

PUBLIC CONTRACTS REVIEW BOARD

Case No. 328

WSM/22/2011

Period Contract for Multi point to point connections between all premises managed and operated by WasteServ Malta Ltd Malta Ltd

This call for tenders was published in the Government Gazette on the 25th March 2011. The closing date for this call with an estimated value of € 81,559.20 was the 15th April 2011.

Three (3) tenderers submitted their offers.

Vodafone Malta Ltd filed an objection on the 19th May 2011 against the decision of WasteServ Malta Ltd Malta Ltd to discard its offer as not technically compliant and to recommend tender award to Robert Runza Sky Telecom.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Monday, 12th September 2011 to discuss this objection.

Vodafone Malta Ltd

Mr Keith Psaila	Business Sales and Development Manager
Mr Ivan Zammit	Business Solutions Manager
Mr Robert Ellul Micallef	Sales Engineer

Robert Runza Sky Telecom

Dr Adrian Mallia	Legal Representative
Mr Robert Runza	Representative
Mr Ronald Mifsud	Representative

WaterServ Malta Ltd

Dr Victor Scerri	Legal Representative
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Evaluation Board

Mr Terrence Borg	Chairman (IT Admin. WasteServ Malta Ltd)
Mr Geroge Guillaumier	Member

After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Mr Keith Psaila, representing Vodafone Malta Ltd, the appellant company, made the following submissions:

- i. according to the 'Notice of Award of Tender' forwarded by WaterServ Malta Ltd via email dated 17th May 2011, the offer submitted by Vodafone Malta Ltd was found technically non-compliant because in the 'Specification Form' it did not state the type of security used but indicated '*encryption depends on terminating equipment capabilities*';
- ii. Vodafone Malta Ltd considered its bid as the best both in terms of quality and price;
- iii. the contracting authority requested bidders to indicate the type of encryption that they were proposing to bridge connectivity between the different sites operated by WasteServ Malta Ltd so as to protect data against unauthorised interceptions;
- iv. the contracting authority also asked the bidder to indicate which type of encryption of data in transmission it was proposing, namely whether AES or 3DES;
- v. Vodafone Malta Ltd indicated that it would provide encryption according to the equipment of the client;
- vi. AES and 3DES functioned on open unlicensed spectrum and on WIFI connectivity and, as a consequence, could be accessed by third parties since it was not tailor-made for the client or propriety based.

Mr Terrence Borg, chairman of the adjudicating board and IT administrator at WasteServ Malta Ltd, explained that:-

- a. WasteServ Malta Ltd requested the set up to work on Layer 2 throughout, which was the standard system they used so as to allow for a computer to function at the different WasteServ Malta Ltd sites without necessitating additional hardware; and
- b. in its tender submission, Vodafone Malta Ltd circled and hence opted for Layer 2 connectivity. Nevertheless, in the 'Additional Information' sheet it indicated that its proposed solution would terminate (end up) with Layer 3 connectivity which was not compatible with the system operated by WasteServ Malta Ltd.

Mr Robert Ellul Micallef, also representing Vodafone Malta Ltd, pointed out that the reason for exclusion that was communicated to them had to do with the encryption and not whether their proposal featured Layer 3 instead of Layer 2.

Mr Borg replied that the encryption depended on whether connectivity was going to be at Layer 2 or at Layer 3 so much so that the appellant company had indicated that the *'encryption depends on terminating equipment capabilities'* which at WasteServ Malta Ltd terminated at Layer 2 and not at Layer 3 as proposed by the appellant company. Mr Borg added that WasteServ Malta Ltd did not have the equipment to run a solution that terminated on Layer 3.

Mr Robert Ellul Micallef intervened and remarked that:-

- i. Vodafone Malta Ltd, in fact, proposed a Layer 2 solution as requested by the contracting authority but it also offered the client the option for a solution that would terminate on Layer 3 which would require equipment on the part of WasteServ Malta Ltd. Yet, it was entirely up to the client to decide whether it wished the solution to terminate on Layer 2 or Layer 3 as that made no difference to Vodafone Malta Ltd;
- ii. It was evident that the drafter of the tender document based the requirements on the system operated by the current provider, Sky Telecom (the recommended tenderer), in terms of AES or 3DES encryptions and that, besides unfairly favouring the current contractor, it did not make sense because it, unnecessarily, limited the choice to those two alternatives;
- iii. Although AES and 3DES were on the unlicensed spectrum which could be accessed by more than one user as in the case of WIFI, yet the alternative solution proposed by Vodafone Malta Ltd would terminate on Layer 3 which was a licensed microwave link and tailor-made for the client such that the encryption would be propriety based and therefore more secure; and
- iv. if WasteServ Malta Ltd wanted the Layer 3 solution then the appropriate terminating routing equipment had to be provided otherwise Vodafone Malta Ltd would provide the Layer 2 solution.

On his part Mr Psaila argued that if the contracting authority had any difficulty in establishing whether Vodafone Malta Ltd was proposing a Layer 2 solution, as indicated in the 'Specification Form', or a Layer 3 solution, as indicated in the 'Additional Information', the contracting authority could have asked for a clarification, especially when Vodafone Malta Ltd's offer amounted to €62, 640 and the recommended offer amounted to €77,000.

Dr Adrian Mallia, legal representative of Robert Runza Sky Telecom, an interested party, submitted that:-

- a. the tender specifications requested a Layer 2 solution and not a Layer 3 solution;
- b. if a tenderer wanted to challenge the tender specifications the regulations provided the tenderer with a way how to do that at preliminary stage but, in this case, the appellant company failed to avail itself of that provision;

- c. it resulted that the solution proposed by the appellant company was not compliant with specifications and that it would require the contracting authority to install additional equipment;
- d. contrary to what the appellant company seemed to imply, the requested Layer 2 solution could have been offered by any bidder and not solely by the current contractor, namely Robert Runza Sky Telecom; and
- e. it was not acceptable for the appellant company to offer routing equipment that supported Layer 3 security free of charge to the contracting authority at objection stage as indicated at paragraph 3 of the letter of objection.

Mr Borg remarked that he did not have (i) the technical literature of the hardware that Vodafone Malta Ltd was going to use and (ii) the security, because all that the appellant company indicated in that regard was that '*encryption depends on terminating equipment capacities*'.

Mr Psaila concluded by reiterating that, besides offering the Layer 2 solution, as clearly indicated in the 'Specification Form section A', Vodafone Malta Ltd was offering the client the possibility/option of an upgrade to Layer 3 which was superior as it provided more security and even a cheaper solution than the Layer 2 solution proposed by the recommended tenderer. He added that Vodafone Malta Ltd had the necessary experience in this sector and on its books it had clients like, gaming companies, the Malta International Airport and Lufthansa Technik which demanded a high level of security.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 19th May 2011, and through the verbal submissions made during the hearing held on the 12th September 2011, had objected against the decision of WasteServ Malta Ltd to discard its offer as not technically compliant and to recommend tender award to Robert Runza Sky Telecom;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) according to the 'Notice of Award of Tender' forwarded by WasteServ Malta Ltd via email dated 17th May 2011, the offer submitted by Vodafone Malta Ltd was found technically non-compliant because in the 'Specification Form' it did not state the type of security used but indicated '*encryption depends on terminating equipment capabilities*', (b) Vodafone Malta Ltd considered its bid as the best both in terms of quality and price, (c) Vodafone Malta Ltd indicated that it would provide encryption according to the equipment of the client, (d) AES and 3DES functioned on open unlicensed spectrum and on WIFI connectivity and, as a consequence, could be accessed by third parties since it was not tailor-made for the client or propriety based, (e) the reason for exclusion that was communicated to them had to do with the encryption and not whether their proposal featured Layer 3 instead of Layer 2, (f) whilst Vodafone Malta Ltd proposed a Layer 2 solution as requested by the contracting authority it also offered the client the option for a solution that would terminate on Layer 3 which would require equipment on the part of WasteServ Malta Ltd, (g) it was entirely up to the client to decide whether it wished the solution to terminate on Layer 2 or Layer 3 and that it made no difference to Vodafone

Malta Ltd, (h) it was evident that the drafter of the tender document based the requirements on the system operated by the current provider, Sky Telecom (the recommended tenderer), in terms of AES or 3DES encryptions and that, besides unfairly favouring the current contractor, it did not make sense because it, unnecessarily, limited the choice to those two alternatives, (i) albeit AES and 3DES were on the unlicensed spectrum which could be accessed by more than one user as in the case of WIFI, yet the alternative solution proposed by Vodafone Malta Ltd would terminate on Layer 3 which was a licensed microwave link and tailor-made for the client such that the encryption would be propriety based and therefore more secure, (j) if WasteServ Malta Ltd wanted the Layer 3 solution then the appropriate terminating routing equipment had to be provided otherwise Vodafone Malta Ltd would provide the Layer 2 solution and (k) if the contracting authority had any difficulty in establishing whether Vodafone Malta Ltd was proposing a Layer 2 solution, as indicated in the 'Specification Form', or a Layer 3 solution, as indicated in the 'Additional Information', the contracting authority could have asked for a clarification, especially when Vodafone Malta Ltd's offer amounted to €62, 640 and the recommended offer amounted to €77000;

- having considered the contracting authority's representative's submissions, namely that (a) WasteServ Malta Ltd requested the set up to work on Layer 2 throughout, which was the standard system they used so as to allow for a computer to function at the different WasteServ Malta Ltd sites without necessitating additional hardware, (b) whilst in its tender submission, Vodafone Malta Ltd circled and hence opted for Layer 2 connectivity, in the 'Additional Information' sheet it indicated that its proposed solution would terminate (end up) with Layer 3 connectivity which was not compatible with the system operated by WasteServ Malta Ltd, (c) that the encryption depended on whether connectivity was going to be at Layer 2 or at Layer 3 so much so that the appellant company had indicated that the *'encryption depends on terminating equipment capabilities'* which at WasteServ Malta Ltd terminated at Layer 2 and not at Layer 3 as proposed by the appellant company, (d) WasteServ Malta Ltd did not have the equipment to run a solution that terminated on Layer 3, (e) the contracting authority did not have the technical literature of the hardware that Vodafone Malta Ltd was going to use and (f) the contracting authority did not have the security, because all that the appellant company indicated in that regard was that *'encryption depends on terminating equipment capabilities'*;
- having considered the submissions made by the representative of the recommended tenderer, including the fact that (a) the tender specifications requested a Layer 2 solution and not a Layer 3 solution, (b) if a tenderer wanted to challenge the tender specifications the regulations provided the tenderer with a way how to do that at preliminary stage but, in this case, the appellant company failed to avail itself of that provision, (c) it resulted that the solution proposed by the appellant company was not compliant with specifications and that it would require the contracting authority to install additional equipment, (d) contrary to what the appellant company seemed to imply, the requested Layer 2 solution could have been offered by any bidder and not solely by the current contractor, namely Robert Runza Sky Telecom and (e) it was not acceptable for the appellant company to offer routing equipment that supported Layer 3 security free of charge to the contracting authority at objection stage as indicated at paragraph 3 of the letter of objection,

reached the following conclusions:

1. The Public Contracts Review Board feels that the fact that the reason for exclusion that was communicated to the appellant company had to do with the encryption and not

whether their proposal featured Layer 3 instead of Layer 2 renders the scope of the appeal in question as more credible and justified.

2. Furthermore, during the hearing and throughout its deliberation process following the hearing, the Public Contracts Review Board established that the fact that Vodafone Malta Ltd indicated that it would provide encryption according to the equipment of the client was, *sui generis* a submission. This Board notes that, regardless of the parameters governing this hearing, whilst the appellant company proposed a Layer 2 solution, as requested by the contracting authority, it also offered the client the option for a solution that would terminate on Layer 3 which would require equipment on the part of WasteServ Malta Ltd and that it left it entirely up to the contracting authority to decide whether it wished the solution to terminate on Layer 2 or Layer 3 and that it made no difference to Vodafone Malta Ltd whichever option was chosen.
3. The Public Contracts Review Board considers the uncontested claim made by the appellant company, namely, that, albeit AES and 3DES were on the unlicensed spectrum which could be accessed by more than one user as in the case of WIFI, yet the alternative solution proposed by Vodafone Malta Ltd would terminate on Layer 3 which was a licensed microwave link and tailor-made for the client such that the encryption would be propriety based and, therefore, more secure. This Board feels that this line of reasoning is justifiable.
4. The Public Contracts Review Board feel that it was quite evident that what Vodafone Malta Ltd offered went beyond the terms of the tender document, namely not only being in a position to propose a Layer 2 solution, but also to offer a Layer 3 solution alternative subject to WasteServ Malta Ltd being able to provide the appropriate terminating routing equipment.
5. The Public Contracts Review Board also agrees with point raised by the appellant company wherein it was argued that if the contracting authority had any difficulty in establishing whether Vodafone Malta Ltd was proposing a Layer 2 solution, as indicated in the 'Specification Form', or a Layer 3 solution, as indicated in the 'Additional Information', the contracting authority could have asked for a clarification.

In view of the above this Board finds in favour of the appellant company and, whilst recommending that the bid submitted by the same appellant should be reintegrated in the evaluation process for further evaluation, it also recommends that the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

30 September 2011