

PUBLIC CONTRACTS REVIEW BOARD

Case 1600 – CT 2130/2020 – Tender for the Provision of Security Services at Ta' Qali Crafts Village

26th July 2021

The Board,

Having noted the letter of objection filed by Dr Ryan C. Pace acting for and on behalf of Kerber Securities Ltd, (hereinafter referred to as the appellant) filed on the 16th April 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 27th 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 15th July 2021 hereunder reproduced.

Minutes

Case 1600 – CT 2130/2020. Tender for the Provision of Security Services at Ta' Qali Crafts Village

The tender was published on the 6th May 2020 and the closing date was the 9th June 2020. The value of the tender was € 238,694.40.

On the 16th April 2021 Kerber Security Ltd filed an appeal against 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 € 1,193 was paid.

There were eleven (11) bids and seven (7) bidders.

On 15th 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
Mr Martin Casha

Legal Representative
Representative

Contracting Authority – INDIS Malta Ltd

Dr Chris Vella
Mr Keith Buttigieg
Mr Louis Attard
Mr Dorian Bugeja

Legal Representative
Chairperson Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee

Preferred Bidder – Signal 8 Security Services Ltd

Dr Carlos Bugeja
Mr Jovan Grech

Legal Representative
Representative

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 the Appellant's complaint is that the Evaluation Committee did not practice self limitation in their evaluation and there are aspects of subjectivity in their decision in so far as their methods did not follow the tender specification and more specifically in requiring matters not requested in the tender and without seeking any clarifications.

Dr Chris Vella Legal Representative for INDIS Malta Ltd stated that a review of the evaluation grid marks makes it obvious that there are shortcomings in Appellant's submissions. Appellant seems not to have noticed changes in the terms and condition or requirements in this tender and was penalised for shortcomings in his offer. In a PBQR tender, on which evaluators are allowed certain leeway, the basis is on quality and hence 60% of the points were reserved for the technical offer. Clarifications were not in order in this case - if at all it was a matter of providing further information which is a rectification but Note 3 applied. It was up to the Appellant to provide the list of measures required and the small deduction of points in the submissions indicate how carefully every detail was examined and assessed.

Dr Pace said that PCRB Case No 1530 had established that clarifications are allowed on any misunderstanding or ambiguities and requested the Board to hear the testimony of a witness.

Mr Martin Casha (43457M) called as a witness by the Appellant testified on oath that he assisted in the submissions of the tender offer. He made the following points in his testimony:

1. On the adequate level of service criterion Appellant had offered additional personnel with adequate training with a person of integrity in charge and without any conflict of interest.
2. Regarding Rostering and Time-tabling the service offered included the replacement, increase or reduction of personnel according to circumstances. Document 1.8 paragraph 3 of submissions indicates that instructions are sent electronically to each employee.

3. The criterion on Complaints on Security Staff was dealt with in Document 1.12 and included the keeping of log sheets, action within five hours maximum of an incident and follow-up investigation on a complaint.
4. No numbers were requested in the tender on the replacement number of sick personnel, but Appellant offered 'a considerable pool of employees'.
5. The training and back-up section was dealt with in matters already covered in other sections and it was felt that there was no point in repetition.
6. Appellant offered monthly time sheets with details and was not relying on the Authority's system.
7. The Handover Report frequency was not mentioned in the tender and Appellant's offer met the tender requirements on this point.

No clarifications had been sought by the Authority on any of these points.

In answer to questions asked by Dr Vella the witness agreed that the Appellant's submissions referred to 'doors' when in fact the tender dealt with Ta' Kali Crafts Village site where there were only 'gates' which had to be manned – this was obviously a 'copy and paste' operation from past tenders. Similarly he agreed that under the enforcement of rules and regulations the matter of traffic management had not been dealt with. Regarding points j) and k) of the Terms of Reference witness agreed that the wording Appellant used in these sections was different to what was requested but it still covered the points required but he did not agree that not enough details were provided in the adequate level of service section. Finally witness confirmed that Appellant Company is currently providing the security service at Ta' Kali Crafts Village.

Mr Keith Buttigieg (8879M) called as a witness by Appellant testified on oath that he is the Principal Procurement Officer at INDIS Malta Ltd and was the Chairperson of the Evaluation Committee. He stated that apart from him the Committee consisted of Louis Attard, Elton Micallef, Dorian Bugeja and Janella Camilleri as Secretary and that the evaluation process had not been discussed with any outside party. He confirmed the number of security guards required as being as shown in Section 1.2 (page 3) of the Instruction to Tenderers.

Regarding the level of service witness said that bidder's response reproduced the Terms of Reference in the tender with no plan or methodology indicated in their I.9 submission. Whilst agreeing that 'relievers' and 'replacements' conveyed the same meaning witness stated that all Appellant offered was a big pool of people without specifying how many personnel were being allocated to this tender. This sort of information was essential on criteria like contingencies and again although bidder stated that use of other security company personnel would be available no number was stated. It was intrinsic and crucial that the Authority knew what numbers were involved.

Questioned by Dr Vella witness said that Crafts Village was an open site with gates and with ongoing construction activity and it was vital to ensure that no infringements took place. He described how there is a number of family activities including a children's playground which require a different security approach – this was not recognised by Appellant's bid as it offered solutions for a closed site rather than one specifically tailored. Traffic management did not include the presence of vehicles entering and leaving site since the presence of tourists and construction vehicles makes gate control and traffic management significant. Witness confirmed that Appellant had not sought any clarifications on the points in dispute.

Dr Bugeja Legal Representative for Signal 8 Security Services Malta Ltd said that the preferred bidder concurs totally with the submissions made by Dr Vella.

Dr Pace said what transpired in this hearing confirmed that the evaluation was not correctly carried out in terms of the tender since the Authority was expecting matters that were not requested – it is immaterial that the tender was on BPQR basis there was still a lack of subjectivity. Reference was made to PCRB Cases 1419, 1454 and 1530 which all had decisions bearing on BPQR evaluations. The failure of the Authority to ask for clarifications was the minimum expected and it is their duty and obligation to try to save a tender. On the industrial action criterion it was established and confirmed that all terms had been met yet marks had been deducted; similarly on other points. Mr Buttigieg in his testimony had stated that certain requirements had been implied but this was not acceptable to the Appellant. The lack of self limitation can only lead to a re-evaluation.

Dr Vella stated that this offer was a ‘cut and copy’ exercise of submissions in past tenders illustrated by reference to ‘doors’ in lieu of ‘gates’ as confirmed by witness Mr Casha. The Evaluation Committee has to ensure that the measures on quality are met but the offer is seriously lacking in providing assurance on security and is not tailored to meet the tender requirements as crucial points were missed. Quality had to be demonstrated in the offer. The point regarding clarifications is not a matter in question as asking for further details would amount to rectification. It was up to Appellant to demonstrate clearly that as experts they were providing a quality service. The evaluation process was correctly carried out and the appeal should be refused.

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 15th July 2021.

Having noted the objection filed by Kerber Securities Ltd (hereinafter referred to as the Appellant) on 16th April 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2130/2020 listed as case No. 1600 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

Appearing for the Preferred Bidder: Dr Carlos Bugeja

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

- a) The Evaluation Committee, in its evaluation and consequent mark allocation, was thoroughly subjective and, limitedly vis-à-vis appellant company, deliberately diverted from the principle of self-limitation.
- b) The principle of self-limitation imposes a duty on any adjudicating body to limit its evaluation to the terms and conditions specifically outlined in the applicable tender document. Evaluation committees cannot reasonably expect prospective bidders to provide information and/or documentation which is not clearly and explicitly stated and/or listed in the tender dossier. Even more so, Evaluation Committees cannot penalise prospective bidders for failing to provide information and/or documentation which is not clearly and explicitly stated and/or listed in the tender dossier or not requested in the first place.
- c) The evaluation grid accompanying the decision of the Director General Contracts of 6th April 2021, manifests that the Evaluation Committee: i) deducted points for information and/or documentation clearly and explicitly stated and/or listed in the tender dossier which although provided by appellant company, it discarded – possibly inadvertently; and ii) diverted from the principle of self-limitation by deducting points from appellant company for information and/or documentation not stated and/or requested in the applicable tender document.
- d) The Evaluation Committee bizarrely and unexplainably refused to seek clarification from the appellant company in terms of Note 3 of “Notes to Clause 5” and proceeded to unjustifiably deduct marks for information and/or documentation which the Contracting Authority did not request.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 27th April 2021 and its verbal submission during the virtual hearing held on 15th July 2021, in that:

- a) Appeal is essentially based on Appellant’s disagreement with the Evaluation Board’s noted deficiencies of their proposals.
- b) In tender document, article 6.1 in the criteria table, all prospective bidders were instructed as follows, *“bidder is expected to provide a clear demonstration of the degree to which the implementation strategy being proposed will achieve the contract objectives. Bidder is expected to provide a list of measures that will be taken to ensure the below.”* *“Bidder is to provide a contingency plan including response time that can realistically deal with eventualities as described in the tender and other such unexpected and undesirable occurrences”.*
- c) The Appellant was assessed in various areas whereby:
 - i. Timekeeping - *“the response failed to provide concrete measures.....”*
 - ii. Adequate level of service – *“Bidder reproduced the TOR as published*”
 - iii. Safeguarding the Contracting Authority’s property and assets within Ta’ Qali – *“the response lacked site specific tailoring”*

- iv. Rostering / Timetable – *“bidder’s response failed to allocate any possible relievers in his weekly rosters.....”*
 - v. Complaints against security staff – *“overall, response lacked particular information.....”*
 - vi. Sick personnel – *“Response failed to specify the number of employees.....”*
 - vii. Immediate replacement is to be provided for an employee who will be on vacation leave / sick leave – *“overall, the response failed to specify the number of employees.....”*
 - viii. Replacement in case of termination – *“Response lacked to provide the desired level of detail.....”*
 - ix. Draft monthly timesheets – *“Response failed to indicate the frequency”*
 - x. Proposed methodology..... – *“Response failed to indicate whether daily spot checks will be carried out”*
- d) In light of the above results from the evaluation examination, it is crucial to state that the Appellant was very much informed of the level and quantity of information required from its end, as well as all other prospective bidders equally, but failed to comply accordingly. Thus, Appellant’s claims that it was not informed by the Evaluation Committee are unfounded.
- e) 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. Such details provided are what essentially bring about higher scores in the technical quality of the proposals brought forward by the bidders. As noted in its Procurement Policy Note number 25 (Award criteria with respect to Security, Cleaning, Clerical and Care Worker Services Contracts issued) dated 25th April 2016, the Department of Contracts stated that the concept of value for money recognises that services are not homogeneous and that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value for money is that contracting authorities should aim to procure the optimum combination of features that satisfy their needs.

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:
 - 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. that the Appellant company had every opportunity to clarify any points with the Authority but did not avail itself of such opportunity. Likewise, the Contracting Authority did not itself make any requests for clarifications.

- iii.* 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. It is finally the prospective bidder's responsibility to ensure that his bid is specific to the tender in question. Reference is made to page 7 of the tender dossier whereby "*Bidder is expected to provide a **clear demonstration** of the degree to which the implementation strategy being proposed will achieve the contract objectives. Bidder is expected **to provide a list of measures** that will be taken to ensure*".
- iv.* This Board opines that the Contracting Authority should do everything in its power to try and save a bid, but is obviously constrained in certain aspects whereby no rectifications would be allowed, if subject matter would fall under 'Note 3'. Hence, ultimately it is the Prospective Bidder that has to ensure full compliance to the tender dossier. In instances where a "**clear demonstration**" and "**to provide a list of measures**" is clearly mentioned in the tender dossier, it is amply clear that just by providing the bare minimum will not necessarily mean the obtainment of full marks in the respective section.
- b) 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)
- c) Reference is now made to page 18 of the Tender dossier, to Section 3 Terms of Reference, sub section 2.2 'Specific Objectives'. From the testimony of witness Mr Martin Casha, it clearly transpires that the submission by the Appellant company referred to doors, when in fact the tender dealt with 'gates' which had to be manned (sub paragraph 'h'). In sub paragraph 'i', the tender dossier requested the 'enforcement of traffic management, parking rules and parking area'. This specific objective was not dealt with by the Appellant company in its original bid.
- d) In the testimony of Mr Keith Buttigieg, it was emphasised that the 'Ta Qali' Crafts Village is an open site with gates. There is construction activity going on, family activities including children's playgrounds etc. All these require a different security approach, which the Appellant lacked to offer specific tailor-made submissions in their regard. More specifically traffic management was not dealt with in detail.
- e) 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 of a generic nature and not detailed enough on certain aspects of the ‘Specific Objectives’, part 2.2 Section 3 Terms of Reference of the Tender dossier.

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