

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 420

**MCA-0/MC/11-0635**

**Tender for the Provision of Internal Audit Services – Malta Communications Authority**

This call for tenders was published in the Government Gazette on the 29<sup>th</sup> November 2011. The closing date for this call with an estimated budget of € 20,000 per annum (excl. VAT) was the 13<sup>th</sup> January 2012.

Seven (7) tenderers submitted their offers.

James Grech Risk – Advisory – Internal Audit filed an objection on the 11<sup>th</sup> April 2012 against the decision of the Malta Communications Authority to recommend tender award in favour of RSM Malta.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday 8<sup>th</sup> June, 2012 to discuss this objection.

Present for the hearing were:

### **James Grech Risk – Advisory – Internal Audit**

Mr James Grech                      Partner

### **RSM Malta**

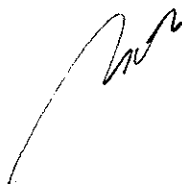
Ms Maria Micallef                  Representative

### **Malta Communications Authority**

Dr Antoine Cremona                Legal Representative  
Dr Nicholas Borg                    Legal Representative

### **Evaluation Board**

Mr Lawrence Briffa                  Chairman  
Mr Ian Agius                          Member  
Mr Damian Gatt                      Member  
Ms Celia Falzon                      Member  
Mr Miguel Scerri                     Secretary



After the Chairman's brief introduction, the appellant firm's representative was invited to explain the motives of his firm's objection.

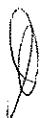
Mr James Grech, representing James Grech Risk – Advisory – Internal Audit, the appellant firm, submitted that:-

- i. by email dated 10<sup>th</sup> April 2012, the contracting authority had informed his firm that the offer was not successful as it was felt that *“quality and suitability might be impacted by the limited capacity and institutional experience of the firm, it being a two-men firm”*;
- ii. although his firm had been allocated maximum points for having quoted the cheapest price, yet, it had been allocated only 24 out of 35 points with regard to ‘quality and suitability of the proposal submitted and bidder’s experience’ and 22 out of 35 points in respect of ‘qualification and experience of staff assigned on the engagement’;
- iii. in the same email the contracting authority had informed the appellant firm that it had *“generally met expectations and the proposed methodology to be applied throughout the engagement was appropriate and logical. The Adjudication Committee felt that quality and suitability may be impacted by the limited capacity and institutional experience of the firm, this being a two-men firm”*;
- iv. the firm was made up of two partners because it has opted to specialise solely in internal audit which was a specialised niche;
- v. both partners were certified public accountants, certified internal auditors by the US Internal Audit Institute and also certified information systems auditors;
- vi. the tender only requested the selected bidder to be the holder of a Certified Public Accountant (CPA) warrant and, as a result, both partners were more than qualified to bid for this contract;
- vii. apart from the fact that both partners were full-time internal auditors and they could easily cover the 40-hour per month internal audit work requested in the tender document, this assignment was similar in scope and in the number of hours required as the one which the firm was performing for the Lotteries and Gaming Authority for the second time running;
- viii. in terms of experience, his partner had been the head of the internal audit section at Malta Enterprise and for five years headed the internal audit services at Vodafone Malta Ltd. The tender requested three years experience in internal audit and the firm’s two partners had between them more than ten years experience in this line of work;
- ix. one had to question whether the contracting authority had sought information from the references he quoted in his tender submission;

- x. the adjudicating board's remark that two full-time partners could not offer continuity of service was incomprehensible when all that was being requested was 40 hours per month and in a flexible manner, namely one could perform them in one week or staggered over a month;
  - xi. whilst it was true that the firm's competitors for this contract were relatively larger firms with international brand names yet, although being small, his firm could provide this service as it has been providing to the Lotteries and Gaming Authority;
- and
- xii. contracting authorities should not discriminate against small firms which were qualified to do the job

Dr Antoine Cremona, legal representative of the Malta Communications Authority, on his part submitted that:-

- a. the contracting authority had in fact sought references from the Lotteries and Gaming Authority, through its CEO, Mr Rueben Portanier;
- b. there was no problem with regard to the qualifications and the methodology presented by the appellant firm and it was not a prerequisite that the bidder had to have an international brand name;
- c. the Malta Communications Authority was not contending that the appellant firm was not up to the job so much so that the appellant firm placed second out of five compliant bidders, some of whom were relatively large firms and had international brand names;
- d. the Malta Communications Authority had to determine the award of the tender on the basis of the most economically advantageous tender (MEAT) and it was not bound to accept the cheapest tender;
- e. the evaluation criteria were set out at page 13 of the tender document and these were reproduced in the evaluation grid which allocated the following maximum marks:- 30 for price, 35 for quality and suitability of proposal and 35 for qualification and experience of staff;
- f. the appellant firm was awarded maximum points for offering the cheapest bid;
- g. with regard to the two remaining criteria it was not enough for a tenderer to qualify to do the job but since this was based on the MEAT concept then the Malta Communications Authority had to compare the five compliant bids with a view to selecting the most advantageous offer;
- h. the appellant firm was allocated equal or more points than three branded competitors with regard to the quality and suitability of the proposal;
- i. with regard to qualification and experience of staff the appellant firm was ranked the fourth out of the five complaint bidders and the main concern of the



contracting authority was that the appellant firm did not provide 'assurance of staffing continuity from one year to the next', third bullet of criterion 3;

- j. albeit the contracting authority did not indicate the number of staff required for this job, yet, the appellant firm, being a two-person firm, could not provide the same level of 'assurance of staffing continuity from one year to the next' that other firms could when considering that if one of the partners were to renounce one's services for whatever reason then the appellant firm would, likely, face difficulties to execute the contract given that the said firm, admittedly, had to cope with other contracts in hand;
  - k. on the other hand, other competitors offered more peace of mind to the contracting authority in this respect, e.g. the recommended tenderer presented a team of 6 personnel, and, as a result, the adjudicating board could not put the appellant firm on the same footing as, say, the recommended tenderer, in this regard;
  - l. although the recommended tenderer would not detail six auditors full-time on this job still the said tenderer could offer the kind of staff continuity which the appellant firm could not offer due to sheer lack of numbers;
- and
- m. it was not the case that the appellant firm was discriminated against for being a small firm because, overall, two of the relatively largest local accountancy and audit firms placed after the appellant firm.

The Chairman Public Contracts Review Board remarked that:-

- i. the contracting authority should or could have identified the minimum number of staff required;
  - ii. the delivery of this service was quite flexible such that 40 hour monthly service could be delivered, say, in one week or staggered over a whole month;
- and
- iii. the appellant firm was awarded ten points less than the recommended tenderer on criterion 3 which was considered rather on the high side given the qualifications of the appellant firm's personnel and the flexibility in the execution of the service.

At this point Dr Cremona pointed out that:-

- a. it was not the responsibility of the Public Contracts Review Board to undertake a re-evaluation exercise of the bids received but its task was to judge whether the adjudicating board carried out its work in a judicious, transparent and fair manner;
- and



- b. being a MEAT, it was not a question of whether a bidder was qualified to do the job or not but it was a question of selecting the most suitable contractor.

Mr Lawrence Briffa, chairman of the adjudicating board, remarked that:-

- i. whereas the recommended tenderer stated in the firm's tender submission that "the MCA would be consulted with prior to assigning any new staff to the engagement" the appellant firm made no such commitment;
  - ii. the fact that RSM Malta was allocating one (1) IT auditor whereas the appellant firm provided two (2) IT auditors was taken into account because the IT auditor was one of a team which had to include various competencies;
  - iii. during the evaluation process two bidders were disqualified and five others were adjudicated administratively and technically compliant;
  - iv. each evaluator allocated the points individually and then the points were aggregated and an average worked out;
  - v. the adjudicating board did not discriminate against the appellant firm for being a two-person firm so much so that Grant Thornton, employing about 60 persons, was given almost the same points as the appellant with regard to criteria 2 and 3;
  - vi. in its tender submission the appellant firm did not give 'assurance of staffing from one year to the next' and the contracting authority was not obliged but was even prevented from drawing the appellant firm's attention to provide such an assurance;
  - vii. on comparing the CVs submitted by the appellant firm with those of the recommended tenderer, it was evident that RSM Malta had more experience in this sector with one of the partners having no less than 24 years experience in internal audit;
- and
- viii. once all five remaining bidders possessed the minimum requirements then the task of the adjudicating board was to go into the details of the submissions to determine which one of the five compliant bidders submitted the best overall proposal.

Ms Maria Micallef, representing RSM Malta, the recommended tenderer, remarked that:-

- a. the award criterion was MEAT and so it was not just whether a bidder had the minimum requirements to execute the contract;
- b. internal auditing involved a variety of skills which were difficult for any one auditor to possess and that was why RSM Malta presented a team of six staff members possessing a mix of competencies who could undertake the diverse tasks that would likely be faced in the course of the execution of the contract;



and

- c. she had been carrying out internal audit work for the past 25 years or so and, notwithstanding that experience, she would probably not be able to cover this assignment from A to Z but, maybe, from A to W and for the rest she would require the assistance of other experts

At this point Mr Grech had this to add:-

- i. he tended to agree with Ms Micallef that in the course of the execution of the contract there might arise instances that he would require expert/s with certain specific competencies so much so that he had indicated in his firm's tender submission that the firm would sub-contract such services;
- ii. although the two partners were certified internal auditors, he could not exclude that a problem or a risk might arise which would require a specific professional competency, such as, the requirement of an IT engineer to ascertain that the equipment in place was capable of eliminating the risk identified by the internal auditor;
- iii. it was normal practice to resort to sub-contracting certain specific services even in the case of larger firms as it was rather difficult to have on one's books all the experts that might be required, even remotely;

and

- iv. his firm had recently concluded a cooperation partnership with an audit firm whereby it gained access to the resources of this audit firm and he refrained from mentioning this development because the tender document did not ask for such information.

The Chairman Public Contracts Review Board observed that in the circumstances:-

- a. the contracting authority was faced with the decision of, on one hand, having the recommended bidder that provided a wide range of competencies, which have been already identified and were available and, on the other hand, the appellant firm who might not be in a position to engage a sub-contractor for a particular task due to non-availability for whatever reason and that could jeopardise the delivery of the service;

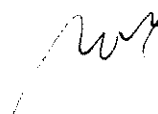
and

- b. the contracting authority was correct to take into account the resources at the disposal of the bidder with a view to having the peace of mind that the required service would be provided professionally and uninterruptedly

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



10<sup>th</sup> April 2012 and also through their verbal submissions presented during the hearing held on the 8<sup>th</sup> June, 2012, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant firm's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 10<sup>th</sup> April 2012, the contracting authority had informed the appellant firm that the offer was not successful as it was felt that "*quality and suitability might be impacted by the limited capacity and institutional experience of the firm, it being a two-men firm*", (b) although the appellant firm had been allocated maximum points for having quoted the cheapest price, yet, it had been allocated only 24 out of 35 points with regard to 'quality and suitability of the proposal submitted and bidder's experience' and 22 out of 35 points in respect of 'qualification and experience of staff assigned on the engagement', (c) in the same email the contracting authority had informed the appellant firm that it had "*generally met expectations and the proposed methodology to be applied throughout the engagement was appropriate and logical. The Adjudication Committee felt that quality and suitability may be impacted by the limited capacity and institutional experience of the firm, this being a two-men firm*", (d) the firm was made up of two partners because it has opted to specialise solely in internal audit which was a specialised niche, (e) both partners were certified public accountants, certified internal auditors by the US Internal Audit Institute and also certified information systems auditors, (f) the tender only requested the selected bidder to be the holder of a Certified Public Accountant (CPA) warrant and, as a result, both partners were more than qualified to bid for this contract, (g) apart from the fact that both partners were full-time internal auditors and they could easily cover the 40-hour per month internal audit work requested in the tender document, this assignment was similar in scope and in the number of hours required as the one which the firm was performing for the Lotteries and Gaming Authority for the second time running, (h) in terms of experience, one of the firm's partners had been the head of the internal audit section at Malta Enterprise and for five years headed the internal audit services at Vodafone Malta Ltd, (i) the tender requested three years experience in internal audit and the firm's two partners had between them more than ten years experience in this line of work, (j) one had to question whether the contracting authority had sought information from the references it had quoted in its tender submission, (k) the adjudicating board's remark that two full-time partners could not offer continuity of service was incomprehensible when all that was being requested was 40 hours per month and in a flexible manner, namely one could perform them in one week or staggered over a month, (l) whilst it was true that the firm's competitors for this contract were relatively larger firms with international brand names yet, although being small, the appellant firm could provide this service as it has been providing to the Lotteries and Gaming Authority, (m) contracting authorities should not discriminate against small firms which were qualified to do the job, (n) the firm's representative tended to agree with Ms Micallef that in the course of the execution of the contract there might arise instances that the firm would require expert/s with certain specific competencies so much so that it had indicated in its tender submission that the firm would sub-contract such services, (o) although the two partners were certified internal auditors, one could not exclude that a problem or a risk might arise which would require a specific professional competency, such as, the requirement of an IT engineer to ascertain that the equipment in place was capable of eliminating the risk identified by the internal auditor and (p) it was normal practice to resort to sub-contracting certain specific

services even in the case of larger firms as it was rather difficult to have on one's books all the experts that might be required, even remotely;

- having considered the contracting authority's representatives' reference to the fact that (a) the contracting authority had in fact sought references from the Lotteries and Gaming Authority, through its CEO, Mr Rueben Portanier, (b) there was no problem with regard to the qualifications and the methodology presented by the appellant firm and it was not a prerequisite that the bidder had to have an international brand name, (c) the Malta Communications Authority was not contending that the appellant firm was not up to the job so much so that the appellant firm placed second out of five compliant bidders, some of whom were relatively large firms and had international brand names, (d) the Malta Communications Authority had to determine the award of the tender on the basis of the most economically advantageous tender (MEAT) and it was not bound to accept the cheapest tender, (e) the evaluation criteria were set out at page 13 of the tender document and these were reproduced in the evaluation grid which allocated the following maximum marks:- 30 for price, 35 for quality and suitability of proposal and 35 for qualification and experience of staff, (f) the appellant firm was awarded maximum points for offering the cheapest bid, (g) with regard to the two remaining criteria it was not enough for a tenderer to qualify to do the job but since this was based on the MEAT concept then the Malta Communications Authority had to compare the five compliant bids with a view to selecting the most advantageous offer, (h) the appellant firm was allocated equal or more points than three branded competitors with regard to the quality and suitability of the proposal, (i) with regard to qualification and experience of staff the appellant firm was ranked the fourth out of the five compliant bidders and the main concern of the contracting authority was that the appellant firm did not provide 'assurance of staffing continuity from one year to the next', third bullet of criterion 3, (j) albeit the contracting authority did not indicate the number of staff required for this job, yet, the appellant firm, being a two-person firm, could not provide the same level of 'assurance of staffing continuity from one year to the next' that other firms could when considering that if one of the partners were to renounce one's services for whatever reason then the appellant firm would, likely, face difficulties to execute the contract given that the said firm, admittedly, had to cope with other contracts in hand, (k) on the other hand, other competitors offered more peace of mind to the contracting authority in this respect, e.g. the recommended tenderer presented a team of 6 personnel, and, as a result, the adjudicating board could not put the appellant firm on the same footing as, say, the recommended tenderer, in this regard, (l) although the recommended tenderer would not detail six auditors full-time on this job still the said tenderer could offer the kind of staff continuity which the appellant firm could not offer due to sheer lack of numbers, (m) it was not the case that the appellant firm was discriminated against for being a small firm because, overall, two of the relatively largest local accountancy and audit firms placed after the appellant firm, (n) being a MEAT, it was not a question of whether a bidder was qualified to do the job or not but it was a question of selecting the most suitable contractor, (o) whereas the recommended tenderer stated in the firm's tender submission that "the MCA would be consulted with prior to assigning any new staff to the engagement" the appellant firm made no such commitment, (p) the fact that RSM Malta was allocating one (1) IT auditor whereas the appellant firm provided two (2) IT auditors was taken into account because the IT auditor was one of a team which had to include various competencies, (q) during the evaluation process two bidders were disqualified and five others were adjudicated



administratively and technically compliant, (r) each evaluator allocated the points individually and then the points were aggregated and an average worked out, (s) the adjudicating board did not discriminate against the appellant firm for being a two-person firm so much so that Grant Thornton, employing about 60 persons, was given almost the same points as the appellant with regard to criteria 2 and 3, (t) in its tender submission the appellant firm did not give 'assurance of staffing from one year to the next' and the contracting authority was not obliged but was even prevented from drawing the appellant firm's attention to provide such an assurance, (u) on comparing the CVs submitted by the appellant firm with those of the recommended tenderer, it was evident that RSM Malta had more experience in this sector with one of the partners having no less than 24 years experience in internal audit and (v) once all five remaining bidders possessed the minimum requirements then the task of the adjudicating board was to go into the details of the submissions to determine which one of the five compliant bidders submitted the best overall proposal;

- having also considered the recommended tenderer's representative's reference to the fact that (a) the award criterion was MEAT and so it was not just whether a bidder had the minimum requirements to execute the contract, (b) internal auditing involved a variety of skills which were difficult for any one auditor to possess and that was why RSM Malta presented a team of six staff members possessing a mix of competencies who could undertake the diverse tasks that would likely be faced in the course of the execution of the contract and (c) she had been carrying out internal audit work for the past 25 years or so and, notwithstanding that experience, she would probably not be able to cover this assignment from A to Z but, maybe, from A to W and for the rest she would require the assistance of other experts,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the contracting authority should or could have identified 'a priori' the minimum number of staff required.
2. The Public Contracts Review Board argues that the delivery of this service was quite flexible such that a 40 hour monthly service could be delivered, say, in one week or staggered over a whole month. This fact alone could, if taken as a stand-alone criterion, cast doubt on the conclusion reached by the evaluation board, namely that the appellant firm could end up encountering problems due to the fact that only two people made up the operational team. Undoubtedly, if one were to take this fact in isolation then 40 hours per month should, all things being equal, not impinge on anyone's workload. Nevertheless, at this juncture one cannot be oblivious of the fact that similar operations cannot rely on one client type as was indeed manifested during the hearing. As a consequence, this Board cannot but take cognizance of the fact that, holistically, there could very much be a few problems which a small firm could encounter in delivering its services. Having deliberated so, this Board has been given no proof that this scenario shall prevail in this particular instance.
3. The Public Contracts Review Board feels that the fact that on criterion 3 the appellant firm was awarded ten points less than the recommended tenderer should be considered rather excessively, adversely judged by the evaluation board, especially given the qualifications of the appellant firm's personnel and the flexibility in the execution of the service.

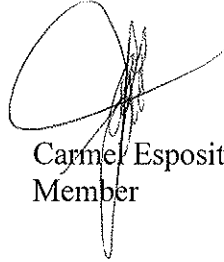
4. This Board, like the appellant firm's representative, also tends to agree with Ms Micallef's argument wherein she placed emphasis on the fact that in the course of the execution of the contract there may arise issues which may necessitate the recruitment of an expert or group of experts with certain specific competencies.
5. The Public Contracts Review Board cannot but take note of the contracting authority's reference to the fact that it (a) encountered no problem with regard to the qualifications and the methodology presented by the appellant firm, (b) was not a prerequisite for a bidder to have an international brand name, (c) was not contesting that the appellant firm was not up to the job so much so that the appellant firm placed second out of five compliant bidders, some of whom were relatively large firms and had international brand names and (d) had to determine the award of the tender on the basis of the most economically advantageous tender (MEAT) and it was not bound to accept the cheapest tender
6. The Public Contracts Review Board would like to express its reservations on the fact that, apart from the fact that the contracting authority did not indicate the number of staff required for this job, it is also evident that the evaluation board regarded the fact that the appellant firm was, practically, a two-person firm, as an inferior option establishing that such firm could not provide the same level of 'assurance of staffing continuity from one year to the next' that other firms could. This conclusion was reached when consideration was given by the evaluation board to the fact that if one of the partners were to renounce one's services for whatever reason then the appellant firm would, very likely, face difficulties to execute the contract given that the said firm, admittedly, would have to cope with other contracts in hand. This Board has taken full cognizance of the fact that, during the hearing, the appellant firm's representative had placed emphasis on the fact that, although the two partners were certified internal auditors, he could not exclude that a problem or a risk might arise which would require a specific professional competency, such as, the requirement of an IT engineer to ascertain that the equipment in place was capable of eliminating the risk identified by the internal auditor. The appellant firm's representative rightly argued that for any professional firm – regardless of its size - to resort to sub-contracting certain specific services is considered as being normal praxis as it is deemed to be rather difficult for any firm to have on its books all the experts that might be required on a particular job. In this instance this Board feels that what transpired during the hearing could have easily been clarified at evaluation stage and any kind of guarantees could have been requested and, possibly provided. Needless to say that whether such guarantees (e.g. relating to continuity and so forth) would have been given would have been another question. Nevertheless, this Board considers that the evaluation board could have acted in haste and, as a result, deprived the appellant firm's bid to be entirely and thoroughly assessed.
7. The Public Contracts Review Board feels that the appellant firm's bid could have been more thoroughly tested rather than it being preconditioned by subjective opinion. Indeed, this Board feels that further clarifications - regarding the appellant firm's potential to make at the contracting authority's disposal the resources with a view to enable the said authority to acquire the peace of mind that the necessary service would be provided professionally and uninterruptedly - were required.

In view of the above, this Board finds in favour of the appellant firm and, apart from recommending that the latter's bid be reintegrated in the evaluation process thus enabling the contracting authority to seek, if possible, the desired operational and continuity assurances from the appellant firm, this Board also recommends that the appellant firm be reimbursed with the deposit paid for the appeal to be lodged.



Alfred R Triganza  
Chairman

*19<sup>th</sup> June 2012*



Carmel Esposito  
Member



Joseph Croker  
Member