

PUBLIC CONTRACTS REVIEW BOARD

Case 1594 – CT 2016/2020 – Tender for the Provision of Security Services at MIP Head Office Msida Valley Road, B’kara

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 26th 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 1594 – CT 2016/2020. Tender for the Provision of Security Services at MIP Head Office Msida Valley Road, B’Kara

The tender was published on the 29th April 2020 and the closing date was the 2nd June 2020. The value of the tender was € 220,237.

On the 26th March 2021 Kerber Securities Ltd filed an appeal against Malta Industrial Parks Ltd now known as INDIS Malta as the Contracting Authority objecting to their disqualification on the grounds that their offer failed to satisfy the BPQR criteria.

A deposit of € 1,101 was paid.

There were seven (7) 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

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

Contracting Authority – INDIS Malta

Dr Christopher Vella	Legal Representative
Mr Keith Buttigieg	Chairperson Evaluation Committee
Ms Janella Camilleri	Secretary Evaluation Committee
Mr Louis Attard	Member Evaluation Committee
Mr Iman Schembri	Member Evaluation Committee

Preferred Bidder – Executive Security Services Ltd

Mr Steve Ciangura - Representative was unavoidably absent but confirmed through an e-mail that the Board can proceed with hearing this case in his absence

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 as already stated in appeal letter there was no suggestion that this appeal was in any way a criticism of INDIS. Appellant accepts that the BPQR system is set up to eliminate subjectivity – the award of the tender was contested on the deduction of points on items that were not requested in the tender, and thus on the lack of adherence to self limitation by the evaluators. The allegation by the Authority that this appeal is a delaying tactic is regrettable and unfounded as Appellant is well known as a respectable operator in his field.

Dr Christopher Vella Legal Representative for INDIS Malta said that since the tender was evaluated on BPQR criteria quality has to be taken into consideration not just price and it seems that Appellant does not appreciate the aspect of quality. All that Appellant did in this tender was to follow the laid down methodology which is not sufficient as it is expected that the bid has to be adapted to fulfil the objectives requested by the Authority and not just provide the bare minimum.

Mr Martin Casha (43457M) called as a witness by the Appellant testified on oath that he assisted in the submission of the tender offer. He was referred to a series of specifications in the tender where points had been deducted as the Authority felt that not enough detail had been provided. These included the following replies by witness:

1. On measure to check timekeeping it was explained that the control room verifies attendance with employees who are even provided with mobile phones to aid communication apart from the preparation of rosters and checking by supervisors.
2. A long list of measures was presented on the vetting of staff including duties of security staff and aspects of Health and Safety and copy of the terms of reference confirming compliance.

3. Appellant provided details of action to be taken to safeguard assets including on events like a bomb alert, lift stoppages, fire fighting besides the stipulated patrols.
4. On rostering and time table Appellant offered quick replacement of missing personnel through the considerable number of staff they employ.
5. Appellant confirmed that complaints against security staff can be made through the log sheets and the company's own procedures for dealing with complaints which included follow-up on all cases.
6. With regard to sick personnel there was no tender requirement to detail the number of replacement staff.
7. In instances of contingencies like industrial action, breakdown of public transport and vacation and sick leave and staff terminations arrangements included assistance from another security company, a number of vehicles including arrangements with a car hire firm, replacement of absent staff within one hour plus arrangements if absence is longer than one day.
8. Witness had no recollection that the Authority requested endorsement provisions in the case of security reports whilst on the expected level of service witness stated that daily checks were not requested and they had offered weekly and regular checks.

In all above instances witness confirmed that the Authority had not sought any clarifications on Appellants submissions.

Questioned by Dr Vella witness agreed that the bidder had an opportunity to clarify any points with the Authority but felt that the requirements were clear enough and that therefore there was no need for further clarifications. Witness was aware of restrictions imposed by Note 3 and that the technical offer fell under that umbrella and agreed that it was crucial that timekeeping be adhered to and detrimental to the Authority and yet all they had offered was staff replacement within one hour. As regards an adequate level of service it was confirmed that all that was offered was a 'copy and paste' of the tender requirements and there was no indication of the method to be used to motivate staff. On the section on industrial action witness confirmed that apart from following the legislation there were no details on how it was going to be implemented. Witness agreed that on the matter of 'bomb threats' no procedure had been proposed in respect of dealing with such possibilities. Witness agreed with the statement that the Appellant Company had several contracts to handle and that therefore only part of its staff are available to service this contract, and that in their submissions they had failed to state what the number of staff on stand-by would be. There was no indication or details of the follow-up procedure in the case of complaints – there was merely a submission of points indicating procedure. Witness stated that no clarification was sought on points regarding the number of employees as he did not feel that it was required and also agreed that the draft incident report lacks any reference to the endorsement of incidents by the Authority.

Mr Keith Buttigieg (8879M) called as a witness by the Appellant testified on oath that he is the Principal Procurement Officer at INDIS and was the Chairperson of the Evaluation Committee and was involved in supervising the compilation of the tender. He named the other members of the committee as Mr Louis Attard, Mr Damian Whitehead and Mr Iman Schembri with Ms Janella Camilleri as Secretary. He confirmed that whilst only the named evaluators were involved in the actual evaluation they were not part of the process in the compilation of the tender. On the safeguarding of property the Authority was looking for an implementation plan but all they were offered was patrols. The implementation plan offered only basic requirements whilst on contingencies like sickness and industrial action the Authority expected an exact indication even though the tender did not particularly specify numbers.

The endorsement by a company representative was essential but not provided on the draft incident report.

In reply to questions from Dr Vella witness said that the BPQR award carried 60% of the points on the technical side and bidders were aware that quality was more important than price – the Authority therefore was expecting measures and clear evidence of how the tender criteria were to be met over and above the minimum requirements and a demonstration of how the service was to be implemented. Generally, however, the Appellant responses were generic in nature and there was a lack of indication on methodology and plans which lead to a deduction of points. The number of bids all submitted at the same price made it more than ever essential to assess the technical offers on quality. In regard to the incident report form witness stated that it was essential to have it endorsed by the Authority as a way of checking if it agreed with the contents. On complaints against security staff Appellant simply confirmed that it will comply without any indication of how the follow-up was to be executed. It was important to state the number of staff available to meet any of the listed contingencies, especially in the case of industrial action, and not just to state that the number was ‘considerable’.

Dr Pace stated that the extensive testimonies heard highlighted the variances expected in submissions of tenders. This appeal was not a challenge on subjectivity but a comparison of what was requested and what was offered. The evaluation seems to have been carried in isolation of the tender and points were deducted, as for example in indicating the number of personnel, when it was not indicated in the tender. The terms of the tender have to be scrupulously followed and marks cannot be deducted for items that were not requested. Moreover Appellant cannot request clarifications on matters that were not in the tender and is only obliged to provide what is requested and it is unfair to deduct points on what is expected. From experience the Appellant is well known as a reliable operator.

Dr Vella said that referring to past experience is irrelevant in evaluating a tender and is discriminatory. The Evaluation Committee did not rule Appellant’s bid as being not compliant but they expected a plan to ensure that the objectives were met. The methodology is missing details over and above the basic requirements as for example in the incident report where the input of the Authority was essential. The BPQR procedure is to be judged on quality and implementation. In the case of PCRB Case 1390 it was held that the production of an ISO certificate as an add-on gives extra benefit. There is no doubt that the evaluation was carried out transparently and correctly.

Dr Pace re-iterated that although transparency was followed self limitation was not observed and the matter of the ISO certificate has to be seen in the context to which it referred. The points deducted on Appellant’s bid are not a true reflection on the quality offered.

Dr Pace asked the Board if the extensive points covered in the testimonies in this hearing could be used in the following Case (Case No 1595) in view of the similarity of the appeals in both cases. The Chairman said that this will be considered after consulting the parties involved.

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 26th March 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2016/2020 listed as case No. 1594 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace & Dr Christina M. Laudi

Appearing for the Contracting Authority: Dr Christopher Vella

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

- a) Sub-criteria B: Contract Management and Operations; (subsections i ii) in this section the appellant is being asked to submit a list of measures wherein said list 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 the hereunder criteria, wherein in all cases the feedback received, and subsequent reason for reduction of points was not information that was ultimately requested from the bidder / appellant. These are:
 - i. Timekeeping
 - ii. An adequate level of service as required
 - iii. Safeguarding the Contracting Authority's (CA) property and assets within MIP Head Office
 - iv. Rostering / Timetable
 - v. Complaints against security staff
- b) Sub-criteria B: Contract Management and Operations; (subsection iii) in this section the appellant was penalised amongst others for:
 - i. Failing to specify the number of employees at its disposal. This is somewhat confusing when that which was required was a contingency plan to address certain eventualities.
- c) Sub-criteria B: Contract Management and Operations; (subsection iv) in this section, all the documentation required by the appellant was provided and this as per terms of reference. The feedback provided

which resulted in the decrease of points does not coincide to the requests made to the bidder / appellant. Moreover, this section called for draft reports and not methodologies.

- d) Sub-criteria B: Contract Management and Operations: (subsection v) in this section again the appellant provided methodology which shows how the company shall provide the level of service required as per that required by the tender document.
- e) 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.
- f) Appellant clearly provided all the information and data that the tender document required from the bidder in respect to evaluation grid.
- g) 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) Appeal is essentially based on its disagreement with the Evaluation Board's noted deficiencies of their proposals.
- b) The technical offer (Organisation & Methodology) (Note 3) document clearly stated that "bidder is expected to provide a clear demonstration" of the degree to which the implementation strategy being proposed will achieve the contract objectives. It is up to the bidder to provide detailed distinctive features of its services to present the proposal which will ultimately rank highest and therefore lead to the award of the tender.
- c) Terms of tender were in no way unclear or uncertain. Nothing precludes the Appellant to request additional information or clarifications from the Contracting Authority.
- d) 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 principal grievances, as follows: The Board notes:

- i. the award of the tender was contested on the deduction of points on items that were not requested in the tender, and thus on the lack of adherence to self limitation by the evaluators.
 - ii. although Appellant company had every opportunity to clarify any points with the Authority it felt that the requirements were clear enough and that therefore there was no need for further clarifications
 - iii. as confirmed by witness Mr Martin Casha, in the industrial action section where points were deducted, that apart from following the legislation there were no details on how it was going to be implemented. Witness agreed that on the matter of 'bomb threats' no procedure had been proposed in respect of dealing with such possibilities.
 - iv. as confirmed by witness Mr Keith Buttigieg, in this particular tender, *"quality was more important than price – the Authority therefore was expecting measures and clear evidence of how the tender criteria were to be met over and above the minimum requirements and a demonstration of how the service was to be implemented. Generally, however, the Appellant responses were generic in nature and there was a lack of indication on methodology and plans which lead to a deduction of points."*
- b) Reference to past experience of bidders, unless being a specific requirement of the tender dossier, is irrelevant in other circumstances.
- c) There is a fine line between the concepts of Self Limitation and evaluating a tender so that the purpose and main objective of the Best Price-Quality Ratio, i.e. to identify the tender that offers the best value for money, is achieved. In this regard, this Board is adamant and has on numerous occasions stated that 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. Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations. (PCRB Case Refs: 1577 & 1583)
- d) The Board refers to the discussions which ensued on PCRB Case 1390, whereby an ISO certificate was submitted by one of the bidders in that particular tender. Without going into the specific merits of the case, the Board opines that, being that this particular tender, i.e. CT 2016/2020, is being evaluated under the BPQR criteria, submitting more specific procedures which are to be undertaken by the prospective bidders, always if these specific procedures are fully compliant with the tender dossier, these specifications should result in being understood to provide a better value for money for the Contracting Authority, which is after all the main objective of BPQR. It stands

then to reason that better value for money should result in being awarded more points in the evaluation grid.

- e) The Board takes this opportunity to instruct all prospective bidders to avail themselves of the opportunity to make clarification requests if this would serve to be more specific in their tender bids.

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 Charles Cassar
Member

Mr Lawrence Ancilleri
Member