

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 261**

#### **CT/2125/2010 - Adv No CT/117/2010**

#### **Enabling Framework for the Supply of Attendance Verification System Solutions within the Public Service**

This call for tenders was published in the Government Gazette on 18<sup>th</sup> May 2010. The closing date for this call with a department estimate of €500,000 was 22<sup>nd</sup> July 2010.

Four (4) tenderers submitted their offers.

DataByte Ltd filed an objection on 23<sup>rd</sup> December 2010 against the decisions by the Contracts Department to disqualify its offer on being found administratively and technically non-compliant with the consequence that it was not among the selected approved suppliers.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Wednesday, 9<sup>th</sup> February 2011 to discuss this objection.

Present for the hearing were:

#### **DataByte Ltd**

Dr Andrew Borg Cardona	Legal Representative
Mr Frederick Micallef	Managing Director
Mr Victor Ciantar	Systems Specialist for Time Attendance Systems

#### **AISTL Ltd**

Ing. Anthony Bartolo	Representative
Mr Jeremy Borg Grech	Representative

#### **Office of the Prime Minister (OPM)**

Dr Silvio Brincat	Legal Representative
Ms Caroline Schembri de Marco	Consultant (MITA)

#### **Evaluation Board**

Mr Anthony Azzopardi	Chairman
Ms May Mifsud	Secretary
Mr Edward Caruana	Member
Mr Paul Galea	Member
Mr Espedito Grech	Member

#### **Department of Contracts**

Mr Francis Attard	Director General
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After the Chairman Public Contracts Appeals Board's brief introduction, the appellant company's representatives were invited to explain the motives of the company's objection.

Dr Andrew Borg Cardona, legal representative of DataByte Ltd, the appellants, stated that by way of an email dated 17<sup>th</sup> December 2010 sent by the Contracts Department to his client, the latter was informed that its tender submission was found to be (i) administratively non-compliant since the tables provided in Form 4.7 were not filled in and (ii) technically non-compliant as per reference made in the evaluation board's report. The appellant company's legal advisor called upon the Public Contracts Appeals Board to keep in constant view that the purpose of this call was not to award a supply contract but to select supplier/s with whom to place future orders.

Dr Borg Cardona remarked that, allegedly, his client failed to give certain financial details such as, its share capital and banker's name. He referred to *Appendix 1* where one could find the share capital and the banker's details and, as a result, he maintained that the information was in fact made available. Dr Borg Cardona conceded that Form 4.7 was not filled in as requested, claiming omission was due to an oversight, but he insisted that the important thing was that the information was available in his client's tender submission. At this stage Dr Borg Cardona called upon the Public Contracts Appeals Board that if, for some remote reason, this appeal would not be upheld then consideration would be given to refund part of the deposit paid by this client due to the disorderly manner in which Form 4.7 was initially presented so much so that it took a number of clarifications to correct it. The appellants' legal representative even observed that the fact that his client's offer was evaluated technically was, itself, indicative that administrative compliance was not an issue in the case of his client.

Dr Silvio Brincat, legal representative of the contracting authority, admitted that in the original tender document Form 4.7. section 4.7.2 made reference to '*annual value of construction work undertaken for each of the last three years*' which did not apply in this case. Nevertheless, continuing on the same subject matter, Dr Brincat added that an amendment was effected by way of clarification no. 3, which was communicated to all concerned, which read '*annual value of similar work undertaken for each of the last three years*'. Dr Brincat remarked that, albeit the other bidders participating in this tender submitted Form 4.7 as amended, yet the appellant company failed to fill in this form which form was a mandatory requirement.

Mr Frederick Micallef, also representing the appellant company, contended that any information not included in Form 4.7 was readily available in the financial statements included in *Appendix 1* of the original submission. Mr Micallef expected the contracting authority to contact him, as it did on other issues, to fill in the required figures from those already given in the original submission at *Appendix 1*, i.e. without altering or adding any new data.

Dr Brincat agreed that some of the information required in Form 4.7 might have been provided elsewhere in the appellant company's submission but this was scattered all over and not in its entirety. The contracting authority's legal representative insisted that it was mandatory on the bidders to submit *Form 4.7* and one should not tolerate bidders omitting this kind of information and expecting the contracting authority to extrapolate these figures from statements that could be found elsewhere in the tender submission.

Mr Espedito Grech, Assistant Director OPM and member of the evaluation board, under oath, made the following observations with regard to Form 4.7 - a mandatory requirement:

- Section 4.7.1 concerning basic capital data was filled in;
- Section 4.7.2, which, as per clarification 3 requested the ‘annual value of similar works undertaken for the last three years’, and section 4.7.3, which requested the value of works in hand, were, in both instances, not filled in. On the other hand, at page 14 of the appellant company’s submission under the heading ‘*Tenderer’s Previous Experience and Current Projects*’ there was a list of works which did not indicate (i) the value of the works and (ii) the date when these were carried out and, as a consequence, that list was of no relevance for the purposes of sections 4.7.2 and 4.7.3;
- Section 4.7.6 – concerning the filling in of data extracted from the statements of account and projections – was not filled in and, despite the fact that the appellant company submitted financial statements at *Appendix 1*, one should not expect the evaluation board to go through the financial statements and extract the information required in this form, with the possibility of errors being made in the process to the detriment or to the advantage of the bidder. Moreover, projections for the current year were not available in the financial statements; *and*
- the scope of the tender was to identify bidders that had the capabilities to supply the products and services requested in the tender and then the contracting authority, at its discretion, could request quotations from the selected suppliers.

Whilst conceding that his client did not fill in form 4.7, Dr Borg Cardona insisted that the information requested was available in his client’s submission even if it was not in the format requested. Dr Borg Cardona also stressed that, strictly speaking, this was not a ‘normal’ call for tenders but an ‘Enabling framework’.

The Public Contracts Appeals Board remarked that it was the responsibility of the tenderer to ensure that one’s submission was complete and correct and that a bidder was not at liberty to choose which forms to fill in and which information to omit. The Board added that a bidder could not abdicate from one’s responsibility by shifting onto the evaluation board the responsibility of, say, the extrapolation of financial data from the financial statements to fill in, on behalf of the bidder, Form 4.7, a ‘Form’ whose submission was mandatory.

*It was noted that at Appendix 1 the appellant company submitted the financial statements for 2009 (with 2008 comparative figures) and then referred the contracting authority to the Malta Financial Services Authority (MFSA) website with regard to the financial statements for 2007 and 2008.*

With regards to the issue of 'Technical Non-Compliance', the issue was split into:

***Option 1: Model SC530 – Power Autonomy***

Dr Borg Cardona argued that although his client offered a standard battery that was rated at 3 hours at closing date of tender, recent developments in this sector has improved the rating of this battery up to 4 hours as confirmed by the manufacturer. He conceded that whilst, admittedly, no one was expecting that the contracting authority had to keep a lookout for developments taking place but, rather, it was expected that the said authority had to evaluate and adjudicate on the literature presented to it at submission of tender. Nevertheless, the appellants' legal representative stressed that, apart from the back-up battery rated at 3 to 4 hours, his client's submission included a UPS that could extend the battery operation even up to 8 hours which was, by far, in excess of the 4 hours requested in the tender. Dr Borg Cardona explained that a battery was a source of power and so was a UPS unit.

Dr Brincat intervened to remark that the contracting authority requested a battery with a 4 hour rating as a minimum whereas the appellant company offered a battery that was rated at 3 hours with an add-on, a UPS, which could extend the operation period up to 8 hours. The contracting authority's legal representative added that the technical personnel of the contracting authority did not consider the UPS as equivalent to a battery. At this point Dr Brincat referred those present to page 48 of the appellant company's submission wherein, *inter alia*, it was stated that:

*'The tenderer is to confirm that the proposed AVS device has an operational battery backup for a minimum period of 4 hours' and the appellant's corresponding response read 'Supplier operation backup battery is rated for 3-4 hours depending on operation. However, a larger UPS can be used to extend autonomy even up to 8 hours'.*

Mr Micallef conceded that in the tender submission the battery presented could guarantee up to 3 hours operation even though, at a later stage, after the closing date of the tender, the manufacturer confirmed that the battery could render up to 4 hours operation. However, Mr Micallef added that, in the same original tender submission, his company included a UPS, which was considered as a battery, with the primary scope being that of extending the power autonomy up to 8 hours and, in consideration of this, Mr Micallef argued, there should be no issue with regard to 'battery backup'. The same appellant company's representative proceeded by (a) stating that the cost of the UPS, €42, was included in the company's offer and (b) stressing that its offer was not excluded on issues concerning prices.

Mr Victor Ciantar, *Systems Specialist for Time Attendance Systems*, also representing Databyte Ltd, under oath, stated that:

- technically, a UPS was a battery with additional security for uninterrupted power supply;

- the standard battery offered was rated for 3 hours, even though, in practice, it rendered more than 3 hours, so much so that, at present, the manufacturer was rating it at up to 4 hours depending on the manner in which it would be operated;
- the appellant company included the use of a UPS to extend the battery operational backup period up to 8 hours;
- the standard battery with 3 hours operation was itself described on its label as a mini UPS and he called upon the evaluation board to check whether the batteries offered by the other tenderers were in fact mini UPSs; and
- the standard battery was, itself, an external unit and that was so in order to provide a slender unit otherwise an internal battery would render the unit cumbersome.

At this point Mr Grech, under oath, gave the following evidence, *inter alia* stating that:

- the contracting authority requested a battery backup but the solution provided by the appellant company consisted of a standard battery rated at 3 hours, which, to reach the minimum requirement had to be supplemented with a UPS which entailed an additional device thus rendering the unit cumbersome;
- even though a UPS could be termed as a battery, the appellant company's proposal did not represent what the contracting authority had in mind; and
- the tender document did not specify that the battery had to be an internal component within the device.

Dr Brincat pointed out that the rating given by the manufacturer was 3 hours whereas, in its submission the appellant company stretched the battery's operational period from 3 to 4 hours in an evident attempt to meet the tender minimum requirement of 4 hours. The contracting authority's legal representative added that the other tenderers provided batteries that were compliant with tender specifications.

The Public Contracts Appeals Board remarked that the evaluation board had to evaluate the offer on the documentation presented and could not take into account developments that took place after the tender closing date and, as a result, for all intents and purposes, the battery presented by the appellant company rendered 3 hours. The same Board noted that what had to be established was whether, technically, a UPS represented a battery and, therefore, whether the combination of the standard battery and UPS met the tender specifications with regard to battery backup.

## ***Option 2: Model IM2500 – Biometric Face Recognition Device***

Dr Borg Cardona explained that his client complied with the tender technical specifications by offering the requested RFID (Radio Frequency Identification Device) which, however, had an added option, which the user could opt to disable, whereby a picture could be taken of the person clocking in or out. Dr Borg Cardona added that the device offered by his client was definitely not a biometric face recognition device.

Albeit, Dr Brincat agreed with the assessment made by Dr Borg Cardona that the product offered by his client did not include a biometric feature, yet, he pointed out that the appellant company had failed to indicate in its submission that the added feature could be disabled and it was only in this letter of objection that the appellants clarified this point. Dr Brincat explained that taking photos of employees was considered too intrusive and that was why the contracting authority was against that aspect of the appellant company's offer keeping in view that - in the original submission - it had not been indicated that this feature could be switched off. The contracting authority's legal advisor, apart from remarking that this option was not excluded in the tender specifications, stated that, in the light of the clarification given, the biometric feature was not an issue anymore and should not be discussed any further.

Dr Brincat opined that, once the appellant company's submission was found administratively non-compliant, the evaluation board should not have gone on to evaluate the offer from the technical point of view.

*It was established that it was not the case that all items had to be awarded to one supplier but the items could, eventually, be procured from different suppliers, so much so that the evaluation board selected two suppliers as a result of this tendering process.*

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 4<sup>th</sup> January 2011 and also through their verbal submissions presented during the hearing held on 9<sup>st</sup> February 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company's representatives' (a) reference to the fact that the appellant company's tender submission was found to be (1) administratively non-compliant since the tables provided in Form 4.7 were not filled in and (2) technically non-compliant as per reference made in the evaluation board's report, (b) reference to *Appendix 1* where one could find the share capital and the banker's details and, as a consequence, the information was in fact made available, (c) concession that Form 4.7 was not filled in as requested due to an oversight, (d) claim that, whilst it was true that Form 4.7 was not filled in as requested, yet the important thing was that the information was available in the tender as they had officially submitted it, (e) contention that any information not included in Form 4.7 was readily available in the financial statements

included in *Appendix 1* of the original submission, (f) expectation that the contracting authority should have contacted the company to enable the latter to fill in the required figures from those already given in the original submission at *Appendix 1*, and this without altering or adding any new data, (g) claim that albeit the company offered a standard battery that was rated at 3 hours at closing date of tender, recent developments in this sector has improved the rating of this battery up to 4 hours as confirmed by the manufacturer, (h) argument that apart from the back-up battery rated at 3 to 4 hours the tenderer's submission included a UPS that could extend the battery operation even up to 8 hours which was, by far, in excess of the 4 hours requested in the tender, (i) reference to the fact that, technically, a UPS was a battery with additional security for uninterrupted power supply and that the standard battery with 3 hours operation was itself described on its label as a mini UPS and (j) explanation that, whilst the company complied with the tender technical specifications by offering the requested RFID (Radio Frequency Identification Device) yet, the fact that the device had an added option - whereby a picture could be taken of the person clocking in or out - which the user could, in any case, opt to disable, did not, *per se*, render the said device as a biometric face recognition device;

- having considered the contracting authority's representative's reference to the fact that (a) albeit the other bidders participating in this tender submitted Form 4.7 as amended, yet the appellant company failed to fill in this form which form was a mandatory requirement, (b) some of the information required in Form 4.7 might have been provided elsewhere in the appellant company's submission but this was scattered all over and not in its entirety, (c) one should not allow bidders to omit mandatory information and then these expect the contracting authority to extrapolate these figures from statements that could be found elsewhere in the tender submission, (d) the contracting authority requested a battery backup but the solution provided by the appellant company consisted of a standard battery rated at 3 hours, which, to reach the minimum requirement had to be supplemented with a UPS which entailed an additional device thus rendering the unit cumbersome, (e) even though a UPS could be termed as a battery –albeit the contracting authority's position remained that it did not consider the UPS as equivalent to a battery - the appellant company's proposal did not represent what the contracting authority had in mind, (f) the tender document did not specify that the battery had to be an internal component within the device, (g) albeit one may agree with the assessment made by the appellant company that the product offered by it did not include a biometric feature, yet, the appellant company had failed to indicate in its submission that the added feature could be disabled and it was only in this letter of objection that the appellants clarified this point and (h) regardless of (g) in the light of the clarification given, the biometric feature was not an issue anymore and should not be discussed any further,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board opines that the primary scope of any request for mandatory documentation should be to elucidate the evaluation committee as regards the suitability or otherwise (be it financial, technical and so forth) of a tendering entity or individual. However, this Board recognises that there are instances wherein

certain documentation is expected to be submitted in a given format and one should not expect that third parties such as evaluation committees should venture into a 'search mission' to try to, somehow, extrapolate information. This Board has on many an occasion endorsed this line of thought and it shall continue to advocate such stand. On this particular occasion, however, the issue is that such documentation, albeit still required to enable the evaluation of a tenderer's financial suitability, yet it was required to be submitted in a template. During the hearing and from documentation submitted, it transpired that such information was either, partially, submitted (by appellant company) elsewhere and easily traceable, or else, the evaluation committee was provided with information as to where additional relevant information could be traced. One cannot state that such information was not made available or omitted. This Board recognises that, after all, at this juncture, the scope of the tender was simply to identify bidders that had the capabilities to supply the products and services requested in the tender and then the contracting authority, at its discretion, could request quotations from the selected suppliers. Indeed, one will have to assume some degree of flexibility when comparing 'exploratory missions' against a 'formal tender', especially when information requested is either submitted or else told where it may be found.

2. The Public Contracts Appeals Board feels that whilst there seems to be an unclear interpretation as to whether a UPS could be termed as a battery, yet the fact that (a) the standard battery with a 3 hour operation - as originally supplied by the appellant company - was formally referred to on its label as 'a mini UPS', (b) the tender document did not specify that the battery had to be an internal component within the device and (c) albeit, at tendering stage, a standard back-up battery rated at 3 to 4 hours was offered, it is also a fact that the same battery as offered contained a UPS that could extend the battery operation even up to 8 hours which was, by far, in excess of the 4 hours requested in the tender.
3. Following what transpired during the hearing, this Board considers the question relating to the biometric feature of the RFID as not constituting an issue and which, as a result, does not necessitate any further consideration by this Board.

In view of the above, this Board finds in favour of the appellant company and that, apart from the deposit paid by the appellants being reimbursed, this Board also recommends that the appellants' bid be reintegrated in the evaluation process.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel Esposito  
Member

*7 March 2011*