

PUBLIC CONTRACTS REVIEW BOARD

Case 1595 – MIP/TQF/SAP/D026/20 – Tender for the Provision of Security Services at Safi Aviation Park

26th July 2021

The Board,

Having noted the letter of objection filed by Dr Christina M. Laudi on behalf of City Legal acting for and on behalf of Kerber Securities Ltd, (hereinafter referred to as the appellant) filed on the 27th March 2021;

Having also noted the letter of reply filed by Dr John Bonello on behalf of 8 Point Law acting for and on behalf of INDIS Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 5th April 2021;

Having heard and evaluated the testimony of the witnesses Mr Martin Casha (Assistant in the compilation of the tender bid on behalf of the Appellant company) and Mr Keith Buttigieg (Chairman of the Evaluation Committee) as summoned by Dr Ryan Pace acting for Kerber Securities Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 8th July 2021 hereunder reproduced.

Minutes

Case 1595 – MIP/TQF/SAP/DO26/20. Tender for the Provision of Security Services at Safi Aviation Park

The tender was published on the 17th November 2020 and the closing date was the 7th December 2020. The value of the tender was € 87,600.

On the 27th March 2021 Kerber Securities Ltd filed an appeal against Malta Industrial Parks Ltd now known as INDIS Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that their offer failed to satisfy the BPQR criteria.

A deposit of € 438 was paid.

There were five (5) bidders.

On 8th July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain 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:

Appellant – Kerber Securities Ltd

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| Dr Ryan Pace | Legal Representative |
| Dr Christina Laudi | Legal Representative |
| Ms Lindsey Axisa | Representative |

Contracting Authority – INDIS Malta

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| Dr Christopher Vella | Legal Representative |
| Mr Keith Buttigieg | Chairperson Evaluation Committee |
| Ms Janella Camilleri | Secretary Evaluation Committee |
| Ms Romina Borg Tabone | Member Evaluation Committee |
| Mr Iman Schembri | Member Evaluation Committee |

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant's representative to make his submissions.

Dr Ryan Pace Legal Representative for Kerber Securities Ltd said that his initial submissions were similar to those he made in Case No 1594 heard earlier on this same day by the Board but wished to deal with a specific point through the testimony of witnesses who will be asked to also confirm their earlier testimony.

Dr Vella agreed that the grievance in this case was slightly different but the arguments were similar to the earlier case.

Mr Martin Casha (43457M) called as a witness by the Appellant testified on oath that he assisted in compiling the tender bid. He confirmed the testimony given in the earlier hearing. Witness was referred to the document submitted in regard to Criterion I.10 dealing with safeguarding of property and assets which the Authority claimed was not specific and which Appellant states provides high visibility presence, patrols, personal and immediate dealing with problems, responsibility for bomb threats through a responsible officer-in-charge. Witness said that no distinction was made between property and assets.

Dr Christopher Vella Legal Representative for INDIS Malta Ltd pointed out to the witness that in this tender the property is different from that in Birkirkara (Case 1594) as in this case the building has access to the Malta International Airport runway.

Mr Keith Buttigieg (8879M) called as a witness by the Appellant testified on oath that he was the Chairperson of the Evaluation Committee and Principal Procurement Officer at INDIS and stated that the evaluators were Antoinette Catania, Romina Borg Tabone, and Dorian Bugeja with Janella Caruana as Secretary. This was a departmental tender and was evaluated on the existing rules. He confirmed the testimony he gave in the earlier tender.

Witness differentiated between property which is buildings and assets which consist of goods belonging to the Contracting Authority. The operational requirements of the Safi Aviation Park building are not similar to the ones in Birkirkara since the access to the runway gives rise to the aspect of national security – the tender makes this clear from the title. The previous witness Mr Casha

indicated that the bidder was not aware of the location of the property confirmed by the fact that bidder's response was not specific to operational requirements of Safi Aviation Park.

In reply to questions by Dr Vella witness stated said that the operational requirements were different in this case as the security includes the Aviation Park which gives access to the airport runway raising elements of national security. Bidder did not give enough comfort to the Authority in regard to security of the Aviation Park – the substantial number of employees alone makes a considerable difference in the security aspect. The use of the word assets by the Authority covered both their moveable and immovable property.

Dr Pace said that he was not casting any reflection on the integrity of the evaluators. Witness had just stated that there was no distinction between property and assets and therefore it was incongruous why points had been deducted from one but not from the other. In any re-evaluation that the Board may order they should make it clear that there is no distinction between the two terms.

Dr Vella said that the deduction of points was general and not specific to either assets or property. The tender is clear that the operational requirements are different from those of the Birkirkara tender because of the aspect of national security. A 'cut and paste' offer is not good enough to safeguard likely breaches of national security. The submissions in the earlier case should also apply in this instance.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 8th July 2021.

Having noted the objection filed by Kerber Securities Ltd (hereinafter referred to as the Appellant) on 27th March 2021, refers to the claims made by the same Appellant with regards to the tender of reference MIP/TQF/SAP/D026/20 listed as case No. 1595 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Ryan C. Pace

Appearing for the Contracting Authority:

Dr Christopher Vella

Whereby, the Appellant, in their Letter of Objection, contends that:

- a) Sub-criteria B: Contract Management and Operations: (subsections i and ii) in this section the appellant is being asked to submit a list of measures wherein said list of measure provides a clear demonstration of the degree to which the implementation strategy being proposed will achieve contract objectives, and this in terms of Section 3, Clause 4.2.1 of the Terms of Reference of the Tender Document. The Appellant was penalised on one criteria, wherein the feedback received, and subsequent reason for reduction of points was never information that was ultimately requested from the bidder / appellant. The specific section is “Safeguarding the Contracting Authority’s property and assets within MIP Head Office”. The terms of reference added only that this should be done as directed by Safi Aviation Park Administrator. Appellant as a general statement, submitted that it will “shall ensure the safeguarding of the Contracting Authority’s property and assets” and further continued to elaborate as to how it will do this by stating that its security service will offer high visibility presence and will concentrate on maintenance of good order and crime prevention, ensuring quick assistance.
- b) The determination of the award was affected by the application of criteria which were unknown to the bidders, making the terms of the tender unclear and uncertain, breaching the transparency, openness and proportionality to competition that the public procurement process is expected to fulfil.
- c) Appellant clearly provided all the information and data that the tender document required from the bidder in respect to evaluation grid.
- d) The Appellant ranked second due to the considerations made by the evaluation committee that were unknown to the appellant. That evaluating a tender based on criteria that was not specifically asked for, which then results in the decrease of points and loss of tender, brings about a situation whereby the tender document was therefore unclear and ambiguous.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 5th April 2021 and its verbal submission during the virtual hearing held on 8th July 2021, in that:

- a) Appellant failed to provide specific measures on how the assets of INDIS were to be safeguarded unlike the successful bidder.
- b) Terms of tender were in no way unclear or uncertain. Nothing precludes the Appellant to request additional information or clarifications from the Contracting Authority.
- c) The BPQR’s main purpose is to identify the tender that offers the best value for money. The nature of the BPQR leads to a selection which heavily depends on the proposal of the bidder not at face value, but in consideration of the details provided therein.

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, will consider Appellant's grievances, as follows in their entirety:

- a) Tender dossier states in:
 - i. page 17, point 2.1 states *"This contract is to cater for the provision of security services at the Safi Aviation Park"*
 - ii. page 17/18 point 2.2 (b) *"to safeguard the assets of the Contracting Authority, which include the infrastructure and various equipment relating to the operation of the Safi Aviation Park. **In addition, the contractor shall also be responsible for safeguarding assets belonging to the general public and staff making use of the same Aviation Park.**"*

Therefore, the Board opines that objective of the tender, in these specific sections, is not unclear and ambiguous. It made clear references that the prospective bidders were to take into consideration the safeguarding of assets belonging to the general public and staff making use of the same Aviation Park in its technical offer and not just the assets of the Contracting Authority held within such Aviation Park.

- b) The testimony of Mr Martin Casha confirmed that the bid by the Appellant could not be specific to this particular tender when he confirmed that the bidder was not aware of the location of the property
- i. As stated on numerous occasions by this Board, in the BPQR method of evaluation, the Evaluation Committee is to be 'afforded' an element of 'leeway' in the way it proceeds with its business of evaluation. It is after all their main responsibility for such an appointment in this respective committee. This element of 'leeway' needs to be exercised *"...in a professional, detailed and meticulous manner and always within the remit of the Public Procurement Regulations and the specific Tender document in question."* (PCRB Case Ref: 1577) *"Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations."* (PCRB Case Ref: 1583) In this regard, the Board opines that no specific evidence has been brought forward to show the contrary.
- c) The purpose of the best price-quality ratio is to identify the tender that offers the best value for money. It must be assessed on the basis of criteria linked to the specific subject matter of the public contract in question. In this particular case it is evident that the offer by the Appellant was not specific on how the assets are going to be safeguarded in line with the objective of the tender document.

Finally, the Board, does not uphold the Appellant's grievances.

In conclusion this Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- 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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Chalres Cassar
Member

Mr Lawrence Ancilleri
Member