

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 937 – CT 3005/2016: Provision of a Comprehensive Tablet Computer Solution for Primary School Education – One Tablet per Child Initiative.**

The Tender was published on the 1<sup>st</sup> March 2016. The closing date was on the 10<sup>th</sup> May 2016. The estimated value of the Tender is €8,800,676.80.

On the 18<sup>th</sup> April 2016 Sound Machine Company Limited filed an Objection raising pre-contractual concerns in terms of Regulation 85 of the Public Contracts Procurement Regulations.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 19<sup>th</sup> May 2016 to discuss the Objection.

Present for the hearing were:

#### **Sound Machine Company Limited:**

|                          |                      |
|--------------------------|----------------------|
| Mr Steven Agius          | Representative       |
| Mr Eman Castagna         | Representative       |
| Dr Michael Borg Costanzi | Legal Representative |
| Dr Joseph Camilleri      | Legal Representative |

#### **Ministry for Education and Employment (MEDE):**

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| Mr Franco Costa  | Representative |
| Mr Joe Mamo      | Representative |
| Mr Dennis Zammit | Representative |

#### **Department of Contracts:**

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| Dr Christopher Mizzi | Legal Representative |
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#### **Interested Persons:**

|                |                                   |
|----------------|-----------------------------------|
| Mr David Rizzo | Director, Energy Investment       |
| Mr Ian Galea   | Representative, Energy Investment |

The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Joseph Camilleri on behalf of the Appellants contended that the Tender specifications regarding wireless charging of the tablets were discriminatory and limited competition. Although in the Department of Contracts' Letter of Reply it was claimed that there were several solutions of achieving this wireless charging and not necessarily inbuilt ones, Sound Machine Company Ltd, while aware that these solutions existed, was concerned that such solutions could eventually cause technical problems and damage the tablets.

The Contracting Authority states that the possibility would be considered in the future but would compatibility be a problem? The Appellant can if fact provide such technology but did not believe that wireless charging of the tablets would benefit the end users. The Appellant suspected that in order to arrive at the specifications the Contracting Authority studied the specifications of a number of tablets on the market and tried to incorporate everything without examining if these requisites were reasonable or limited choice.

Dr Camilleri contended that this specification limited offers at the expense of a future possible occurrence. As a consequence this would be prejudicial to Appellant and to the Contracting Authority itself who wanted to obtain good quality and value for money.

Dr Michael Borg Costanzi on behalf of the Appellant continued to explain that the original wording of the Tender Document contained "tablet to support wireless charging". Through a clarification note this was changed, by adding that this could be done in the future through a separate Tender. This meant that the wireless charging equipment could be external and that it was possible that the equipment would be supplied by third parties. Thus if Appellant's offer was awarded there could be a future decision to fit third party equipment to the tablets supplied by Appellant, leaving the Appellant in no position to ascertain whether this equipment was compatible with the tablets. The tablets supplied by Appellant would still be under warranty if these were damaged.

The word "*inbuilt*" was used by Appellant to distinguish between tablets that had an inbuilt potentially in it – and there was only one tablet on the market that had this potential – and the external mechanism available that would be fitted to the tablet enabling wireless charging. This equipment however was from third parties and could not therefore be compatible with the tablets offered by Appellant.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the Contracting Authority only specified that wireless charging support was a requisite. This did not impinge on the Public Procurement Regulations. The Contracting Authority wanted to cover a future possible eventuality. Procurement of the additional wireless charging equipment would be through an open Tendering process and it was the Contracting Authority's prerogative to limit what equipment was needed at this stage. Appellant had no right to impose any technology on the Contracting Authority. The Tender had just asked for "future" support of wireless charging via conduction.

Clarifications later opened this to include "or any other technique which does not involve physical connection of cables to the tablet in the eventuality that such a direction is pursued." The Contracting Authority needed support for wireless charging and there were several different means to achieve this. The Contracting Authority in fact could opt to not using

wireless charging eventually.

Dr Michael Borg Costanzi for the Appellant said that his client's concern is that the Tender requires that the tablet supports wireless charging but it is difficult for them to make an offer on a future occurrence that may not happen.

Mr Joe Mamo, Chief Information Officer at the Contracting Authority stated that he was convinced that wireless charging, an emerging technology at present would be the norm in the future. All suppliers are considering this. This technology is a must for schoolchildren to obviate the need of connecting all the tablets in a class for charging. Since the technology is still being developed it was considered better just to ask that the tablets offered would be configured to be able to use wireless charging. Later on the technology would be used if considered beneficial. Technology is evolving rapidly and even the Appellant's suppliers are using the new technology.

Mr Eman Castagna on behalf of the Sound Machine Company Ltd explained that their concern is that while the tablets to be offered must have a three year warranty period, yet the wireless charging equipment that could be used later, could damage or not be compatible with the tablets supplied by Appellant.

Mr Castagna asked hypothetically what would be the outcome if, in the future, the Appellant's tablet could not be charged using third party equipment? The connection of third party chargers could invalidate the warranty.

Mr Joe Mamo for the Contracting Authority contended that all the submissions were based on suppositions and not facts.

At this point the hearing was closed.

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**This Board,**

**Having noted the Letter of Pre-Contractual Objection dated 18 April 2016 filed by Sound Machine Co Ltd and also through their verbal submissions raised during the Public Hearing held on 19 May 2016, had raised a "*Pre-Contractual Concern*", in that:**

- a) With regards to the wireless charging, the Appellants contend that the Tender Specifications were discriminatory and restrict healthy**

**competition;**

- b) With regards to the always evolving advancements of these equipments, the Appellant also maintain that since the requirement for the future application for the wireless charging of these tablets is still an unknown factor, the possibility of non compatibility between the equipment being offered today and the availability of the wireless charging modes could arise in the future.**

**Having considered the Contracting Authority’s “*Letter of Reply*” dated 25 April 2016 and also through their verbal submissions during the Public Hearing held on 19 May 2016, in that:**

- a) The Contracting Authority contends that it had not limited competition and that the Technical Specifications were not discriminatory, so much so, that the requirement of “*Wireless Charging*” of the tablets, when so required, will be issued through a separate Tender.**

**The Authority would also refer clarifications which included “*Or any other Technique which does not involve physical connection of cables to the tablet in the eventuality that such a direction is pursued*”.**

**In this regard, the Contracting Authority was requesting the Availability of support for wireless charging and there were various ways and techniques to obtain this support.**

**b) The Contracting Authority maintains that through the Evolving Technology, the Technique of Wireless charging of the Tablets were not only sustained but rather improved.**

**Reached the following conclusions:**

**1. With regards to the Appellant's First Concern, this Board, after having heard the submissions made by both the Appellant Company and the Contracting Authority, credibly opines that no proof of evidence was presented by the Appellant to show that the Technical Specifications of the Tender were somewhat discriminatory or limiting the scope of fair and open competition.**

**During the submissions, it was credibly evident that the Technical Specifications did not, in whatsoever manner, favour a particular brand of equipment, moreover, this Board justifiably notes that even, when and if, the Ancillary equipment to allow wireless charging will**

**be required by the Contracting Authority, these same requirements will be procured through a new Tender. In this regard, this Board credibly upholds the Contracting Authority's line of action.**

**This Board also notes that the Technical Specifications of the Tender requests support for wireless charging. At the same instance, this same Board justifiably notes that the Ancillary Equipment allow for various techniques of wireless charging.**

**This Board would also refer to Clarification 1 dated 15 March 2016, wherein it is clearly confirmed by the Contracting Authority that *“Tablets must support wireless charging via conduction OR any other technique which does not involve the Physical Connections of cables to the Tablet.”***

- 2. With regards to the Appellant's Second Contention, this Board is fully aware that Great Advancements are being achieved in the IT Technology; however, this Same Board does not foresee a problem with regards to the future wireless charging facilities as this would be highly beneficial for all users of such tablets. The Technology is evolving quickly and some suppliers, (including the Appellant's), are using the new Technology.**

**However, this Board would justifiably opines that it is the responsibility of the Contracting authority to define the Technical Requirements in a Tender and at the same time, it is the obligation of the Contracting Authority to ensure that the Technical Specifications as dictated does indeed represent the actual requirement of the same Contracting Authority. At the same instance, it is the obligation of the prospective Bidder to adhere to the dictated Technical Specifications.**

**In view of the above, this Board dismisses the Pre-Contractual Concerns raised by the Appellant Company and recommends that the Tendering Process is to be continued.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*23 May 2016*