

PUBLIC CONTRACTS REVIEW BOARD

Case 1591 – MAFA 9/2021 Tender for the Provision of Security Services at the MAFA Gozo Office and the Mgarr Port

20th September 2021

The Board,

Having noted the letter of objection filed by Dr Christina M. Laudi acting for and on behalf of Kerber Securities Ltd, (hereinafter referred to as the appellant) filed on the 29th March 2021;

Having also noted the letter of reply filed by Dr Victoria Claire Scerri acting for Ministry for Agriculture, Fisheries, Food and Animal Rights (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 Marixei Callus (Chairman of the Evaluation Committee) as summoned by Dr Christina M. Laudi 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 sittings of the 24th June 2021 and 14th September 2021 hereunder-reproduced;

Minutes

Case 1591 – MAFA 9/2021. Tender for the Provision of Security Services at the MAFA Gozo Office and the Mgarr Port

The tender was published on the 22nd January 2021 and the closing date was the 15th February 2021. The value of the tender was € 125,831.52.

On the 26th March 2021 Kerber Security Ltd filed an appeal against the Ministry for Agriculture, Fisheries, Food and Animal Rights as the Contracting Authority objecting to their disqualification on the grounds that their offer failed to satisfy the award criterion.

A deposit of € 629.16 was paid.

There were four (4) bidders.

On 24th June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Kerber Security Ltd

Dr Christina M Laudi	Legal Representative
Mr Ronald Axisa	Representative

Contracting Authority – Ministry for Agriculture, Fisheries, Food and Animal Rights

Dr Victoria Claire Scerri	Legal Representative
Mr Marixei Callus	Chairperson Evaluation Committee
Mr Mario Micallef	Representative
Mr Marco Zammit	Member Evaluation Board
Mr Jesmond Demanuele	Member Evaluation Board
Mr Mario Agius	Member Evaluation Board

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 noted that the Evaluation Report appeared to be missing the Declaration of Impartiality and Confidentiality signed by the evaluating members and the hearing could not proceed until it was established if these were available.

Mr Marixei Callus Chairperson of the Evaluation Committee said that these declarations had been made on line due to the current pandemic but he was unable to locate them on the ePPS as the tender was closed and access was not allowed.

The Chairman then stated that these Declarations were not available to the Board in the submissions made and therefore the case had to be deferred until these documents are produced. It was essential that Contracting Authorities ensured that they made submissions with full documentation not to delay cases. He thanked the parties for their attendance and declared the hearing deferred.

End of Minutes

SECOND HEARING

On 14th September 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 Security Ltd

Dr Christina M Laudi	Legal Representative
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Contracting Authority – Ministry for Agriculture, Fisheries, Food and Animal Rights

Dr Victoria Claire Scerri	Legal Representative
Mr Marixei Callus	Chairperson Evaluation Committee
Mr Mario Micallef	Representative
Mr Marco Zammit	Member Evaluation Board

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 noted that the Board had received confirmation that the Declarations of Impartiality and Confidentiality relating to this evaluation had been received and invited submissions.

Dr Christina Laudi Legal Representative for Kerber Security Ltd stated that Appellant was contesting this decision on the grounds that the feedback requested by the Contracting Authority does not tally with the tender requirements – hence one had to consider the subjectivity of that decision.

Dr Victoria Claire Scerri Legal Representative for the Ministry for Agriculture, Fisheries, Food and Animal Rights emphasised that what was requested in the tender was clear and unequivocal. Certain aspects of the contingency plan were not up to the expected level or not mentioned by bidders and therefore could not be ascertained.

Mr Martin George Casha (43457M) called as a witness by the Appellant testified on oath that he was the person who submitted the tender document. He referred to the submission regarding personnel and said that not mentioning any reference to Gozo did not mean that the Appellant did not have sufficient number of staff to meet the thirty-minute deadline or that they could not comply with the tender terms. This applied also to contingencies arising out of industrial action problems and the other sections which were queried by the Authority. Records were kept in the case of sickness, lack of private car usage and measures to deal with any action before it escalated.

In regard to the requirements regarding training Appellant had made it clear that training is ongoing which was essential as unless personnel had a training certificate they could not act as security guards. No clarification or explanation on any of the above points was sought by the Authority.

Questioned by Dr Scerri witness confirmed that there was no distinction between Malta and Gozo in the staff pool and the Company had other contracts in Gozo which indicates that there were staff members based in Gozo.

Mr Marixei Callus (182281M) called as a witness by the Appellant testified on oath that he was the Chairperson of the Evaluation Committee and had co-ordinated the evaluation. He stated that the comments in the write-ups on the evaluation process were done automatically by the ePPS. He said that it was open to all bidders to provide their own proofs and methodology and the tender did not provide a definition of what a contingency plan was. Appellant responses did not warrant the award of full points. On the matter of industrial action contingencies, the reply provided by Appellant was not as satisfactory as the best submissions, whilst on methodology not proof was supplied that the measures were substantially sufficient. Regarding the training and licenced personnel, the Authority relied on the write-ups provided by the Appellant.

Questioned by Dr Scerri witness could not recall if the certificates had been submitted in the tender but agreed that this was not a requirement of the tender.

Dr Laudi said that from the testimony just provided by the last witness it was very clear that many assumptions and expectations not specified in the tender dossier were made by the evaluators nor were any clarifications sought. It was obvious from the Authority's letter of reply on the point concerning methodology that self-limitation was not practised.

Dr Scerri concluded by saying that there were no assumptions by the Authority. The plans obliged the bidders to cover contingencies – besides no indication was given that workers were available in Gozo hence the reduction in marks. The tender was solely to do with working in Gozo.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 24th June 2021 and 14th September 2021.

Having noted the objection filed by Kerber Securities Ltd (hereinafter referred to as the Appellant) on 29th March 2021, refers to the claims made by the same Appellant with regards to the tender of reference MAFA 9/2021 listed as case No. 1591 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Christina M. Laudi

Appearing for the Contracting Authority: Dr Victoria Claire Scerri

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

- a) The Appellant company penalisation was for reduction of points due to information that was never ultimately requested from the bidder (appellant).
- b) Under the heading Sub-criteria B: Contract Management and Operations in the section marked as B2 – Contingency Plans the prospective bidders were asked to submit a contingency plan report in the form of a write up of approximately 200 and 300 words as per Terms of Reference (TOR) Article 3.2 explaining the proposed measures for emergencies specified (Sick Personnel, Industrial Actions, Breakdown of Public Transport and Replacement in case of termination)
- c) 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.
- d) The appellant clearly provided all the information and data that the tender document required from the bidder.

- e) The appellant ranked third due to decisions made by the evaluation committee that were not requested of the appellant.
- f) Whereas the appellant met all the criteria made known to him in the tender document and was deemed compliant with the tender requirements, the evaluation made was based on considerations and information not requested from the bidder and therefore unknown to it.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5th April 2021 and its verbal submissions during the virtual hearings held on 24th June 2021 and 14th September 2021, in that:

- a) The wording of sub criteria B2 entitled "Contingency Plans" is indeed clear and unequivocal. The bidder had to submit contingency plans with a response time of a maximum of 30 minutes including back-up emergency provisions for emergencies. The crux of this requirement was that this was an opportunity for the bidder to highlight all their resources in the provision of the requested security services in particular challenging situations.
- b) The appellant's argument seems to indicate that it expected the contracting authority to indicate which resources were to be included in the contingency plan and possibly also the line of the action. Such an expectation does not tally with the competitive element envisaged in the request for the drafting of personalised contingency plans. The conditions and aims of the requested plans were direct and clear.
- c) The Appellant failed to indicate the essential element, that it has staff based in Gozo, of a successful contingency plan in the tender offer it submitted. In the Letter of Objection this crucial resource is mentioned more than once. Unfortunately, this reference is too late at this stage and does not make up for its absence in the proposed contingency plan.

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) The Board notes that the tender with reference number: MAFA 9/2021 is for services to be provided on the island of Gozo.
- b) The Board also notes that in the proposal / bid of the Appellant company, no specific mention is noted that their operations are done only from the island of Malta or only from the island of Gozo. However, they do point out and confirm that in the occurrence of several scenarios, such as Industrial Action, Temporary absence of personnel not being able to carry out the requested service such as sick personnel etc, they have confirmed that suitable replacements can be made available within the 30 minutes as requested by the Tender Dossier.

- c) The justification provided by the Contracting Authority for the reduction in points on the Contingency Plans is *“Since the service is to be provided in Gozo no tangible proof of how replacement is to be provided within 30 minutes as per Section 1 Article 6.1 B2 and Section 3 Article 3.2”*
- d) The Constitution of Malta defines the term “Malta” in article 124 (1) as *“Malta means the Island of Malta, the Island of Gozo and the other islands of the Maltese Archipelago, including the territorial waters thereof;”* Furthermore, the Tender Dossier Section 3, paragraph 1.1 states “Beneficiary Country – Malta”.
- e) This Board, hence, opines that the Evaluation Committee made assumption/s in arriving at the justification quoted above in point (c). This assumption made by the Evaluation Committee is in breach of the Self Limitation concept that Evaluation Committees need to adhere to. This also created a non-level playing field between prospective bidders.
- f) With regard to the justification on deduction of points on ‘Methodology’ which stated *“No proof of continuous training and refresher courses provided”*, it is to be noted that these were not being directly requested by the tender dossier. The appellant did in fact also confirm that refresher courses are provided as otherwise the licenses will not be renewed.
- g) It is also generally accepted that it is the responsibility of Contracting Authorities to try and save tenders by way of Clarifications should this be a possibility. The Board notes that no such attempts were made by the Contracting Authority.

Therefore, this Board upholds the grievances of the Appellant company.

In conclusion this Board;

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

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the ‘Notice of Award’ letter dated 18th March 2021;
- c) To cancel the Letters of Rejection dated 18th March 2021 sent to Kerber Securities Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Kerber Securities Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board’s findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member