



QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF MARK CHETCUTI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar l-Erbgħa, 22 ta' Ġunju, 2022.

Numru 33

Appell numru 105/2022/1

Security Service Malta Limited (C-20791)

v.

**Id-Direttur tal-Kuntratti; *Ozosecurity Limited*; u Direttur *Corporate Services*
fil-Ministeru għall-Finanzi u Xogħol**

1. Dan huwa appell ta' *Security Service Malta Limited* ["l-appellanti"] minn deċiżjoni tat-28 ta' Frar 2022 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku ["L.S. 601.03"], li ċaħad oġġezzjoni tagħha kontra deċiżjoni tal-Ministeru għall-Finanzi u Xogħol ["l-awtorità kontraenti"] li warrab għax sabha "*technically non-compliant*" offerta tagħha wara sejħa pubblika għal offerti ta' kuntratt "*for the provision of cash in transit service*" u ippropona illi l-kuntratt jingħata lil *Ozosecurity Limited* ["*Ozosecurity*"].

2. Il-fatti rilevanti seħnew hekk: kienet saret sejha mill-awtorità kontraenti għal offerti għall-kuntratt fuq imsemmi. Il-kondizzjonijiet tas-sejha iġiddu *inter alia* illi:

»Every security officer shall wear a complete company uniform which is clean and smart at all times. The successful tenderer is to provide, at his own cost, adequate uniforms and equipment for the intended service delivery. Uniforms shall include a shirt, trousers or skirts, jacket, tie and security hat.¹

3. Tefgħu offerti, fost oħrajn, l-appellanti u *Ozosecurity*. B'ittra tal-10 ta' Jannar 2022 fuq *letterhead* tad-Dipartiment tal-Kuntratti l-appellanti ġiet mgħarrfa illi l-offerta tagħha twarrbet għax "*technically non-compliant*" u illi l-kuntratt kellu jingħata lil *Ozosecurity*. Ir-raġuni għala l-offerta tal-appellanti tqieset li ma kinitx teknikament konformi ġiet imfissra hekk:

»Further to rectification request in the technical literature being Note 2 for Uniforms, Appearance and Attitude, bidder was requested to submit picture/photo of uniform for the 3 lots. The submitted picture[s] do not display jacket, tie and shirt as requested in article 4.2 of Section 3 – Terms of Reference. Hence bidder found to be technically non-compliant.«

4. L-appellanti ressqet oġġezzjoni quddiem il-Bord ta' Reviżjoni b'ittra tal-20 ta' Jannar 2022, tilmenta kemm dwar l-għażla ta' *Ozosevice* u kemm dwar it-twarrib tal-offerta tagħha. Il-bord iddeċieda hekk:

»... .. this board :

»(a) does not uphold appellant's letter of objection and contentions,

»(b) upholds the contracting authority's decision in the recommendation for the award of the tender to *Ozosecurity Ltd*,

»(d) irects that the deposit paid by appellant not be reimbursed.«

5. Ir-raġunijiet li wasslu lill-bord għal din id-deċiżjoni ġew imfissra hekk:

»The tender was issued on the 25th August 2020 and the closing date was the 14th September 2020. The value of the tender, excluding VAT, was €130,000 for all three lots.

¹ Section 3, para. 4.2

»On the 20th January 2022 *Security Services Malta Ltd* filed an appeal against the Ministry for Finance and Employment (formerly the Ministry for Finance and Financial Services) as the contracting authority objecting to their disqualification on the grounds that their tender was deemed to be technically not compliant.

»... ..

»Dr Sammut, legal representative for the Ministry for Finance, raised a preliminary procedural point regarding late written submissions sent by appellant.

»The chairman confirmed that in line with the PCRB policy the documents received on the 18th February 2022 will not be considered and will be ignored.

»... ..

»When Mr Vella [rappreżentant tal-appellanti] tried to raise a grievance on the share capital of the preferred bidder Dr Thompson [rappreżentant ta' *Ozosecurity*] objected as this point was not raised in the original appeal.

»The chairman said that the board concurred with Dr Thompson's comment and their decision will take account only of the two grievances raised in the appeal.

»... ..

»... .. the appellant, in their letter of objection, contends that:

a) MCCAA² Standards – The winning bidder is not technically compliant since they are not a member of the MCCAA standards as outlined in DSM3200:2014, cash and valuables-in-transit and vaulting services. On the 5th April 2021, *Ozosecurity Ltd* sent an official letter to join this association. However, this company started offering the cash in transit service only from the 15th June 2020, and up to today is still not part of this association given shortcomings in their operations. The tender closing date was 14th September 2020, therefore *Ozosecurity Ltd* certainly was not compliant to this standard, after less than 3 months in operation. You can note that discussions are ongoing up to last week, and an audit must take place to certify their level of operation, since we were aware of various shortcomings – being a start-up operation. We cannot understand how this was overlooked to adjudicate this tender to *Ozosecurity Ltd*.

b) Uniform – We also received information that we were technically non-compliant since the uniform pictures we submitted do not display a tie. We would like to inform you that the CIT³ uniform complies, is approved, and accepted by the Commissioner of Police, and to change any part of the uniform we would need their evaluation and authorisation in writing. At the inception of our business, over 25 years ago, discussions with the Commissioner of Police concluded that the CIT officers should not be wearing a tie, for obvious health and safety reasons, giving the risky nature

² *Malta Competition and Consumer Affairs Authority*

³ *Cash in transit*

of the operations. We have 2 distinctive uniforms for the guarding services (with a tie) and the cash in transit service (without a tie but with a bullet proof vest), both approved by the Commissioner of Police. You can view both uniforms in the attachment named 'uniform'. If we submitted a guarding uniform, we would have been deceiving the evaluators, in our opinion. Finally, this is the first time, in over 25 years, that we are being pointed out with this 'non compliance'. We were also successful in the past for the same tender (for several times) with the same uniform. Our uniforms for the CIT and guarding services never changed since then. The wording in such a tender would need to be changed, so that the CIT uniform requirement makes sense and not just a copy and paste from the requirement of a guarding/security tender.

»This board also noted the contracting authority's reasoned letter of reply filed on 27th January 2022 and its verbal submission during the virtual hearing held on 22nd February 2022, in that:

»a) MCCAA Standards – Objector is alleging that the winning bidder is not technically compliant since it is not a member of the MCCAA Standards as outlined in DSM3200:2014, cash and valuables-in-transit and vaulting services. However, the requirement in the tender document did not state that the economic operators have to be a member of the MCCAA and neither asked economic operators to provide any proof of this. The technical specifications in clause 4.2 of the tender document required as a minimum standard of service that: 'The successful tenderer needs to guarantee that the service rendered is following the MCCAA standards as outlined on DM 3200:2014 cash and valuables-in-transit and vaulting services'. The technical offer of the winning economic operator, *Ozosecurity Ltd*, gave a declaration claiming the economic operator will adhere with the technical requirements, guaranteeing that such standards are observed. Since the winning bidder met the requirement in the tender document in guaranteeing that the service it will render is following the MCCAA standards as outlined on DSM 3200:2014, the objector's first ground is unfounded in fact and at law.

b) Uniform – Even the second ground of objection is unfounded in fact and at law. Amongst the technical specifications required in clause 4.2 of the tender document, it was specifically required that:

»"Uniforms, appearance and attitude

»"Every security officer shall wear a complete company uniform which is clean and smart at all times. The successful tenderer is to provide, at his own cost, adequate uniforms and equipment for the intended service delivery. Uniforms shall include a shirt, trousers or skirts, jacket, tie and security hat. Where high risks tasks are envisaged, security personnel must also be provided with bullet-proof vest. Pictures / photos of uniform are to be submitted with the tender offer." (Section 3 Article 4.2 page 13).

»The objector did not submit a clarification in regard to this technical requirement during the tender period.

»Since objector submitted pictures/photos that did not meet this technical requirement, a rectification was requested. This is a Note 2 requirement – Technical Literature – and, in terms of Instructions to Tenderers, the objector was given the opportunity to rectify its position by resubmitting the above mentioned literature for the three (3) lots, to be conformity (*sic*) with respective technical requirements as stated in the tender document. Since objector failed to meet the technical Note 2 literature, even after a rectification was requested, objector's bid was considered as technically not compliant and his bid was not financially evaluated in accordance with tendering regulations. In fact, this bid was considered as technically not compliant as the submitted pictures by bidder *Security Service Malta Ltd* did not display jacket, tie and shirt as requested in article 4.2 of section 3 – Terms of Reference. Whilst the arguments brought forward by *Security Services Malta Ltd* may possibly be comprehensible from its point of view, it must be emphasised that the cash for transit requirements in the tender document requested a uniform with tie (section 3 article 4.2 page 13). Furthermore, the objector did not submit a clarification during the tender period highlighting the mentioned issue and hence the contacting authority had no alternative but to consider the offer as technically not compliant.

»This board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider appellant's grievances, as follows:

»a) MCCAA Standards – This board notes that what the tender dossier specifically required was “The successful tenderer needs to guarantee that the service rendered is following the MCCAA standards as outlined on DNI 3200:2014 cash and valuables-in-transit and vaulting services”, this by way of self declaration only. This board notes that the self declaration was duly provided by the preferred bidder.

»Therefore, this Board does not uphold this grievance of the Appellant.

»b) Uniform – With regards to this specific grievance, this board will analyse this in two sections.

»i. This board notes that during the evaluation stage the contracting authority adhered to all the procedures necessary as per the Public Procurement Regulations S.L. 601.03. When the evaluation committee noticed that the bid of the prospective bidder, now appellant, did not meet the minimum technical requirements as per the tender dossier, with specific reference to the uniform, it proceeded to make a rectification request to the appellant. Therefore, the appellant was provided with an opportunity to amend his bid. This in line with 'Note 2' praxis, since technical literature falls within the remit of 'Note 2'. This board notes that the appellant, upon rectification, still submitted an offer which the evaluation committee deemed technically non-compliant.

- »ii. This board notes that the arguments raised by the appellant in his objection letter were never contested prior to this appeal. The board opines that if the appellant felt aggrieved that the tender dossier requested 'cash in transit' guards to wear ties, then such sort of grievance (reference to 'We also received information that we were technically non-compliant since the uniform pictures we submitted do not display a tie') should have been dealt with by way of a 'remedies before closing date of a call for competition' or the very least by way of 'clarification' request to the contracting authority during the tendering/ bidding process. The tender dossier was clear and unambiguous in paragraph 4.2 of Section 3 when it stated 'Every security officer shall wear a complete company uniform which is clean and smart at all times. The successful tenderer is to provide, at his own cost, adequate uniforms and equipment for the intended service delivery. Uniforms shall include a shirt, trousers or skirts, jacket, tie and security hat. Where high risks tasks are envisaged, security personnel must also be provided with bullet-proof vest. Pictures / photos of uniform are to be submitted with the tender offer'.

»Reference is also made to *Rockcut Ltd v. Malta Industrial Parks Ltd* et decided on 31st May 2019 whereby "Kif tajjeb osserva d-Direttur Ġenerali (Kuntratti), jekk ir-regoli tas-sejha jimponu l-preżentata ta' tali taghrif, hu mistenni li offerenti li jjeħdu sehem f'dik is-sejha joqogħdu għal dawk ir-regoli. Wara kollox ir-regoli tas-sejha qegħdin hemm biex jigu mħarsa u mhux biex jigu mwarrba. Biex jigi żgurat il-ħarsien ta' dawn il-prinċipji, l-awtorità kontraenti hija obbligata li tosserva strettamenti il-kriterji li hija stess tkun stabiliet".

»Therefore, this board does not uphold this grievance of the appellant.«

6. *Security Services Malta Limited* appellat b'rikors tat-18 ta' Marzu 2022 li għalih wiegħbu d-Direttur tal-Kuntratti fit-28 ta' Marzu 2022 u l-awtorità kontraenti fis-6 ta' April 2022.
7. Id-Direttur tal-Kuntratti ressaq eċċezzjoni preliminari illi ma kellux jiġi mħarrek f'dan l-appell u għalhekk għandu jinħeles mill-ħarsien tal-ġudizzju.
8. Din l-eċċezzjoni hija tajba u għandha tintlaqa'. Id-dokument tas-sejha jgħid illi l-valur stmat tal-kuntratt huwa mija u tletin elf ewro (€130,000). Ir-reg. 9(1)(a) tal-L.S. 601.03 igħid illi "l-proċess ta' akkwisti għal kuntratti

pubbliċi li l-valur stmat tagħhom hu inqas minn mija u disa' u tletin elf ewro (€139,000) għandhom jinħarġu, jiġu amministrati u determinati mill-awtoritajiet kontraenti waħidhom mingħajr il-ħtieġa li jiġi involut id-Direttur". Fil-fatt id-direttur ma kienx involut fil-proċeduri quddiem il-Bord ta' Revizjoni. Imbagħad ir-reg. 285 igħid min għandhom ikunu l-partijiet fl-appell:

»285. Ir-rikors tal-appell għandu jkun indirizzat kontra l-awtorità. responsabbli għat-tmexxija tas-sejha, l-awtorità kontraenti, l-offerent rakkomandat, jekk ikun hemm, u kull parti oħra involuta fil-proċeduri quddiem il-Bord ta' Revizjoni dwar Kuntratti Pubbliċi,«

9. Mela kemm għax ma kienx involut fil-proċess tal-akkwist u kemm għax ma kienx involut fil-proċeduri quddiem il-bord, id-Direttur tal-Kuntratti ma kellux ikun parti f'dan l-appell. Tassew illi l-ittra li biha l-appellanti kienet mgħarrfa illi l-offerta twarrbet saret fuq *letterhead* tad-Dipartiment tal-Kuntratti, li seta' wassal biex l-appellanti tiġi żgwidata (għalkemm fil-fatt ma ħarrkitx lid-direttur quddiem il-Bord ta' Revizjoni). Dan ikollu effett fuq l-ispejjeż iżda mhux li jdaħħal lid-direttur fi proċeduri li ma għandux ikun parti fihom.
10. Il-qorti għalhekk teħles lid-Direttur tal-Kuntratti mill-ħarsien tal-ġudizzju, b'dan illi d-direttur għandu jhallas l-ispejjeż tiegħu.
11. Ngħaddu issa għall-meritu tal-appell.
12. L-aggravji huma tlieta: l-ewwel aggravju jolqot id-deċiżjoni tal-Bord ta' Revizjoni li ma jippermettix lill-appellanti tressaq oġġezzjonijiet li ma kinitx semmiet fl-ittra tal-20 ta' Jannar 2022 – dawn l-oġġezzjonijiet jolqtu l-eligibilità ta' *Ozosecurity* għax l-appellanti tgħid li *Ozosecurity* għandha

nuqqasijiet li ma jippermettulhiex li validament tagħti s-servizz li trid l-awtorità kontraenti; it-tieni aggravju jolqot id-deċiżjoni li l-offerta tal-appellanti kellha titwarrab minħabba f'nuqqasijiet fl-uniformi; u t-tielet aggravju wkoll jolqot l-eligibilità ta' *Ozosecurity* għax mhix konformi mal-*MCCAA standards*.

13. Nibdew bit-tieni aggravju – dak dwar l-uniformi – billi jekk ma jintlaqax dan l-aggravju, u għalhekk l-offerta tagħha twarrbet validament, l-appellanti ma jifdlilhiex interess f'dan l-appell. L-aggravju gie mfisser hekk:

»It-tieni aggravju jirrigwarda d-deċiżjoni li s-soċjetà appellanti tiġi eliminata minħabba allegat nuqqas fl-uniformi li kienet qiegħda tip-provdi, senjatament minħabba l-fatt li s-soċjetà appellanti ma inkludietx ingravata fl-uniformi sottomessa filwaqt li t-*tender* kien jehtiegħa.

»Kif sottomess mis-soċjetà appellanti, l-uniformi sottomessa fl-offerta tagħha hija dik awtorizzata u ċertifikata mill-Kummissarju tal-Pulizija u għalhekk l-appellanti ma setgħet tbiddel ebda parti mill-uniformi u wisq anqas tipprovdi ingravata *stante* li din hija meqjusa perikoluża fis-servizz meħtieġ peress li ufficjal jista' jiġi marbut jew anke fgat biha.

»Dan huwa rekwizit li ddeċieda l-Kummissarju tal-Ġulizija meta s-soċjetà appellanti bdiet l-eżerċizzju tagħha aktar minn ħamsa u għoxrin sena ilu u ma jistax jinbidel kif ġieb u laħaq, iżda jehtiegħ ħafna żmien u sottomissjonijiet lill-Kummissarju tal-Pulizija.

»Kif spjegat l-appellanti, din għandha żewġ uniformijiet, waħda għall-*guarding services* (li tinkludi ingravata) u waħda għas-servizz meħtieġ fis-sejha, *cioè cash in transit service* (mingħajr ingravata izda b'*bullet proof vest*), li t-tnejn huma approvati mill-Kummissarju tal-Pulizija.

»Fil-passat, f'sejhiet preċedenti, din l-uniformi dejjem giet aċċettata u l-appellata dejjem ingħatat il-kuntratt relattiv b'din l-istess uniformi li issa qiegħda tiġi rifjutata.

»Għaldaqstant is-soċjetà appellanti tissottmetti umilment li dan l-aggravju jisthoqqlu li jintlaqa' u li s-soċjetà appellanti jisthoqqilha bis-sħiħ terġa' tiġi redintegrata fit-proċess tal-għażla.«

14. Effettivament li qiegħda tgħid l-appellanti hu illi s-sejha għal offerti fiha kondizzjonijiet li jmorru kontra l-liġi. Tistrieħ fuq id-disposizzjonijiet tar-reg. 9 tar-Regolamenti dwar Gwardjani Privati [“L.S. 389.01”].

»9. (1) Kull persuna li jkollha liċenza ta' gwardjan privat għandha, waqt li tkun fuq dmirijietha, tilbes dik l-uniformi skond kif japprova l-Kummissarju minn żmien għal żmien:

»Iżda l-Kummissarju jista', f'ċirkostanzi speċjali, jawtorizza bil-miktub biex jeżenta gwardjan privat milli jilbes uniformi kif imsemmi fuq.

»(2) Dik l-awtorizzazzjoni għandha tkun jew dwar xogħol partikolari jew dwar perijodu speċifikat u tkun suġġetta għall-kondizzjoni espressa li l-gwardjan privat hekk awtorizzat għandu jgħorr fuqu, waqt li jkun fuq dmirijietu, u juri meta hekk mitlub, l-awtorizzazzjoni bil-miktub u l-karta tal-identità maħruġa mill-Kummissarju taħt dawn ir-regolamenti.«

15. Dan ir-regolament ma jgħidx illi l-uniformi ma tistax tkun b'ingravata; igħid biss illi trid tkun approvata mill-Kummissarju tal-Pulizija. Kull ma kellha tagħmel l-appellanti hu li titlob permess għal uniformi bl-ingravata għall-iskopijiet tal-kuntratt mal-awtorità kontraenti, u mhux tiddeċiedi li l-kondizzjoni fis-sejha għal offerti lilha ma torbothiex.

16. L-appellanti iżda tgħid ukoll illi hija prassi frażina illi għal xogħol bħal dak li trid l-awtorità kontraenti tintlibes ingravata. Jekk dan huwa minnu, ir-rimedju kellha tfittxu fiż-żmien li tagħti l-liġi, viz. qabel id-data tal-għeluq tas-sejha, taħt it-Taqsima IX tal-L.S. 601.003, *Rimedji qabel id-Data tal-Għeluq tas-Sejha*, u mhux timxi bħallikieku l-kondizzjoni minnha impunjata titqies li ma torbotx. Ir-reg. 262(1)(d) igħid hekk:

»262. (1) Kandidati prospettivi u offerenti jistgħu, fl-ewwel żewġ terzi taż-żmien allokati fid-dokument tas-sejha għat-tfiġh tal-offerti, jipprezentaw rikors b'raġunijiet quddiem il-Bord ta' Reviżjoni:

»... ..

»(d) biex isewwu żbalji jew biex ineħħu ambigwitajiet ta' terminu jew klawżola partikolari mdaħħla f'sejha għall-kompetizzjoni, fid-dokumenti tal-kuntratt, f'noti ta' kjarifika jew f'xi dokument ieħor li jirriwarda l-proċedura dwar l-għoti ta' kuntratt.«

17. Ladarba l-appellanti ma fittxix dan ir-rimedju fil-waqt li fih kellu jintalab, ma tistax tfittxu issa. Il-kondizzjonijiet tas-sejha, fosthom dawk dwar l-

uniformi, huma dawk li huma, l-appellanti *ex admissis* ma ħarsithomx, ukoll wara li ngħatat opportunità tagħmel tajjeb għan-nuqqas, u għalhekk l-awtorità kontraenti ma setgħetx ħlief twarrab l-offerta.

18. Billi għalhekk f'kull każ l-offerta tal-appellanti għandha titwarrab, u għalhekk ma għandhiex interess ġuridiku tikkontesta l-eligibilità tal-oblatatur rakkomandat, ma huwiex meħtieġ li nqisu l-aggravji l-oħra.

19. Il-qorti għalhekk tiċġad l-appell u tikkonferma d-deċiżjoni tal-Bord ta' Reviżjoni. L-ispejjeż ta' dan l-appell tħallashom l-appellanti, ħlief għall-ispejjeż tad-Direttur tal-Kuntratti li għandu jħallas l-ispejjeż tiegħu.

Mark Chetcuti
President

Giannino Caruana Demajo
Imħallef

Anthony Ellul
Imħallef

Deputat Reġistratur
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