

PUBLIC CONTRACTS REVIEW BOARD

Case 2032 – SPD2/2024/004 – Services - Framework Contract for Secure Transportation of Deposit Takings from the Offices of Identita to Local Banks

26th November 2024

The Board,

Having noted the letter of objection filed by Dr Jonathan de Maria acting for and on behalf of City Security Ltd., (hereinafter referred to as the appellant) filed on the 24th June 2024;

Having also noted the letter of reply filed by Dr Neil Harrison acting for Identita (hereinafter referred to as the Contracting Authority) filed on the 1st July 2024;

Having heard and evaluated the testimony of the witness Mr Mark Anthony Gatt (Representative of City Security Ltd.) as summoned by Dr Jonathan de Maria acting for City Security Ltd.;

Having heard and evaluated the testimony of the witness Mr Fabio Muscat (Representative of Ozo Security Ltd) as summoned by Dr Neil Harrison acting for Identita;

Having heard and evaluated the testimony of the witness Mr Pablo Cachia Belli (Representative of Identita) as summoned by Dr Neil Harrison acting for Identita;

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 15th November 2024 hereunder-reproduced.

Minutes

Case 2032 – SPD2/2024/004 – Tender Framework Contract for Secure Transportation of Deposit Taking from the Offices of Identita to Local Banks - Identita

The tender was issued on the 15th March 2024 and the closing date was the 19th April 2024

The estimated value of this tender, excluding VAT, was € 112,000.

On the 24th June 2024 City Security Ltd filed an appeal against Identita objecting to its disqualification on the grounds that the preferred bidder's bid was abnormally low.

A deposit of € 560 was paid.

There were three bids.

On the 15th November 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Dr Eng Damien Gatt as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – City Security Ltd

Dr Jonathan de Maria	Legal Representative
Mr Mark Anthony Gatt	Representative

Contracting Authority – Identita

Dr Neil Harrison	Legal Representative
Mr Pablo Cachia Belli	Chairperson of the Evaluation Committee
Ms Geraldine Abdilla Busuttil Inguanez	Secretary of the Evaluation Committee
Mr Wilfred Saliba	Evaluator
Mr Benjamin Spiteri	Evaluator

Preferred Bidder – Ozo Security Ltd

Mr F Muscat	Representative
Mr Jonathan Francica	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Jonathan de Maria Legal Representative for City Security Ltd stated that the tender estimated value was € 120,000 within which figure the bidder had to justify that it was able to provide the requested service. Appellant carried out a detailed exercise to justify their offer. The parameters of the tender are laid down by law and moreover one had to consider traffic delays and problems. The offer by the preferred bidder is not viable if one takes into consideration all these mentioned factors. The preferred bidder is simply not following the economic model laid down in the tender and appellant claims that this is an abnormally low offer.

Dr Neil Harrison Legal Representative for the Contracting Authority said that the tender estimated value was based on previous tenders. The Evaluation Committee requested clarification on the bid price and received a reply. It is not up to the Evaluation Committee to decide at which level bids are submitted. Cartels are frowned upon at law and competition leads to lower prices as experience of various cases indicate. This is a new entrant in this market by a well-established firm.

Mr Mark Anthony Gatt (337967M) called as a witness by the Appellant stated on oath that his firm confirmed the figure submitted by letter to the Evaluation Committee. He confirmed that the calculations in reaching the submitted figure were correct.

In reply to a question from Dr Harrison, witness said that the figures submitted were in line with previous tender experience.

Mr Fabio Muscat (164396M) called as a witness by the Contracting Authority stated on oath that the figures submitted were based on consolidating use of the vans with other contracts and Appellant was wrong in assuming that collections would be carried out on single journeys. Servicing a number of clients simultaneously meant that costs could be split up. The Company was just entering this

market and they wished to build trust in their service and it would not make sense for them to jeopardise their reputation.

Questioned by Dr de Maria, witness stated that they had used the data provided by the client and worked out costs accordingly taking into consideration opportunity costs. There is nothing in the tender that specifies that trips could not be combined.

Mr Pablo Cachia Belli (542383M) called to testify by the Contracting Authority stated on oath that the estimated value of the tender was established on the basis used for four years by the last contractor. These were estimated at € 40 per trip.

Questioned by Dr de Maria witness confirmed that the procedure was carried out to find out if bidder can carry out the contract at the price offered. The process on this tender was exactly as previously carried out. The hands of the Evaluation Committee were tied once appellant confirmed the submitted price.

Dr de Maria, in concluding, stated that the offer to be realistic had to reflect that all costs, taxes etc are included. Appellant's costs had been worked out in great detail.

Mr Muscat pointed out that this was not the first tender awarded to his firm and the Contracting Authority should have referred to the previous satisfactory service given.

Dr Mark Anthony Debono Legal Representative for the Department of Contacts said that in line with Regulation 243(2) the Evaluation Committee has to follow the tender terms and all other submissions must be disregarded.

Dr Harrison said that the chosen offer was compliant and the cheapest – simply because the economic model offered is new does not mean that it is not viable.

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 15th November 2024.

Having noted the objection filed by City Security Ltd. (hereinafter referred to as the Appellant) on 24th June 2024, refers to the claims made by the same Appellant with regard to the tender of reference SPD2/2024/004 listed as case No. 2032 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan de Maria

Appearing for the Contracting Authority: Dr Neil Harrison

Appearing for the Preferred Bidder: Mr Fabio Muscat

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) Following a proper costing analysis performed by my clients, as will be proven during the hearing of this appeal, it clearly results that it would be impossible for any operator who is fully compliant with all relevant company, tax, employment and environmental laws and is also compliant with all requirements related to the business of secure transportation of deposit takings to fulfil all obligations resulting from the award of a contract (in respect of Tender ID 208787 for Secure Transportation of Deposit Takings from the Offices of Identita' to Local Banks - Identita') on the basis of a financial offer excluding VAT of €27,740.
- b) It must also be stated that had the Contracting Authority performed an appropriate analysis of the financial offer excluding VAT of €27,740 submitted by OzoSecurity Ltd in comparison with the estimated value of the procurement which was set by the Contracting Authority at €112,000 excluding VAT and then compared the estimated value of the procurement and the financial offer excluding VAT of €27,740 submitted by OzoSecurity Ltd with the financial offer excluding VAT of €109,026 submitted by my clients City Security Ltd (who was the only other compliant bidder), it should have immediately noted that the financial offer submitted by OzoSecurity Ltd was an Abnormally Low Offer.
- c) As will be shown during the hearing of this appeal, the Contracting Authority was not allowed to accept the tender offer of €27,740 excluding VAT submitted by OzoSecurity Ltd without having first required OzoSecurity Ltd to explain the price or costs proposed in its offer.
- d) The Abnormally Low tender offer of €27,740 excluding VAT submitted by OzoSecurity Ltd does not allow for the proper compliance with obligations established in Contracts Circular N° 01/2024 issued by the Department of Contracts in respect of the Minimum Hourly Rates Payable to Contractors (excluding VAT) for the year 2024. As results from Annex 1 to the said Contracts Circular N° 01/2024, the Minimum Hourly Rate in respect of security guards (for Monday to Saturday, as is applicable in this case) are €10.95 (which is subject to be amended in line with the COLA entailment of the Budget and/or amendments in the Public Service Salary Scales and/or any Associated Government Increments).
- e) In the event that the Contracting Authority does award the contract for Secure Transportation of Deposit Takings from the Offices of Identita' to Local Banks to OzoSecurity Ltd on the basis of its Abnormally Low tender offer of €27,740 excluding VAT, then there is an extremely high probability that OzoSecurity Ltd would either need to rely on State Aid or would have to subsidise its operations from other sources of income, meaning that it would be resorting to anti-competitive and unfair trading practices in order to fulfil its obligations under the Contract, which it must be

recalled in no uncertain terms, is not compatible with Malta's EU Treaty requirements and obligations, EU law, and Maltese law.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 1st July 2024 and its verbal submission during the hearing held on 15th November 2024, in that:

- a) the two offers by Ozo Security Ltd and City Security Ltd were both administratively and technically compliant, and that the procurement was awarded to the cheapest priced offer, that is the offer tendered by Ozo Security Ltd;
- b) during the course of the financial evaluation stage, and in view of the reason that the offer submitted by Ozo Security Ltd appeared to be abnormally low in relation to the estimated procurement value of the tender, the Tender Evaluation Committee had requested a clarification from this particular bidder;
- c) Ozo Security Ltd duly replied to the query of the Tender Evaluation Committee with a justified response, essentially being that they are relatively new entrants in this market and that they are offering competitive rates without compromising the quality and efficiency of the service to be provided;
- d) the objector in its appeal to the Public Contracts Review Board is essentially arguing that given the abnormally low offer, the successful bidder would not be in a position to properly fulfil all the applicable legal and contractual obligations, and to be properly compliant with the obligations established by Regulation 16(k) of the Public Procurement Regulations;
- e) the Contracting Authority totally differs with this line of argument, which is utterly a speculation and conjecture intended solely to prevent effective competition being maintained on the relevant market, and in this particular case also to the detriment of the Government of Malta;
- f) measures intended to prevent effective competition being maintained on the relevant market are prohibited by the relevant National laws as well by the European Union laws;

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 as follows in their entirety.

- a) This Board deems that what is most relevant to this appeal is regulation 243 of the Public Procurement Regulations S.L. 601.03 ("PPR").
- b) Regulation 243(1) states that "*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 emphasis added)

- c) The Board agrees with the initial assessment of the Contracting Authority that the bid as submitted by Ozo Security Ltd appears to be abnormally low and therefore the mandatory requirement of regulation 243(1) becomes ‘active’. This is evident when the bid of the recommended bidder makes up only 24.7% of the estimated procurement value as listed in paragraph 1.3 of the tender dossier.
- d) Where the Board’s assessment differs to that of the Contracting Authority is when Mr Pablo Cachia Belli, Chairperson of the Evaluation Committee, stated that *“The hands of the Evaluation Committee were tied once appellant **confirmed** the submitted price”*.
- e) Regulation 243(1), apart from making it mandatory on the Contracting Authority to issue a clarification note to the economic operator, makes ample reference that ‘economic operators to explain the price or costs proposed.....’. Therefore, the Evaluation Committee is also obliged to assess / analyse the reply provided by the economic operator. The question that now arises is whether a ‘**confirmation**’ as provided by Ozo Security Ltd is to be considered ‘enough’ for this purpose.
- f) Regulation 243(2) of the PPR provides various possibilities of what and how such explanations can be formulated. It can take the form of, for instance, economic and / or technical parameters. [Reference is made to sub-paragraphs (a) to (f)]
- g) This Board opines that the reply provided by Ozo Security Ltd is nothing more than a confirmation and is therefore not in line with the requirements of both regulations 243(1) and 243(2).
- h) It is to be noted that in his testimony, Mr Fabio Muscat provided more objective reasons as to why his company provided the financial offer it actually submitted. Such reasons are welcomed by this Board and actually start to make their offer look more reasonable. However, this Board opines that if it were to allow such reasoned replies to be added to what the economic operator originally submitted in its initial clarification reply, it would go against the Principle of Equal Treatment which is enshrined in the EU Directive 2014/24/EU.
- i) In conclusion, this Board’s viewpoint is that such reasoned replies should have been provided by Ozo Security Ltd within the five (5) days it was provided when the clarification note was issued by the tender evaluation committee.

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 14th June 2022;
- c) To cancel the Letter of Rejection dated 14th June 2022 sent to City Security Ltd;
- d) To order the contracting authority to re-evaluate the bids received in the tender procedure 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 Vincent Micallef
Member

Dr Damien Gatt
Member