

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 294

#### T078/10

#### Tender for the provision of Interactive Whiteboards and Training Services

This call for tenders was published in the Government Gazette on 10<sup>th</sup> September 2010. The closing date for this call for offers was 29<sup>th</sup> October 2010.

The estimated value of tender is Euro 3,158,000.

Seven (7) tenderers had submitted their offers.

FGL Information Technology Limited and Jos. Vincenti & Co (1911) Limited Consortium filed an objection on the 23<sup>rd</sup> March 2011 against the decision taken by MITA to award Lots 1 and 2 to Audio Visual Centre Limited and Cutajar Limited Consortium based on the cheapest compliant offer.

The Public Contracts Review Board composed of Mr Edwin Muscat, Acting Chairman and Messrs Carmel Esposito and Joseph Croker, Members, convened a public hearing on Wednesday, 25<sup>th</sup> May 2011 to hear and discuss this appeal.

The following represented the various parties during the hearing:

#### **FGL Information Technology Ltd and Jos.Vincenti & Co (1911) Ltd Consortium (FGL Consortium)**

Mr Etienne Borg Cardona	Representative
Mr Tancred Tabone	Representative
Mr Alfred Vassallo	Representative
Mr Fabrizio Colombo	Representative
Mr Simon Schembri	Representative
Dr Joseph Camilleri	Representative

#### **Audio Visual Centre Ltd and Cutajar Ltd Consortium (Audio Visual Consortium)**

Dr John L. Gauci	Legal Representative
Dr Stefano Filletti	Legal Representative
Mr Steven Agius	Representative - Audio Visual
Mr Simon Bonello	Managing Director Audio Visual Centre Limited
Mr Mario Cutajar	Managing Director Cutajar Limited
Mr Matthew Cutajar	Sales and Marketing Director Cutajar Limited
Mr Darryl Morris	Software Development Manager Hitachi Solutions Europe Limited
Mr Chris Hazeldine	Business Account Manager Hitachi Solutions Europe Limited

#### **Malta Information Technology Agency (MITA)**

Dr Pauline Debono	Legal Representative
Dr Marouska Cilia Barbara	Legal Representative

#### **Evaluation Board:**

Mr Mario Cilia Attard	Chairman
Mr Dennis Zammit	Member

The Acting Chairman opened the proceedings with an introduction and invited the appellants to specify the reasons for lodging the objection.

Mr Simon Schembri on behalf of FGL Consortium, the appellant, explained that they objected to the recommended awards of Lots 1 and 2 to Audio Visual Consortium since the latter's bid was not technically compliant with regard to Lot 1, while none of the bidders was compliant with the eligibility criteria for Lot 2.

Mr Schembri explained that Package 2, Part II of Schedule A – Interactive Whiteboards, required that *“Whiteboards are to be compatible with Interactive Whiteboard Common File Format.”*

He claimed that Audio Visual Consortium did not satisfy this technical requirement and as a result should never have been recommended for award of the tender. On the other hand his consortium did satisfy this condition.

Mr Schembri further stated that during a presentation held on the 7<sup>th</sup> December 2010, his consortium demonstrated that the product they offered was compatible with the Common File Format (CFF). This was confirmed by SMART Technologies as per letter dated 14<sup>th</sup> December 2010 and by Becta, a third party body, as per email of the 14<sup>th</sup> December 2010. Copies of these communications were forwarded.

Dr Pauline Debono, representing MITA, the contracting authority, explained that (a) the adjudication board found that four bidders, including both appellant and recommended tenderer, satisfied the minimum tender requirements and thus qualified for the Third package stage; (b) MITA made use of the provisions of sub-clause 05.2.(c) (page 17) of the tender document and asked for a presentation in Malta of a synopsis of the Tenderers' proposal; (c) the presentation did not concern solely the Common File Format but the tender specifications in general; (d) following the presentation, MITA asked for common clarifications to all the tenderers whereby they were requested to submit proof from third parties, such as Becta and the Information Standards Board (ISB), that the proposed software was compliant with the CFF specifications; (e) written proof was submitted from Becta by the recommended tenderer and from Information Standards Board for Promethean and from Becta in respect of SMART by the appellant consortium. As a result, both appellant and recommended consortia qualified for the Third Package stage and, in accordance with award criteria specified in the tender document to the effect that the tender was to be awarded to the cheapest compliant bidder; Audio Visual Consortium's bid was recommended for approval.

To Mr Schembri's request for confirmation that the recommended tenderer had demonstrated that the software he was offering was compliant insofar as CFF was concerned, Dr Debono replied that during the demonstration, MITA verified a number of specifications, among them CFF compliance, and the clarifications submitted by tenderers were intended to further support their claim that their products satisfied the criteria concerning compliance of their software products with tender requirements.

Mr Mario Cilia Attard, chairman of the adjudicating board, took the stand and under oath stated the following:

- The recommended tenderer submitted a letter from Becta dated 16<sup>th</sup> December 2010 which confirmed that Hitachi had sent them software which allows the use of the Interactive Whiteboard Common File Format (IWB CFF) specification files. The support for the specification is equivalent to compliance of other vendors they had tested.
- During the presentation the Board did not assist to a demonstration as to CFF compatibility of the Interactive Whiteboards of the recommended tenderer, but, according to guidelines, the recommended tenderer had confirmed that his product was compliant;

- The appellant consortium had presented two products of the brands SMART and Promethean and demonstrated that the former could take the CFF, but this was not the case with Promethean;
- A request for clarification was sent to appellants to substantiate their claim that their IWB solution was compatible with CFF and in reply MITA received two letters from Information Standards Board and an email from Becta confirming compatibility for SMART only;
- The contracting authority was satisfied with the endorsements of these internationally recognised third party bodies that both appellant and recommended parties were able to provide the requested products;
- He confirmed Mr Schembri's statement that whereas in the case of both Promethean and Hitachi, the third party certification referred to a commitment to have IWB CFF software, in the case of SMART there was a written confirmation from SMART dated 14<sup>th</sup> December 2010 backed by Becta's email which Mr Cilia Attard noted also included the term "commitment" on the part of SMART Technologies; and
- That though the adjudication board included technical persons such as himself, they requested the comfort of third parties – such as Becta and Information Standards Board – to confirm the products offered since the Common File Format was an innovation and was still in the process of implementation.

Mr Schembri reiterated that it was evident that while the Board did see the SMART Common File Format in operation during the demonstration, this could not be said with regards to the Hitachi product.

Mr Schembri noted that section 5.2.2 last paragraph stated that *"If from this process of verification it results that the equipment/services did not meet the tender specifications listed in Part II of the Response Format, the Tender will not be considered further."*

Dr Stefano Filletti, representing the recommended tenderer, emphasised that his client's product was fully compliant; nevertheless, according to section 3.5 (page 9), the tender document only required the tenderer to supply CFF compatible products on the delivery date/s, which for Lot 1 was between March and September 2011, and October 2011 and September 2012 for Lot 2.

Dr Pauline Debono noted that the tender contemplated other verification options apart from presentations.

Mr Cilia Attard remarked that the clarification sought from the recommended tenderer clearly indicated that he did not demonstrate CFF compatibility during the presentation and thus he was required to indicate how this was to be achieved; the Board was satisfied with the documentary evidence produced from third parties; and that the tender nowhere required that the proposed software was to be fully functional on the date of presentation.

Mr Fabrizio Colombo of SMART Technologies confirmed on oath (a) that his company's software was capable of importing and exporting the CFF; (b) that the software was demonstrated during the site presentation; and, (c) that SMART had already officially declared support to such a standard to Becta of the UK.

Acting Chairman PCRB remarked that the compatibility of the SMART software was not in question and there was no issue in that regard.

Mr Chris Hezeldine, Business Account Manager Hitachi Solutions Europe Limited, declared on oath that (a) Hitachi had been working on the CFF since 2007 and has been compliant since July 2010, that

is, prior to the publication of the tender; (b) that the IWB CFF was available on the day of presentation but that for some reason it was not demonstrated; and (c) that the clarification sought by MITA was duly satisfied by Becta in their letter of the 16<sup>th</sup> December 2010.

Dr Marouska Cilia Barbara, on behalf of MITA, noted (a) during the presentation the contracting authority was informed that the software of the recommended tenderer was compliant but could not be demonstrated at that point in time; (b) that at that time the contracting authority only wanted to confirm availability of the software, while compliance with CFF was to be confirmed by third parties; and, (c) that both appellant and recommended parties were treated in the same manner.

Concluding, Mr Schembri, on behalf of the appellant, stated that it was manifest that only SMART demonstrated the capabilities of its software during the presentation process, something which could not be said for Hitachi and as a result the offer submitted by the recommended tenderer should not have been considered further. His client, FGL Information Technology Consortium should be awarded the tender since theirs was the cheapest technically compliant offer.

Dr Pauline Debono submitted that all bidders were treated equitably and with fairness and that the adjudication board took all necessary measures to ensure that any selected tender would be able to supply the required material/services

Dr Stefano Filletti on behalf of Audio Visual Centre consortium reaffirmed that Hitachi software was CFF compliant during the adjudication and that it had been compliant since July 2010. He said that though the tender document required bidders to prove that the proposed software was compliant, it did not state that it had to be demonstrated during the presentation, so much so, that it provided a list of various ways of how this compatibility was to be verified including written confirmation from third parties. Dr Filletti argued that the tender did not even require compliance by the closing date of the tender or at the evaluation stage, but only on the date of delivery.

Dr John Gauci on behalf of Audio Visual Centre, referred to PCAB Case No 217 wherein it was declared that when an appellant made allegations on the non-compliance of the recommended bidder, it was not admissible to submit arguments to that effect but one had to present written evidence.

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 23 March 2011, and also through the verbal submission presented during the hearing held on 25 May 2011, had objected to the decision taken by the pertinent authorities.
- having noted the appellant company's representative's contention that (a) with regard to Lot 1 the recommended tenderer's offer should have been rejected because it was not technically compliant with tender requirements whilst that of his client was compatible with the Common File Format and tender should therefore have been awarded to the latter, (b) that recommended tenderer failed to demonstrate the Common File Format it was offering during the presentation to the contracting authority, and (c) with regard to Lot 2, none of the bidders was compliant.
- having noted Dr Debono, MITA's legal adviser, state that (a) the adjudication board had concluded that both the recommended tenderer as well as the appellants met the minimum tender requirements and therefore both qualified to the Third Package stage, and (b) that the presentation did not concern solely the Common File Format but also the tender specifications in general, and (c) that the recommended tenderer submitted written proof from Becta that the

Hitachi software they were offering allows the use of IWB CFF specification files which was equivalent to compliance of other vendors they had tested, and (d) that tender award criteria

- provided that tender be awarded to the cheapest compliant bidder, which in this case turned out to be Audio Visual Consortium.
  
- having taken note of the evidence given by the Chairman of the adjudication board, who confirmed that (a) the recommended tenderer had submitted a document from Becta confirming that the Hitachi software allows the use of IWB CFF specification files, and (b) that he did not assist to the demonstration as to CFF compatibility of the International Whiteboard of the recommended tenderer. However, in accordance with the tender guidelines, the recommended tenderer had confirmed that his product was compliant, and (c ) that once additional proof in writing was given by internationally renowned companies, the adjudication board was satisfied that both the recommended tenderer as well as the appellants met tender requirements.
  
- having taken note of Dr Filletti's intervention, particularly (a) his insistence that his client's software was compliant since July 2010, that is , prior to the publication of tender, and (b) that the tender document provided for bidder to supply the required items on delivery date and not on closing date of tender.
  
- having taken note of Mr Hazeldine's assertion that the Hitachi software had been CFF compliant since July 2010 and that the clarification sought by MITA was satisfactorily answered by the presentation of a declaration by Becta.
  
- having taken note of Dr Cilia Barbara's intervention where she remarked that (a) during the presentation, the contracting authority was informed that the software of the recommended tenderer was compliant but they could not demonstrate it at that point in time, and (b) that the contracting authority's main interest was that the software was there and that the technical aspect of it would have to be confirmed in writing by third parties

reached the following conclusions, namely;

1. that the tender did not specify that the requested software was to be CFF compliant at any stage prior to the date of delivery, and that one of the proofs for compatibility was the submission of documentary evidence by third parties;
2. that the recommended tenderer submitted documentary confirmation from Becta to the effect that the software produced by Hitachi was tested CFF compliant and thus satisfied the requirement as per one of the proofs listed in the tender document;
3. that the adjudicating board ensured that all bidders were treated equally and with fairness;
4. that the Public Contracts Review Board is satisfied that the adjudicating board set up by the Contracting Authority to adjudicate this tender acted correctly in all respects and ensured fairness and equal treatment for all;
5. that the appellant consortium did not substantiate its claim that the bid submitted by the recommended bidder was not technically compliant to the satisfaction of the Board; and
6. that the preferred bidder, Audio Visual Centre Ltd and Cutajar Limited Consortium submitted the cheapest technically compliant tender.

In view of this, the Board rejects the appeal lodged by FGL Information Technology Ltd and Jos. Vincenti & Co (1911) Ltd and recommends that the deposit paid by the appellants be forfeited to Government.

Edwin Muscat  
A/Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

8 June 2011.