

PUBLIC CONTRACTS REVIEW BOARD

Case 1099 – MFSA 02/2017 – Tender for the Supply, Installation and Deployment of a Self-Service Business Intelligence Software Solutions

The Publication Date of the Call for Tenders was 3 February 2017 whilst the Closing Date for Call of Tenders was 10 March 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 120,000.

Nine (9) Bidders have submitted offers for this Tender.

On 5 October 2017, Icon Studios Limited filed an Objection against the decision taken by the Malta Financial Services Association to award this said Tender to iMovo Limited for the price of € 119,750 (Exclusive of VAT) against a deposit of € 600.

On 7 November 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Icon Studios Limited

Dr Gege' Gatt	Representative
Dr Peter Fenech	Legal Representative
Dr Lena Sammut	Legal Representative

Recommended Bidder – iMovo Limited

Mr Pierre Mallia	Representative
Dr Christian Farrugia	Legal Representative

Contracting Authority – Malta Financial Services Association

Mr Glen Ellul	Secretary, Evaluation Board
Mr Joseph Demanuele	Member, Evaluation Board
Mr Alan Cassar	Representative
Dr Aidan Buhagiar	Legal Representative
Dr Katya Psaila Savona	Legal Representative

Following an introduction made by the Chairman of the Public Contracts' Review Board, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Peter Fenech, a Legal Representative for Icon Studios Limited, opened by saying that they were objecting on three grounds. The First Grievance was that, the Malta Financial Services Association did not understand, the Appellants Bid with regards to the Tender Document's claim. In that, the solution had to be fully supported by the Bidder. Icon Studios Limited understood this and submitted their Offer according to the requests made in the Tender Document.

The Contracting Authority requested an immediate support for any problem encountered, continued Dr Fenech. His clients, on the other hand suggested that, in case of basic issues, these, could be tackled by their trouble shooting department, then the Appellants would intervene, should the need arises. Dr Peter Fenech quoted Page 103 of his client's offer which *inter alia* stated that:

“ICON will efficiently handle incidents or service requests received by the IT Help Desk via an established process in which requests are effectively and efficiently received, recorded, processed and resolved”.

The Appellants felt, that there should not be an overlapping element between the trouble shooting department at the Malta Financial Services Association and themselves. They had a standard format in presenting their bids and Icon Studios Limited felt that the Contracting Authority should have sought a clarification, if they saw something which was not clear.

Dr Peter Fenech continued, by illustrating his client's Second Grievance which the Contracting Authority alleged, that they did not want conditions which could free the Appellants from their responsibilities. This issue could have also been subject to a clarification since Icon Studios Limited was not the software programmers but, offered only support services on the same.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether Icon Studios Limited owned the software. Dr Peter Fenech, Legal Representative for the Appellants replied that his clients provided only support for the software and solve any issues encountered, such as; software issues and software errors.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked, whether the third parties were involved with regards, to the upgrading of the software for which Dr Peter Fenech, a Legal Representative for the Appellants replied in the affirmative.

Dr Lena Sammut, a second Legal Representative for Icon Studios Limited added that the software was provided by another company. The Appellants then provide the software and support services to the Contracting Authority.

With regards their Third Grievance, Dr Peter Fenech, one of the Legal Representatives for Icon Studios Limited quoted Page 106 of their offer which *inter alia* said that:

“Software Assurance is the process in which new software is installed when made available by Minely to update an existing computer program or its supporting data, to fix or improve it through a limited amount of new items, for example, fixes, corrections and minor enhancements of and to the Software. This includes fixing security vulnerabilities or Problems.

ICON will make available any updates and patches as they are made available from Minely and will ensure regression testing at software level to avoid any difficulties which may occur with a release”

Dr Fenech then also quoted Page 102 of their offer which *inter alia* said that:

“Without prejudice to Article 15 hereunder, Upgrades and Changes are treated as a project outside the scope of this Agreement”.

Dr Peter Fenech continued by saying that the offer presented by Icon Studios Limited was; that they bound their submission, with the purpose for any requests made by the Contracting Authority, as emphasised in one of the clauses, on Page 19 of the Tender Document which said that:

“Deploy/Install any enhancement including software updates, patches, service packs and upgrades”

Dr Peter Fenech continued by saying that, by including the word “*upgrades*” with the word “*enhancements*”, the meaning of the latter is completely changed, since it could be interpreted differently. At this stage, Dr Fenech suggested that the Director of the Appellant Company was to testify and presented for further questioning by all parties concerned.

At this point, Dr Gege’ Gatt, the Director of Icon Studios Limited holding ID Card Number 123579 M, was summoned to testify under oath before the Public Contracts Review Board.

Following Dr Gatt’s testimony, Dr Peter Fenech, a Legal Representative for Icon Studios Limited, said that with regards to the question asked by the Public Contracts Review Board about the maintenance, the issue was whether this was covered by the term “*enhancement*” or not.

Dr Katya Psaila Savona, the Legal Representative for the Malta Financial Services Association, said that when the Tender was issued, her clients set up a Clarification Meeting for all interested parties in this Tender. The Prospective Bidders attended and asked questions. The Clarification minutes, were then issued. From the information given to Dr Psaila Savona, it resulted that the Appellants did not attend for this Clarification Meeting. Any further Clarifications were therefore made, by means of the Electronic Public Procurement System.

The Malta Financial Services Association, continued Dr Psaila Savona, could only clarify and not rectify since if her clients discussed these issues with the Appellants, they would have distorted the “*Level Playing Field*” principle. The Contracting Authority wanted full support from the prospective Bidders despite having themselves a first line of support. This was a requisite in the Tender Document. If the Appellants had any doubts, they should have sought Clarifications.

Dr Katya Psaila Savona then referred to Page 4 of their Reasoned Letter of Reply dated 12 October 2017 which *inter alia* stated that:

“It may become necessary as a part of ICON’s product lifecycle to desupport certain Software and, therefore ICON reserves the right however any desupport will be subject to a six (6) month notification warning”.

This reasoning, which was originally present in the Appellant's offer, showed that, the Software Assistance had a definite term which showed that they might back up from the agreement if chosen. With regards the Appellant's Third Grievance, Dr Katya Psaila Savona wanted to bring in a Witness to explain some issues.

At this point, Mr Jacques Mizzi, an Information Systems Leader within the Malta Financial Services Association, holding ID Card Number 230088 M was summoned by the same Contracting Authority to testify under oath before the Public Contracts Review Board.

At the end of Mr Mizzi's testimony, Dr Katya Psaila Savona, the Legal Representative for the Malta Financial Services Association said that Icon Studios Limited have offered enhancements and not upgrades.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that since the Appellant submitted the declaration, and they were going to abide to all Tender conditions, therefore the latter, should have included the upgrades and updates.

Dr Katya Psaila Savona, the Legal Representative for the Malta Financial Services Association remarked that with regards to the comment that, enhancement was an umbrella term, the Appellants should have either attended the Clarification Meeting or else sought a Clarification at a later stage. She then quoted Page 102 of Icon Studios Limited's offer which *inter alia* stated that:

“Without Prejudice to Article 15 hereunder, Upgrades and Changes are treated as a project outside the scope of this Agreement”.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked why the Appellants did not attend the Clarification Meeting organised by the Malta Financial Services Association for this Tender.

Dr Peter Fenech, a Legal Representative for Icon Studios Limited replied that, the fact that his clients did not attend for the meeting, it meant, that the Contracting Authority gave a clear definition regarding the word “*enhancements*” which the Appellants have understood.

At this point Dr Fenech referred to the case IT Limited Ericsson Microwave System AB vs Department of Contracts issued by the Hon Civil Court on 3 March 2006 which stated that, the Contracting Authority had to be clear in its interpretations. Icon Studios Limited declared that, they were going to supply the Malta Financial Services Association with everything they offered and that the latter should have sought a Clarification, if they thought that the enhancements were out of scope. Article 15 of the Appellant's offer was a clear one. With regards the support, Dr Peter Fenech felt that Dr Psaila Savona did not understand Page 107 of the Appellant's offer.

Dr Anthony Cassar asked the Appellants to explain the clause in Page 102 of their offer which stated that:

“Without Prejudice to Article 15 hereunder, Upgrades and Changes are treated as a project outside the scope of this Agreement”.

Dr Peter Fenech, one of the Legal Representatives for Icon Studios Limited, replied that the way his clients have structured their Bid meant that their clients were going to give a number of hours for any assistance required over and above the Tender.

With regards the Clarification meeting, Dr Fenech noted that the Contracting Authority has made a lot of emphasis on the fact that his clients failed to attend for this meeting. At that stage, Icon Studios Limited felt that, there was no need to clear anything.

Dr Katya Psaila Savona, the Legal Representative for the Malta Financial Services Association said that the Clause 10 b) in Page 102 of the Appellant's offer was clear and showed that the upgrades were outside the scope of the agreement. That was the way to be read and the Witness supplied by the Contracting Authority had the same interpretation.

Dr Peter Fenech, one of the Legal Representatives for Icon Studios Limited, countered that it was for that reason that the Contracting Authority should have sought a clarification if they were not clear about the upgrades issue. The decision taken, by the Hon Civil Court in the IT Limited Ericsson Microwave System AB vs Department of Contracts case on 3 March 2006 was a clear one and it stated that, what was written in the Tender Document counted.

Dr Christian Farrugia, the Legal Representative for iMovo Limited, the Recommended Bidders said, that his clients agreed with the position taken by the Malta Financial Services Association. All Bidders were given the same treatment and that the Recommended Bidders have completely adhered to the Tender Requirements. The first two points were completely satisfied by iMovo Limited who offered a specialist in Information Technology in their Bid.

At this stage, the Public Hearing was adjourned to Tuesday 21 November 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Icon Studios Limited (herein after referred to as the Appellant) on 9 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MFSA 02/2017 listed as Case No 1099 in the records of the Public Contracts Review Board, awarded by the Malta Financial Services Association (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Peter Fenech

Dr Lena Sammut

Appearing for the Contracting Authority: Dr Katya Psaila Savona

Whereby, the Appellant contends that:

- a) **The Contracting Authority misunderstood the contents in their offer with regards to “*Full Support*” referred therein. In this regard, the Appellant maintains that although his offer suggested that, in cases of basic problems, the latter issue can be dealt with by the Malta Financial Services Association, Icon Studios Limited also declared that it would provide the “*Full Support*” for the tendered services;**

- b) **The Appellant Company also insists that by suggesting the mode of “*First Stage Support*”, it did not imply that it will exonerate itself from the responsibilities and duties, as requested in the Tender Document;**

- c) **Icon Studios Limited refers to page 102 of their offer and contend that although they stated that “*Upgrades and Changes are treated as a project outside the scope of this agreement*”, confirmation of the provision of full support was declared under the heading “*Enhancements, Upgrades are included*”.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 12 October 2017 and its verbal submissions during the Public Hearing held on 7 November 2017, in that:

- a) The Tender Document dictated a “*Full Support*” requirement whilst Icon Studios Limited’s offer denoted certain conditions which would not fulfil this requirement. If, on the other hand, the Appellant failed to understand what was actually requested, he had other remedies available to him to clarify any misunderstandings prior to the submission of his offer;**

- b) The Malta Financial Services Association refers to the Appellant’s submission relating to “*Desupport*”, wherein it was stated that “*it may become necessary, as part of Icon’s product life cycle to desupport certain software and therefore, Icon reserves the right however, that any desupport will be subject to a six month notification warning*”. In this regard, the Malta Financial Services Association insists that through this declaration, the Appellant Company is not binding itself to a 5 year agreement for ongoing maintenance and technical support as duly requested in the Tender Document;**

- c) The Contracting Authority contends that the Appellant’s concern regarding the interpretation of the word “*Enhancement*” and**

whether the latter word comprises “Upgrades”, would have evened out had the Appellant requested clarifications.

This same Board also noted the Testimonies of the witnesses namely:

- 1. Dr Gege’ Gatt duly summoned by Icon Studios Limited**
- 2. Mr Jacques Scerri duly summoned by the Malta Financial Services Association**

This Board has also taken note of the documents submitted by the Malta Financial Services Association which consisted of:

- 1. Clarification Note 1 in response to Clarification Requests Submitted on 9 February 2017;**
- 2. Minutes of the Clarification Meeting held by the Malta Financial Services Association on 14 February 2017**

This Board would like to respectfully point out that although this Appeal refers to contents of a technical nature in the IT field, the objections raised by the Appellant Company, concern the interpretation of terminology contained in the Tender Document. In this regard, this Board opines that

there are three major issues to be considered and these are “*Full Support*”, “*Adherence to the Tender Conditions*” and the interpretation of the word “*Enhancement*”.

1. Full Support

This Board refers to Section 4 – Technical Specifications, Clause 9, wherein it is stated that,

“Solution must be fully supported by the Bidder. This includes training, technical support and software upkeep.”

Through this particular condition, the Malta Financial Services Association clearly dictated that the support must be in full, which means including all services to maintain the Solution. On the other hand, this Board also noted that Icon Solutions Limited qualified its support by including the phrase,

“Customer is required to establish and maintain a “First Line Support” for the deliverables to directly serve its internal users and end-users. If after reasonable commercial efforts, the Customer is unable to diagnose or resolve problems or issues for the deliverables, the Customer may contact ICON’s IT Help Desk for “Second Line Support”.

This Board opines that, through this qualification note, the Appellant is, in fact, imposing upon the Contracting Authority what action is to be taken with regards to “*First Line Support*” so that a substantial deviation from the requirements dictated in the Tender Document is being imposed.

In this regard, this Board would like to point out that the Tender Document did not specify that a “*First Line Support*” will be carried out by the Contracting Authority itself. In fact the conditions in the Tender Document make it vividly clear that the Malta Financial Services Association requests full support and not partial.

It is a well-established principle that the Contracting Authority has the right to dictate conditions in a Tender Document to safeguard its interests, provided that such conditions are fair, just and do not limit the scope of competition and such conditions contained in this particular case, fully satisfied this principle.

This Board also justifiably notes that by qualifying the “*First Line of Support*”, the Appellant is not only imposing upon the Contracting Authority a condition which does not exist in the Tender Document,

but also it was changing the basic substance of “*Full Support*” which the Tender requested.

The possible fact that such an imposed clause might have been a condition in the Appellant’s standard agreements does not, in any credible way, justify the inclusion of such a qualification in its offer. At the same instance, Icon Studios Limited should have sought clarifications prior to the submissions of such an inclusion as the latter affected the core of the condition of the solution being requested by the Malta Financial Services Association. In this regard, this Board does not uphold Icon Studios Limited’s First Grievance.

2. Adherence to the Tender’s Conditions

With regards to the Appellant’s Second Contention, this Board would like to respectfully point out that one of the prime obligations of a prospective Bidder is to strictly abide by the conditions stipulated in a Tender Document and to ensure that prior to the submission of his offer, he had diligently understood the exact dictated requirements.

One has to acknowledge and appreciate that the basic objectives of these conditions which, in a summarised form, should safeguard that the public funds available for the particular project are properly regulated; the Tender itself is issued in a transparent manner and promotes a Level Playing Field for all prospective Bidders, yet, last but not least, the conditions rendered therein would render the desired results to the Contracting Authority.

In this particular case, as had been credibly established, the Malta Financial Services Association requested “*Full Support*” of the Software Solution being tendered for and in this respect; this Board justifiably interprets the phrase “*Full Support*” to mean exactly all the dictated services in the Tender Dossier to be executed so that the Contracting Authority would achieve its objectives.

At the same instance, this Board notes that item “*A4-Service Level Agreement*”, on page 18 of the Tender Document, does not include any exclusions or exceptions to the conditions therein to allow the Bidder to be tolerated for any deviation therefrom and in this respect, the standard clause referred to above which was submitted in the Appellant’s offer did, in fact, deviate from the obligations dictated in the Tender Dossier and in this regard, this Board does not uphold the Icon Studios Limited.

3. Interpretation and Inclusion of the word “*Enhancement*”

This Board would respectfully refer, to Page 19 of the Tender Document, with particular reference to “*Requirement II – Preventive Maintenance*”, wherein included in the dictated services are the following sub clauses:

- Carry out the necessary service to keep the systems in an optional state and tuned for best performance, reliability and security;**
- Deploy/install any enhancement including software updates, patches, services packs and upgrades;**
- Attend to any incident and help desk requests.**

The above three conditions clearly denote what the Malta Financial Services Association was requesting with special reference to all above mentioned inclusions. This Board also refers to page 106 of the Appellant’s offer where under clause 14.1, no mention was made of “*Upgrades*” in the list of tasks to be performed. With regards to the interpretation of the word “*enhancement*”, this Board notes that the Contracting Authority, in the above mentioned Clauses, was in fact

qualifying “*Updates*” and “*Upgrades*” which were to be included so that this Board opines that the word “*Enhancement*” does not automatically include such services and from the testimony of the Technical Witness duly summoned by the Malta Financial Services Authority, it was credibly confirmed that enhancements do not include upgrades. In this regard, this Board does not uphold the Appellant’s Third Contention.

On a general note, this Board would like to recommend that in such similar Tenders, the Malta Financial Services Association should include a “*Glossary of Technical Terms*”, being quoted in the Tender Document so that any confusion in the interpretation of technical terminology is eliminated. At the same instance, this Board would like to justifiably point out that the Appellant’s grievances, in this regard, could have been evened out had the latter requested clarifications and attended the “*Clarification Meeting*” duly held for such purposes, prior to the submission of his offer.

In view of the above, this Board:

- a) Upholds the Evaluation Board’s decision in the adjudication of Icon Studios Limited’s offer;

b) Does not uphold the Appellant’s grievances for reasons mentioned above.

This Board would however consider the fact that, as mentioned in 3 above, the inclusion of a “*Glossary of Technical Terms*”, could have avoided misinterpretation of the word enhancement and in this regard, this Board recommends that the deposit paid by Icon Studios Limited should be fully refunded.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

21 November 2017