

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 488

**MCA-EXT/pc/12-0910**

**Tender for Provision to Offer Consultancy Services in relation to the Localisation and Piloting of the Webcheck Scheme in Malta**

This call for tenders was published in the Government Gazette on the 13th July 2012. The closing date for this call with an estimated budget of € 40,000 was the 22nd August 2012.

Three (3) tenderers submitted their offers.

PKC Malta – Kinetix IT Solutions Ltd filed an objection on the 3<sup>rd</sup> October 2012 against the decision of the Malta Communications Authority to adjudicate its offer not cheapest compliant offer and to recommend the award of the tender to EMCS.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Tuesday, 6th November 2012 to discuss this objection.

### **PKC Malta – Kinetix IT Solutions Ltd**

Dr Sarah Tua	Legal Representative
Mr Reuben Zammit	Representative
Ms Tiziana Gauci	Representative

### **EMCS Ltd**

Mr Adrian Said	Representative
Mr Matthew Castillo	Representative

### **Malta Communications Authority**

Dr Antoine Cremona	Legal Representative
Dr Louise Spiteri	Legal Representative

### **Evaluation Board**

Dr Nicholas Borg	Chairman
Mr Paul Aron Cumbo	Member
Mr Miguel Scerri	Secretary



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

Dr Sarah Tua, legal representative of PKC Malta – Kinetix IT Solutions Ltd, the appellant, made the following submissions:

- i. by email dated 26th September 2012 the appellant was informed that its offer was not ranked as the cheapest technically compliant tender and that the tender was recommended for award to EMCS Ltd;
- ii. the purpose of this tender was for the localisation and piloting of the WebCheck Scheme in Malta and to test its viability and effectiveness in the local context (the WebCheck Scheme was currently being implemented also in Ireland);
- iii. the appellant questioned how the consultancy and the audit were being taken together when the audit should be carried out independently from whoever would be rendering the consultancy services;
- iv. the appellant's price per audit was cheaper than that of the recommended bidder, namely, €590 against €649;
- v. clause 36.2 stated that '*When putting forward a tender a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project*', besides, reference was also made to the ethics clause 8 in the Tenderer's Declaration which, similarly, dealt with the issue of conflict of interest;
- vi. the appellant contended that, in this case, there was a direct link between this project and EMCS Ltd, the preferred bidder, and that was evident from EMCS Ltd's website and, more importantly, the fact that EMCS Ltd had, effectively, carried out the transferability analysis which served as the basis for the services requested in this tender;

and

- vii. if EMCS Ltd were to be awarded this contract then it would, effectively, mean that it carried out the transferability analysis and it would also carry out the consultancy services and the audit itself besides the fact that it was considered important that the consultancy and the audit should be carried out by separate contractors.

Ms Tiziana Gauci, also representing the appellant, explained that the company had erroneously quoted the price of €23,600 per audit and the contracting authority, noting that that price did not in fact refer to the price per audit unit, had sought a clarification and the appellant had indicated that the price per audit unit was in fact €590, namely €23,600/40 units, which, in a way, did not alter the original quote.



Dr Antoine Cremona, legal representative of the Communications Authority, remarked that the appeal centred on two issues, namely (a) the price and (b) conflict of interest.

### Price

Dr Cremona pointed out that the note at Volume 4 'Financial Offer' stated that "*For comparison reasons, the total financial offer will be considered to include Item A and 40 of Item B that equated to 40 participants being supported through the pilot*".

He added that the total price was arrived at in a very transparent manner (as indicated hereunder):

	Item 'A'	Item 'B'	Total Bid
	€	€	€
Appellant	12,400	23,600 (€590 x 40)	36,000
Recommended bid	9,794	25,960 (€649 x 40)	35,754

Dr Cremona concluded that the recommended bid was slightly cheaper by €246.

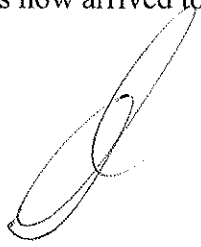
### Conflict of Interest

Dr Cremona remarked that:-

- a. conflict of interest could arise in a situation where an entity was involved in two contracts on the same project on-going at the same time but that was not so in this case;
  - b. EMCS Ltd did execute a contract on behalf of the Malta Communications Authority to carry out a study on the regulatory regime in Ireland but that study was concluded and paid for about one or two years ago;
- and
- c. it was not the case that ECMS Ltd was going to audit its own work.

Dr Tua insisted that the recommended tenderer had carried out the transferability analysis which formed the basis of the present call for consultancy services so much so that it was part of the terms of reference of this tender as per clause 3.1 'Specific Activities' Phase 1 which specifically referred to the 'attached document 'Transferability Analysis'.

Dr Cremona stated that the study referred to by the appellant concerned the transferability analysis on the WebCheck System in Ireland which project had since been implemented and the time has now arrived to audit the system after having been in service for a year or so.

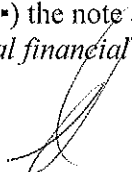


The Chairman Public Contracts Review Board remarked that if the appellant wanted to question whether it was proper for one to include the consultancy and the audit in the same award then the opportune time to do that was prior to the closing date of the tender and not at appeal stage because, once a bidder participated, it meant that such bidder had accepted the tender conditions.

At this point the hearing came to a close.

This Board,

- having noted that the appellant, in terms of their 'reasoned letter of objection' dated the 2<sup>nd</sup> October 2012 and also through their verbal submissions presented during the hearing held on the 6<sup>th</sup> November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 26th September 2012 the appellant was informed that its offer was not ranked as the cheapest technically compliant tender and that the tender was recommended for award to EMCS Ltd, (b) the purpose of this tender was for the localisation and piloting of the WebCheck Scheme in Malta and to test its viability and effectiveness in the local context (the WebCheck Scheme was currently being implemented also in Ireland), (c) the appellant questioned how the consultancy and the audit were being taken together when the audit should be carried out independently from whoever would be rendering the consultancy services, (d) the appellant's price per audit was cheaper than that of the recommended bidder, namely, €590 against €649, (e) clause 36.2 stated that *'When putting forward a tender a candidacy or tender, the candidate or tenderer must declare that he is affected by no potential conflict of interest, and that he has no particular link with other tenderers or parties involved in the project'*, (f) the ethics clause 8 in the Tenderer's Declaration, similarly, dealt with the issue of conflict of interest, (g) the appellant contended that, in this case, there was a direct link between this project and EMCS Ltd, the preferred bidder, and that was evident from EMCS Ltd's website and, more importantly, the fact that EMCS Ltd had, effectively, carried out the transferability analysis which served as the basis for the services requested in this tender, (h) if EMCS Ltd were to be awarded this contract then it would, effectively, mean that it carried out the transferability analysis and it would also carry out the consultancy services and the audit itself besides the fact that it was considered important that the consultancy and the audit should be carried out by separate contractors, (i) the company had erroneously quoted the price of €23,600 per audit and the contracting authority, noting that that price did not, in fact, refer to the price per audit unit, had sought a clarification and the appellant had indicated that the price per audit unit was, in fact, €590, namely €23,600/40 units, which, in a way, did not alter the original quote and (j) the recommended tenderer had carried out the transferability analysis which formed the basis of the present call for consultancy services so much so that it was part of the terms of reference of this tender as per clause 3.1 'Specific Activities' Phase 1 which specifically referred to the 'attached document 'Transferability Analysis'';
- having considered the contracting authority's representative's reference to the fact that (a) the appeal centred on two issues, namely (1) the price and (2) conflict of interest, (b) with regard to price, (▪) the note at Volume 4 'Financial Offer' stated that *"For comparison reasons, the total financial offer will be considered to include Item*



*A and 40 of Item B that equated to 40 participants being supported through the pilot”, (▪) the total price was arrived at in a very transparent manner and (▪) the recommended bid was slightly cheaper by €246, (c) with regard to conflict of interest, (Δ) conflict of interest could arise in a situation where an entity was involved in two contracts on the same project on-going at the same time but that was not so in this case, (Δ) EMCS Ltd did execute a contract on behalf of the Malta Communications Authority to carry out a study on the regulatory regime in Ireland but that study was concluded and paid for about one or two years ago and (Δ) it was not the case that ECMS Ltd was going to audit its own work and (d) the study referred to by the appellant concerned the transferability analysis on the WebCheck System in Ireland which project had since been implemented and the time has now arrived to audit the system after having been in service for a year or so,*

reached the following conclusions, namely:

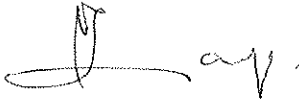
1. The Public Contracts Review Board recognizes the fact that if the appellant wanted to question whether it was proper for one to include the consultancy and the audit in the same award then the opportune time to do that was prior to the closing date of the tender and not at appeal stage because, once a bidder participates, this implies that such bidder would have accepted the tender conditions.
2. The Public Contracts Review Board, whilst acknowledging that the ethics clause 8 in the Tenderer's Declaration dealt with the issue of conflict of interest, yet, considers the argument raised by the appellant - wherein the latter argued that, in this case, there was a direct link between this project and EMCS Ltd, the preferred bidder, and that was evident from EMCS Ltd's website and, more importantly, the fact that EMCS Ltd had, effectively, carried out the transferability analysis which served as the basis for the services requested in this tender - as somewhat baseless in principle.

On this particular issue this Board cannot but agree with the arguments brought forward by the contracting authority, especially the fact that, whilst it is true that EMCS Ltd did execute a contract on behalf of the Malta Communications Authority to carry out a study on the regulatory regime in Ireland, yet that study was concluded and paid for quite some time before the publication of this tender. Furthermore, no one was contesting that the study referred to by the appellant concerned the transferability analysis on the WebCheck System in Ireland which project had since been implemented and the time has now arrived to audit the system after having been in service for a year or so. As a result, this Board sees no particular issue relating to a presumed 'conflict of interest' considering that, in the context of this tender, the recommended tenderer would not be auditing its own work.

3. This Board also opines that with regard to price, the Public Contracts Review Board was not provided with any evidence that there was some irregularity in regard and, as a result, albeit quite negligible, yet it was a fact that the recommended bid was slightly cheaper than that submitted by the appellant by €246.



In view of the above this Board finds against the appellant and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.

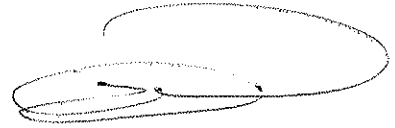


Alfred R Triganza  
Chairman

*19 November 2012*



Carmel Esposito  
Member



Paul Mifsud  
Member