

was no specific request or objective intention for the appeal. The Board will however hear the appeal.

Dr Maurice Meli Legal Representative of Support Services Ltd said that the object of his clients' appeal was to find out how the tender was evaluated through the testimony of witnesses.

Ms Karen Muscat (141773m) called as a witness by Appellants testified on oath that she was a member of the evaluation committee. She stated that there had not been any contact by the evaluation committee with Kerber Security Ltd and that the committee had not submitted any clarification notices regarding the tender price.

Dr Meli then asked that it should be formally recorded that the bid of the preferred bidder ought not to have been accepted due to the abnormally low price.

Ms Audrey Anne Apap Bugeja (16083G) called as a witness by the Public Contracts Review Board (PCRB) testified on oath that she was the Chairperson of the Evaluation Committee. She stated that she was aware why marks had been deducted in two sections of the criteria assessment of Appellants' bid – on data protection and working conditions. On data protection Appellants had failed to meet the contractual obligations to provide information under paragraph 4.2.1 of the Terms of Reference, whilst on the good working relations conditions they were awarded one mark as the information supplied by them was not detailed enough and not sufficiently informative.

Questioned by Dr Meli witness stated that regarding data protection the bidders were contractually bound to ensure that employees were compliant with the General Data Protection Regulations (GDPR) and this information was not provided. With regard to the matter of bonuses under the working conditions section, there was one instance where evidence was not provided and in another the information supplied was very poor in comparison with the submission of the winning bid which was better.

Dr Meli said that it was obvious that the preferred bidder, as was his right, would be operating the tender at a loss. The law stipulated that abnormally low tenders must be evaluated by the PCRB. At their quoted price there was no financial provision for overhead expenses like uniforms – this will lead to problems in the course of the carrying out of the contract dealing with an essential service. Reference was made to ECJ Case C 559/10 which laid out that if a bid was too low, even if it conformed to the regulations, the contracting authority should still ask for explanations. This was supported by Article 243 of the Public Procurement Regulations (PPR). One must look at the overall context of a tender and consider all overheads – administration, training and uniforms for staff replacements which are likely to occur with some 40 personnel.

The GDPR requirements were covered by the existing legislation and it is obvious that they will be adhered to – Appellants gave no indication that the law would not be followed or ignored; it was therefore unnecessary and erroneous to deduct marks on this section.

Dr Franco Agius Legal Representative of St Vincent De Paul Long Term Care Facility said that in his view there was no utility in this appeal. Since Appellants were not requesting a change of preference in the bids they had no juridical interest,

Dr Meli said that there is concern on how Kerber Security Ltd had been awarded the tender as well as with the choice of second preference.

Dr Agius said that it was futile to claim that the contract will not be fulfilled or that it will create problems as this was not part of the evaluation process. He referred to Court of Appeal (CA) Case 162/2014 where it was held that the motive for a low bid may not have been financial but for other reasons. In any case Appellants bid exceeds the budget allocation and therefore the evaluation committee could not consider the bid as abnormally low. The data protection requirement was for an adequate level of service at a place where vulnerable people resided and the Contracting Authority had to ensure that employees were contractually bound to observe the Data Protection Act - they thus needed a declaration which was not submitted. Reference was made to CA Case 45/19 which considered a similar situation where Appellants were attacking the conditions existing prior to the award of a tender after the award. Reference was also made to CA case 98/19 where it was held that the contracting authority was entitled to impose its own conditions.

As far as working conditions were concerned the evaluation committee has to use discretion to ensure strict rules are adhered to and apply to all bidders. ECJ Case 6/15 recognised that the evaluation committees have leeway in reaching their decisions. In this instance Appellants had not been disqualified but given a lower marks rating. The adjudication had been carried out correctly and their decision was justified.

Dr Meli said that Appellants were not challenging the decision of the Contracting Authority but the lack of clarification to justify such a low price. The law obliges adherence to the GDPR and there is no point in penalising someone on matters where they are bound by that law.

Dr Ryan Pace Legal Representative of Kerber Security Ltd stated that this so-called appeal does not follow what the regulations require. There has been no appeal submitted and efforts to find a reason for the appeal during this hearing were not taken up. The winning bid was perfectly in line with the tender documents and was the most economically advantageous. No submissions were made supporting the claim that the bid was abnormally low and the evaluation committee had to follow and did follow the terms of the tender.

There is a distinction between the award of the tender and the fulfilment and implementation of the contract. Bids had all been evaluated similarly and the committee had used its discretion equitably.

Dr Meli re-iterated that several overhead items had not been included in the submissions of the preferred bidder.

Dr Agius stated the requirement to bind employees to adhere to specific requests had not been dealt with by Appellants. As regard the price clarification, the fact that the two leading bids were both above the tender estimate speaks for itself. Clarification is only sought if a bid is abnormally low not if it is in excess of the budget allocation.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of minutes

Decision

This Board,

having noted this objection filed by Support Services Ltd (herein after referred to as the Appellants) on 9 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2145/2019 listed as case no 1350 in the records of the Public Contracts Review Board, awarded by St Vincent de Paul Long Term Care Facility (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Maurice Meli

Appearing for the Contracting Authority: Dr Franco Agius

Whereby, the Appellants contend that:

- a) **The preferred Bidder's offer did not cater for all the requirements that are necessary for the proper execution of the tendering services and in that respect, such an offer constitutes an abnormally low offer.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 22 August 2019 and its verbal submissions during the hearing held on 12 September 2019, in that:

- a) **It contends that, in their 'Letter of Objection', Appellants failed to indicate or request a change in the preference of the bids, so that they did not have any juridical interest.**
- b) **The Authority also insists that, the Preferred Bidder's offer was not abnormally low, and Appellants' bid was well in excess of the allocated budget.**

This same Board also noted the testimony of the witnesses namely,

Ms Karen Muscat, duly summoned by Support Services Ltd

Ms Audrey Anne Apap Bugeja, duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issues that deserve consideration are twofold namely:

- **Whether the Successful Bid is an Abnormally low offer and**
- **The Evaluation Process**

1. First and foremost, this Board would confirm that Appellants' 'Letter of Objection' lacked the necessary requirements that are stipulated in the Public Procurement Regulations, in particular and at the first instance, Appellants failed to make a request and in general, the contents of the objection letter lacked the necessary motive which this Board has to decide upon. However, same Board opted to consider the submissions made by the parties concerned to endeavour to establish whether the evaluation process was carried out in a fair and transparent manner.

2. Abnormally Low Offer

Appellants are insisting that the preferred bidder's offer did not include certain necessary items of expenditure which are vital for the proper

execution of the tendered service, hence the successful offer is abnormally low.

In this regard, this Board would respectfully point out that, the main indications which might give rise to an abnormally low offer are the following:

- A comparison is made between the estimated value of the tender with the value of the tendered price.**
- A comparison is made of the tendered price with the prices proposed by the other compliant bidders.**

The EU directive does not define an ‘Abnormally Low Tender’ and this concept is generally recognised as referring to a situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be executed properly.

- 3. In this particular case, this Board notes that the successful offer is very close to the Authority’s estimated value, it was also close to the second**

compliant offer. At the same instance, Appellants' offer exceeds the estimated value and there are no indications whatsoever, that the successful bid is abnormally low, in fact, the offer compares to the normal market value of such tendering services.

4. With regard to Appellants' claim that the Evaluation Committee should have carried out the necessary enquiries to probe into the successful bid, this Board does not find any justifiable cause for such an action, on the part of the Evaluation Committee, as there were no 'Abnormally Low Offers' for this particular tender.

5. With regard to Appellants' contention in that the successful tenderer will incur a loss, this Board is not concerned whether the successful bidder will make a profit or sustain a loss, same Board is however satisfied that, from documentation made available, the successful bidder will abide by all the conditions as stipulated in the tender document which includes the legal obligation with regard to conditions of employment.

6. The Evaluation Process

Appellants showed concern, without any submission of proof or evidence, as to the evaluation procedure adopted by the Authority. In this regard, this Board would respectfully point out that, the evaluation procedure, as clearly defined in paragraph 9.1 of the tender document, was carried out under the BPQR method, which does render the most advantageous offer.

7. From the evaluation report, this Board noted that prudent and appropriate apportionment of marks were duly allotted to the respective items in the evaluation grid, accompanied by justifiable reasons for the marks so allotted by each evaluator, so that, this Board is justifiable convinced that the Evaluation Committee carried out the whole evaluation process in a fair and transparent manner, adhering to the principles of equal treatment and self-limitation and at the same instance this Board also noted that Appellants' loss of marks in their offer was truly justified.

In conclusion, this Board opines that:

- a) Appellants' 'Letter of Objection' does not provide the motive and necessary requests for any changes which might affect the Authority's decision in the award of the tender.**

- b) The successful offer is within the estimated budget of the Authority and in no case whatsoever, can it be deemed to be an abnormally low offer.**

- c) The evaluation process was carried out in a fair, just and transparent manner.**

In view of the above, this Board,

- i) does not uphold Appellants' alleged claims,**

- ii) upholds the Authority's decision in the award of the tender,**

iii) Directs that the deposit paid by Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

24 September 2019