulated through the Electronic Public Procurement System which *inter alia* stated that:

"In order to ensure unanimity, the Department of Contracts is hereby advising that no closing dates shall fall between the 12th August 2016 and the 24th August 2016 both days inclusive. In the event that any already published CFTs that may fall in between the assigned period, such CFTs are to be extended thus ensuring that the closing dates shall fall outside the above mentioned dates". Dr Franco Agius said that the Circular was issued on 28 June 2016 at 9 am and exhibited a copy of it to the Public Contracts Review Board.

Dr Mark Vassallo, Legal Representative for Kerber Security Limited then asked the witness to confirm whether this directive requested an extension of 7 days to whoever had any Tenders whose closing dates fell within the stipulated period for which Dr Franco Agius confirmed in the affirmative.

Dr Lydia Abela, Legal Representative for the Grand Harbour Regeneration Corporation asked Dr Franco Agius to confirm whether the Contracting Authority fell under Schedule 1 and Schedule 3 of the Public Procurement Regulations for which the witness agreed.

Dr Abela then invited Dr Agius to explain the difference. The latter replied that Schedule 1 incorporate all Contracting Authorities whilst Schedule 3 put the administration for the Call of Tenders to selected authorities one of which was the Grand Harbour Regeneration Corporation.

Dr Lydia Abela then asked how the Authorities get notified of such directives for which Dr Agius replied that all Contracting Authorities, including those in Schedule 3 are manually notified.

Dr Abela then referred to Point 4 of the Procurement Policy Note 13 which *inter alia* states:

“In order to pursue maximisation of the number of Tenders submitted, tendering periods within which such a recess falls are to be extended by a minimum of seven (7) calendar days”.

Here Dr Abela requested the contextual definition of the words “*such a recess falls*” for which the witness replied that those words meant when the Closing Date of the Tenders fall in the recess period.

Dr Lydia Abela, continued to refer to the same note, precisely to the statement quoted earlier by Dr Franco Agius in his testimony as an example and asked the latter to confirm that it is in that period that the “*recess falls*”. The witness replied that the 40 day period for call for Tenders ends within the period in question.

She also asked Dr Agius what he understands when referring to the part of the notification issued by the Department of Contracts on the 28 June 2016 which stated:

“In the event that any already published CFTs that may fall in between the assigned period, such CFTs are to be extended”

The witness replied that any calls for Tenders which were to finish in that period had to be extended.

Dr Abela continued her cross-examination by asking Dr Agius what that would mean if there was a Tender whose original closing date was on 22 July 2016 but was extended to 12 August 2016 for which the witness replied that he understood that the Closing Date was 12 August 2016.

Dr Anthony Cassar, Chairman Public Contracts Review Board remarked that if the closing date fell in the dates where an extension was not needed, the Closing Date would fall. The witness agreed with this statement.

Dr Lydia Abela for the Contracting Authority asked the witness to clarify the words “*in between*” in the notification. Dr Agius replied that those words referred to the days between 12 August 2016 and 24 August 2016 both days inclusive.

Dr Mark Vassallo for Kerber Security Limited queried whether this applied to all Schedule 1 entities which included the Grand Harbour Regeneration Corporation for which Dr Franco Agius agreed.

Dr Mark Vassallo then asked the witness to confirm that the notification was sent to all parties who fall under Schedule 1. Dr Franco Agius replied that one should distinguish between a circular and an instruction like this. A Circular applies to all Schedule 1 entities while this note informs all Electronic Public Procurement users with the new instructions.

Dr Vassallo then asked for confirmations whether the Contracting Authority had to follow these instructions. Dr Agius confirmed while adding that there were no records on who has received the notification or not as the system does not hold any such records.

At this point, Dr Mark Vassallo asked the Public Contracts Review Board whether anyone from the Contracting Authority can be summoned to witness.

Arch Mario Bonello, ID 89274, Member of the Evaluation Board was then summoned to witness under oath.

Dr Mark Vassallo for Kerber Security Ltd asked whether the Contracting Authority was aware of this directive for which the witness replied in the affirmative.

Dr Vassallo then asked why the Closing Date of Tender went back from 12 August 2016 to 11 August 2016. Arch Bonello replied that as both the Policy Note and Dr Agius said, the Note applies for all Tenders published prior to the 28 June 2016. Any Tenders whose closing date was on 12 August 2016 had to extend the Closing Date according to the Regulation.

The Tender was published on 1 July 2016 while its Closing Date was 22 July 2016, hence the Tender being issued after the directive was issued by the Department of Contracts. A week following the Publication of the Tender, the Grand Harbour Regeneration Corporation felt the need to extend the Closing Date in order to give more Bidders the chance to submit any prospective offer and therefore the Tender was extended until 12 August 2016. When the Contracting Authority realised that the date fell under a further extension as per 28 June 2016 directive, it revised the Closing Date of Tenders for 11 August 2016.

This is why, continued Arch Mario Bonello, the policy note does not apply to this Tender. Whoever issued Tenders before 28 June 2016 was not aware that the “*recess period*” fell between the 12 and 24 August. The Contracting Authority was aware of this policy and it issued the Tender on 1 July 2016 with a Closing Date of 22 July 2016. The latter was extended to 12 August 2016 but when it realised the mistake it had put back the Closing Date for one day, namely the 11 August 2016.

Dr Mark Vassallo, for Kerber Security Ltd, asked how they notified the Public of the extension from 22 July 2016 to 12 August 2016 for which Arch Mario Bonello replied that they have issued a clarification on the Electronic Public Procurement System. Dr Michael Grech, also for Kerber Security Ltd countered that there was no clarification.

Arch Mario Bonello, Member of the Evaluation Board continued his witness by saying that in the Government Gazette of 1 July 2016, the Closing Date published was 22 July 2016 but a week later on 8 July a note was issued which stated that any prospective Bidders had a day less to submit their offers and that the Closing Date was closed on the 11 August 2016.

Dr Mark Vassallo then asked the witness to indicate where they showed that the Closing Date of Tenders was 12 August 2016 for which the witness said that this only appeared on the Electronic Public Procurement System and that in an official way, this was not issued.

Dr Lydia Abela, Legal Representative for the Grand Harbour Regeneration Corporation then asked the witness whether they ever received a request to extend the deadline either from the Appellants or from any other Bidder for which Arch Bonello replied that there were no requests for extension and that both bids were submitted in time.

Dr Abela then asked the witness whether they received any Pre-Contractual Concerns or not for which the witness replied in the negative. Arch Bonello continued by saying that the extension was made internally since here one was discussing security equipment for the forthcoming EU 2017 activities which were going to be held in Malta and the respective timelines. After an internal review, it was decided to extend the Closing Date from the 22 July to 11 August to give more time to prospective Bidders to submit their offers.

Dr Abela then asked Arch Bonello on what was the duration of the time frame who replied 41 days.

Dr Mark Vassallo, Legal Representative Kerber Security Ltd submitted that the Public Procurement Regulations are there for a reason. He understands that there were circumstances where certain leeways are allowed in order not to cancel Tenders or lose EU Funds but there were also certain obligations which the Contracting Authority had to respect.

Dr Vassallo contended that the discussion here concerned a Tender which was published on 1 July 2016, after the issuing of the 28 June 2016 directive by the Department of Contracts which meant that this Tender had to abide by what the latter had ordered. The Closing Date for Tenders was extended from 22 July 2016 to 12 August 2016 and according to the Tender Document a Clarification should have been published and this did not happen.

Clarification 1 issued on the 8 July 2016 was an afterthought of the Grand Harbour Regeneration Corporation who realised that they had made a mistake and arranged the Closing Date of Tenders from 12 August 2016 to 11 August 2016. This first mistake, continued Dr Vassallo, should lead to the annulment of the Tender since the extension was not communicated according to the Tender Document Requirements or the Public Procurement Regulations.

Dr Vassallo argued also that there was a second mistake made by the Contracting Authority since they had changed the Closing Date of Tenders to one day in advance. This went against article 10.1 of the General Rules Governing Tenders v 1.14 issued by the Department of Contracts on 4 January 2016, which gives power to the Contracting Authorities to extend forward the Closing Date of Tenders not backwards.

The third mistake, continued Dr Vassallo, the Contracting Authority not only couldn't move backwards the Closing Date according to Clause 10.1, there was also the Procurement Policy Note 13 and then the directive issued by the Department of Contracts on 28 June 2016 which told the Grand Harbour Regeneration Corporation that if the Closing Date of Tenders fall during the recess period, they had to extend the latter according to the Procurement Policy Note 13. There was nowhere in the Tender Document where they could have advanced the Closing Date of Tenders.

Dr Vassallo argued that the Contracting Authority was thinking what prejudice had the Appellant suffered in this matter but this was not the case since the Tender should have been annulled on these three grounds. With regards the question of being in Schedules 1 and 3, the Contracting Authority should know well that the Directive applied also to them since they fell under Schedule 1.

Dr Lydia Abela for the Grand Harbour Regeneration Corporation referred to the testimony of Arch Mario Bonello and to the e-mail sent on 28 June 2016 to the latter by the Department of Contracts. The Tender was published on 1 July after the issuing of this e-mail which meant that the Closing Date of Tender could not have been between the 12 and 24 August 2016. The Grand Harbour Regeneration Corporation wanted to assure that the Closing did not fall between those dates in order to obey the directive and they had to shift the closing date to 11 August 2016 because they couldn't afford to extend the Tender for a further week.

Dr Abela was surprised with this Objection since the Appellant did neither send a Clarification nor a Request to extend the Tender or at least file a Pre-Contractual Remedy. The Letter of Objection sent by Kerber Security Ltd did not even talk about the latter being prejudiced in any way and here she referred to point 5 of the same letter dated 26 September 2016 which *inter alia* said, "*The Call for Tenders allow for a change in the deadline dates*"

The important thing, contended Dr Abela, was that the Grand Harbour Regeneration Corporation abided by the directives issued by the Department of Contracts. There was nowhere in the Public Procurement Regulations which talked about advancing the Closing Date of Tenders.

Following the issue of Clarifications, both Tenders submitted were Technically Compliant and the decisive factor was the price. Due to the fact that Kerber Security Ltd did not suffer any prejudice, his Appeal should be rejected continued Dr Lydia Abela.

Dr Mark Vassallo, Legal Representative of Kerber Security Ltd, argued that there were also sentences from the European Courts of Justice which state that the element of prejudice was not always necessary for the Tender to be annulled. The Tender requirements were there to be observed. Clarification 1 show that the Closing Date of Tenders was on 11 August 2016 not 12 August 2016 as it originally happened.

Dr Vassallo then referred to Case 962 decided by the Public Contracts Review Board on 3 August 2016 where the latter accepted the fact that no Tender must be closed during the recess period.

Dr Michael Grech, Legal Representative for Kerber Security Ltd said that the Grand Harbour Regeneration Corporation was trying to justify the notification of the 12 August Closing Date with the Electronic Public Procurement System.

Dr Lydia Abela for the Contracting Authority concluded that the Public Contracts Review Board had to just see whether the Procurement Process was done properly or not.

At this stage, the Public Hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 26 September 2016 and also their verbal submissions during the Public Hearing held on 20 October 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Kerber Securities Ltd contend that no clarification was sent to the bidders denoting the change of the Closing Date of this Tender from 12 August 2016 to 11 August 2016.**

In this regard, the Appellant maintains that the Tender should be cancelled, since there was no provision in the Tender Document whereby the Closing Date could be advanced.

Having considered the Contracting Authority's "*Letter of Reply*" dated 4 October 2016 and also their verbal submissions during the Public Hearing held on 20 October 2016, in that:

- a) The Grand Harbour Regeneration Corporation maintains that following the issue of e-mail dated 28 June 2016, they noted that the Closing Date of this Tender would have fallen on the recess period**

between 12 August 2016 and 24 August 2016. In this regard, since the Closing Date of the Tender was 12 August 2016, the Contracting Authority advanced the Closing Date by one day, ie 11 August 2016 after originally extending the same Tender from 22 July 2016 to 12 August 2016.

The Contracting Authority finds no contravention to any regulation as to why they cannot advance the Closing Date by One Day.

Reached the following conclusions:

- 1. This Board after the lengthy submissions by all parties concerned justifiably notes that the main issue of this Appeal relates to the advancement of the Closing Date of Tenders by one day.**

This Board also notes that various arguments were raised to the fact that the Grand Harbour Regeneration Corporation did not abide by the e-Mail dated 28 June 2016 referring to Procurement Policy Note 13. However, a logical approach to this Appeal is to treat two main issues which are the “*Change of Closing Date*” and the “*Cancellation of Tender*”.

i) **Change of Closing Date**

This Board notes that this Tender, originally had a closing date of 22 July 2016. To enable, enhance and promote participation, the Grand Harbour Regeneration Corporation extended the Closing Date to 12 August 2016, representing an extension period of 21 days.

At the same instance, the Contracting Authority published the advancement of the Closing Date to 11 August 2016 through the notice in the Government Gazette on the 8 July 2016.

In this regard, although no clarification was submitted by the Contracting Authority, Kerber Securities Ltd were aware that such an advancement of dates occurred, so much so, that the Appellant's submissions were filed within the stipulated period.

One has to point out, that although the reference to Policy Note 13 was not submitted through a clarification; the same was submitted via e-mail dated 28 June 2016 to all "*Electronic Public Procurement*" users.

In this regard, this Board is somewhat surprised that the Appellants were bringing forward its arguments regarding the “*Advancement of the Closing Date*” in front of the same when they could have filed either a Clarification or a Pre-Contractual Remedy wherein their issues could have been treated in the normal course.

At the same instance, this Board places great emphasis on the fact that Kerber Securities Limited did, in fact, make their submissions within the stipulated period of 22 July 2016 to 11 August 2016.

At the same time, this Board would prudently point out that, by submitting his offer, the Appellant had accepted all the conditions laid out in the Tender Document including that the Closing Date to be 11 August 2016.

In this regard, the Appellant did not challenge the advancement of the Closing Date nor did he file a “*Pre-Contractual Concern*”.

ii) Cancellation of Tender

This Board, after having established the credible fact that, Kerber Securities Ltd were aware of the “*Advancement of the Closing Date* and at the same instance did not file a “*Pre-Contractual Concern*”, prior to the submission of their offer. This does not entertain the Appellant’s Contention that the Tender should be declared null and void.

In this regard, this Board opines that, the Grand Harbour Regeneration Corporation acted diligently by advancing the Closing Date by one day and yet at the same time, the Appellants were aware of this Advancement and submitted their offer within the new stipulated period.

This Board notes that there are no regulations which prohibit the Contracting Authority from advancing the Closing Date of a particular Tender. Apart from the fact that from a realistic point of view, an advancement of the Closing Date by just one day should not, in any practical manner, affect the extension period of 21 days.

The facts are that the Appellant's offer was Technically Compliant but was not the cheapest.

In view of the above, this Board finds against Kerber Securities Limited and recommends that the deposit paid by the latter should not be reimbursed.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

26 October 2016