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27th April 2015

Public Contracts Review Board
Notre Dame Ditch
Floriana, FRN 1601

Reply of Signal 8 Security Services Malta Ltd to the objection filed by Appletree International Ltd in respect of tender no. TM 085/2014 entitled: Tender for the Provision of Scheduled Public Transport Monitoring Services.

It is respectfully submitted:

- That on the 7th November 2014, a call for tenders was issued for the provision of scheduled public transport monitoring services, which tender bore reference number TM 085/2014 (hereinafter the “Tender”);
- That the sole award criterion for the Tender was based on the cheapest priced tender satisfying the administrative and technical criteria;¹
- That Signal 8 Security Services Malta Ltd (hereinafter the “Exponent”) was one of the bidders who submitted an offer in respect of the Tender;
- That the deadline for the submission of the Tender was 21st November 2014;
- That the Tender was awarded to the Exponent for the amount of €95,480.00 being the cheapest priced tender satisfying the administrative and technical criteria;
- That Appletree International Ltd, another bidder in this tendering process (hereinafter the “Appellant”), filed an objection with the Public Contracts Review Board (hereinafter the “Board”) from this decision claiming that:

¹ Page 13, Clause 32.1 of the Tender Document.

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- (1) *From a procedural point of view the Evaluation Committee did not abide by the timetable as set out in Section 2 [page 4] of the tender document. The tenders were not opened on the day and at the time scheduled in the timetable. We were informed that the tenders were not to be opened on the fixed date and time because a responsible person was absent. No information about this modification setback was provided to us in accordance with Clause 11.3 and Clause 27 (page 11 of the tender document). The Opening Schedule document bears no remarks except the details of the deadline for submission. To our knowledge, therefore, the tenders were not opened as required by the call for tenders;*
- (2) *In our view, the Evaluation Committee was not obliged to select the cheapest price but the most favourable one. It appears that the recommended bidder simply availed itself of a Government notice requiring that the minimum tender price concerning the engagement of personnel (security and cleaning) through the tendering process should not be less than €5.78. In this particular tender, the Contracting Authority requested 14,000 hours of monitoring services and the recommended bidder worked out the price as follows: 14,000 hours multiplied by €5.78 equals €80,920 add VAT (18%) and the total equals €95,485.60. The Recommended bidder submitted a price of €95,480. Considering the number of overheads that are involved in reaching a proper bid price (e.g. the minimum employee rate in terms of S.L. 452.75 and/or S.L. 452.76, National Insurance, cost of living increases, statutory bonus), the Recommended Bidder could not have been in a position to bid the above described price which in our view is not a realistic commercial price but aimed at taking an unfair advantage. To our knowledge, the Recommended Bidder did not abide by the requirements of Clause 17 (Tender Prices) on page 9 of the tendering document;*
- (3) *We are also of the view that given the price offered by the Recommended Bidder, it would not be in a position to comply with the provisions of our Employment Laws as required by Clause 12 of Volume 1 Section 1 page 7 of the tendering document, especially considering the transfer of business provisions. According to the Transfer of Business (Protection of Employment) Regulations [S.L. 452.85] should the contract be awarded to the Recommended Bidder, it would be obliged to retain the personnel currently engaged with the Contracting Authority;*
- (4) *To our knowledge, the Recommended Bidder did not comply with the requirement of Clause 7.8 in Volume 2 Section 3 which requires it "..... to quote a rate per hour including VAT. The quoted rate is to include all costs*

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relating to the gathering of the required information and the electronic transmission of the data, in the prescribed format. The rate per hour is applicable regardless of the day of the week”;

(5) *The Recommended Bidder failed to present the signed declaration required by Clause 16.1 (e) (vide page 8 of the tender document);*

- That the Exponent disagrees with and strongly rebuts and opposes the objection filed by the Appellant and the arguments brought forward to sustain the said objection;

The Exponent, therefore, is hereby humbly submitting the following arguments in response to the objection filed by the Appellant:

1. *The Evaluation Committee did not abide by the timetable as set out in Section 2 [page 4] of the tender document. The tenders were not opened on the day and at the time scheduled in the timetable.....because a responsible person was absent. No information about this modification setback was provided in accordance with Clause 11.3 and Clause 27 of the tender document... To our knowledge therefore the tenders were not opened as required by the call for Tenders.*

1.1 The circumstances surrounding the date and the time of the opening of the tenders can only be properly explained by the Contracting Authority (the “Authority”)/Evaluation Committee (the “Committee”). However, the Exponent humbly submits that, if a responsible person was not going to be present on the date and at the time scheduled for the opening of the tenders, then the Authority/Committee had good reason to postpone the said opening;

1.2 Moreover, Clause 11.3 (page 7) and Clause 27 (page 11) of the Tender document deal with the ability of the Authority to extend the deadline for the submission of tenders. However, according to the Exponent’s knowledge, the deadline was not extended in the present case and the date by which bidders had to submit their tender remained unchanged.² Thus, the only change which occurred in the present case concerned the opening date of the tenders that had already been submitted, an issue which does not fall within the purview of the above-mentioned clauses. Thus, the Authority/Committee did not breach any of the conditions of the Tender in this respect;

² 21st November 2014.

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1.3 Nevertheless and without prejudice to the above, the Appellant failed to show how the change in the date and time of the opening of the tenders prejudiced or compromised its bid (which like other bids had to be submitted by a given date) in any way. As a result, this ground is nothing but a feeble attempt on the part of the Appellant to find a reason on which to object to a decision which did not go its way;

1.4 Therefore, in view of the above reasons, the Appellant's claim in this regard should be rejected as it is unfounded in fact and in law.

2. In our view the Evaluation Committee was not obliged to select the cheapest price but the most favourable one..... Considering the number of overheads that are involved in reaching a proper bid price the Recommended Bidder could not have been in a position to bid the above-described price which in our view is not a realistic commercial price but aimed at taking an unfair advantage. To our knowledge, the Recommended Bidder did not abide by the requirements of Clause 17 (Tender Prices) on page 9 of the tendering document.

2.1 In the first place, the Appellant fails to submit any proof that supports its claim in caption but relies on unfounded opinions and false assumptions instead. In this regard, reference is made to Article 562 of Chapter 12 of the Laws of Malta wherein it is held that “.....the burden of proving a fact shall, in all cases, rest on the party alleging it.” This provision is based on the principle *onus probanti incumbit ei qui dicit non ei qui negat*, which principle has been confirmed by our Courts on several occasions;

2.2 For instance, in **Giordmaina Medici Frank Et vs. William Rizzo Et** (Ref. no. 984/1994/1) the Court held that: “(H)uwa l-attur li jrid jipprova l-fatti minnu premessi u allegati fiċ-ċitazzjoni”. Moreover, in **Ciantar Emanuel vs. Curmi David Noe** (Ref. no. 153/1994/2) the Court held that “..... l-piz tal-prova huwa mixħut fuq min jafferma fatt, u mhux fuq min jinnegah”;

2.3 In any case, it is simply untrue that the Committee was not obliged to select the cheapest priced tender but the most favourable one. Reference is here made to Clause 32.1 (page 13) of the Tender document which specifically states that:

*The sole award criterion will be the price. The contract will be awarded to the **cheapest priced tender** satisfying the administrative and technical criteria.³*

³ Page 13, Clause 32.1 of the Tender Document.

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2.4 Moreover, the price quoted by the Exponent is firmly in line with the requirements of Clause 17 on page 9 of the Tender document as, among other things, it includes all of the works to be provided under the Tender together with taxes and other duties. In this respect, it is irrelevant for the purposes of awarding the Tender in question whether the price submitted by the Exponent is a realistic commercial price or not. This is so because the sole award criterion for this Tender was the cheapest priced tender satisfying the administrative and technical criteria (which included quoting a rate per hour for the employees which covered the minimum hourly rate stipulated by law). In the present case, it was the Exponent that satisfied this criterion, thus, the Committee was legally bound to award the Tender to the Exponent;

2.5 This was emphasized by the Court of Appeal in its superior jurisdiction in **Kerber Securities Ltd (C-37233) vs Wasteserv Malta Ltd u Signal 8 Security Services Malta Limited** which held that:

Dan ifisser li, jekk il-kriterji amministrattivi u tekniċi jiġu sodisfatti mid-diversi offerenti, allura dak li jirbaħ huwa l-irħas tender, u la l-Kumitat tal-Evalwazzjoni u lanqas il-Bord ta' Revizjoni ma jistghu jinjoraw jew jiddipartixxu minn din il-kundizzjoni tassattiva tat-tender." Għalhekk ladarba jirriżulta li s-soċjeta' appellanti u s-soċjeta' appellata Signal issodisfaw il-kundizzjonijiet amministrattivi u tekniċi, allura kellha bilfors tipprevali l-irħas offerta....⁴

2.6 All that the Board needs to consider, therefore, is whether the successful bidder will respect the conditions concerning the employment of labour in Malta. Thus, it is not the competence of the Board in the present case to delve into whether the rate as quoted by the preferred bidder, in this case the Exponent, will result in a loss or profit for the said bidder. This was also confirmed by the Board itself in its decision dated 4th November 2013 following an objection filed by Dimbros Ltd to the decision by the St Paul's Bay Local Council to award a contract for the collection of bulky refuse to a Mr Antoine Fenech;

2.7 More recently, in its decision of the 23 April 2015 the Board, following an objection filed by Grange Security (Malta) Ltd against the decision to award a tender for the provision of security services on the campus of the University of Malta and other university designated sites⁵ to Signal 8 Security Services (Malta) Ltd, once again confirmed that:

..... it is not the competence of either the evaluation committee of the contracting authority nor the competence of the Public Contracts' Review Board to delve into the fact whether the rate quoted by the preferred bidder will result in a breakeven or loss situation. If the rate quoted by the preferred bidder

⁴ Appell Civili Nru. 162/2014/1 decided on the 30th July 2014.

⁵ CT 2043/2014.

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represented an hourly quoted rate for a service to the contracting authority and falls within the parameters of the stipulated minimum hourly labour rate, the cheapest rate is quite rightly chosen.⁶

- 2.8 Moreover and without prejudice to the above, even if the Board were competent to delve into whether the rate as quoted by the preferred bidder will result in a loss or profit for the said bidder, the motives behind a tender offer do not necessarily have to be of a financial nature to be successful as, for instance, the bidder may wish to obtain the contract solely in order to gain experience. This is in line with what was stated by the Court of Appeal in the above-mentioned case when it held that:

..... il-profitt mhux neċessarjament l-uniku fattur wara l-offerti ir-rebħ tat-tender jista' jkun ta' benefiċċju għas-soċjeta' li tirbħu, mhux biss mil-lat ta' profit immedjat, iżda anke mil-lat ta' reputazzjoni tas-soċjeta' fid-dinja kummerċjali.⁷

- 2.9 Therefore, it is irrelevant for the purpose of awarding the Tender in question whether the preferred bidder will make a loss or a profit. The Court of Appeal reiterated that “*raġuni għalfejn kumpanija tidhol għal kuntratt hija rrilevanti għall-fini tad-deċiżjoni li jrid jieħu l-Bord ta' Reviżjoni*”;⁸
- 2.10 In view of the above reasons, the Appellant's claim in this regard should also be rejected as it too is unfounded in fact and in law.

3. We are also of the view that given the price offered by the Recommended Bidder, it would not be in a position to comply with the provisions of our Employment Laws as required by Clause 12 of Volume 1 Section 1 page 7 of the tendering document, especially considering the transfer of business provisions.....

- 3.1 In the first place, it is once again submitted that the Appellant fails to submit any proof that supports its claim in caption. In this respect, reference is made to the contents of paragraphs 2.1 and 2.2 above;
- 3.2 In any case, however, the hourly employee rate of €5.78 quoted by the Exponent is in accordance with the law. This is so because the rate of €5.78 was originally imposed by the Government as the minimum hourly rate to be paid to security and cleaning personnel engaged

⁶ Case No. 799.

⁷ Appell Civili Nru. 162/2014/1 decided on the 30th July 2014.

⁸ Ibid.

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through a tendering process specifically in order to curb precarious employment. Moreover, according to the minimum hourly workers cost submitted by the Exponent, the rate of €5.78 takes into consideration the annual gross salary, bonuses and the national insurance company share. The gross salary per week is, in turn, at €165.68 which is equivalent to the National Minimum Wage for 2014;⁹

3.3 In addition, all bidders, including the Exponent, were required to agree to the 'Statement on Conditions of Employment' wherein the bidders guarantee and confirm that all employment regulations shall be observed, including filling in, signing and attaching the minimum hourly workers' costs. Also, by virtue of the general conditions of the contract that will be signed between the Authority and the Exponent, the latter would, in the performance of his obligations, be contractually bound to adhere to Maltese employment law¹⁰ with harsh consequences of financial penalties¹¹ and/or termination of the contract if it fails to so adhere.¹² Thus, the Exponent's adherence to employment conditions is an on-going requirement;

3.4 As a matter of fact, the Board, in rejecting the above-mentioned objection filed Grange Security (Malta) Ltd against the decision to award the tender in question to Signal 8 Security Services (Malta) Ltd,¹³ held that:

.....although the preferred bidder's quoted rate, which is within the parameters of the stipulated minimum hourly rate to be paid to the employees of the said preferred bidder, might not seem to be considered as commercially viable, the preferred bidder has indulged himself to abide by the local stipulated rules with regards to precarious employment conditions. In this regard, it is the onus of the contracting authority to ensure and monitor that once the awarded tendered services are carried on, these stipulations are strictly adhered to.¹⁴

3.5 Lastly, with respect to the Transfer of Business (Protection of Employment) Regulations (S.L. 452.85) (hereinafter the "Regulations"), the Appellant fails to explain how these Regulations apply to the present case. In fact, reference to these Regulations by the Appellant appears to be without basis;

⁹ Website of the Department of Employment and Industrial Relations: <https://dier.gov.mt/en/Employment-Conditions/Wages/Pages/National-Minimum-Wage.aspx>

¹⁰ Article 7.1 of the General Conditions for Services Contracts (Version 1.04 dated 26th April 2013).

¹¹ Article 10.2 of the General Conditions for Services Contracts (Version 1.04 dated 26th April 2013).

¹² Article 34 of the General Conditions for Services Contracts (Version 1.04 dated 26th April 2013).

¹³ CT 2043/2014.

¹⁴ Case No. 799.

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3.6 It is in fact highly doubtful whether these Regulations do apply to the present case given the definition of “service provision change” in Regulation 2 (1) (i) as well as the fact that these Regulations are mostly concerned with situations in which a “transfer” occurs. According to Regulation 2 (1) (i), a “service provision change” means a situation in which:

Activities cease to be carried out by a person¹⁵ hereinafter referred to as a “client”, on his own behalf and are carried out instead by another person on the client’s behalf, hereinafter referred to as a “contractor”.

3.7 In this regard, the Appellant did not prove that the activities in question used to be carried out by the Authority and then ceased to be carried out by the same. Therefore, it is highly unlikely that the award of the Tender constitutes a service provision change within the meaning of these Regulations;

3.8 Moreover, as stated earlier, these Regulations are mostly concerned with the circumstances surrounding transfers. A transfer is, in turn, defined as:

.....a transfer of an undertaking which retains its identity as an organized group of resources having the objective of pursuing an economic activity and shall include a service provision change in accordance with these regulations.

3.9 From a reading of the above definition it is clear that the award of the Tender in the present case does not amount to a transfer of an undertaking as, otherwise, it would mean that the Authority is being transferred to the Exponent, which is, of course, not the case;

3.10 Furthermore, the fact that Clause 16.1 (d) on page 8 of the Tender document states that “(P)ublic officers and employees of government agencies and government entities of the beneficiary country, cannot be recruited as experts” and the fact that Article 7.8 of the Special Conditions on page 30 of the Tender document states that “(T)he Agency is responsible to recruit and train its surveyors” continue to militate against the idea/assumption that the Regulations apply to the present case;

Therefore in view of the above reasons, the Appellant’s claim in this respect should also be rejected as it too is unfounded in fact and in law.

¹⁵ Emphasis added.

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4. To our knowledge, the Recommended Bidder did not comply with the requirement of Clause 7.8 in Volume 2 Section 3 which requires it “..... to quote a rate per hour including VAT. The quoted rate is to include all costs relating to the gathering of the required information and the electronic transmission of the data, in the prescribed format. The rate per hour is applicable regardless of the day of the week”.

4.1 In the first place, it is reiterated that the Appellant once again fails to submit any proof that supports its claim in caption. In this respect, reference is made to the contents of paragraphs 2.1 and 2.2 above;

4.2 Moreover, this allegation is nothing but a repetition of the allegation contained in point number 2 of the objection filed by the Appellant. For this reason, reference is being made to the contents of paragraphs 2.4 till 2.9 of this reply to rebut this allegation;

Therefore, in view of the reasons contained in paragraphs 2.1 till 2.9 of this reply, this claim is not founded in fact and should therefore also be rejected.

5. The Recommended Bidder failed to present the signed declaration required by Clause 16.1 (e) (vide page 8 of the tender document)

5.1 Once again, the Appellant fails to present any evidence in support of its allegations as it is obliged to do according to law and jurisprudence.¹⁶ Moreover, unless the Appellant based this allegation on information it obtained in accordance with Clause 27.2 (page 11) of the Tender document, this allegation raises some serious concerns as to how the Appellant reached this conclusion;

5.2 Moreover and without prejudice to the above, although the word ‘Declaration’ is listed in Clause 16.1 (e) on page 8 of the Tender document, the actual declaration is not included in the Tender document at Volume 3 of the same. Therefore, this must be the result of a mistake or a misprint in the Tender document itself which could also have affected other bidders and which should not in any way prejudice the Exponent;

Therefore in view of the above reasons, the Appellant’s claim in this regard should also be rejected.

¹⁶ Vide paragraphs 2.1 and 2.2 of this reply.

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In conclusion, it is clear from the above arguments that the award of the Tender to the Exponent was firmly within legal parameters and in accordance with the Tender conditions. As a result, the Appellant's objection should be rejected in its entirety and the decision of the Committee to award the Tender to the Exponent be upheld.

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