

PUBLIC CONTRACTS REVIEW BOARD

Case 1650 – SPD5/2021/035 – Services – Tender for the Provision of Security / Receptionist Services for Legal Aid Malta Agency

9th November 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 2nd September 2021;

Having also noted the letter of reply filed by Dr Graziella Tanti and Mr Bruno Zahra acting for and on behalf of Legal Aid Malta Agency (hereinafter referred to as the Contracting Authority) filed on the 10th September 2021;

Having heard and evaluated the testimony of the witness Mr Martin Casha (Assistant in the compilation of the tender bid on behalf of the Appellant company) 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 4th November 2021 hereunder reproduced.

Minutes

Case 1650–SPD5/2021/035. Tender for the Provision of Security/Receptionist Services for Legal Aid Malta Agency

The tender was published on the 16th June and the closing date was the 7th July 2021. The value of the tender excluding VAT was €87,296

On the 2nd September 2021 Kerber Securities Ltd filed an appeal against Legal Aid Malta Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically non-compliant.

A deposit of € 438 was paid.

There were six (6) bidders.

On 4th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Kerber Securities Ltd

Dr Ryan Pace
Mr Martin Casha

Legal Representative
Representative

Contracting Authority – Legal Aid Malta Agency

Dr Graziella Tanti
Mr Bruno Zahra

Legal Representative
Chairperson Evaluation Committee

Preferred Bidder – Signal 8 Security Services Malta Ltd

Dr Carlos Bugeja

Legal 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 invited submissions.

Dr Ryan Pace Legal Representative for Kerber Securities Ltd said that Appellant was contesting the decision by the Contracting Authority in that it had been failed on technical grounds due to the lack of reference to black non-slip shoes. The offer plainly referred to black shoes with illustrations and also by reference to protective equipment which obviously included the specified item and as such should not have led to a disqualification.

Dr Graziella Tanti Legal Representative for Legal Aid Malta Agency said the Authority had clearly explained that it could not accept the submissions as it did not mention non-slip shoes. The evaluation would have lacked transparency if they had accepted the offer and the Authority was following procedure in relying on the written submissions.

Mr Martin Casha (43457M) called as a witness by Appellant testified on oath that he had helped in preparing the tender submission. The said submission and the illustrations included therein listed the components of the uniform and included black shoes. The protective equipment included Hi-Vis jackets, helmets and protective shoes if appropriate. Witness confirmed that no clarification had been sought by the Authority.

In reply to a question by Dr Tanti witness confirmed that individual illustrations of black shoes had not been submitted and that Appellant had merely stated black shoes.

Dr Pace stated that from the evidence heard and the submissions it was very clear that the evaluation had not been properly carried out as shown by the only question asked of the witness by the Authority. The Evaluation Committee was wrong in stating that there was no reference to black shoes since Appellant provided a full uniform list including black shoes – it is being too legalistic if ‘non-slip’ wording was also expected, this ignoring the fact that the reference to safety shoes under safety equipment was overlooked. Reference was made to PCRB Case 1419 which had parallel features to this case. Appellant should not have been disqualified without the Authority seeking clarification and they are simply asking for re-integration of their offer and re-evaluation.

Dr Tanti stated that the Authority had no option but to disqualify. It was impossible to decide from the information provided that the shoes were non-slip. It was not up to the Evaluation Committee to try to decipher an offer and a clarification could not be sought without infringing on the transparency

of the evaluation. Reference had been made in the letter of reply to several legal cases backing this decision. At its simplest black shoes do not equal non-slip shoes.

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 sitting of the 4th November 2021.

Having noted the objection filed by Kerber Securities Ltd (hereinafter referred to as the Appellant) on 2nd September 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD5/2021/035 listed as case No. 1650 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan C. Pace

Appearing for the Contracting Authority: Dr Graziella Tanti

Appearing for the Preferred Bidder: Dr Carlos Bugeja

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

- a) In its decision, the Evaluation Committee concluded that appellant company's submission/offer "failed technically" for the reason reproduced hereunder: *"As per Article 4.3 Paragraph 1 of the Terms of Reference the CA requested that the uniforms for both summer and winter to include a black non-slip shoes, however the EO's submission makes no reference to black non-slip shoes, nor to a safety shoes - Average 0%"*. To begin with, the above-quoted excerpt unequivocally confirms that the Evaluation Committee's incorrect and erroneous conclusion that the Appellant's submission/offer "failed technically" was solely and exclusively grounded on the fact that - according to the Evaluation Committee - appellant company's "submission makes no reference to black non-slip shoes, nor to a safety shoes". Therefore, the technical compliance (bar the alleged non-compliance with Article 4.3 Paragraph 1 of the Terms of Reference limitedly in terms of footwear) of Kerber Securities Limited is undoubted. In the award of public contracts, Evaluation Committees are duty bound to shy away from superficial analysis of any and all submissions/offers made and shall, consistently and scrupulously, delve in detail into the core of any matter subject to their scrutiny. Regrettably, the

decision of the Evaluation Committee of the 23rd of August 2021 attests to an evaluation process which did not match the level of scrutiny one would reasonably expect in the realm of public procurement. Appellant company maintains that had the evaluation process been carried out diligently, the Evaluation Committee would have most certainly not concluded (incorrectly and erroneously) that Kerber Securities Limited's submission/offer "failed technically"

- b) As per sub-criteria (i) of Section B.5: The Economic Operator is to provide a photo / visual / picture illustrating the attire available to be worn by the security / receptionist onsite. All minimum requirements set in ToR Article 4.3 are to be depicted in the photo / visual / picture.

Article 4.3 Paragraph 1 of the Terms of Reference textually provides:

Every security/reception personnel on duty shall wear a full Company uniform which should be clean and smart.

The uniform shall consist of:

- i. Summer Uniform: White short sleeve shirt, tie, dark coloured trousers / skirt, black belt (if applicable), skin coloured tights/ socks (for females wearing skirt) and/ or dark coloured tights/ socks (as appropriate if wearing trousers), and black non-slip shoes.*
- ii. Winter Uniform: White long sleeve shirt, tie, dark coloured trousers / skirt, black belt (if applicable), dark coloured jacket, skin coloured tights/ socks (if wearing skirt) and/ or dark coloured tights/ socks (as appropriate if wearing trousers), black non-slip shoes.*

- c) In its submission, duly signed by Managing Director Ms. Lindsey Axisa, appellant company committed, as was expected of it in terms of the applicable tender document, to the following:

The uniform shall, as a minimum, be composed of the following:

- *White Shirt (short and long sleeved);*
- *Black Trousers;*
- *Jacket;*
- *Tie (including security clip);*
- *Cardigan/ Pullover;*
- *Black Waterproof/ Thermal Jacket;*
- *Black shoes;*
- *Private License;*
- *Identification tag with photo and name of security officer and company logo (to be worn on the chest);*
- *Any personal protective equipment (PPE) which may be required throughout the entire contract duration.*

- d) The above-quoted submission, contained within appellant company's technical offer, nullifies, in its entirety, the sole and exclusive ground – “no reference to black non-slip shoes, nor to a safety shoes” - upon which the Evaluation Committee incorrectly and erroneously concluded that appellant company “failed technically”. The reference which, according to the Evaluation Committee, was not made by the Appellant was, as a matter of fact, made but blatantly disregarded/overlooked by the Evaluation Committee.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10th September 2021 and its verbal submission during the virtual hearing held on 4th November 2021, in that:

- a) The argument put forth by the appellant that they had mentioned all the requisites required by the CA is unfounded. The appellant in the information inputted in its bid only mentioned "*Black shoes*" without any reference whatsoever that the black shoes are "*non-slip*". Though the appellant in its bid included 'any personal protective equipment (PPE) which may be required throughout the entire contract duration' but the Evaluation Board has not been appointed to interpret the words, phrases and sentences inputted by a bidder nor is it the Evaluation Committee's obligation and nor can the evaluation committee ask for further clarification as it had to do in this case in order to understand and ascertain whether shoes was "non-slip" or not. On the contrary it was the duty of the applicant appellant to indicate exactly and clearly the exact type of shoes and to satisfy the mandatory criteria. This has been exhaustively stated in the Judgments given by the Maltese Courts. The evaluation committee cannot be held responsible for what applicant has written or not written/included in his application.
- b) Furthermore, even though appellant could have cleared the matter and explained that he had shown that the black shoes was actually 'non-slip' as required and has had been explained in the decision handed over by the Evaluation Committee, he did not even do so at this stage, or even stated that this black shoe was in fact as required, but instead expected the board to "Evaluation Committees are duly bound to shy away from superficial analysis (emphasis by the respondent)". One here cannot but comment on the fact that the "non-slip" black shoes are required for the safety of the employees, so one must ask - is the appellant here expecting the evaluation committee not to give importance to the safety of the employees on its premises? And this especially after referring to the evaluation committee's analyses as a superficial one! On the contrary the evaluation committee has done it's job perfectly and was meticulously as it should have been especially where safety of employees are concerned, in its decision. The tender document was clear in what the CA required and requested and, in this case, specifically under Section 4.3 of the ToR the description of the uniform was exhaustive and mentioned all details required by the CA. Had the CA requested further items of uniform to be included, it would have clearly inserted the requirements requested.
- c) Moreover, this criterion in the Evaluation Grid was set as 'mandatory criteria' and the weighting states "100% or 0". that is 100% if compliant or 0 if not compliant. The proviso following the evaluation grid under Section 1 (Instructions to Tenderers) of the tender document states that: "For Mandatory requirements, if the Declaration/Proof/List/Picture/Template (or any other information as requested in each criterion) is not provided or else it is not in line with the specified requirements, automatically a score of '0' shall be allotted and the bidder shall be disqualified. The Standard Operating Procedures (SoP) - Guidelines for Tender Evaluation Committees (TEC) Version 1.3 (January 2021) (p. 11) issued by the Department of Contracts states: "For tenders issued under the Best Price Quality Ratio (BPQR) as award Criteria, when submitted Tenderer's

Technical Offer / Questionnaire fails to meet any one of the pre- established minimum mandatory technical requirements not included in the BPQR table, the offer is to be considered as technically not compliant and consequently a 'zero' (0) score is to be allocated in the relevant ePPS slot without the need to evaluate further. In a similar way, a 'zero' (0) score is to be allocated (through the ePPS) to any one of the mandatory BPQR criteria whose minimum requirements are not met. Although this effectively disqualifies the particular offer, the evaluation of all the other BPQR criteria is to be carried out, in order to be in a position to provide the bidder/tenderer with the strengths and weaknesses of the offer'

- d) Therefore, the appellant's argument that it expected the Evaluation Committee 'to rectify, di sua sponte' is unjustified because had the appellant read all the tender document before submitting the requested information it would surely have been made aware of this proviso and filled and submitted the proper information rather than inserting another bullet point in its reply to try to cover any other 'just in case' requests while expecting the Evaluation Committee to assume to know what the appellant was to provide in the uniform. In line with the above submissions and quoted Judgement, this would also not have been fair to other applicants and cannot be done in line with equity and transparency required in such scenarios.
- e) Furthermore, the argument put by the appellant that 'a full uniform picture (amongst others) including shoes was also provided' does not subsist because a picture of the black shoes forming part of a picture of the whole uniform did not inform the Evaluation Committee with a description of the composition of the black shoes! Neither had the appellant, at the least, submitted a close-up picture of the shoes including the visual of the outsole to guide the Evaluation Committee of the type of shoes they would provide to the security/receptionist.

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

- a) The Board notes:
 - i. That in the submission by the Appellant company entitled "*Submission in respect of Criterion I.18 B5(i) – Uniform / Attire*" made reference to "*Black shoes*" but also made reference to "*any personal protective equipment (PPE) which may be required throughout the entire contract duration*"
 - ii. That during the technical evaluation stage no clarifications were forthcoming from the Contracting Authority for this alleged non-compliance.
 - iii. That photographic evidence was also duly provided by the Appellant company showing the "*black shoes*".

- b) This Board opines that whilst it is true and imperative that Evaluation Committees abide by the principle of Self Limitation, it is also true and imperative that they also scrutinise the fine details consistently of all the bids in front of them. This in the interest of transparency and in order to maintain a level playing field between all prospective bidders.
- c) This Board also opines that the reference made by the Appellant company in this same criterion submission, more specifically “*any personal protective equipment (PPE) which may be required throughout the entire contract duration*” would in fact entail the “*non-slip*” element. The Evaluation Committee has at its disposal the opportunity to make a request for clarification. Once a reply is provided by the prospective bidder, if received within the stipulated timeframes, the reply is to be assessed and a decision taken upon such reply on whether it satisfies the criteria of the tender dossier or otherwise.

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 23rd August 2021;
- c) To cancel the Letters of Rejection dated 23rd August 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