

PUBLIC CONTRACTS REVIEW BOARD

Case No. 437

T 106/11

Tender for the Provision of WAN Active Equipment and Related Ancillary Services for Schools

This call for tenders was published in the Government Gazette on the 24th November 2011. The closing date for this call with an estimated budget of € 500,000 (excl. VAT) was the 6th January 2012.

Four (4) tenderers submitted their offers which included six (6) options altogether.

Messrs ICT Solutions Ltd filed an objection on the 14th May 2012 against the decision of the Malta Information Technology Agency to disqualify its offer as technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 26th July 2012 to discuss this objection.

Present for the hearing were:

ICT Solutions Ltd

Dr Simon Farrugia	Legal Adviser
Mr Keith Fearne	Sales and Marketing Manager
Mr Liam Pace	Representative
Mr Simon Vella	Representative

Computime Ltd

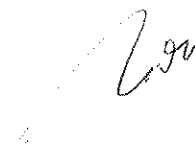
Dr Adrian Mallia	Legal Representative
Mr Neil Bianco	Representative
Mr Adrew Borg	Representative
Mr Clinton Cutajar	Representative
Mr Anton Farrugia	Representative

Malta Information Technology Agency (MITA)

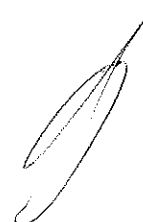
Dr Danielle Cordina	Legal Representative
Dr Jean Pierre Scerri	Legal Representative
Ms Rosalynn Muscat	Representative
Mr Alan Brincat	Expert in Networks
Ing. Ian Bonello	Representative

Evaluation Board

Mr Stefan Briffa	Chairman
Mr Ramon Mangion	Member
Mr Claudio Muscat	Member



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

Dr Simon Farrugia, legal representative of ICT Solutions Ltd, the appellant company, explained that:

- i. by letter dated 4th May 2012 the Malta Information Technology Agency had informed his client that his tender was not successful because it did not satisfy the Layer 2 features;
 - ii. his client had replied 'Yes' to Section A sub-sections 01 to 05 of page 29 of the tender document as to whether the routers satisfied the tender specifications and to Section B 'Layer 2 features' sub-sections 12 to 17 at page 30 of the tender document where, similarly, his client replied in the affirmative with regard to the Layer 2 Features and, at that stage, no other information was requested by the Malta Information Technology Agency except to tick the 'Yes' box;
- and
- iii. his client had submitted a compliant tender submission which was also the cheapest.

The Chairman Public Contracts Review Board read out from Malta Information Technology Agency letter dated 11th January 2012 the following:-

"I regret to inform you that the tender submitted by you was not successful due to the following:-

During the technical verification session held at ICT Ltd's offices as part of the evaluation process, intended to ascertain that the technical specifications of the product proposed in ICT Ltd's tender met the ITT technical requirements, it resulted that the EtherSwitch module, which was quoted in your submissions as an optional item, was required in order to meet the Layer 2 technical requirements stipulated in the ITT. In its tender submission and in the subsequent response to a clarification request by MITA, ICT Ltd stated that the Layer 2 functionality was included and formed part of the stated costs. The Adjudication Board determined that ICT Ltd had applied changes to the technical specifications by including the provision of the EtherSwitch, originally quoted as an optional item, to meet the ITT Layer 2 functional requirements. As a result, the adjudication board determined that ICT Ltd's tender submission could not effectively meet the ITT technical requirements without a change in the technical specifications, which is not acceptable under the ITT tender conditions 05.2 (page 12 of the ITT) stating that "No rectification of incorrect and/or incomplete documentation in Part 11 shall be allowed."

The Chairman Public Contracts Review Board said that it appeared that the Malta Information Technology Agency was contending that, whereas the EtherSwitch module was a mandatory requirement in the tender document, the appellant company was offering it as an option and, as a result, the inclusion of the EtherSwitch by the

appellant company after the closing date of the tender amounted to a change to its original tender submission.

Dr Farrugia further explained that the tender document at Schedule 1.6 (page 46) provided for 'WAN active equipment upgrades' – where it was clearly stated that this was not going to be taken into account in the evaluation process - and it was under this section that his client had included the optional 24 port switch card referred to by the Malta Information Technology Agency in its letter of rejection. He added that to the clarifications requested by the Malta Information Technology Agency his client had, invariably and clearly, confirmed that the Layer 2 functional requirements in the company's original tender submission satisfied the requirements of the tender document.

Dr Danielle Cordina, legal representative of the Malta Information Technology Agency, submitted that:-

- a. in its tender submission the appellant company offered a Cisco Part No. 2911 which referred to a router without the EtherSwitch and that it then offered the EtherSwitch (Part. No. SM-ES2-24) as an optional part under Schedule 1.6 'WAN active equipment upgrades';
- b. the evaluation board, through its technical advisers, noted that the Cisco Part No. quoted by the appellant company was not enough to satisfy the Layer 2 function in its entirety because it also required the EtherSwitch, which the appellant company was offering as an option;
- c. the omission of the EtherSwitch also had a bearing on the price and it was reckoned that the inclusion of the cost of the EtherSwitch in the price offered by the appellant company would render its offer more expensive than the recommended offer;
- d. the appellant company should have included both the Cisco Part No. and the EtherSwitch in order to meet the mandatory requirements in connection with the Layer 2 function;

and

- e. when the Malta Information Technology Agency tested the equipment at ICT Ltd's offices it was noted that, on that occasion, the appellant company had included the EtherSwitch as part of the router module it offered, something which it had failed to do in his tender submission

Mr Keith Fearne, representing ICT Solutions Ltd, offered the following explanations:-

- i. in its tender submission ICT Solutions Ltd offered a module specifically designed to meet the requirements of this tender and that the upgrade included under Schedule 1.6 did not form part of the module offered and, in fact, it was not included in the costings;



- ii. the Cisco Part. No. quoted in the tender submission was actually made up of about ten other different Part Nos. but in this sector it was standard practice to quote the Lead Part No. and not all the Part Nos. involved and then the bidder had to declare if the Lead Part No. was compliant with tender requirements or not;
 - iii. in spite of the fact that the Lead Part No. quoted represented about ten other Part Nos. the Malta Information Technology Agency only asked about one of them, namely the switch, but it did not ask about the other parts, namely the 'memory' and so forth;
 - iv. this tender had to cater for the specific needs of schools and so his firm offered a bundle along with a confirmation that the bundle satisfied all tender requirements;
 - v. whilst the standard bundle offered by ICT Solutions Ltd included a switch with 16 ports, yet, as an option, it also included an upgrade to a switch with 24 ports in case there would be instances that might need such an upgrade;
 - vi. it had already been ascertained with the supplier that the Lead Part No. quoted by ICT Solutions Ltd satisfied all tender requirements;
 - vii. Malta Information Technology Agency had requested ICT Solutions Ltd to make available within a week the equipment offered for testing purposes and, as a consequence, the supplier was asked to deliver a sample of this equipment for testing;
 - viii. it was not being disputed that the router module tested at ICT Solutions Ltd could have included 24 ports instead of 16 ports but, then again, for the purposes of this tender it did not matter if the configuration included 16 or 24 ports;
 - ix. the option meant that one could upgrade the standard bundle, which included a 16 ports card, to a bundle with a 24 ports card;
- and
- x. technically, it did not make sense that the bundle offered by ICT Solutions Ltd did not include the EtherSwitch card and, at the same time, ICT Solutions Ltd declared that the system offered was functional

Dr Jean Pierre Scerri, legal representative of Malta Information Technology Agency, remarked that:-

- a. the Malta Information Technology Agency had requested the testing of the system offered precisely because it was noted that the router offered by the appellant company was without the EtherSwitch and so it did not meet mandatory requirements;



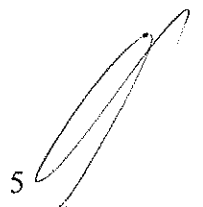
- b. when the test was carried out the appellant company presented a router which included the EtherSwitch, which item was indicated as 'optional' in the appellant company's tender submission;
 - c. the other bidders presented a solution which included both the router and the switch;
- and
- d. the documentation available from Cisco itself indicated that the Part. No. quoted by the appellant company did not satisfy the tender requirements because it did not include the EtherSwitch.

Mr Fearne further explained that:-

- i. ICT Solutions Ltd was offering a bundle which was tailor made to meet schools' requirements and that was why the prices quoted were very advantageous;
 - ii. it appeared that the Malta Information Technology Agency assumed that the bundle offered did not include the EtherSwitch and that the latter was only being offered as an optional, but had the Malta Information Technology Agency explicitly asked if the bundle offered included the EtherSwitch - apart from the 24 port one offered as an optional - the answer by ICT Solutions Ltd would have definitely been in the affirmative;
- and
- iii. the Layer 2 function requested did require an EtherSwitch and ICT Solutions Ltd provided one with 16 ports in the bundle and one with 24 ports as an option/upgrade but, in any case, both of them rendered the Layer 2 functional.

Mr Alan Brincat, the Malta Information Technology Agency expert on networks, under oath, gave the following evidence:-

- a. the Part No. indicated by the appellant company was verified with the documentation made available by Cisco and it transpired that it did not include the EtherSwitch in question;
 - b. there was separate technical documentation (Part Nos.) both with regard to the router and with regard to the switch card;
- and
- c. albeit both a 16 port or a 24 port switch card were acceptable, yet, to his recollection, the 16 port switch card was never mentioned before at this hearing.



At this stage Mr Fearnle intervened and submitted that:-

- i. via email dated 11th January 2012 the Malta Information Technology Agency requested the following clarifications from ICT Solutions Ltd:-

“With reference to your tender submission a number of clarifications are being put forward by the adjudicating team:

Layer 2 features -- Spanning Tree Support

Requirement 12 of the ITT specifies that the router must support the following STP variants: 802.1d STP, 802.1w RSTP and 802.1s MST

- o *Can you please confirm that the cost of the proposed model in Table 1 under Schedule 1.1 - Capital Costs as submitted in your offer includes this functionality and that this functionality will be available from day 1?*
 - o *If not, can you please confirm that the additional module SM-ES2-24 for each router that was included as an optional upgrade in your submission is required to make use of this functionality from day 1?*
- ii. on the 13th January 2012, ICT Solutions Ltd provided the following reply with regard to the first bullet of clarification 1. Layer 2 features - Spanning Tree Support:-

“YES, we can CONFIRM that the cost of the proposed model in table I under Schedule 1.1 capital costs submitted in our offer INCLUDES this functionality and that this functionality WILL BE AVAILABLE from day 1.”

- iii. there was no need to answer the second bullet because the answer to the first one was in the affirmative, however, that reply was, in itself, a confirmation that the additional module, SM-ES2-24, which was included as an optional upgrade in the tender submission of ICT Solutions Ltd, was not required to render the Layer 2 features functional;
- iv. the tender only required ‘yes’ or ‘no’ answers and if the Malta Information Technology Agency required more details as to what those answers represented it should have asked for them, such as what the Lead Part No. quoted represented, i.e. the memory, the switch and so forth;
- v. the Malta Information Technology Agency apparently carried out an internet search on the Part No. quoted by ICT Solutions Ltd and came to the conclusion that that Part No. included a certain number of items, but excluding the EtherSwitch, whereas ICT insisted that it included more parts, one of them being the EtherSwitch, and, in case of doubt, the least that the Malta Information Technology Agency could have done was to ask the tenderer himself what the Lead Part No. the company quoted actually included;




- vi. the contracting authority was not expected to resort to downloading documentation from the internet in order to satisfy its queries but one expected the contracting authority to first ask the bidder about the contents of the company's tender submission and, whenever asked, ICT Solutions Ltd gave unambiguous replies;
 - vii. ICT Solutions Ltd had replied in an exhaustive and definite manner to all the clarifications sought by the Malta Information Technology Agency, including the confirmation that the offer included the Layer 2 functionality;
 - viii. his firm was a systems integrator, namely it could build up a system by picking items from different sources, that is not all parts necessarily originating from one source, e.g. Cisco;
- and
- ix. in submitting such technical bids, it was the practice for the bidder to quote only the Lead Part. No., which, in this case, included not only the router 'chassis' but also the EtherSwitch along with eight (8) or so other items bearing different Part Nos.

Mr Stefan Briffa, chairman of the adjudicating board, explained that:-

- a. when the Malta Information Technology Agency researched Cisco's website documentation it resulted that the Part No. quoted by the appellant company did not include the EtherSwitch card and that in its tender submission the company was offering this card as an option;
 - b. from the other tender submissions it was evident that the Layer 2 functionality was not possible without the EtherSwitch card;
 - c. during testing the appellant company had to include the 24 port EtherSwitch card to the company's proposed solution in order to achieve the Layer 2 functionality;
- and
- d. albeit the Malta Information Technology Agency opted not to question the appellant company's confirmation given in an email dated 13th January 2012 that the company's offer included the Layer 2 functionality, yet, in order to eliminate any doubt in this regard, a test was carried at the appellant company's offices and there the appellant company presented the router together with the 24 port switch card – indicated as optional in its submission - and it was with the combination of the router and the switch card that the Layer 2 functionality was achieved.

Mr Simon Vella, engineer representing ICT Solutions Ltd, declared that:



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- i. in its tender submission ICT Solutions Ltd included a system equivalent to the system used during testing carried out in the presence of the Malta Information Technology Agency personnel and the only difference was that the standard bundle proposed in the tender submission had a 16 port switch card while the one tested had a 24 port switch card which difference was irrelevant for the purposes of this tender;

and

- ii. if the Malta Information Technology Agency requested the test in order to check the switch card then it was quite odd how, during testing, the Malta Information Technology Agency did not ask ICT Solutions Ltd which switch card it was going to actually use in the standard module it was offering.

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' filed on the 17th May 2012 and also through their verbal submissions presented during the hearing held on the 26th July 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) by letter dated 4th May 2012 the Malta Information Technology Agency had informed the appellant company that its tender was not successful because it did not satisfy the Layer 2 features, (b) the appellant company had replied 'Yes' to Section A sub-sections 01 to 05 of page 29 of the tender document as to whether the routers satisfied the tender specifications and to Section B 'Layer 2 features' sub-sections 12 to 17 at page 30 of the tender document where, similarly, the appellant company replied in the affirmative with regard to the Layer 2 Features and, at that stage, no other information was requested by the Malta Information Technology Agency except to tick the 'Yes' box, (c) the appellant company had submitted a compliant tender submission which was also the cheapest, (d) the tender document at Schedule 1.6 (page 46) provided for 'WAN active equipment upgrades' – where it was clearly stated that this was not going to be taken into account in the evaluation process - and it was under this section that ICT Solutions Ltd had included the optional 24 port switch card referred to by the Malta Information Technology Agency in its letter of rejection, (e) to the clarifications requested by the Malta Information Technology Agency the appellant company had, invariably and clearly, confirmed that the Layer 2 functional requirements in the company's original tender submission satisfied the requirements of the tender document, (f) in its tender submission ICT Solutions Ltd offered a module specifically designed to meet the requirements of this tender and that the upgrade included under Schedule 1.6 did not form part of the module offered and, in fact, it was not included in the costings, (g) the Cisco Part. No. quoted in the tender submission was actually made up of about ten other different Part Nos. but in this sector it was standard practice to quote the Lead Part No. and not all the Part Nos. involved and then the bidder had to declare if the Lead Part No. was compliant with tender requirements or not, (h) in spite of the fact that the Lead Part No. quoted represented about ten other Part Nos. the Malta Information Technology Agency only



asked about one of them, namely the switch, but it did not ask about the other parts, namely the 'memory' and so forth, (i) this tender had to cater for the specific needs of schools and so the appellant company offered a bundle along with a confirmation that the bundle satisfied all tender requirements, (j) whilst the standard bundle offered by ICT Solutions Ltd included a switch with 16 ports, yet, as an option, it also included an upgrade to a switch with 24 ports in case there would be instances that might need such an upgrade, (k) it had already been ascertained with the supplier that the Lead Part No. quoted by ICT Solutions Ltd satisfied all tender requirements, (l) Malta Information Technology Agency had requested ICT Solutions Ltd to make available within a week the equipment offered for testing purposes and, as a consequence, the supplier was asked to deliver a sample of this equipment for testing, (m) it was not being disputed that the router module tested at ICT Solutions Ltd could have included 24 ports instead of 16 ports but, then again, for the purposes of this tender it did not matter if the configuration included 16 or 24 ports and this option meant that one could upgrade the standard bundle, which included a 16 ports card, to a bundle with a 24 ports card, (n) technically, it did not make sense that the bundle offered by ICT Solutions Ltd did not include the EtherSwitch card and, at the same time, ICT Solutions Ltd declared that the system offered was functional, (o) ICT Solutions Ltd was offering a bundle which was tailor made to meet schools' requirements and that was why the prices quoted were very advantageous, (p) it appeared that the Malta Information Technology Agency assumed that the bundle offered did not include the EtherSwitch and that the latter was only being offered as an optional, but had the Malta Information Technology Agency explicitly asked if the bundle offered included the EtherSwitch - apart from the 24 port one offered as an optional - the answer by ICT Solutions Ltd would have definitely been in the affirmative, (q) the Layer 2 function requested did require an EtherSwitch and ICT Solutions Ltd provided one with 16 ports in the bundle and one with 24 ports as an option/upgrade but, in any case, both of them rendered the Layer 2 functional, (r) on the 13th January 2012, ICT Solutions Ltd provided the following reply (1) with regard to the first bullet of clarification 1. Layer 2 features - Spanning Tree Support, "YES, we can CONFIRM that the cost of the proposed model in table I under Schedule 1.1 capital costs submitted in our offer INCLUDES this functionality and that this functionality WILL BE AVAILABLE from day 1" and (2) with regard to the second bullet there was no need for one to answer because, whilst the reply to the first one was in the affirmative, yet, that reply was, 'per se', a confirmation that the additional module, SM-ES2-24, which was included as an optional upgrade in the tender submission of ICT Solutions Ltd, was not required to render the Layer 2 features functional, (s) the tender only required 'yes' or 'no' answers and if the Malta Information Technology Agency required more details as to what those answers represented it should have asked for them, such as what the Lead Part No. quoted represented, namely the memory, the switch and so forth, (t) the Malta Information Technology Agency apparently carried out an internet search on the Part No. quoted by ICT Solutions Ltd and came to the conclusion that that Part No. included a certain number of items, but excluded the EtherSwitch, whereas ICT Solutions Ltd insisted that it included more parts, one of them being the EtherSwitch, and, in case of doubt, the least that the Malta Information Technology Agency could have done was to ask the tendering company what the Lead Part No. the company quoted actually included, (u) the contracting authority was not expected to resort to downloading documentation from the internet in order to satisfy its queries but one expected the contracting authority to first ask the bidder about the contents of the company's tender submission and, whenever asked, ICT Solutions Ltd gave unambiguous replies. As a matter of fact, proceeded the appellant company's representative, ICT Solutions Ltd had replied in an exhaustive and definite manner to

all the clarifications sought by the Malta Information Technology Agency, including the confirmation that the offer included the Layer 2 functionality, (v) the appellant company was a systems integrator, meaning that it could build up a system by picking items from different sources, that is not all parts necessarily originating from one source, such as Cisco, (w) in submitting such technical bids, it was the practice for the bidder to quote only the Lead Part. No., which, in this case, included not only the router 'chassis' but also the EtherSwitch along with eight (8) or so other items bearing different Part Nos, (x) in its tender submission ICT Solutions Ltd included a system equivalent to the system used during testing carried out in the presence of the Malta Information Technology Agency personnel and the only difference was that the standard bundle proposed in the tender submission had a 16 port switch card while the one tested had a 24 port switch card whose difference was irrelevant for the purposes of this tender and (y) if the Malta Information Technology Agency requested the test in order to check the switch card then it was quite odd how, during testing, the Malta Information Technology Agency did not ask ICT Solutions Ltd which switch card it was going to actually use in the standard module it was offering;

- having considered the contracting authority's representatives' reference to the fact that (a) in its tender submission the appellant company offered a Cisco Part No. 2911 which referred to a router without the EtherSwitch and that it then offered the EtherSwitch (Part. No. SM-ES2-24) as an optional part under Schedule 1.6 'WAN active equipment upgrades', (b) the evaluation board, through its technical advisers, noted that the Cisco Part No. quoted by the appellant company was not enough to satisfy the Layer 2 function in its entirety because it also required the EtherSwitch, which the appellant company was offering as an option, (c) the omission of the EtherSwitch also had a bearing on the price and it was reckoned that the inclusion of the cost of the EtherSwitch in the price offered by the appellant company would render its offer more expensive than the recommended offer, (d) the appellant company should have included both the Cisco Part No. and the EtherSwitch in order to meet the mandatory requirements in connection with the Layer 2 function, (e) when the Malta Information Technology Agency tested the equipment at ICT Ltd's offices it was noted that, on that occasion, the appellant company had included the EtherSwitch as part of the router module it offered, something which the appellant company had failed to do in its tender submission, (f) the Malta Information Technology Agency had requested the testing of the system offered precisely because it was noted that the router offered by the appellant company was without the EtherSwitch and so it did not meet mandatory requirements, (g) when the test was carried out the appellant company presented a router which included the EtherSwitch, which item was indicated as 'optional' in the appellant company's tender submission, (h) the other bidders presented a solution which included both the router and the switch, (i) the documentation available from Cisco itself indicated that the Part. No. quoted by the appellant company did not satisfy the tender requirements because it did not include the EtherSwitch, (j) the Part No. indicated by the appellant company was verified with the documentation made available by Cisco and it transpired that it did not include the EtherSwitch in question, (k) there was separate technical documentation (Part Nos.) both with regard to the router and with regard to the switch card, (l) albeit both a 16 port or a 24 port switch card were acceptable, yet the 16 port switch card was never mentioned before this hearing, (m) when the Malta Information Technology Agency researched Cisco's website documentation it resulted that the Part No. quoted by the appellant company did not include the EtherSwitch card and that in its tender submission the company was offering this card as an option, (n) from the other tender submissions it was evident that the Layer 2 functionality was not

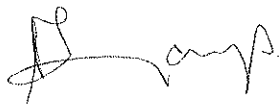


possible without the EtherSwitch card, (o) during testing the appellant company had to include the 24 port EtherSwitch card to the company's proposed solution in order to achieve the Layer 2 functionality and (p) albeit the Malta Information Technology Agency opted not to question the appellant company's confirmation given in an email dated 13th January 2012 that the company's offer included the Layer 2 functionality, yet, in order to eliminate any doubt in this regard, a test was carried at the appellant company's offices and there the appellant company presented the router together with the 24 port switch card – indicated as optional in its submission - and it was with the combination of the router and the switch card that the Layer 2 functionality was achieved,

reached the following conclusions, namely:

1. The Public Contracts Review Board is of the opinion that though it was established that the appellant company indicated the lead part reference number this did not necessarily mean that the part was devoid of any additional components which are necessary for it to function fully and satisfy the Layer 2 functionality. One may compare this with when one quotes the chassis/serial number of a product such as a motor vehicle which would include all the necessary parts and accessories to make a complete unit.
2. The Public Contracts Review Board notes that the appellant company indicated and confirmed that its offer covered the required Layer 2 functionality;
3. The Public Contracts Review Board notes that the 24 port Ethernet Switch was quoted as an optional upgrade, indicating that the basic requirements, presumably the 16 port switch, was included in the price as confirmed by Mr Fearne from the appellant company, who also reiterated that the equipment offered by his company satisfied the technical requirement of the tender without any additional expense.

In view of the above, this Board finds in favour of the appellant company, recommends that the company be reinstated in the tendering process, and that the deposit be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

31st July 2012