

PUBLIC CONTRACTS APPEALS BOARD

Case No. 133

CT/2347/2007 -UM 1224; Advert No 370/2007

Tender for the Procurement of an Integrated University Information System for the University of Malta

This call for tenders was, for a contracted value of € 931,750 (approximately, Lm 400,000) was published in the Government Gazette on 23.10.2007. The closing date for this call for offers was 08.12.2007.

Four (4) different tenderers had submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', **Computime Ltd** filed an objection on 04.08.2008 against the decision by the General Contracts Committee to disqualify its offer for not being administratively compliant and consequently could not qualify for the third stage, namely, the opening of their financial proposal.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 10.09.2008 to discuss this objection.

Present for the hearing were:

Computime Ltd

Dr Adrian Mallia	Legal Representative
Mr Mark Vassallo	

Megabyte Ltd

Dr Mary Grace Busuttil	Legal Representative
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University of Malta

Dr Chris Soler	Legal Representative
Ms Charlotte Attard	Chairperson
Mr Mark Debono	Member Adjudication Board
Ms Valerie Cordina	Member Adjudication Board
Prof Josef Lauri	Member Adjudication Board
Dr Saviour Zammit	Member Adjudication Board
Mr Sergio Scopazzi	Member Adjudication Board
Mr Karm Saliba	Head Procurement Section, University of Malta & Secretary to the Adjudication Board

Department of Contracts

Mr Francis Attard	Director General
Mr Melvin Cachia	Principal

After the Chairman's brief introduction, Dr Adrian Mallia, representing Computime Ltd, the appellant Company, was invited to explain the motive of the objection. This was followed by interventions by representatives of the University of Malta (the contracting authority) and the Department of Contracts.

Dr Mallia explained that the objection raised by his client was quite clear and specific in the sense that Comuptime Ltd had received a letter from the Department of Contracts informing Computime Ltd that it had been disqualified from the tendering process because it failed to provide five reference sites as requested in the tender document. Dr Mallia contended that the tender document did not stipulate that tenders would be disqualified on the ground claimed by the Department of Contracts. Dr Mallia maintained that, on the contrary, the tender document indicated that the submission of the five reference sites was not mandatory. At this stage Dr Mallia quoted from clause 3 (c) iv of the *Instructions to Tenderers* which specified that:

To provide a schedule containing information on all past/current experience in the provision of products and services related to Integrated University Information Systems. A minimum of five reference sites where the proposed system is currently in use and the number of students in each establishment being serviced should be provided, together with the names of contact persons. The University of Malta reserves the right to contact any person from the Reference Sites list without seeking prior authorisation from the supplier.

Dr Mallia went on to quote from clause 4 at page 6 of the tender document where it was stated that:

Each Technical offer and Financial offer must contain one original, clearly marked "Original", and one copy, marked "Copy". Failure to respect the requirements in clauses 4.1, 4.2, 4.3, and 8 will result in the rejection of the tender.

Dr Mallia argued that while clause 4 made specific reference to the clauses which led to the disqualification of offers, no reference was made to clause 3.

The appellants' legal representative then made reference to the *Evaluation Grid* of the tender document wherein, under the heading 'Organisation and Methodology', 10 points were indicated against criteria 'Number of previous installations', which he understood referred to the five reference sites at clause 3 (c) v. Dr Mallia contended that his clients' tender should not have been disqualified for not complying with such requirement but should have been evaluated in accordance with the award criteria as detailed in the *Evaluation Grid* and therefore, a worst case scenario would have been that Computime Ltd be awarded no points in respect of this requirement.

Dr Mallia argued that when one considered what was laid down in clause 3 (c) and in clause 4 together with the *Evaluation Grid*, it appeared reasonable to conclude that in this respect the tender document was misleading.

To questions put forward by the PCAB, Dr Mallia replied that (i) Computime Ltd did not seek any clarification on this issue at the time that it was filling in the tender

document and (ii) Computime Ltd was aware that it was being requested to give five reference sites.

At this point, the Chairman PCAB asked why Computime Ltd did not submit these five reference sites knowing that it would certainly lose 10 points and whether that omission was due to an oversight. Dr Mallia replied that as a matter of fact Computime Ltd did not have five reference sites, however, the decision/risk to forfeit 10 points was up to the tenderer.

Mr Karm Saliba, Head Procurement, at the University of Malta and Secretary to the Adjudication Board, stated that under clause 3 (c) of the tender document the following wording was used: *The Tender will be required: To provide a background..... To present a statement ... and To provide a schedule.. To submit a list..etc.* He added that the *Administrative Compliance Grid* was given to tenderers to guide them as to what was being requested in the tender document.

Mr Saliba confirmed that the five reference sites referred to universities. He added that on the 8th November 2007, the University of Malta organised a clarification meeting for tenderers and during that meeting 26 questions were raised and the University of Malta had given written answers to all of these questions. Mr Saliba explained that these questions and answers were sent to all those who had procured the tender document up to that date and a set of these questions and answers was attached to the tender documents that were still available for sale so as to form part of the tender document. Mr Saliba informed the PCAB that the clarification meeting took place before the closing date of the tender and that Computime Ltd was represented by Mr Vassallo and Mr Cutajar. None of the questions raised was related to the issue under consideration.

In reply to a specific question by the PCAB, Mr Saliba declared that the two tenderers that were being recommended to proceed to the successive third stage did in fact produce the five reference sites requested.

On cross examination by the PCAB, Mr Mark Vassallo, also representing Computime Ltd., said that his Company was aware that it did not submit the five reference sites requested. However, he claimed that they did not consider that such requirement was mandatory because they interpreted the words 'The Tender will be required' (in clause 3 (c)) in the sense that this was part of the evaluation criteria. He argued that, as a consequence, they should have been penalised 10 points but not disqualified.

Furthermore, Mr Vassallo said that, in his opinion, one did not necessarily have to offer an integrated system because one could offer different applications that could be integrated together and, in that sense, he considered that Computime Ltd did in fact offer a complete system.

Dr Chris Soler, on behalf of the University of Malta, emphasised that the key words used in clause 3 (c) were '*should be provided*' and '*will be required*' and not something like 'will be favourably considered' or 'preferably' or 'it is recommended' and the reason behind the choice of that wording was to indicate that what was being required there was necessary and indispensable. Dr Soler also pointed out that to arrive at the *Evaluation Grid* one had to consider that tenderers had to satisfy certain

admissibility criteria such as administrative compliance, in the absence of which, that tender would not be eligible for further consideration irrespective of the fact that 10 points would not have been awarded for the shortcoming.

At this stage the Chairman PCAB observed that at one point the Director General (Contracts) had advised the Adjudication Board that the tender submitted by Computime Ltd should not be disqualified but it should be considered further along with the rest. The Chairman PCAB remarked that if the offer made by Computime Ltd was not administratively compliant, the Adjudication Board should have disqualified it at that point in time and it should not have continued with its evaluation because it appeared to him that it was useless to evaluate a non compliant offer. He continued by asking the Adjudication Board at what stage did it decide that the offer submitted by Computime Ltd was non compliant.

Mr Saliba explained that this tender was issued through the Contracts Department and hence the University of Malta, the contracting authority, acted throughout under the guidance of the Contracts Department. He added that the Adjudication Board had dropped Computime Ltd's tender when it was drawing up the administrative compliance grid, however, the Contracts Department had advised the Adjudication Board to reintegrate the tender submitted by Computime Ltd in the technical evaluation process.

Ms Charlotte Attard, Chairperson of the Adjudication Board, stated that the Adjudication Board had been advised by the Contracts Department that since the administrative compliance grid had not been published, the Adjudication Board had to continue with the evaluation of the offer made by Computime Ltd and that consequently, Computime Ltd's tender was evaluated on the same lines as that of the other tenders.

The Chairman PCAB reiterated his view that it did not make sense to evaluate a tender knowing beforehand that it was going to be disqualified.

Dr Mallia observed that although it was a fact that one could find the administrative compliance grid in page 119 of the tender document, however, no reference was made to this grid in the said tender document and, therefore, there was no explanation in its regard, especially as to whether one would be disqualified for not submitting any of the items listed therein, as the contracting authority seemed to imply.

The Chairman PCAB reminded Dr Mallia that the situation he described was common to all tenderers. Moreover, he remarked that there were cases when a tender document specified that the non submission of mandatory requirements would lead to exclusion and that there were cases where this was not specified as such.

At this stage Dr Mallia pointed out that the purpose of the hearing was to examine the actions taken by the Contracts Department and not the conduct of his client.

Mr Saliba clarified that the administrative compliance grid was an integral part of the tender document and in fact it had to be included in the Adjudication Report for submission to the Contracts Department as required by regulations.

At this stage, Mr Francis Attard, Director General (Contracts), was summoned to the witness stand, and the Chairman PCAB asked Mr Attard on what grounds did the Department of Contracts issue the instructions to the Adjudication Board to reintegrate the tender submitted by Computime Ltd in the evaluation process when the Adjudication Board had already indicated that the offer submitted by Computime Ltd was found administratively non compliant. Under oath, Mr Francis Attard stated that, as far as he could recall, at the time that the Adjudication Board had requested this advice it had not yet been established which tenders were compliant with the technical requirements. Mr Attard explained that a decision to disqualify a tender had to be taken following the submission to the Contracts Department of a comprehensive report on Package Two, which, he stressed should incorporate both the administrative and the technical aspects of the offers received. He further explained that the Contracts Department would first examine the report, then submit it for the consideration of the General Contracts Committee and finally publish the decision of the General Contracts Committee. On cross examination, Mr Attard stated that it was the opinion/recommendation of the Adjudication Board that the tender of Computime Ltd was administratively non compliant, however, for that opinion/recommendation to be approved by the Contracts Department the Adjudication Board had to submit a comprehensive report incorporating both the administrative and the technical aspects for the consideration of the General Contracts Committee.

The Chairman PCAB once again questioned the logic behind not accepting in the first instance the recommendation of the Adjudication Board that the offer submitted by Computime Ltd was not administratively compliant once it did not have the required five reference sites and then, later on in the process, the same offer was ruled as not being compliant for the same reason, with the resultant waste of time and effort and, in the course of events, raising the expectations of the tenderer concerned. And all this, remarked the PCAB's Chairman, despite the fact that the so-called "comprehensive report" referred to by the DG Contracts was still never written, let alone submitted for consideration.

At the specific request of Dr Mallia, Ms Attard and Mr Saliba were called to the stand to confirm under oath the instructions they received from the Contracts Department.

Mr Saliba declared that the Adjudication Board had indicated that the offer submitted by Computime Ltd did not meet all the administrative requirements listed in the relative grid and that this, among other things, was communicated to the Department of Contracts on the 10th February 2008. He also confirmed that Ms Charlotte Attard, Chairperson of the Adjudication Board, was informed by the Director of Contracts that since up to that time the tender had not been awarded, for all intents and purposes, Computime Ltd was still a valid tenderer.

On her part, Ms Attard confirmed that the Department of Contracts had instructed the Adjudication Board to reintegrate the tender submitted by Computime Ltd in the evaluation process and, to questions put to her by Dr Mallia, she (i) replied that the Adjudication Board had issued a questionnaire directly to the reference sites indicated by the tenderers and (ii) confirmed that the 'Number of previous installations' indicated in page 120 of the tender document referred to what was being requested in clause 3 (c) v of the same tender document.

Dr Soler argued that when one considered the evaluation exercise itself and how the points were awarded, it transpired that much depended on the answers submitted by the reference sites in response to the questionnaires forwarded to them by the Adjudication Board. Dr Soler added that, in this regard, it was not even possible to calculate, let alone award, any points to Computime Ltd. Dr Soler added that it was a case of inadmissibility *a priori* and that there was a tangible incompliance once the tenderer did not submit the reference sites requested. Dr Soler disagreed with the line of logic adopted by Dr Mallia because that approach was assuming that there were inconsistencies or conflicting provisions in the tender document. On the contrary, Dr Soler contended that it was not the case so much so that clause 3 (c) stated 'The tenderer will be required' and at para. (iv) of the same clause there was the phrase 'should be provided' which clearly indicated that the requirement was mandatory and that to arrive at that conclusion did not take a logical interpretation but a literal interpretation.

In concluding, Dr Mallia maintained that the main argument put forward by his client was that the tender document was not clear and that it allowed one to reasonably think that the non submission of reference sites would have not in itself led to outright disqualification from the tendering process. In this context, Dr Mallia referred, once again, to clauses 3 and 4 and to the fact that the issue of reference sites was going to be taken into consideration upon completion of the technical evaluation and in accordance with the award criteria and the weighting detailed in the *Evaluation Grid*. Dr Mallia reiterated that in the worst case scenario the non submission of the reference sites should have resulted in the non award of the 10 points allocated for that purpose and not to the outright elimination from the tendering process. Dr Mallia remarked that before that hearing, Computime Ltd was not aware of the recommendation by the Department of Contracts to reintegrate the offer of Computime Ltd in the tendering process, which recommendation Dr Mallia interpreted as a sign that even the Department of Contracts did not consider it sufficient ground for the disqualification of Computime Ltd's offer.

At this stage the public hearing was brought to a close and the PCAB proceeded with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 04.08.2008, and also through their verbal submissions presented during the public hearing held on the 10.09.2008, had objected to the decision taken by the General Contracts Committee;
- having observed that Computime Ltd did not submit the five reference sites as requested by the tender document knowing that it would certainly lose 10 points during the evaluation process;
- having considered the fact that, as it transpired during the hearing, Dr Mallia stated that Computime Ltd did not have five reference sites and that the decision/risk to forfeit 10 points was up to the tenderer;

- having taken note of Dr Soler's remarks regarding the key words used in clause 3 (c);
- having taken note of both Mr Saliba's and Ms Attard's testimony, especially regarding the fact that they were instructed by DG Contracts to reintegrate Computime Ltd's tender;
- having also taken note of the fact that Dr Mallia claimed that the tender document was not clear and that it allowed one to reasonably think that the non submission of reference sites would have not in itself led to outright disqualification from the tendering process,

reached the following conclusions, namely:

1. Having established that the offer made by Computime Ltd was not administratively compliant, the DG Contracts should not have advised the Adjudication Board not to disqualify the said tenderer and that the same Adjudication board should not have continued with the evaluation of the tenderer's offer
2. Further to (1) above, the PCAB maintains that it cannot accept the logic adopted by the DG Contracts and the Adjudication Board wherein, albeit highly aware of the fact that Computime Ltd was not administratively compliant as it did not have the required five reference sites, yet it proceeded with the evaluation process to reach the same conclusion which it had reached 'a priori' with the resultant waste of time and effort, raising the expectations of the tenderer concerned in the meantime. This line of reasoning tends to become more anomalous when the PCAB observes that the need for the so-called 'comprehensive report' (referred to by the DG Contracts during the hearing) seemed to be so pivotal to the evaluation process at a point in time wherein the DG Contracts felt that its submission was a 'sine qua non', necessitating a reintegration of the appellant Company's bid, yet, the same mandatory need for this same 'comprehensive report' became a triviality by the time the adjudication process had come to its final stages. This leads the PCAB to wonder why was such a 'comprehensive report' considered so important in the first place resulting in a flawed bid not being disqualified immediately
3. Following points raised and evidence given during the hearing, the PCAB does not concur with Dr Mallia's assertions regarding the fact that the (a) tender document was not clear, and (b) DG Contracts had instructed the Adjudication Board to reintegrate Computime Ltd's bid was to be interpreted as a sign that even the Department of Contracts did not consider it sufficient ground for the disqualification of Computime Ltd's offer
4. The PCAB maintains that it considers it to be highly illogical for one to contemplate that a mandatory requirement is not adhered to despite the fact that a participating tenderer knows 'a priori' that 10% of the marks attributable to such a condition's fulfilment would be forfeited once such a condition is not entertained. The fact that, during the hearing, it transpired that the appellant

Company did not have the mandatory five reference sites, renders this appeal frivolous in spirit and substance

As a consequence of (1) to (4) above, this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

22 September 2008