

## **PUBLIC CONTRACTS APPEALS BOARD**

**Case No. 54**

### **CT 2137/2005 – Advert No 193/2005 Tender for the Development of a Management Information System for the Occupational Health and Safety Authority, Malta**

An invitation to potential participants to take part in the open tender procedure relating to the development of a Management Information System for the Occupational Health and Safety Authority, Malta was issued by the Contracts Department following a formal request received by the Malta Occupational Health and Safety Authority (OHSa).

The estimated cost of this tender was Euros 166,000 (equivalent to approximately Lm 71,000).

In total, three (3) offers were submitted by tenderers on closing date for submission of offers which was 4 August 2005. Following notification received from the Contracts Committee stating that their offer was not accepted as it was considered “...*not technically compliant because it only obtained 45 points whilst the minimum requirement was that of 80 points*”, and that the contract was awarded to Messrs Holistic Technologies Ltd, Messrs Megabyte Ltd. filed a Notice of Objection on 12 October 2005 against the said award.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) and Mr Anthony Pavia and Mr Maurice Caruana who acted as the other Members, convened a public hearing on 23 November 2005 to discuss this objection.

Present for the hearings were:

#### **Megabyte Ltd**

Mr James Forte  
Dr Albert Grech LL.D.

#### **Holistic Technologies Ltd**

Mr Simon Bonanno – Managing Director

#### **Evaluation Committee**

Mr David Saliba - Chairperson  
Ms Gertrude Farrugia - Secretary  
Mr Cedric Camilleri – Member  
Mr Silvio Farrugia – Member  
Mr Kevin Gauci - Member

After the Chairman's brief introduction, Megabyte Ltd's representatives were invited to explain the motive that led to their objection.

Dr Albert Grech, the appellants' legal representative, said that it was very difficult for them to rebut what the Department of Contracts had communicated to them because it was only stated that Megabyte '*obtained 45 points whilst the minimum requirement was that of 80 points*'. As a result, Dr Grech claimed that it was indispensable for the appellants to know the reasons why their offer was not accepted.

Mr James Forte, from the same Company, said that the Development Request for a Management Information System (MIS) for the Maltese Occupational Health and Safety Authority (OHSA) was issued by the Department of Contracts on 3 June 2005. According to Mr Forte, Megabyte Ltd submitted their proposal, which included software and hardware for servers, in August 2005. Furthermore, Mr Forte stated that, subsequent to some kind of analysis by the Contracts Committee, on 23 September 2005 the Director General Contracts informed Megabyte Ltd that the tender was not accepted because it was not technically compliant as it only obtained 45 points whilst the minimum required was that of 80 points. On 12 October 2005 they submitted their objection because they were of the opinion that their proposal met the tender's requirements.

Mr David Saliba, representing OHSA, said that Megabyte Ltd lodged their appeal because unfortunately the Department of Contracts did not communicate the reasons as to why their offer was not compliant with the tender's requirements. He concurred with the appellants' claim that, had the Authority (OHSA) provided more plausible and reasonable explanations, the position would have been clearer to one and sundry. Mr Saliba said that, following the receipt of Megabyte Ltd's objection, OHSA prepared a resume', wherein they highlighted shortcomings in Megabyte Ltd's proposal in order to demonstrate in a tangible manner, why they did not agree with Megabyte's statement regarding the technical validity of their proposal.

In reply to the appellants' claim that their offer was cheaper than that of Holistic Technologies Ltd, Mr Saliba explained that the price of Megabyte Ltd's offer was still unknown because the financial package was still sealed. At this point, he tabled the relative sealed envelope as evidence and also presented a resume' in point form regarding Megabyte Ltd's shortcomings.

Mr Saliba, in his capacity of Chairman of the Evaluation Committee, testified that points 1, 2 and 3 of the 10 points mentioned in the document he had tabled earlier, were immaterial and were not even considered for evaluation purposes. As a consequence, Mr Saliba emphasised that such points did not ultimately affect the Committee's decision to exclude Megabyte's offer. This statement was verbalised on Dr Grech's request.

Mr Saliba proceeded by saying that in clause 3 (d) under *Instruction to Tenderers for Service Contract* it was specified that '*A tenderer shall include in his tender a statement of the undertaking's turnover and its turnover in respect of the products, works or services to which the contract relates for the three previous financial years.*' He said that Megabyte did not supply any statement of account.

When the appellants' representatives were asked to comment on this issue, Dr Grech replied that they had taken note of what was stated.

The Chairman of the Evaluation Committee said that in clause 2 – *Timetable* under *Instructions to Tenderers for Service Contracts* it was clearly indicated that no interviews would be held with tenderers. He contended that in their tender dossier Megabyte made reference to negotiations. Mr Saliba maintained that they wanted clear statements and as a specific example he mentioned the two options for computer servers which he claimed were offered subject to negotiations. Dr Grech intervened and pointed out that in the tender dossier it was not indicated whether they required a single or dual server.

With regards to Megabyte Ltd's contention that their offer was cheaper than that of Holistic Technologies, Mr Saliba said that Megabyte Ltd's offer was still sealed because they only evaluated their tender on technical grounds.

When Dr Grech referred to paragraph 6 *The Hardware* in Megabyte Ltd's offer, wherein it was stated that *'The hardware configuration we are proposing is based on HP technology. In our bid we are including the price for Option 1 which is a single server configuration. Should the OHSA wish to consider a dual node cluster we have included Option 2'*, Mr Saliba pointed out that in their bid they included the price of Option 1 only and that no price was given in respect of Option 2. This was confirmed by Mr Forte, representing Megabyte Ltd.

At this stage Mr Saliba proceeded by making reference to Warranty issues, stating that under clause 4.2.1. 'Warranty', it was specified that:

*'a) The successful contractor is to warrant that all system deliverables (including the server) are free from hardware and software defects and is obliged to carry out all necessary fixes at no additional cost to the Occupational Health and Safety Authority.*

*b) This warranty period is to be valid for one year from final acceptance of the system by the Occupational Health and Safety Authority.'*

He said that in Megabyte Ltd's offer under para 3.1 *Warranty* sub-paragraph 3.1.1 *Application Software* it was stated that:

*'The warranty period normally provided for bespoke developed software is that of 90 days which commences on User Acceptance of the system, as once this warranty has expired, the customer may request the repair or replacement of any defective software under the terms of the Maintenance and Support contract. However, to satisfy the request of the OHSA, Megabyte would be prepared to revise the duration of the warranty period to 1 calendar year.'*

Mr Saliba claimed that the above showed that Megabyte Ltd offered only a warranty period of 90 days whilst OHSA requested 365 days. Apart from this Megabyte indicated that the 90 days would start from the 'user acceptance' whilst according to the Tender Dossier the 365 days had to commence from the 'final acceptance'. He maintained that there was a difference between these two acceptances because, as the

project was to be implemented in various phases, the fact that a module was accepted did not mean that the final system was accepted. Moreover, he contended that, if Megabyte Ltd were so prepared to revise the duration of the warranty period to one calendar year, they could have stated this as part of the offer and included it as a side note.

In his final comments on the warranty issue, Mr Saliba alleged that Megabyte's proposal could entail extra charges and they wanted a one year warranty without incurring any additional costs. It was pointed out that these terms of reference were written after taking into consideration OHSA's financial limits.

The same witness said that in the terms of reference under clause 4.2.2 *System Maintenance and Support Agreement* it was stated that:

*'a) The successful contractor is obliged to maintain the system for at least two (2) years after completion.'*

The Chairman of the Evaluation Committee said that Megabyte Ltd. provided a sample agreement and requested negotiations during the contract. He clarified that Megabyte Ltd. were penalised only because they failed to provide what was requested.

Mr Saliba said that clause 4.2.4 *Source Code* under the *Terms of reference* it was specified that *'After the Management Information System has been completed, the contractor will supply all source codes necessary for the IT staff to be able to effect certain changes to the Management Information System.'* This was stressed once again under clause 8.2 *Special requirements* wherein it was stated that *'Notwithstanding the fact that the OHSA shall reserve the right to make all or any alterations to the system by using the source code, the successful tenderer shall deliver all and any training on the effective use of such a system.'*

In Megabyte's offer under paragraph 3.4 *Source Code* it was stated that *'Megabyte finds no issue with supplying the Customer with the source code which is required for the Customer's IT Staff to be able to effect certain changes to the Management Information System. However, Megabyte retains the property of the IPR and makes available the source code strictly for maintenance purposes of the system only. Notwithstanding this, one would still have to find a suitable arrangement that would allow the IT Staff to carry out changes as well as Megabyte to continue supporting and maintaining the system without either party hindering the other.'*

He claimed that the source code was fundamental because this would allow OHSA staff to effect changes to the system without breaching any copyright laws. He contended that what Megabyte offered was different from what was requested and that the other companies offered the supply of source codes without any conditions or restrictions.

In reply to Dr Grech's question, the witness declared that the tender document did not specifically request the IPR (Intellectual Property Rights) and that it was only mentioned by Megabyte Ltd.

Mr Forte explained that they wanted to find 'suitable arrangements' for both parties because they did not want to encounter any problems in the future due to modifications carried out by OHSa staff if, eventually, they were asked to intervene on the system.

When Mr Saliba was asked by the PCAB to state whether he was still of the same opinion after having heard Megabyte Ltd's representative's clarification regarding the Company's insistence to retain the property of the IPR whilst making available the source code strictly for maintenance purposes of the system only, the Chairman of the Evaluation Committee replied that in view of the fact that Megabyte Ltd's statement was not all that clear, it was easy for anyone to misinterpret the actual implication of such statement. At this stage, the PCAB explained that, this was a classical case where, in the prevailing circumstances, such matter could have been clarified during the evaluation process.

Dr Grech reiterated that they were clear in their submission because they confirmed that they were going to continue supporting and maintaining the system and that Megabyte Ltd did not request any additional financial claim for this purpose.

With regards to the issue of 'training', Mr Saliba said that under Clause 8.2 *Special requirements* of the *Terms of reference* it was specified that *'The Contractor shall deliver training to a minimum of 2 and a maximum of 5 OHSa staff. The duration of this training shall be of a minimum of 5 to a maximum of 10 working days according to the need.'*

In Megabyte Ltd's proposal, under clause 3.6 *Training*, it was stated that,

*'We are assuming that the following user training will be required:*

- *Technical training of help desk support staff*
- *Training to OHSa staff'*

He said that Megabyte Ltd did not indicate the type of training they were going to give.

At this point, Dr Grech intervened by stating that Mr Saliba had misquoted what was written in Megabyte Ltd's offer because in the document presented during these proceedings he wrote that *"Megabyte in their bid stated that 'they are assuming that training will be required to OHSa Staff'"*. It was explained that Megabyte Ltd's assumption was not on whether the training would be required or not but on the type of training required.

On the PCAB's request, Mr Saliba said that their contention was on the fact that Megabyte Ltd did not stipulate the duration of training and the amount of people that would be trained. Here, his attention was drawn to the fact that there was no doubt that Megabyte Ltd were misquoted and misinterpreted and that under the same clause it was declared that *'All training will be provided after User Acceptance of the system.'*

Mr Saliba said that under Clause 3.2 *Risks* of the *terms of reference* it was stated that *'The principal risk that is identifiable at this stage is the interface between the software that is already in place and the new Management Information System.'* Mr Saliba said that the term 'interface' meant the transposition of OHSA's existing data and documentation onto the new server. He contended that Megabyte Ltd failed to indicate how this would be carried out

Dr Grech said that this was only a statement and therefore Megabyte Ltd did not need to be specific in their offer because it was obvious that Megabyte Ltd would take that risk.

Subsequently, Mr Saliba made reference to *Annex III: Organisation & Methodology*, wherein under *1 Rationale*, tenderers were required to submit *'An explanation of the risks and assumptions affecting the execution of the contract'*.

Dr Grech contended that Clause 3.2 *Risks* and *Annex III: Organisation & Methodology* were unrelated because they referred to separate issues altogether.

When the PCAB drew Mr Forte's attention about the fact that in Annex III it was specified that the required information had *'to be completed by the tenderer'*, the appellants' representative confirmed that they had explained the methodology of the execution of the project and that they did not specify the risks and assumptions.

Mr Saliba said that in bullet no 3. *MIS Server* under *12. Deliverables* of *OHSA-MIS Scoping Study: High Level Design Specifications*, it was specified that the Server had to be *'SQL Server 2005 Enterprise or equivalent'* whilst Megabyte Ltd offered the *'SQL server 2000 Standard Edition'*, which was obviously different from what was requested.

Mr Forte pointed out that, in his opinion, the server offered by Megabyte Ltd would still meet OHSA's requirements.

Mr Saliba said that under *6.1 Personnel: Expert 2 – Assistant MIS System Programmer* of the *Terms of Reference* it was specified that *'The programmer shall have experience in the working on systems similar to the one required by the Occupational Health and Safety Authority.'* He said that in Mr Stephen German's CV it was not indicated that he had previous experience in the development of a similar MIS. The witness said that although the role of both Mr Stephen German and Mr Eric Falzon was indicated as 'MIS System Programmer' they assumed that the latter was the *Assistant Programmer*.

Mr Forte said that both Messrs Falzon and German were of the same calibre and that they were also involved in similar systems and considered to be key experts in their field. The same witness explained that, contrary to what was alleged by Mr Saliba, under *4. Professional experience*, Mr German's CV clearly indicated that he was a *Manager Information Systems* at the Malta Freeport Terminals Ltd between 1994 – 2001 and the description included MIS.

After Mr Saliba's testimony, Dr Grech asked the witness to state how he would distribute the points after taking into account that earlier in the hearing it was

confirmed that the last seven points in *Doc A* affected the number of points awarded to the appellants. Mr Saliba replied that he was not in a position to answer because he was a non-voting official in so far the Evaluation Board is concerned. However, it was explained that the points were given against the maximum points as indicated in the Evaluation Grid which was provided by the Department of Contracts. He said that the points given under *rationale, strategy, timetable of activities* and *key experts* by each of the three evaluators were consistent.

Finally, the PCAB commented on the 'points system' by stating that, whenever a tenderer fails to fulfil the requirements as stipulated in the Tender Document, such tenderer should not be allowed to continue in the first place and no points should be awarded with regards to such an item. One has to realise that a clause which stipulates the supply of, for example, a particular server, is either met in full or not. One cannot award any points at all unless the Tender Document allows for alternatives where an element of subjectivity is expected. In this particular instance, if the type of server was a 'sine qua non' then it was irrelevant for the evaluators to keep on awarding points on other critical clauses. Mr Saliba, whilst concurring with this statement, yet stated that the Committee tried not to award *zero* points to anyone. The PCAB begged to differ with this line of reasoning.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 12<sup>th</sup> October, 2005, and also through their verbal submissions presented during the public hearing held on the 23<sup>rd</sup> November, 2005, had objected to the decision taken by the General Contracts Committee communicated to them in terms of the letter dated 23<sup>rd</sup> September, 2005, informing them that the tender submitted by them was not successful since their tender "*....was not technically compliant because it only obtained 45 points whilst the minimum requirement was that of 80 points*".
- having considered appellants' insistence that their offer was technically valid, and was also "*....an innovative one, based on state-of-the-art technologies and supersedes those requested in the Tender document*";
- having established that appellants' 'failure' was the result of their overall (final) score awarded through the 'Evaluation of technical offers' conducted in terms of Clause 12.1 of the tender documents and as determined by the evaluation grid exhibited in Part C of the tender dossier;
- having taken note of appellants' insistence that, for the sake of transparency, they should be informed in which aspects they had failed to secure the minimum 80-point requirement;
- having, for the purpose of establishing whether the evaluation exercise was conducted under conditions which guaranteed an acceptable level of fair play

and impartiality, heard the evidence obtained under oath from the Contracting Authority's (OHSA's) representative, which evidence was based on a two-page document listing the 10 aspects which had a bearing on the final evaluation result, but out of which only Points numbered 4 through 10 (7 points in all) provided the reasons why the Evaluation Committee had penalised the appellants for failing to meet the award criteria and the associated weighting detailed in the evaluation grid;

- having heard the contestations made by the appellants in respect of the said 7 points, in response to the explanations given by the Contracting Authority's representative;
- having examined these contestations in conjunction with (a) the specific requirements as stated in the tender documents and (b) the respective terms and specifications offered by the appellants in their tender;

reached the following conclusions:

1. The decision to award failing points to the appellants in respect of Points numbered 6, 7, 8 and 10, referring respectively to the following sections of the tender documents (Annex B9 b2):- (i) **“Source Code”** - Clause 4.2.4, (ii) **“Training”** - Clause 4.2.5., (iii) **“Importing of legacy data”** - Item 3 of and (iv) **“Qualifications”** - Item 6.1.1, was based on an evaluation which has resulted to the Board to be lacking in the proper and valid interpretation of the information supplied and consequently, the appellants were unjustly awarded failing points;
2. The decision to award failing points to the appellants in respect of Points numbered 4, 5 and 9, referring respectively to the following sections of the tender documents (Annex B9 b2):- (i) **“Warranty”** - Clause 4.2.1, (ii) **“System Maintenance and Support Agreement”** - Clause 4.2.2 and (iii) **“Server”** - item number 3 under “12. Deliverables” page 30 of Annex II A was based on the Evaluation Committee's correct interpretation of the respective offers submitted by the appellants in their tender and consequently, the respective points awarded were acceptable to the Board;

Particularly, it was proved that in the case of item (iii), the MIS Server offered by the appellants was clearly different from the one specified by the Contracting Authority in terms of item number 3 under “12. Deliverables” on page 30 of Annex II A of the tender documents and, consequently, did not meet the specified requirement. Since this item represented a requirement which was crucial to the Contracting Authority's overall MIS project expectations, failure on the part of any bidder in this respect merited an outright disqualification of the offer, without consideration being given to the merits of the offers made in respect of the other aspects of the tender;

3. In view of these findings, the Board accepts the outcome of the adjudication exercise and, in consequence, rejects appellants' objection to the decision reached by the General Contracts Committee to award the contract to Messrs Holistic Technologies Ltd.

The Board has also concluded that the deposit paid by the appellants in conjunction with this appeal is not refundable.

Additional Remark

The Board has noted that the evaluation modalities featuring in a number of recently issued tenders, including the one under consideration, where use was made of evaluation grids which were supplemented by a minimum score requirement, have given rise to a number of appeals and objections, in view of the intrinsic high subjectivity content of these evaluation models.

Given this situation, the Board strongly recommends that, for the sake of ensuring *a priori* that all bidders are treated equally and transparently, the aspects constituting the evaluation grids for point-awarding purposes should not be of the general and all-encompassing type but should rather be very well-defined and broken down as far as possible into the respective constituent elements.

**Alfred R. Triganza**  
Chairman

**Anthony Pavia**  
Member

**Maurice Caruana**  
Member

*14 December 2005*