

PUBLIC CONTRACTS REVIEW BOARD

Case 1900 – SPD1/2022/233 – Services - Framework Contract for the Provision of two (2) Security Guard Services with Receptionist duties at the Department for Industrial and Employment Relations

1st September 2023

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of JF Security & Consultancy Services Limited, (hereinafter referred to as the appellant) filed on the 14th June 2023;

Having also noted the letter of reply filed by Dr Andrew Grima on behalf of the Department of Industrial and Employment Relations (hereinafter referred to as the Contracting Authority) filed on the 22nd June 2023;

Having heard and evaluated the testimony of the witness Ms Susan Tonna (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for JF Security & Consultancy Services Limited;

Having heard and evaluated the testimony of the witness Mr Theo Vella (Representative of the General Workers Union) as summoned by Dr Matthew Paris acting for JF Security & Consultancy Services Limited;

Having heard and evaluated the testimony of the witness Mr Christopher Galea (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for JF Security & Consultancy Services Ltd;

Having heard and evaluated the testimony of the witness Ms Luana Grech (Secretary of the Evaluation Committee) as summoned by Dr Andrew Grima acting for Department of Industrial and Employment Relations;

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 1st August 2023 hereunder-reproduced.

Minutes

Case 1900 – SPD1/2022/233 – Services – Framework Contract for the Provision of Two (2) Security Guards Services with Receptionist Duties at the Department for Industrial and Employment Relations

The tender was issued on the 17th February 2023 and the closing date was the 20th March 2023. The estimated value of the tender, excluding VAT, was € 153,628.80

On the 14th June 2023 JF Security & Consultancy Services Ltd filed an appeal against the Department for Industrial & Employment Relations as the Contracting Authority objecting to their disqualification on the grounds that their offer was not the best one under the Best Price Quality Ratio criteria.

A deposit of € 768.14 was paid.

There were five (5) bids.

On the 1st August 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – JF Security & Consultancy Services Ltd

Dr Matthew Paris Legal Representative

Contracting Authority – Department for Industrial & Employment Relations

Dr Andrew Grima	Legal Representative
Ms Luana Grech	Secretary Evaluation Committee
Mr Christopher Galea	Evaluator
Ms Susan Tonna	Evaluator
Mr Omar Grech	Representative

Preferred Bidder – Executive Security Services

Dr Alessandro Lia Legal Representative

Preferred Bidder - Signal 8 Security Services Ltd

Mr Julian Dimech Representative

Grange Security (Malta) Ltd and **Gold Guard Security Services Ltd** were invited to attend but declined the offer.

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Paris Legal Representative for JF Security & Consultancy Services Ltd (JF) said that Appellant's grievance was as stated in the letter of appeal and at this stage would request that witnesses be heard.

Ms Susan Tonna (437170M) called to testify by the Appellant stated on oath that she was one of the evaluators and detailed the composition of the Tender Evaluation Committee (TEC). JF was the only bidder that was not compliant since points were deducted due to the lack of a renewed Collective Agreement, the one submitted having expired in 2014. [Present Agreement shown on share screen]. The tender makes it clear that a renewed Agreement was required. Referred to a clause in the existing Agreement that it remains in force until rescinded, witness said that what the tender requested is confirmation that the Agreement has been renewed. The lack of renewal meant that Appellant could not be awarded full points. The Department for Industrial and Employment Relations (DIER) confirmed that the Agreement was still valid according to the witness.

In reply to a question from Dr Alessandro Lia, Legal Representative for Executive Security Services, witness said that there was no notification of renewal of the Agreement.

Mr Theo Vella (468573M) called to testify by the Appellant stated on oath that he is the Secretary of the Disciplined Forces, Security & Law Enforcement Officers at the General Workers Union and has been so since December 2017 and is responsible for the Agreement with the Appellant firm and has been negotiating for some time with the firm for a new Agreement. Referred to Clause 4 of the Agreement, witness stated that the Agreement is still valid but has not been renewed due to disagreement with JF on matters like salaries, incentives, disciplinary processes etc. A letter dated 25th May 2023 from the GWU confirming that the Agreement was still valid was displayed on screen share.

Dr Andrew Grima Legal Representative for DIER asked the witness to confirm that negotiations for a new Agreement were still taking place. Witness also confirmed that the 2014 Agreement has not been renewed.

Questioned by Dr Lia, witness said that both parties recognise that a new Agreement cannot be signed as they are still negotiating.

In reply to further questions from Dr Paris witness said that there are similar situations with other companies. The length of an Agreement with private companies was for three years and with Government for five years.

Mr Christopher Galea (45577M) called to testify by the Appellant stated on oath that he was one of the evaluators. He had not seen among the Appellant's submission the letter from the GWU dated 25th May 2023 displayed earlier in the hearing. Only two letters dated 20th July 2020 and 8th April 2022 from the GWU had been submitted in the bid. The points awarded under Clause 3 reflected the documents submitted.

Ms Luana Grech (123287M) called to testify by the Contracting Authority stated on oath that she was the Secretary of the Evaluation Committee. Points had been awarded according to the evaluation grid. The Agreement submitted by JF had expired and not been renewed so it could not be awarded full points but was awarded 65% of the marks. The agreement was not registered with the DIER.

In reply to a question from Dr Paris witness said that this shortcoming could not be clarified as it was subject to Note 3.

This concluded the testimonies.

At this stage Dr Lia asked the Board to note that he was objecting to Dr Paris' method of questioning witnesses and the way he was addressing other legal representatives.

Dr Paris said that all bidders should be able to participate in this tender. The Collective Agreement states that it remains valid until one of the parties terminates it – it is, therefore, still valid and binding on both parties as confirmed by witness Mr Theo Vella, and it is still acknowledged by the DIER. The claim that it has expired is fallacious. The Court case *Salvina Mizzi vs Marlene Tua* was cited in support of the claim of the validity of a Collective Agreement. Some of the grid clauses give different results, so why not give the Appellant the benefit of the doubt – why give 3.9 and not 4 points. The self-limitation obligation is to follow the tender terms as illustrated in the *South Lease* case. The tender should have stated that extensions of the Agreement would not be accepted. This appeal should be upheld.

Dr Lia said a distinction must be made between the relationship between the Union and the firm concerned and what the tender required. Appellant created confusion by not making this distinction. The Agreement binds the parties by way of a contract to protect the workers. The Authority in this case is asking that the Agreement is still active and registered with the DIER. Appellant claims that the award of points is contradictory; however, page 13 of the tender is clear on the award of the points. JF failed on points iv and v in Clause 3 and was therefore awarded 65% equivalent to 3.9 points – nothing could be clearer. If Appellant disagreed with this method of award there was a precontractual remedy available. The question is not if the Agreement is still effective but if what the tender requested has been justified.

Dr Grima said that what Dr Lia had just said reflected very much the views of the Authority. The tender requested a renewed Agreement. Mr Vella in his testimony confirmed that there has been no renewal. The DIER is looking for a renewed Agreement which was not provided and it is clear that the evaluators followed the tender requirements.

In conclusion Dr Paris said that the reference to validity period in the technical offer form should not apply in this case. An exchange of emails between the Appellant and DIER confirms that the Agreement is registered with the DIER.

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 1st August 2023.

Having noted the objection filed by JF Security & Consultancy Services Limited (hereinafter referred to as the Appellant) on 14th June 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2022/233 listed as case No. 1900 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Andrew Grima

Appearing for the Preferred Bidder (Executive Security Services): Dr Alessandro Lia

Whereby, the Appellant contends that:

- a) 1st grievance - Breach of self-limitation doctrine -

In its evaluation, the Contracting Authority through its evaluation committee concluded that: *"Your company has submitted an expired collective agreement"*. Thus and thereby it awarded 3.9 marking, with the

following justification: “65 per cent was given as per Section 1 - Instructions to Tenderers Evaluation Grid, Criteria C - Social Aspects, Conditions of Employment”

It is the submission by JF that the 3.9 marking is arbitrary and has no basis in the tender document and/or the established marking scheme provided by the Contracting Authority. The doctrine of self-limitation is an important public procurement principle which has been referred to by this Honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency. The Appellant company feels aggrieved by the decision of the evaluation committee, in particular since it failed to adhere to the mandatory requirement of the tender document, and in the process breaching this fundamental principle.

b) 2nd grievance - Wrong evaluation -

CA, in justifying the reduction in the mark allocation, held that: *'Your company has submitted an expired collective agreement'*. JF submits that all the required documents have been made to (sic) available to the CA at submission stage, and which documents confirm that the statement erroneous and factually incorrect. For all intents and purposes, JF hereby declares and unequivocally confirms that it has a valid collective agreement which is appropriately registered with the Department of Industrial and Employment Relations, incidentally the beneficiary of the services of the procurement procedure. The points afforded to JF should have been the maximum, in accordance with the criteria weighting matrix, and thus the evaluation and the ensuing marking is erroneous!

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22nd June 2023 and its verbal submission during the hearing held on 1st August 2023, in that:

a) 1st grievance - Breach of self-limitation doctrine -

The Contracting Authority humbly submits that there was no breach of the self-limitation doctrine. This doctrine lays down that tender submissions are adjudged only on the basis of conditions stipulated within the tender document and nothing else, thereby ensuring predictability and transparency. The Criteria and sub-criteria, including Criteria C, sub-criteria II, set forth in the tender document were clear and unequivocal for all the tenderers, including the Appellant.

The Contracting Authority further respectfully submits that if the Appellant genuinely felt that there was any shortcoming in the way the tender document was drafted and/or any unfair criteria, then in terms of Regulation 262 of the Public Procurement Regulations, the Appellant had other remedies available to it of which he did not avail itself prior to the submission of his bid. The submission of his bid conclusively confirms his acceptance of all tender conditions by which he is now bound.

b) 2nd grievance – Wrong evaluation -

In the appeal brought forward by the Appellant, the latter argues that it provided all the documentation requested and that the Contracting Authority was erroneous and incorrect when it

held that *"Your company has submitted an expired collective agreement"*. The Contracting Authority did not make a wrong evaluation of the documentation submitted nor of the criteria established in the tender document.

Indeed, the collective agreement submitted to the Contracting Authority was an expired one and hence it could not allocate full marks in terms of the above-cited criteria.

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 in their entirety.

a) **The Collective Agreement -**

- i. As from the outset, this Board opines that the Collective Agreement as presented by the Appellant is undeniably still in force, albeit that it has a 'time window'.
- ii. Even though section 4 of such Collective Agreement states *"This Agreement shall be effective from the 4th June 2012 and shall remain in force until the 3rd June 2014"*, it then goes also to speak about its validity in 'interim periods' when it states *"During negotiations, and until a new Agreement is signed, the contents of this Agreement shall remain in force"*.
- iii. This was confirmed by the appellant in two (2) stages. Initially during the tender submission period within the letter issued by Mr Theo Vella, Secretary Disciplined Forces, Security & Law Enforcement Officers Section General Workers' Union where he stated *"We also confirm that the collective agreement which covers period 2012-2014 between GWU and JF Security is still effective and that both parties are undergoing negotiations to amend clauses re disciplinary procedures, salaries, basic work conditions and other incentives"*. Subsequently, this was also reconfirmed during the hearing under oath by the same Mr Theo Vella.

b) **The Tender Document -**

- i. Now that the Board has assessed that the Collective Agreement is indeed valid, reference is now made to the Tender Document and the nomenclature used in the tender document to ascertain whether it embraces / permits or otherwise a collective agreement which is valid and whether such nomenclature requires anything 'beyond simply being valid'. This in terms of the self-limitation principle.
- ii. Reference is made to page 13 of the tender dossier, "Conditions of Employment" criterion which states *"In addition, if available, the Conditions of Employment Report shall also include a copy of a Collective Agreement as negotiated by the Parties involved. If such a Collective Agreement is not available, the Economic Operator may submit documentation as detailed below"* (underline emphasis added) The word "a", in the singular denotes that they could have produced a past copy, while the words "as negotiated" presume that negotiations had been carried out and concluded, indeed. The fact that it has already been established that

the Collective Agreement is indeed valid brings the last part, i.e. *“If such a Collective Agreement is not available, the Economic Operator may submit documentation as detailed below”*, as irrelevant.

- iii. Therefore, what the Tender Document required, in the Board’s opinion, is proof of a valid (still in force) Collective Agreement.
- iv. Once proof was submitted that negotiations are underway, the Collective Agreement is still valid and deemed to be in force, therefore meeting the requirements of the tender document.

Hence, this Board upholds the Appellant’s grievances.

The Board,

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

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the ‘Notice of Award’ letters dated 5th June 2023;
- c) To cancel the Letter of Rejection dated 5th June 2023 sent to JF Security & Consultancy Services Limited;
- d) To order the contracting authority to re-evaluate the bid of the Appellant received in the tender procedure whilst also taking into consideration this Board’s findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member