

PUBLIC CONTRACTS REVIEW BOARD

Case 1775 – CT2234/2021 – Tender for the Provision of Security Services for the Ministry of Health - Lot 1

19th August 2022

The Board,

Having noted the letter of objection filed by Dr Alessandro Lia on behalf of Lia Aquilina Advocates acting for and on behalf of Executive 4 Security Joint Venture, (hereinafter referred to as the appellant) filed on the 9th May 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri Zrinzo acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 19th May 2022;

Having heard and evaluated the testimony of the witness Mr Steve Ellul (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Executive 4 Security Joint Venture;

Having heard and evaluated the testimony of the witness Mr Paul Micallef (Representative of the General Workers Union) as summoned by Dr Alessandro Lia acting for Executive 4 Security Joint Venture;

Having heard and evaluated the testimony of the witness Mr Giulio La Scala (Representative of DIEMME Srl – member of the appellant joint venture) as summoned by Dr Alessandro Lia acting for Executive 4 Security Joint Venture;

Having heard and evaluated the testimony of the witness Dr Alessandro Lia (Legal representative of the appellant) acting for Executive 4 Security Joint Venture;

Having heard and evaluated the testimony of the witness Mr Alfred Farrugia (Representative of the Ministry of Health and Chairperson of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ms Rita Turchett (Secretary of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Mr Julian Dimech (Representative of the Preferred Bidder) as summoned by Dr Damien Degiorgio acting for G4S Security Services Ltd;

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

Having noted and evaluated the minutes of the Board sitting of the 4th August 2022 hereunder-reproduced.

Minutes

Case 1775– CT2234/2021 – Tender for the Provision of Security Services for the Ministry of Health – Lot 1.

The tender was issued on the 18th August 2021 and the closing date was the 28th October 2021. The estimated value of the tender for Lot 1, excluding VAT, was € 11,305,384.45.

On the 9th May 2022 Executive 4 Security Services Joint Venture filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority objecting to the award of the tender to a bidder whose offer was deemed to be abnormally low.

A deposit of € 50,000 was paid.

There were three (3) bids.

On the 4th August 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Executive 4 Security Joint Venture

Dr Alessandro Lia	Legal Representative
Mr Stephen Ciangura	Representative
Mr Shannon Camilleri	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Alfred Farrugia	Chairperson Evaluation Committee
Ms Rita Tirchett	Secretary Evaluation Committee
Mr Steve Ellul	Member Evaluation Committee

Preferred Bidder – G4S Security Services Ltd

Dr Paul Felice	Legal Representative
Dr Damien Degiorgio	Legal Representative
Mr Julian Dimech	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Alessandro Lia Legal Representative for Executive 4 Security Services Joint Venture (Executive) as a preliminary point referred to a *Rikors* filed by the Appellant objecting to the decision not to provide it with information which in the view of the PCRb was of as commercially sensitive nature but which Appellant maintains is necessary to enable it to mount its case.

In response the Chairman stated that the Board took full cognisance of the request filed by Dr Lia on behalf of Executive to revoke *contrario imperio* this decision, however it must be underlined that the Board is directed by the Public Procurement Regulations to order its affairs as it sees fit. The *Rikors* states that the call documents establish the minimum working hours however the Appellant's request

is for the number of personnel not the number of hours. It further accepts that the tender establishes two shifts for supervisors and senior guards –the request for the number of persons required in this section is thereof superfluous. The claim in the *Rikors* is so that the Appellant can confirm that the preferred bid truly satisfies the specifications of the tender. The Board would point out that this is the role of the Evaluation Committee not the Appellant's. It is as clear as anything that this is nothing more than a fishing expedition. The Board would assure all parties that it has the necessary full information to enable it to enable it to make a decision on this appeal.

Dr Lia requested that he commences his submissions by calling witnesses.

Mr Steve Ellul (262476M) called as a witness by the Appellant testified on oath that he was, together with another two persons, an evaluator in this tender – he is a Manager in the Contracts and Finance Department at Mater Dei Hospital. He agreed that the minimum number of hours and the rates were correct and that according to the tender the Supervisors' number of hours were 24hours per day for a whole year. The number of Senior Supervisors specified was one (1) day shift and one (1) night shift at both MDH and SAMOC whilst the overall one (1) Manager was required to work a normal 40 office hours week. According to the witness in Clarification 2 Note 10 the tender requests are inflated as they cover the current operation of security officers but he could not relate the Senior Supervisors positions to the job titles shown in Table 10 (tabled as Doc 1). Witness stated that the transfer of business regulations do not apply to senior positions or key experts. Table 10 was not part of the evaluation process as it preceded it. Both security guards and key experts come within the GWU collective agreement.

Witness further testified that the tender global sum is for a three year contract and consist of the hourly rate wages plus the administration costs. The bid price of € 10,129,157 for the security guards is a figure factoring 'everything in' at rates applicable at the time of the tender publication. Figures submitted were reviewed but not queried as they were near the tender estimates and the tender was on BPQR basis – none of the bids were questioned. Since the tender had a 70% weighting on the technical submissions this was naturally given more attention and the financial offers did not have a great effect on the overall result.

The 70% technical weighting was confirmed in reply to a question put by Dr Alexia Farrugia Zrinzo Legal Representative for the CPSU.

Mr Paul Micallef (544860M) called as a witness by Appellant testified on oath that he is an Assistant Section Secretary at the GWU and stated that the collective agreement covering the security services is still in effect and includes the employees stated in Section2 of the agreement. He is not *au fait* with the tender.

Mr Giulio La Scala (AV 8861404) called to testify by the Appellant as a representative of DIEMME Srl one of the members of the Appellant Joint Venture stated on oath that the figures submitted by him were those as given in the tender form and were quoted at no less than € 9.65 per hour and so on for the following years. Witness gave a summary of workings and prices quoted using rates given in answer to answer 10 of clarification. The minimum possible price that could be quoted in the tender apart from the security guards is € 1,442,450 giving an overall total of € 11,571,610.

Questioned by Dr Farrugia Zrinzo, witness stated that the calculations were based on 24 hours per day for seven days as the tender requested.

In reply to questions by Dr Damien Degiorgio Legal Representative for G4S Security Services Ltd, witness stated that he did not query the estimated value of the tender although it is stated that figures above this value will not be considered.

Dr Alessandro Lia (511285M) sought the Board's permission to testify himself on behalf of Appellant. On oath he stated that on the 21st March 2022 he sent a letter to the Ministry of Health and the CPSU but since he received no reply he then sent the letter to the Director of Contracts (tabled as Doc AL1) querying the outcome if the tender was below the minimum price. The DoC advised him to be careful as his letter might influence the result. He requested to be notified if there were any mathematical errors in the bid to save appealing. He was advised that the DoC could not give any further information and he should appeal if not satisfied.

Mr Alfred Farrugia (726861M) called to testify by the Contracting Authority stated on oath that he is the Financial Controller, Private Health Care at the Ministry of Health and was the Chairperson of the Evaluation Committee. He stated that if one converts the gross salaries of the Manager and Supervisors by a 40 hour week then the costs will halve from 17.8 full time equivalent whilst the tender requires only 9 full timers. Witness said that the tender was on BPQR basis with 70% technical weighting and the financial side was worked on the basic estimated costs.

Questioned by Dr Lia, witness said that the tender specified 12 hours per shift. The figures in table 10 reflect a 40 hour week not two shifts of 12 hours each. The figures of the preferred bidder and the other unsuccessful offers respected the tender terms as they were below the total amount – as long as the employees rates were honoured and guaranteed the tender requirements were met. No one highlighted that on transfer of business same rates had to apply.

Ms Rita Tirchett (53270M) called as a witness by the Contracting Authority testified on oath that she was the Secretary of the Evaluation Committee and stated that the Evaluation Report was forwarded to the DoC on the 21st February 2022.

Mr Julian Dimech (275766M) called to testify by the preferred bidder stated on oath that he is the Managing Director of G4S Security Services Ltd (G4S) and they have been the incumbents of the security service at MDH since its start. He detailed how the tender was estimated and explained that costs were offset against the margins on rates. The Senior Security Officers rates and those of Coordinators shown in Table 10 do not match with calculations made. The rate of € 14.59 shown for Coordinators is in excess of rates for Senior Duty Officers which should be at € 9.94.

This concluded the testimonies.

Dr Lia said that Appellant's first grievance is that there is disagreement between the parties on the minimum rate of € 9.65 for 2021 which the preferred bidder claims covers all supervisors – this cannot be any lower as it would be illegal – calculated on the rates proposed by the Contracting Authority this would be at precarious rates. Excluding this, leaves nine employees working on seven days by 24 hours basis and allowing the hours for the Manager the total would amount to that stated in the Table. The rate of the basic security officer multiplied by the number of hours exceeds € 1,000,000. The Contracting Authority should have realised this and if they had worked it out it would have worked out higher than the G4S bid.

The rate, continued Dr Lia, is not € 9.65 as staff are to be taken over on transfer of business. The Table lists the current employees to be taken over and the extra supervisors have to be paid at the same rate. Regulation 38 of the PPR directs that tenders must be clear and unambiguous whilst Regulation 39 deals with the need for equal treatment and proportionality and one wonders whether these have

been observed. Have the parties all been supplied with all the information, asked Dr Lia. The € 10,129,157 is just the rate payments and that rate does not refer to the administrative costs but just the payment of the basic workers and hence it is obvious that the rate offered is below the current rates.

The second grievance, according to Dr Lia, is that the Court of Appeal has held that irrespective of the percentage difference in bids the Contracting Authority is obliged to query if a bid is abnormally low and if so should lead to the cancellation of a tender. In this case the Authority has not asked these questions even though it is obvious that the tender is abnormally low. The Appellant has done its utmost to try to avoid submitting an appeal but it failed as it was not given a reply to its questions. Under the circumstances the Appellant would request that immaterial of the outcome there should be a full refund of the deposit paid.

Dr Degiorgio said that the information that was sought is in the tender document which states that the offers could be lower. G4S are fully familiar with the requirements based on their experience and their offer fully meets the legal requirements. Their offer is 3.8% lower than the estimated value which is more than reasonable not to be abnormally low.

Dr Leon Camilleri Legal Representative for the CPSU said that the consequence of an abnormally low tender is for the Evaluation Committee to request clarification. This offer is very near the value of the tender and the Committee acted logically in their evaluation as there was only a small percentage difference. This was a BPQR basis tender and hence the evaluators had to look at all aspects of the bid, with the financial side being only 30% of the points weighting. The amounts indicated that the 9.65 rate is not what is paid to the workers but the costs to employer and the Evaluation Committee felt the administrative costs of the winning bid were reasonable. The Table 10 referred to is only indicative and one must consider the total annual costs. Appellant could have made use of the remedy in PPR 262 if it felt that certain details were missing in the tender or if it felt it was not clear. The estimated contract value was a guide for the Evaluation Committee and the offer was close enough not to trigger a query.

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 August 2022.

Having noted the objection filed by Executive 4 Security Joint Venture (hereinafter referred to as the Appellant) on 9th May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2234/2021 – Lot 1 listed as case No. 1775 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Alexia J Farrugia Zrinzo & Dr Leon Camilleri

Appearing for the Preferred Bidder: Dr Damien Degiorgio & Dr Paul Felice

Whereby, the Appellant contends that:

- a) If the calculations of the Appellant company are correct, both the financial offers of G4S (the recommended bidder) and Signal 8 are invalid as they go against what was requested by the Contracting Authority.
- b) Any economic operator who furnished a financial offer below the threshold of Eur11,571,610.15 cannot be deemed to have provided a valid compliant financial offer.
- c) None-the-less, such offer below the aforementioned threshold should have been treated as abnormally low offers as per regulation 243 of the Public Procurement Regulations. It is not known if the Contracting Authority contacted economic operators with abnormally low offers.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th May 2022 and its verbal submission during the virtual hearing held on 4th August 2022, in that:

- a) Primarily, CPSU submits that the primary aim of the public procurement legislation regime in Malta and throughout the European Union is that the State and ultimately, the general public obtains a service or supplies which are up to the required standards and specifications and at the best price possible, This general principle is fine tuned with other safeguards such as that against abnormally low tenders, however such safeguards should only be triggered in the general public interest and not for commercial interest as that would defeat the whole scope of having public procurement legislation for the general public interest.
- b) The appellant claims that any offer below the sum of €11,571,601.15 would be below the expenses required in fulfilment (sic)of the minimum requirements as established by this tender, which it divides into €10,129,159.27 for security guards and €1,442,450.88 for Supervisors and Duty Senior Guards, which however fails to explain how it arrived to the latter calculation. Whilst the €10,129,159.27 is understandable as it represents the estimated number of hours at the minimum rate payable to employees, the other costs remain at the discretion of each and every bidder.
- c) The Manager, Supervisors for every shift (one for samoc and one for MDH) and duty senior guard for every shift (one for Samoc and one for MDH) are indicated under the contact as Key Experts and their CV was submitted, and therefore their wages and salaries is at the discretion of the contractor, within the parameters of the law, regulations, orders and agreements in force from time to time.

- d) All of the bidders have catered for this expense in their administrative cost section in the financial bid form, however the objector decided to bid (as was his right to do) with administrative costs which were well in excess of the other 2 bidders.
- e) Regulation 243 of the Public Procurement Regulations provides that: *“243.(1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.”*
- f) The objectors are claiming that it should have appeared to the evaluation committee that the offer of the recommended bidder was abnormally low. CPSU fundamentally disagrees and this because there was no reason why CPSU should have suspected this.
- g) The law does not provide a definition of abnormally low prices and does not even provide for any guidelines (mandatory or recommendations) on how to identify abnormally low prices, however this Honourable Board had identified a number of methods how an evaluation committee can flag a potentially abnormally low offer, in case number 1140 delivered on the 15th of March 2018, in an objection relating to cleaning services.

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 now consider Appellant’s grievances in their entirety. Initially, this Board will list down points which it deems most relevant to this appeal. Subsequently reference will be made to the testimony under oath of various witnesses and a list made of the most relevant statements. Finally, this Board will provide its conclusions on the matter and grievances of the Appellant.

Relevant points

- a) Paragraph 1.3 of Section 1 of the Tender Dossier lists down the Estimated Procurement Value of Lot 1 at €11,305,384.45.
- b) Tender Dossier – Section 3 Terms of Reference – Lot 1 – Paragraph 4.2.3 (subsection 26) states *“The Contractor shall provide a **Duty Senior Guard** who shall remain in the hospital at **all times** throughout his/ her periods of duty on a shift basis and for **24 hours x 7 days x 52 weeks including Public and National Holiday**, and shall where necessary and appropriate , liaise with the Contracting Authority’s Representative or his delegate in the execution of his/ her duties. The contracting authority should always identify a contact person from the hospital staff 24 (twenty four) hours x 7 (seven) days). Seniors and Supervisors can be calculated on a 12hrs shift ii) one senior and one Supervisor in each shift at MDH and iii) One senior and one Supervisor in each shift at SAMOC.”* (bold & underline emphasis added)
- c) Tender Dossier – Section 3 Terms of Reference – Lot 1 – Paragraph 6.1.2 states *“Key Experts: Apart from the Security Officers the contractor shall provide the following Key Experts: - Key Expert – Manager - The*

Contractor shall appoint a competent manager with at least 5 years experience in Security Services and who shall be in full charge of the security Services. The manager shall dedicate all his working hours at Mater Dei Hospital to supervising all security personnel, and to provide the necessary recommendations on the number of personnel required in order to secure the whole Hospital subject to agreement and subsequent approval by the Contracting Authority. The Contractor's manager in charge shall be contactable, available in person at the Hospital for discussion with the Contracting Authority's Representative or delegate at all times by means such as telephone, mobile phone, pager or radio contact.

Duty Senior Guard – i) One (1) senior guard in each shift at MDH ii) One (1) senior guard in each shift at SAMOC

Supervisor – i) One (1) Supervisor in each shift at MDH ii) One (1) Supervisor in each shift at SAMOC

The salary of the above Key Experts must also be taken into consideration and factored in the submitted rate per hour for the provision of security services in the financial bid form.

(bold & underline emphasis added)

- d) The figure of €10,129,159.27, representing the estimated number of hours at the minimum rate payable to employees (Security Officers) is not being disputed. This also as per paragraph 3 of the Contracting Authority's letter of reply.

Extracts from testimony under oath of Mr Steve Ellul

- a) *“the tender global sum is for a three year contract and consist of the hourly rate wages plus the administration costs.”*
- b) *“The bid price of € 10,129,157 for the security guards is a figure factoring ‘everything in’ at rates applicable at the time of the tender publication.”*
- c) *“Figures submitted were reviewed **but not queried as they were near the tender estimates** and the tender was on BPQR basis – **none of the bids were questioned**. Since the tender had a 70% weighting on the technical submissions this was naturally given more attention and the **financial offers did not have a great effect on the overall result.**” (bold & underline emphasis added)*

Extracts from testimony under oath of Mr Giulio La Scala

- a) *“The minimum possible price that could be quoted in the tender apart from the security guards is €1,442,450 giving an overall total of € 11,571,610.”*

Extracts from testimony under oath of Mr Alfred Farrugia

- a) *“if one converts the gross salaries of the Manager and Supervisors by a 40 hour week then the costs will halve from 17.8 full time equivalent whilst the tender requires only 9 full timers.”*

- b) *“the tender specified 12 hours per shift. The figures in table 10 reflect a 40 hour week not two shifts of 12 hours each.”*

Conclusions

- a) In this Board’s opinion, the tender document was very much clear and unambiguous in Section 3 Terms of Reference – Lot 1 – Paragraph 4.2.3 (subsection 26) that it required Duty Senior Guards and Supervisors to be on duty on a **24-hour basis all year long** including Public and National holidays.
- b) It was likewise clear and unambiguous in Section 3 Terms of Reference – Lot 1 – Paragraph 6.1.2 that the salary of the Key Experts must also be taken into consideration and factored in the submitted rate per hour for the provision of security services in the financial bid form.
- c) Even though the calculations as presented by Mr Giulio La Scala during his testimony under oath were immaterially off in the hourly rate of the Duty Senior Guard, the Board deems them very much relevant to this case. (Duty Senior Guard MDH & SAMOC hourly rate should have read €10.17 instead of €14.59). With this ‘amended’ rate the total minimum fees for these key experts (Manager, Duty Senior Guard MDH & SAMOC and Supervisor MDH & SAMOC) amounts to €1,210,772.16. This in slight contrast to the €1,442,450.88 as initially presented by Mr La Scala and more materially different to the €750k as calculated by the Evaluation Committee and more specifically by Mr Farrugia during his testimony.
- d) It is important to note that Mr Farrugia arrived at the €750k figure by ‘assuming’ that the Duty Senior Guards and Supervisors are to be paid and employed on a 40-hour week basis. Even though this is materially true, it is to be noted that the tender dossier in Section 3 Terms of Reference – Lot 1 – Paragraph 4.2.3 (subsection 26) is requiring two (2) twelve (12) hour shifts all year long, i.e. 168 hours per week. Therefore, it is evident that the ‘normal’ 40-hour week (multiplied by 2 as done by Mr Farrugia) is certainly not enough resources to cover such a demand in the tender document and therefore mitigating alternatives need to be procured. This can take the form of overtime, in accordance to law and collective agreement in place or else through the employment of more Duty Senior Guards and Supervisors. However, the main aspect to be adhered to remains what the tender document requested in Section 3 Terms of Reference – Lot 1 – Paragraph 4.2.3 (subsection 26).
- e) The above is all deemed relevant as if one were to add the figure of €10,129,159.27, representing the estimated number of hours at the minimum rate payable to employees (Security Officers) which as already analysed is not being disputed, to the ‘revised’ €1,210,772.16 ‘minimum fees’ to be paid to the Key Experts, one would notice that the total arrived at amounts to €11,339,931.43, an amount which is above the Estimated Procurement Value of €11,305,384.45 and even more materially higher to the bids of the other two (2) economic operators who participated in this

bidding process. The amount of €11,339,931.43, is only the ‘minimum fees / salaries’ to be paid to Security Officers and Key Experts and is therefore not including any overheads and / or profitability of the economic operator.

- f) It therefore stands to reason that bids in the region of €10.5m and €10.8m should have been queried by the evaluation committee as potentially abnormally low bids. The Board further notes that:
- i. The Public Procurement Regulations (“PPR”) do not make reference to abnormally low bid being less ‘important’ if the tender is awarded by BPQR with 70% weighting on the technical aspect. Therefore, even though the financial aspect was ‘only’ weighted at 30%, regulation 243 should have still been adhered to if bids appeared to be abnormally low.
 - ii. This Board opines that since the minimum salary costs amount to €11,339,931.43, it is more than evident that bids in the €10.5m and €10.8m region *prima facie* appear to be abnormally low.
 - iii. The least expected out of the evaluation committee would be to require economic operators to explain the price proposed as per regulation 243(1) of the PPR. As outlined in jurisprudence, economic operators are at liberty to bid at what appears to be abnormally low bids, by for example foregoing their element of profitability, but these have to be duly scrutinised by the evaluation committees.

Hence, this Board upholds the Appellant’s grievances.

The 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 29th April 2022;
- c) To cancel the Letter of Rejection dated 29th April 2022 sent to Executive 4 Security Joint Venture;
- d) To order the contracting authority to re-evaluate all the bids received 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

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member

