

PUBLIC CONTRACTS REVIEW BOARD

Case 1953 – CT2186/2023 – Services - Tender for the Provision of Security Services for the Ministry for Social and Affordable Accommodation

29th January 2024

The Board,

Having noted the letter of objection filed Dr Damien Degiorgio and Dr Ramona Galea on behalf of Fenech Farrugia Fiott Legal acting for and on behalf of G4S Security Services (Malta) Limited, (hereinafter referred to as the appellant) filed on the 11th December 2023;

Having also noted the letter of reply filed by Dr Anita Giordimaina on behalf of Ministry for Social and Affordable Accommodation (hereinafter referred to as the Contracting Authority) filed on the 21st December 2023;

Having heard and evaluated the testimony of the witness Ms Roberta Zerafa (Chairperson of the Evaluation Committee) as summoned by Dr Damien Degiorgio acting for G4S Security Services (Malta) Limited;

Having heard and evaluated the testimony of the witness Mr John Bartolo (Representative of G4S Security Services (Malta) Limited) as summoned by Dr Damien Degiorgio acting for G4S Security Services (Malta) Limited;

Having heard and evaluated the testimony of the witness Mr Renato Portelli (Member of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for the Ministry for Social and Affordable Accommodation;

Having heard and evaluated the testimony of the witness Ms Alexia Maria Sultana (Member of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for the Ministry for Social and Affordable Accommodation;

Having heard and evaluated the testimony of the witness Ms Idonia Cutajar (Secretary of the Evaluation Committee) as summoned by Dr Anita Giordimaina acting for the Ministry for Social and Affordable Accommodation;

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 23rd January 2024 hereunder-reproduced.

Minutes

Case 1953 – CT 2186/2023 – Services – Tender for the Provision of Security Services for the Ministry for Social and Affordable Accommodation

The tender was issued on the 30th July 2023 and the closing date was the 29th August 2023.

The estimated value of this tender, excluding VAT, was € 553,849.92.

On the 11th December 2023 G4S Security Services (Malta) Ltd filed an appeal against the Ministry for Social and Affordable Accommodation objecting to the award of the tender as the preferred bids were abnormally low.

A deposit of € 2,769 was paid. There were seven bids.

On the 23rd January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – G4S Security Services (Malta) Ltd

Dr Christian Farrugia	Legal Representative
Dr Damien Degiorgio	Legal Representative
Dr Ramona Galea	Legal Representative
Mr John Bartolo	Representative
Eng Edward Chetcuti	Representative

Contracting Authority – Ministry for Social and Affordable Accommodation

Dr Anita Giordimaina	Legal Representative
Ms Roberta Zerafa	Chairperson Evaluation Committee
Ms Idonia Cutajar	Secretary Evaluation Committee
Mr Renato Portelli	Evaluator
Ms Alexia Maria Sultana	Evaluator

Recommended Bidder – Gold Guard Security Services Ltd

Invited to attend but did not take up the offer

Recommended Bidder – Executive Security Services

Invited to attend but did not take up the offer

Recommended Bidder – Signal 8 Security Services

Dr Lara Attard	Legal Representative
Mr Joseph John Grech	Representative

Recommended Bidder – Grange Security Malta

Mr Melville Grange	Representative
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Recommended Bidder – Kerber Ltd

Dr Ryan Pace	Legal Representative
Ms Lindsey Axisa	Representative

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

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

Dr Damien Degiorgio Legal Representative for G4S Security Services (Malta) Ltd (G4S) requested that witnesses be heard first.

Ms Roberta Zerafa (444686M) called to testify by the Appellant stated on oath that she was the Chairperson of the Evaluation Committee. Regulations and matters like the Wages Order had been factored in when the tender was set up. It was not unusual in a tender for bids to be lower than the estimated value of the tender wherein was indicated that bids could be higher or lower than the estimated value. The recommended bids which were only 5% below the estimated value were binding as they met all the tender requirements. Clarification was sought from one bidder due to an arithmetical error.

Mr John Bartolo (187478M) called to testify by the Appellant stated on oath that he is the Chief Commercial Officer of G4S and had 30 years' experience in security work. Bids had to follow Wages Orders plus factors such as vacation leave, holidays etc. costing € 10.23 in all. Other costs to be factored in were cost of uniforms, training, administration expenses, maintenance, fuel costs vehicle insurance all over and above the basic hourly cost. In the case of G4S these had all be taken into account in their bid. There was also the profit element to be considered. G4S had a standard formula which was used to work out costs and profit and this indicated that the offers by the other bidders were not sustainable.

In reply to a question from Dr Giordimaina witness agreed that costs charged were at the discretion of the bidders.

Replying to questions from Dr Debono witness stated that the costs enumerated above were not itemised in the Financial Bid Form as this only listed the tender requirements.

Dr Attard pointed out to witness that G4S might have a different costs structure as they were a big company. Witness replied said that costs applied to all companies immaterial of size.

In reply to a question from Dr Pace, witness confirmed that in what he said, he was not referring to precarious work practices.

Mr Renato Portelli (82477M) called to give his testimony by the Contracting Authority stated on oath that he was one of the evaluators and that the normal stages of the evaluation had been followed in their proper order. At the financial stage all the awardees got full points. There was nothing unusual in any of the bids.

In reply questions witness said that the evaluators had not considered any bid as abnormally low, and all rates mentioned in the tender had been observed.

Ms Alexia Maria Sultana (358079M) called to testify by the Authority stated on oath that the evaluators had considered all aspects of the tender and clarification sought where required. The evaluation had followed the BPQR system so ranking followed automatically. None of the bids appeared to be abnormally low.

Ms Idonia Cutajar (487391M) called by the Authority testified on oath that she was the Secretary of the Evaluation Committee. The evaluation had been done on BPQR basis and all bids were successful. If any corrections were required, clarifications were used.

In reply to a question from Dr Degiorgio, witness said that the evaluators had concentrated on the technical submissions as the financial aspect was more or less automatic.

This concluded the testimonies.

Dr Degiorgio said the evaluation appeared to have been superficially carried out – it was simply a tick the box exercise and the evaluators did not take Regulation 243 into consideration as no investigation was carried out and no questions were asked. Apart from the actual cost of the security there other administrative wages and costs to be taken into account. Appellant was not inferring that there was any money laundering or precarious practices – they are merely asking if the contracts were viable. Questions should have been asked.

Dr Pace stated that the Appellant is trying to make out that the evaluation was superficial. The evaluation committee is there to follow established parameters and if these parameters are out of place there are remedies. Appellant expected the evaluators to take extraneous factors into consideration and that would have been incorrect – they followed what the law required and therefore the evaluation was not superficial. There were many instances where the points made by Appellant were on post-contractual matters. There was no attempt made to prove that bids were abnormally low. The tender estimated value is just that, is not binding and outcomes can vary. Jurisprudence establishes that to be abnormally low the offer must be such as to tender it not genuine and must be a clear case where costs are not being covered. The expectation of profit might vary between parties. No proof was provided that employees would not be paid – the profit element is not a matter for the PCRB. The offer makes sense.

Dr Attard made the point that the Appellant was basing his claim on the financial side of the bids without knowing them.

Dr Giordimaina said that Appellant's claim was that bids were abnormally low but the case it made was on post-contractual matters. The value of the tender is only a guide and bidders are free to bid as they wish. The estimated value of the tender was based on market research and the difference in many of the bids submitted was only 4 or 5% different. It was a matter of discretion if and what administration costs a bidder added. The bids all satisfy legislation. It is not the role of the Evaluation Committee to consider the amount of profit but to ensure that the requirements were followed. The appeal should be rejected.

Dr Debono said that Regulation 243 must be adhered to, to prove that a bid is abnormally low. The evaluators did not consider the bids low and all the recommended rates were honoured by bidders otherwise the evaluators would have been acting *ultra vires*. Reference was made to *Cherubino vs Direttur tal-Kuntratti* and CJEU Case T64/2021 to support the suspicion of abnormally low tenders. No evidence of suspicion of abnormally low bids has been raised and therefore there was no need to investigate.

Dr Degiorgio concluded by saying that the questions he was asking on sustainability should have been asked by the Evaluation Committee.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd January 2024.

Having noted the objection filed by G4S Security Services (Malta) Limited (hereinafter referred to as the Appellant) on 11th December 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2186/2023 listed as case No. 1953 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Damien Degiorgio & Dr Ramona Galea
Appearing for the Contracting Authority:	Dr Anita Giordimaina
Appearing for the Department of Contracts:	Dr Mark Anthony Debono
Appearing for the Preferred Bidder (Signal 8 Security Services):	Dr Lara Attard
Appearing for the Preferred Bidder (Grange Security Malta Ltd):	Mr Melvin Grange
Appearing for the Preferred Bidder (Kerber Ltd):	Dr Ryan C. Pace

Whereby, the Appellant contends that:

- a) The offer submitted by the recommended bidders amounts to €529,513.92 while the estimated procurement value as set by the Contracting Authority amounts to €553,849.92. Therefore there is a discrepancy of €24,336 or approximately 5% between these two values.
- b) It is evident that if one were to calculate from where this emanates it results that the recommended bidders included only in their calculations the wages of the security officers.
- c) Therefore, the amounts accepted by the Contracting Authority can never be adjudged to be economically viable in a commercial setting.
- d) The appellant is of the opinion that the Contracting Authority did not request any explanations from the recommended bidders as per Regulation 243 of the Public Procurement Regulations.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 21st December 2023 and its verbal submission during the hearing held on 23rd January 2024, in that:

- a) The Evaluation's Committee obligation when adjudicating such tenders is to ensure that all eligible bids are compliant with the published tender document, and not to verify or evaluate their possible

profit. Thus, the appellant's argument that *“Illi għalhekk m'hemm l-ebda dubju li l-ammont accettati mill-Awtorita' kontraenti qatt ma jistgħu jitqiesu ekonomikament vijabbli fid-dinja kummerjali, u dan meta l-Awtorita' kontraenti jidher li ma talbitx mingħand l-Offerenti Rakkomandati spjegazzjoni cara ta' kif bi hsiebbhom joperaw b'offerti tant baxxi, speċjalment meta wieħed jikkunsidra li hemm ukoll certa spejjeż amministrattivi u 'operational costs' u li m'humiex kopperti taħt l-ammonti kkontestati fl-appell odjern”* does not apply. Had the Evaluation Committee go (sic) into such detail, it will be acting *ultra vires* since it will be delving into the merits of the execution of the contract which shall be distinguished from that of the adjudicating stage.

- b) Furthermore, it should be noted that the difference in the price range is the administration fee which as indicated above was optional.
- c) Additionally, the Contracting Authority would like to reiterate that the Criteria for Award was established in the tender document stating *“The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio (BPQR) in accordance with the below.”*
- d) Thus, in view of the above and given that the difference in the appellant's bid with that of the preferred bidders was exclusively the difference in the administration fee and given that such fee was optional for the bidder to submit it or otherwise, the appellant is humbly submitting that on such basis (a difference of merely 5% and representing an optional fee) the preferred bids could not be considered as abnormally low and thus, Regulation 243 of the SL 601.03 was therefore, not applicable.

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.

- a) In summary, the appellant's main grievance revolves around the presumed 'abnormally' low price as submitted by the preferred bidders. Appellant is also of the opinion that the Contracting Authority did not request any explanations from the recommended bidders as per Regulation 243 of the Public Procurement Regulations. During the testimonies under oath of members of the Evaluation Committee it was confirmed that no explanations were indeed requested.
- b) As duly analysed in PCRB Case 1927 the obligation to investigate is only to be imposed on the evaluation committees when a tender **appears** to be abnormally low and not when any bid is below the Estimated Procurement Value.

“Regulation 243(1) of the PPR states the following:

*“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.” (bold & underline emphasis added)*

*Therefore, this Board opines that the 'obligation' to investigate, whilst it is there and the law uses the word 'shall', such obligation is ONLY to be imposed where tenders **appear** to be abnormally low. Therefore, since there are no*

mathematical hard and fast rules on what constitutes an abnormally low offer, this Board must analyse how and why the offer as submitted by MRCS did not appear to be abnormally low to the Evaluation Committee.”

- c) Similarly, the subject matter will need to revolve around whether such bids, as submitted by preferred bidders, ‘appear’ to be abnormally low.
- d) As was stated in numerous past PCRB and Court of Appeal judgments there is no precise definition of what an abnormally low tender is. Therefore, a number of ‘tests’ need to be carried out.
- e) Following the publication of the Estimated Procurement Value and taking consideration of the fact that no economic operator submitted a ‘Remedies before closing date of a call for competition’, then the Estimated Procurement Value, which was set at €553,849.92 becomes the most important yard stick. When compared to the financial offers of the economic operators who ranked first (1st) in this tender procedure, who bid an amount of €529,513.92, i.e. a value which is €24,336 or just 4.6% lower than the Estimated Procurement Value, *prima facie*, these bids do not appear to be abnormally low.
- f) Furthermore, when one considers that there were five (5) [six (6)] separate and distinct bids, all with the same amount of €529,513.92, it becomes more clear that the argument of the appellants that “...it can never be adjudged to be economically viable in a commercial setting”, loses steam. How can it be argued that all of these five [six] economic operators failed to properly do their costings?
- g) Moreover, it must be stated that the inclusion of the administrative fee was entirely ‘optional’ and not mandatory in nature. All the proposed preferred bidders are well respecting the amounts stated in Circular 4/23 as issued by the Department of Contracts.
- h) Finally, this Board would also like to point out that Evaluation Committees are to fully respect the principle of self-limitation. Hence any further analyses as is being requested by the appellant, on whether they are ‘as a business economically sound’ falls outside of the remit of this specific Evaluation Committee. If the financial standing of the preferred bidder/s was material to the execution of this tender procedure, it could well have been inserted as one of the administrative criteria that economic operators had to fulfil. Once the ‘Economic and Financial Standing’ (reference to Page 4 Part 5(B)(b) of the tender dossier) was listed as “*Not Applicable*”, such arguments are deemed to be irrelevant to proceedings. If the preferred bidder/s would not be in a position to fulfil their obligations, then Post Contractual obligations / remedies would duly kick in.

Hence, this Board does not uphold the Appellant’s grievances.

The 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

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member