

PUBLIC CONTRACTS REVIEW BOARD

Case 1113 – CT 3033/2017 – Supply Tender for the Acquisition, Installation, Commissioning and Testing of Equipment Partially Using Energy Efficient Equipment Core Infrastructure

The Publication Date of the Call for Tenders was 1 September 2017 whilst the Closing Date for Call of Tenders was 3 October 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,198,000.

Three (3) Bidders have submitted offers for this Tender.

On 20 November 2017, Computime Limited filed an Objection against the decision of the Planning Authority to award Lot 2 of the Tender to Merlin Computers Limited for the price of € 424,979.20 (Exclusive of VAT) against a deposit of € 4,350.

On 12 December 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Computime Limited

Mr Andrew Borg	Representative
Mr Chris Ellul	Representative
Mr Stephen Vella	Representative
Dr Lisa Abela	Legal Representative
Dr Steve Decesare	Legal Representative

Recommended Bidder – Merlin Computers Limited

Mr Joel Spiteri	Representative
-----------------	----------------

Contracting Authority – Planning Authority

Mr Kevin Portelli	Chairperson, Evaluation Board
Mr Stephen Conchin	Member, Evaluation Board
Mr Chris Galea	Member, Evaluation Board
Mr David Spiteri	Member, Evaluation Board
Mr Keith Cappello	Representative
Mr Saviour Formosa	Representative
Ms Ashley Hili	Representative
Dr Ian Borg	Legal Representative

Department of Contracts

Dr Christopher Mizzi	Legal Representative
----------------------	----------------------

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, Dr Steve Decesare, the Legal Representative for Computime Limited, said that his clients wanted to cross-examine the Chairman of the Evaluation Board.

At this point, Mr Kevin Portelli, the Chairperson of the Evaluation Board, holding ID Card Number 315174 M was summoned by Computime Limited to testify under oath before the Public Contracts Review Board.

Following Mr Portelli's testimony, Mr Keith Cappello, the Procurement Manager within the Planning Authority, holding ID Card Number 491582 M was summoned by the Department of Contracts and the same Planning Authority to testify under oath before the Public Contracts Review Board.

Following Mr Cappello's testimony. Mr Mark Anthony Ellul, a Principal Officer in the Planning Authority who was also the Technical Originator for this Tender, holding ID Card Number 357284 M, was summoned by the Department of Contracts and the same Planning Authority to testify under oath before the Public Contracts Review Board.

Following Mr Ellul's testimony, all parties present agreed upon suggestion from the Public Contracts Review Board that the latter was to appoint a Technical Expert to decide on the matter.

Second Hearing

On 15th February 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a second public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Computime Ltd

Dr Steve Decesare	Legal Representative
Mr Andrew Borg	Representative
Mr Stephen Vella	Representative
Mr Chris Ellul	Representative

Contracting Authority – Planning Authority

Dr Ryan C Pace	Legal Representative
Dr Robert Abela	Legal Representative
Mr Kevin Portelli	Chairperson Evaluation Board
Mr David Spiteri	Member Evaluation Board
Mr Chris Galea	Member Evaluation Board
Mr Stephen Conchin	Member Evaluation Board
Mr Keith Cappello	Representative

Department of Contracts

Dr Chris Mizzi	Legal Representative
----------------	----------------------

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, in a brief introduction mentioned that this was the second hearing of this appeal - the first hearing having been deferred to hear the testimony of an expert witness, Mr Anthony Vassallo, whose Report had been distributed to both parties. The Chairman confirmed that the expert witness' decision would be final.

Mr Anthony Vassallo (441167M) testified on oath that he was Chief Information Officer at Malta Enterprise. His qualifications were a B.Sc. in Computing and Information Systems and a M.Sc. in Distributing Systems Informatics. In reply to very detailed series of technical questions witness testified that as stated in his report, in his view the product offered by Computime met the storage requirements specified in the tender documents. Although there was a distinct difference between a server and a backup appliance they both fulfilled the same function.

Dr Christopher Mizzi, Legal Representative for the Department of Contracts sought permission to call a witness on behalf of the Planning Authority.

Mr Mark Anthony Ellul (357284M) stated on oath that he was the person who had drafted the specifications for the tender and that he did not form part of the Evaluation team. He confirmed that at the first hearing his expressed concern was about the storage capacity of the server offered by Appellant, rather than that it was a server and not a backup appliance. He accepts that the appliance offered by the Appellant did have the requested storage capacity of 70 Tbs – in fact the offered appliance had a higher capacity than this.

Dr Ryan Pace, Legal Representative of the Planning Authority, said that the Authority had asked for an appliance but been offered a server by Applicants. This was intrinsically different from what was requested and there was no need for technical experts to be involved as the offer was technically non-compliant. This point was re-iterated by Dr Robert Abela.

Dr Decesare stated that it was the prerogative of the Board to decide if the disqualification was right. The Technical Expert had confirmed that his clients' product met the storage capacity requested, and the Contracting Authority cannot change the basis on which they had disqualified the tender.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by Computime Limited, (hereinafter referred to as the Appellant) on 20 November 2017, refers to the contentions made by the same Appellant with regards to the award of

Tender of Reference CT 3033/2017 listed as Case No 1113 in the records of the Public Contracts Review Board awarded by the Planning Authority, (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Robert Abela

Dr Ian Borg

Dr Christopher Mizzi

Dr Ryan Pace

Whereby, the Appellants contend that:

- a) Their original objection related to the alleged reason given by the Planning Authority for their offer's rejection, in that the diagram submitted was inconsistent with the technical offer. In this regard, the Appellants maintain that they had explained the obvious error, through a clarification and in any way, such a trivial mistake did not affect, in any particular manner, the technical offer so submitted by the Appellants.**

b) During the submissions, it became evidently clear that the major obstacle in the Appellants' offer was the storage facilities of the equipment being offered and in this respect, Computime Limited contend that their product had sufficient storage facilities, if not more, than that stipulated in the tender document.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 29 November 2017 and its verbal submission during the Hearings held on 12 December 2017 and 15 February 2018, in that:

a) The Planning Authority insists that the Appellants, in their offer, proposed a particular standard of usable storage capacity which was incompatible with the literature and clarification duly submitted by the same, during the evaluation stage.

This Board also considered the testimonies of the witnesses namely,

- 1. Mr Kevin Portelli duly summoned by Computime Limited;**
- 2. Mr Mark Anthony Ellul duly summoned by the Planning Authority;**
- 3. Mr Keith Cappello duly summoned by the Planning Authority;**

4. Mr Anthony Vassallo, a Technical Expert duly appointed and summoned by the Public Contracts Review Board.

This Board has also taken note of the Technical Report submitted by Mr Anthony Vassallo.

This Board, after having examined the relevant documentation to this Appeal and heard the submissions made by all interested parties, including the testimonies of the technical witnesses, would point out that due to the technical nature of this appeal it had to rely on the submissions made by the same technical witnesses and the report compiled by the appointed expert.

During the first hearing, this Board justifiably noted that the main issue of this appeal was the storage capacity of the Appellants' equipment which was being proposed by the latter in their offer. To this effect, it was agreed by all parties that this Board would appoint an independent expert who would examine the technical offer of Computime Limited and report thereon. All the parties were given the opportunity to submit questions to the expert to answer on his findings.

1. With regards Computime Limited's first contention, this Board notes that the reason given by the Planning Authority for the discarding of the Appellants' offer was the inconsistent diagram, as submitted by the latter during evaluation stage. It was also noted that through a clarification dated 1 November 2017, the Appellants gave the explanation as to why their diagram contained an error.

In this respect, one must acknowledge and appreciate the fact that, no evidence was presented by the Authority that the Appellants' offer was technically non-compliant, except for the fact that the diagram was not compatible with the technical offer. At the same instance, this Board was not credibly comforted by the Planning Authority that, after submitting the clarifications, Computime Limited's offer was still non-compliant.

It is an accepted principle that the diagram had to collaborate with the technical offer and quite appropriately, the Evaluation Board requested the diagram and quite rightly, the Planning Authority requested clarifications during the evaluation stage. However, this Board was not made aware whether, after such clarification, the explanation given by the appellants satisfied the diagram consistency with the technical offer.

This Board also refers to the decision taken by the evaluation committee which although it refers to Article 4.3 whereby, “*The Bidder is to provide a diagram depicting the proposed solution including connectivity*” and confirms that the Appellants admitted the error in the diagram, the same report does not indicate whether, after the clarification, the appellants’ offer was still inconsistent.

In this regard and after considering the lengthy submissions during the second hearing, this Board does not consider the issue of the diagram to be the real cause for the Appellants’ offer rejection, but rather the question of whether Computime Limited’s equipment meets the technical specifications with regards to storage capacity.

2. With regards to the Appellants’ second contention, this Board would respectfully refer to the EU Guidelines with regards to the drafting of the technical specifications in a tender document, which should include the following features:

- Be precise in the way they describe the requirements;**
- Be easily understood by the prospective Bidders;**

- **Have clearly defined, achievable and measurable objectives;**
- **Not mention any brand or requirement which might limit competition or if brands are mentioned, include the term, “*or equivalent*”;**
- **Provide sufficient detailed information to enable prospective Bidders to submit realistic offers.**

This Board notes that, in general, the technical specifications as dictated in the tender document meet the above mentioned criteria, however, although it does not affect the merits of this case, reference should be made to the experts remark, in that he pointed out that,

“The tender document does not stipulate how such scalability is to be addressed and therefore there are different options”.

Through this statement, the expert is confirming that the tender document requested certain capabilities but it did not dictate the way that such conditions are to be achieved.

This Board heard exhaustive technical explanations given by the technical experts and the appointed expert but, at the same time, also credibly established that the issue with regards to the Appellants' offer rejection was the storage capacity of Computime Limited's equipment and in this regard, this Board would refer to the expert's testimony and report, where the technical expert stated:

“The appliance being offered by the claimant (Appellant) meets and exceeds the initial minimum requirements of 40 Tb storage after Raid 6”.

Again in his report, the expert asserts the Appellant's equipment storage capacity, as follows:

“As discussed in section 5 of this report, (calculation of storage space), the offered appliance also meets and exceeds the scalability requirements of 70 Tb storage after Raid 6”.

When the same expert was asked by this Board whether the Appellants' equipment meets the requested storage capacity, his reply was:

“Żewg hard drives l-oħrajn li jista jesagħhom, jiena ma nkludejtomx fil-kalkolazzjoni tiegħi għax imxejt fuq il-Large Point factor biss. Jigifieri xorta fadallu spazju għal tnejn ohra terġa”

At this stage of consideration, this Board would also refer to the testimony of the witness, namely, Mr Mark Anthony Ellul, a technical witness duly summoned by the Planning Authority, as follows:

Question: *“Issa l-initial minimum capacity, x’ kienet fit-Tender?”*

Reply: *“Ahna tlabna 40 usable Terabytes”*

Question: *“Dak it-12LFF jilhaqhom il-40 usable Terabytes?”*

Reply: *“Iva, jien qatt m’ ghedt li le.”*

Again, during the same cross examination of the same witness, it was confirmed that:

Question: *“Hemm l-ispazju neċessarju? Iva jew le?”*

Reply: “Iva”

From the expert’s report and the testimony of the technical witness duly summoned by the Planning Authority, this Board is credibly convinced that the equipment offered by Computime Limited had enough storage capabilities to satisfy the conditions as stipulated in the Tender Document and in this regard, this Board upholds the Appellants’ second contention.

- 3. During the second hearing, it was also alleged that Computime Limited’s equipment was not in accordance with the specifications of the tender document, in that the Planning Authority requested a “Backup Appliance” whilst the Appellants offered a “Server”. This Board will not enter into the merits of this issue, as it was not indicated as a deficiency in the evaluation report and it was not being mentioned that such an issue was one of the reasons for the Appellants’ offer rejection; however, this Board notes the testimony of the expert in this regards, as follows:**

Question: “Ghalik bhala espert tekniku, tghaddi ghalik differenza bejn “Server” u “Appliance”?”

Reply: “Le. Ghax fil-verita Appliance huwa Server li s-software xorta fuqu jrid jiġi. Issa “Hardware based” jew “Software based” bażikament huwa “Server”.

In this regard, this Board justifiably notes that there was enough credible evidence that Computime Limited’s equipment was compliant in this respect.

- 4. On a general note, after hearing the submissions made by the technical witnesses, this Board, although acknowledging that the Planning Authority has the prerogative to dictate the type of equipment it requires, one must also ensure that, as long as the equipment offered by the Appellants is compliant to carry out the dictated functions, the latter’s offer should also be considered in the evaluation process.**

In view of the above, this Board:

- i) Does not uphold the Planning Authority’s decision in the award of the Tender;**

ii) Upholds Computime Limited's contentions and recommends that the deposit paid by the same is to be fully refunded;

iii) Recommends that the Appellant's offer is to be reintegrated in the Evaluation Process.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

1st March 2018