

level certificates in lieu and have therefore provided more than was requested. Despite this they had been disqualified.

Ms Michelina Refalo (81772M) called as a witness by Appellants testified on oath that she is the Support Coordinator at the Ministry for Education. She explained that the School Leaving Certificate is issued to confirm that the holder has met the required attendance at school, and is issued by each individual school.

Mr Lawrence Azzopardi (75679M) called as a witness by Appellants testified on oath that he is the Head of Licensing, Accreditation and Validation at the National Commission for Further & Higher Education. He stated that the School Leaving Certificate (SLC), and the O and A levels are pegged to a qualification level with O level passes between 1 to 5 being graded higher than SLC and grades 6 and 7 being graded as equivalent to SLC. However an O level can never be a lower qualification than an SLC. The SLC sets different examination levels between state and private schools and has a different benchmark to MATSEC. Although at level 2 the qualifications are technically equal, the O and A levels are higher and can never be lower than an SLC.

In reply to questions witness stated that the two qualifications are at separate levels and whilst SLC is holistic, O and A levels cover separate subjects. The SLC shows the range of subjects studied and any informal educational experience which gives a broader view of the individual's educational background than MATSEC which covers individual subjects with grades attained. At law, in accordance with S.L. 327.431 the SLC is graded as MQF level 1 which is equivalent to primary education.

Dr Chris Mizzi Legal Representative for the Ministry for Justice, Equivalence and Governance said that the tender has to be considered in two parts – the difference between the evaluation criteria and the terms of reference. The terms of reference are what will be incorporated in the contract and there is therefore an element of implementation to be met throughout the contract period. The evaluation committee on the other hand has to be guided by the BPQR principles.

Mr Wayne Caruana (16694M) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the annexes in Appellants' submissions were O level certificates not SLC and was therefore awarded zero marks as the criteria were not met, even though the O certificates showed pass grades in ten subjects.

Asked on what basis was quality in the BPQR criteria assessed witness said that it was judged on quality and price. Immaterial of the level submitted the tender specifications had to be met.

The Chairman pointed out that the evaluation committee seems to have overlooked the wording in the tender specifying 'minimum requirement'. The words in the tender 'requirement' and 'minimum requirement' do not have the same meaning.

Dr Bugeja said that there is a conflict in the wording of the tender. The Public Contracts Review Board have always insisted and abided by the need for clear terms. At law the SLC is graded as level 1 – the tender deals with public funds and it was not envisaged that spending will be on individuals at this level.

It is absurd to not only equate but prefer an SLC primary level with an education at O level and the whole idea of BPQR adjudication was to remove subjectivity.

Dr Shazoo Ghaznavi Legal Representative for Kerber Securities stated that he agrees with the objectives as mentioned by Dr Bugeja, but the Public Procurement Regulations and the European Union directives clearly state that evaluation has to follow the terms of the tender. An additional element does not eliminate the need to meet the minimum required. SLC covers all compulsory subjects whilst O levels deal with particular subjects and the two requirements are completely distinct.

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 Signal 8 Security Services Ltd (hereinafter referred to as the Appellants) on 12th October 2020, refers to the claims made by the same Appellants with regard to the tender of reference MJEG/MPU/132/2020 listed as case No. 1508 in the records of the Public Contracts Review Board recommended for award by Ministry for Justice, Equality and Governance (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Carlos Bugeja

Appearing for the Contracting Authority: Dr Chris Mizzi

Appearing for the Preferred Bidder: Dr Shazoo Gaznavi

Whereby, the Appellants contend that:

- a) Clause 4.2.2 of the tender document requested that, assistant clerks must have a minimum standard of education at a level of the school leaving certificate**

and in this respect, they had submitted ‘O’ level certificates, which by far exceeds the minimum, yet Appellants’ offer in this regard was allotted a zero mark.

- b) There exist a conflict in the wording of the tender in that, the ‘Terms of Reference’ states that, there should be a minimum level of an SLC, yet the award criteria in the BPQR dictates that, the SLC is the only level of education which is requested.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 23rd October 2020 and its verbal submissions during the virtual hearing held on 30th October 2020, in that:

- a) The Authority insists that, one should differentiate between the ‘Terms of Reference’ and the ‘Award Criteria’ in that, the former refers to contractual issues whilst the latter represents the guiding principle to be adopted by the Evaluation Committee.**

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

Ms Michelina Refalo duly summoned by Signal 8 Security Services Ltd

Mr Lawrence Azzopardi duly summoned by Signal 8 Security Services Ltd

Mr Wayne Caruana duly summoned by the Ministry for Justice, Equality and Governance.

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 opines that, the issue that merits consideration is whether Appellants' offer was compliant with clause 4.2.2 of section 3, (Terms of Reference).

- 1. This Board would refer to article 4.2.2 of section 3 of the tender document which states that, the employees, in the case of 'Assistant Clerks', must have a minimum of school leaving certificate (SLC).**
- 2. Appellants, on their part, are claiming that, their submission in this regard, by far exceeds the level of the school leaving certificate so that, it was unfair and not proper on the part of the Evaluation Committee to give a zero mark under this particular requirement.**
- 3. On the other hand, the Authority is insisting that, the Evaluation Committee were in duty bound to adhere to the award criteria under the BPQR method of assessment and in the BPQR schedule of allocation of marks, the issue being referred to by Appellants, was clearly denoted that, bidders have to submit a copy of school leaving certificate for Assistant Clerks.**
- 4. This Board would, first and foremost, refer to the Contracting Authority's 'Letter of Rejection' dated 16th September 2020, wherein, the reason for Appellants' offer rejection was communicated as follows:**

“Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by your company was not successful since it failed technically for the following reason:

Assistant Clerk

All proposed Assistant Clerks must be in possession of school leaving certificate. Bidders are to submit a copy of the certificate confirming that the two Assistant Clerks are in possession of the above-mentioned qualification as per Section 3 Terms of Reference Article 4.2.2.

The offer is deemed as technically non-compliant since a score “0” was allotted in the above criterion:

The bidder submitted copies of the O-Level Certificate and A Levels rather than the requested school leaving certificates.”

The above-mentioned reason clearly establishes two important facts namely:

(i) That only specific School Leaving Certificate was mandatorily requested to be submitted and

(ii) Reference is being made to article 4.2.2 of the Terms of Reference.

5. With regard to ‘Assistant Clerks’, article 4.2.2 lists the qualifications of such employees as:

“ . Assistant Clerks must have minimum of School Leaving Certificate”

At this particular stage of consideration, this Board would point out that, the above-mentioned article clearly and vividly states that, the minimum acceptable qualification is that of a ‘School Leaving Certificate’ level.

In this regard, this Board noted that, Appellants submitted ‘O’ level certificates for Assistant Clerk in various subjects which are typically taught at school, so that, in so far as qualification of Assistant Clerk is concerned, Appellants’ submission in this regard was, by far above the ‘School Leaving Certificate’ level, hence, compliant with article 4.2.2.

- 6. The Authority is claiming that, article 4.2.2, included under section 3, Terms of Reference, should be viewed as referring to contractual issues whilst the Evaluation Committee has to abide by the BPQR principles, so that, the tender document has to be considered in two parts, namely the contractual issues and the adherence to the ‘Award Criteria’.**
- 7. In this respect, this Board notes that, whilst article 4.2.2 dictates a minimum of SLC level, same requirement, is stipulated in the evaluation grid as follows:**

“Assistant Clerk

All proposed Assistant Clerks must be in possession of school leaving certificate.

Bidders are to submit a copy of the certificate confirming that the two Assistant Clerks are in possession of the above-mentioned qualification as per Section 3 Terms of Reference Article 4.2.2.

A score of 1 point per Assistant Clerk proposed shall be allotted up to a maximum of 2 points, otherwise if none of the proposed clerical personnel have the requested certificates, a ‘0’ covering all clerical personnel, shall be allotted.”

The wording contained in the above extract from the award criteria grid, does not complement, at all, the contents of article 4.2.2, although same article is being referred to. It is also clearly denoted that, for the purpose of the evaluation process, the SLC is not a minimum level required but only that the SLC is valid.

In conclusion, this Board opines that:

- a) Appellants’ submissions were in compliance with article 4.2.2 of the Terms of Reference.**
- b) The ‘Letter of Rejection’ sent by the Authority, makes reference to Appellants’ failure to abide by article 4.2.2 of the technical specifications (Terms of Reference), which clearly stipulates that, the Assistant Clerk’s qualifications should not be less than at SLC level. In this regard, Appellants’ submissions represented a higher level than at SLC so that, the reason for rejection is incorrect at the outset.**
- c) There exists a conflict in the wording and application of the requirements in the tender document in that, the technical specifications dictate that, the Assistant Clerk’s qualifications should not be less than that of a SLC whilst ,**

the evaluation grid, dictates the SLC, as mandatory, so that a confusion arises as to what is actually being requested.

d) With regard to the Contracting Authority's claim that, the tender document should be viewed into two parts, this Board, as it has on so many occasions, would point out that, the technical specifications in a tender dossier, should be as clear as possible so as to avoid confusion and misinterpretation. At the same instance, the award criteria should reflect the same specifications as those dictated in the terms of reference. In this particular case, there occurred a change of mandatory requirement in the tender document itself.

In view of the above, this Board,

- i. does not uphold the Contracting Authority's decision in the award of the tender,**
- ii. directs that the tender be cancelled,**
- iii. directs that a fresh offer be issued, taking into consideration this Board's findings,**
- iv. directs that the deposit paid be Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
4th November 2020

Dr Charles Cassar
Member

Mr Carmel Esposito
Member