

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1512 – MJEG/MPU/126/2020 – Tender for the Provision of Security Services with Receptionist Duties at the Fondazzjoni Kreattivita, Spazju Kreattiv, St James Cavalier, Valletta**

The tender was published on the 9<sup>th</sup> August 2020 and the closing date of the tender was the 18<sup>th</sup> September 2020. The estimated value of the tender (exclusive of VAT) was € 202,051.74

On the 28th October 2020 Executive Security Services Ltd filed an appeal against the Ministry for Justice, Equality and Governance as the Contracting Authority objecting to their disqualification on the grounds that their bid had not met the criteria under the best price quality ratio.

A deposit of € 1010.26 was paid.

There were six (6) bidders.

On 16th November 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Executive Security Services Ltd**

Dr Alessandro Lia	Legal Representative
Mr James Spiteri Staines	Representative

#### **Contracting Authority – Ministry for Justice, Equality and Governance**

Dr Chris Mizzi	Legal Representative
Ms Kirsty Agius	Chairperson Evaluation Committee
Ms Crystal Falzon	Member Evaluation Committee

#### **Recommended Bidder – Signal 8 Security Services Ltd**

Dr Carlos Bugeja	Legal Representative
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#### **Recommended Bidder – Protection Service Malta**

Dr Shazoo Ghaznavi	Legal Representative
Mr Jason Pisani	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Alessandro Lia Legal Representative for Executive Security Services Ltd requested hearing of testimony of the Chairperson of the evaluation committee.

Ms Kirsty Agius (23491G) called as a witness by Appellants testified on oath that she was the Chairperson of the evaluation committee. She stated that the tender required the submission of a contingency plan in case of a public transport strike to ensure that personnel arrived punctually at their place of work. The Appellants offered a car pooling arrangement between employees ( held to be not realistic during the current Covid pandemic) but stated that in addition they have arrangements with a transportation company in case of a contingency. The evaluation committee felt that the use of the word 'furthermore' had extended the proposal, and if the car pooling had not been mentioned Appellants would have been awarded full points.

In reply to questions from Dr Lia witness agreed that there was no reference to the Covid pandemic in the tender and that no measures had been mentioned in the said tender as to render this option 'not so realistic'. The use of the word 'furthermore' was considered by the evaluators as an alternative proposal and led to the reduction of points.

In reply to a question from Dr Mizzi Legal Representative for the Ministry for Justice, Equality and Governance witness said that 3.6 points (or 71.7%) had been awarded out of five points on this section dealing with the contingency plan, and no other points were deducted.

The Chairman pointed out that that all bidders had mentioned car pooling in their submissions including the preferred bidders. If that was the only shortcoming in Appellants' submission why had they been treated differently?

Dr Mizzi objected to reference being made to other bidders' offers when the other parties did not have that information available to them.

Dr Shazoo Ghaznavi Legal Representative for Protection Services Malta Ltd said that Appellants default was in offering the car pooling services. His clients' proposal to deal with the contingency was the use of a family owned transport company.

Dr Lia said that if the Board were to check Appellants' contingency plan they will note that it is a suggestion or proposal that employees use private cars for car pooling. The use of the word 'furthermore' means additionally or concurrently not alternately. The Contracting Authority claims that car pooling is the primary route but that is not the correct interpretation as it is merely additional to not instead of. Appellants should not be penalised for offering something over and above especially since car pooling was offered by other bidders. The reduction of points is not justified and the use of 'not so realistic' as related to Covid is out of place since there is no reference to the pandemic in the tender and no one knows how long it is going to last.

The use of car pooling as a contingency is also suggested in the other bids and therefore everyone should be treated equally. Why is the family transport business of Protection Service Malta Ltd treated in any less realistic manner than car pooling? The use of the word ‘realistic’ is very subjective and the exact same contingency plan offered in a similar tender was awarded 100% points. The tender should be re-evaluated and Appellants offer included therein.

Dr Mizzi said that Appellants offer of car pooling service must take the Covid pandemic into consideration and the evaluation committee were justified in using a certain leeway in considering it since they have to follow current legal parameters – this leeway is allowed in a Best Price Quality Ratio (BPQR) tender and it would be nonsensical if one were to argue that every bidder should be awarded full points. The precedent of using other similar tenders does not exist and the Board should reaffirm the decision of the evaluation committee as the deduction of this minimal number of points is justified.

Dr Ghaznavi said that under the BPQR system a bidder starts with nil points and then builds them up – the points are therefore not gained rather than deducted. The tender requested a contingency plan and the use of ‘furthermore’ by the Appellants reaffirmed the use of car pooling - in the current situation it was perfectly logical to consider the Covid pandemic along with the proposal. Protection Service Malta Ltd proposed to use a family transportation company which is available across the board and is the first option offered. In the current climate car pooling is not an option.

Dr Carlos Bugeja Legal Representative for Signal 8 Security Services Malta Ltd said that the reasons for the evaluation committee’s decision were correct even if they were not clearly enunciated. The BPQR exercise had been correctly applied.

Dr Lia underlined the fact that Appellants were offering suggestions not firm proposals. There was no reference to Covid in the tender documents and in any case current regulations and/or policies do not ban car pooling. Dr Mizzi’s comment that it was only a small number of points which had been deducted is totally irrelevant as it was that small number of points which led to Appellants losing the tender.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Executive Security Services Ltd (hereinafter referred to as the Appellants) on 28<sup>th</sup> October 2020, refers to the claims made by the same Appellants with regard to the tender of reference MJEG/MPU/126/2020 listed**

**as case No.1512 in the records of the Public Contracts Review Board recommended for award by Ministry for Justice, Equality and Good Governance (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Alessandro Lia**

**Appearing for the Contracting Authority: Dr Chris Mizzi**

**Appearing for the Signal 8 Security Services Ltd: Dr Carlos Bugeja**

**Appearing for the Protection Service Malta: Dr Shazoo Ghaznavi**

**Whereby, the Appellants contend that:**

- a) Their offer with special reference to the ‘Contingency Plan in the case of Public Transport’ was penalised due to the alleged consideration by the Evaluation Committee, that ‘car pooling’ was the first alternative offered by Appellants. In this regard, Appellants maintain that car pooling was one of the alternatives offered in their contingency plan in case of Public Transport breakdown.**
- b) Appellants also maintain and insist that, nowhere in their submissions, were impositions inferred so that such claims are totally unfounded and inappropriate.**

**This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 3<sup>rd</sup> November 2020 and its verbal submissions during the virtual hearing held on 16<sup>th</sup> November 2020, in that:**

- a) The Authority contends that ‘Car Pooling’ was Appellants’ main alternative means of transport of workers to the place of work, in case of breakdown in Public Transport. In this regard, apart from the fact that, the Evaluation Committee is allowed to use certain leeway in their adjudication process, such alternative offered by Appellants is not ideal under the present pandemic climate, so that, under the BPQR method, Appellants’ offer in this regard, was not awarded full marks.**

**This Board also notes the testimony of the witness namely:**

**Ms Kristy Agius, Chairperson of the Evaluation Committee duly summoned by Executive Security Services Ltd.**

**This Board, after having examined the relevant documentation to this appeal, with particular reference to the evaluation report and heard submissions made by all the interested parties, including the testimony of the witness duly summoned opines that, the issues that merit consideration are two-fold namely;**

- a) Inclusion of Car Pooling by Appellants and**
- b) Alleged Impositions by Appellants**

**1. “Car Pooling Issue”**

**1.1. This Board would respectfully refer to clause 2 (Page 25) of the tender document wherein it is stipulated that the contingency plan should cater for:**

*‘Breakdown of Public transportation system that may affect the ability of the security staff to arrive to their place of work as per terms of reference article 3.2 (5 Points)’.*

**1.2. This Board also refers to article 3.2 wherein clause 2 above is amplified to include the sentence, viz:**

*‘In each case, the contractor shall ensure that a replacement is provided to the Contracting Authority with immediate effect. The response time shall be one (1) hour.’*

**1.3. The above-mentioned clauses dictate the objective being requested by the Contracting Authority, in case of breakdown of the Public Transportation System. They do not stipulate the means of transportation the economic operator must submit in a contingency plan to cater for the transportation of workers to their place, in the eventuality of the Public Transport breakdown, so as to ensure that, the service is provided to the Authority without any disruptions , in such circumstances.**

**1.4. The Authority maintains that, Appellants’ contingency plan with regard to transportation of workers in case of Public Transport breakdown, gave as**

a first preference ‘Car Pooling’ among employees. On the other hand, Appellants contend that, ‘Car Pooling’ was one of the alternative measures.

- 1.5. This Board, after having examined closely the offers submitted notes that, the two preferred bidders’ offers also mention ‘Car Pooling’ as one of the alternative measures and from the testimony of the Chairperson of the Evaluation Committee this Board noted that such an issue was not given its due attention during the evaluation process. For the sake of clarity, this Board lists the following quotes:

**Preferred Bidder 1** *‘Also our employees can drive to their place of work and can carpool in some cases.’*

**Preferred Bidder 2** *‘Encourage carpooling between all employees with the help of the principal BCCP team members.’*

- 1.6. With regard to the Authority’s claim that Appellants proposed the ‘Car Pooling’ as their first alternative measure thus leading to points being deducted from their offer, this Board would point out that, the tender document, under the terms of reference, does not denote the Authority’s preferred alternative nor does it stipulate the respective mark for each alternative, so that a considerable element of subjectivity occurred in the allocation or deduction of marks on the contingency plan for breakdown of Public Transport.

**1.7. As stated in the foregoing paragraph, the objective of the contingency plan in this regard is to avoid disruption of the tendered service so that, the Authority ensures that, in case of Public Transport breakdown, the successful economic operator will provide alternate means of transportation for the workers to attend to their duties, on time at their place of work. In this respect, from the testimony of the Chairperson, this Board was made aware that Appellants' offer would have earned full marks if they did not mention 'Car Pooling', viz:**

*“Avukat :*                    *Ma gara xejn. Jien ser nirreferik allura ghal dak li tghidu fir-raguni ghat-tnaqqis tal-punti fejn ghidtu hekk: the bidder proposed a good measure with regards to breakdown of public transportation by stating that he has an agreement with other transportation companies. Ara nghidx sew li kieku l-kwistjoni tal-car pooling ma ssemmietx, il-kwistjoni tal-public transportation breakdown li jkollhom sub-contracted transport, ghalikom kienet timmerita full points, qed nghid sew?*

*Xhud :*                    *Ovjament tghodd dik imma l-fatt illi s-semma l-carpooling, dik m'accettawhiex l-evaluators, tajjeb?*

*Chairman :*            *Dr. Lia ma nahsibx li rrispondietek il-mistoqsija ezatta*

*Avukat :*                    *Li kieku jiena fil-contingency plan tieghi ma semmejttx il-kwistjoni tal-car pooling over and above l-ohra, I would have achieved the identical number of points bhall-ohrajn li huwa full fil-verita, naqblu?*

*Xhud : Iva”*

**1.8. From such testimony, this Board notes that, the Evaluation Committee subjectively, regarded Appellants’ first remedial action as ‘Car Pooling’, although, an extract from Appellants’ submission in this regard, implies that car pooling was in fact one of the alternatives, similar to what the two preferred bidders proposed viz:**

*“Furthermore, to avoid reliance on employees personal transportation in a worst-case scenario whereby there would be a strike in public transportation, we have contacts and agreements with transportation companies to effectively aid employees who cannot travel to and from work. The latter, combined with the database information, puts us in a comfortable position to ascertain that in the remote eventuality of a public transportation strike, our services won’t be interrupted.’*

**In this regard, this Board opines that the above mentioned extract represents an additional remedy of transportation of the employees to the place of work, so that, deduction of marks in this respect is not objectively justified.**

**2. Alleged impositions**

**2.1. With regard to Appellants’ second grievance, this Board would respectfully refer to an extract from the ‘Letter of Rejection’ dated 15th October 2020, as follows:**

*“Points were deducted in the following criteria:*

- *B2 – Contingency Plans (breakdown of public transportation) – The bidder proposed a good measure with regards to breakdown of public transportation by stating that he has an agreement with other transportation companies. However he is imposing as another option on his personnel to pick up other workers in their personal vehicle, which is not realistic considering also the current scenario of Covid-19”*

**2.2. First and foremost, from the above extract, it is being evidently confirmed by the Authority that ‘Car Pooling’ mentioned in Appellants’ contingency plan was one of the alternatives (options) for the transportation of employees to their place of work and not considered as the main alternative.**

**2.3. Furthermore this Board would refer to the term “imposing’ used by the Evaluation Committee, which in the opinion of this Board is somewhat inappropriately exaggerated and definitely not fit to describe Appellants’ proposals as alternatives to transportation of employees to their place of work. In this regard, this Board would also refer to extracts from the testimony of the Chairperson of the Evaluation Committee, as follows:**

*“Avukat :* *Ir-raguni li taghtu intom, ‘however he is imposing as another option on his personnel to pick up other workers in their personal vehicle which is ‘not realistic considering also the current scenario of COVID 19’. Mela naqblu li fit-tender ma kien hemm l-ebda previzjoni biex wiehed jadopera xi mizuri propju fid-dawl tal-COVID 19? Naqblu?*

*Xhud :* *Iva*

*Avukat :* *Tista tghidli xi tfisser ghalik jew almenu tirreferili x’fissret ghal-kumitat evalwattiv not so realistic?*

*Xhud :* *Il-fatt illi intom qed tghidu ha jkun hemm car pooling u ha jmorru ghal xulxin. Dan ifisser illi l-officers ser ikunu fl-istess karozza fejn ma ssemmietx ebda mizura ta’, ovjament bhalissa kulhadd jaf li ghaddejin mill-COVID, jigifieri la ssemma dak il-contingency plan setghu issem mew xi tip ta’ mizuri li jistghu jittiehdu. Jigifieri ma tapplikax ghax it-tender huwa ghal tant ammont ta’ snin. Ahna qeghdin f’dan iz-zmien u t-tender kellu jibda immedjatement. F’dan iz-zmien ghaddejin mill-COVID*

*Avukat :* *Jigifieri inti qed tghidli li minkejja li ma ssemmietx il-COVID, xorta kellha tigi factored*

*Xhud :* *Imma ghax intom semmejt u l-car pooling. Li kieku ssemmiet biss l-option l-ohra, ma kienx hemm bzonn*

*Avukat : Ha nigu issa ghall-ewwel punt ta' dik is-sentenza fejn intom tghidu however he is imposing on their personnel. Ara nissuggerilekx please, jekk tara dak id-dokument tal-bidu, il-contingency plan tal-appellant, jghid 'as such we encourage our employees to use public transportation.' Mela fl-ahhar mill-ahhar qisu l-first option hija l-uzu tal-public transportation for eco-friendly measures. Two hija we also suggest that employees, should they wish to utilise their private vehicles, to pool together. Tista tghidli jekk il-kliem 'imposing on his personnel' hadtuhomx minn 'we also suggest'?*

*Xhud : Le ahna hadniehom . . . . security personnel to ensure all personnel arrive on time at their place of work. If the public transportation system breakdowns the security personnel who has access to the most . . . . vehicle is contacted before . . . . so that they collect the other security personnel. Hemm hekk qed jghid illi ser jghaddi ghas-security l-iehor."*

**It is evidently clear that, the work “‘imposing’ was totally unfitting and from the documentation made available to this Board, no imposing comments or proposals, could be identified.**

**In conclusion, this Board opines that:**

- a) Appellants' inclusion of 'Car Pooling' in their contingency plan in case of Public Transportation breakdown, represents one of the alternative solutions and not any imposed remedy.**

- b) The preferred bidders' submissions included also the alternative of 'Car Pooling' with no marks deducted whilst Appellants' offer was penalised for the inclusion of same alternative.**
- c) The 'Terms of Reference' of the tender document do not stipulate any preferences in so far as proposed alternatives are concerned so that, a substantial element of subjectivity was exercised in the evaluation process of the Appellants' offer.**
- d) It could not identify any imposing comments or proposals in Appellants' offer, so that, such a term "imposing comments or proposals in Appellants' offer", is totally unfitting and inappropriate.**

**In view of the above, this Board,**

- i. does not uphold the Contracting Authority's decision in the award of the tender,**
- ii. upholds Appellants' contentions,**
- iii. directs that, same Evaluation Committee re-evaluates Appellants' offer, taking into account this Board's considerations,**
- iv. directs that the deposits paid by Appellants should be fully refunded.**

Dr Anthony Cassar  
Chairman  
*26<sup>th</sup> November 2020*

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member