

Case 1115 – TMFA 002/2017 – Tender for the Supply and Delivery of Firewalls at the Ministry of Foreign Affairs

The Publication Date of the Call for Tenders was 28 March 2017 whilst the Closing Date for Call of Tenders was 20 April 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 99,102.

Two (2) Bidders have submitted offers for this Tender.

On 19 December 2017, Computime Limited filed an Objection against the decision of the Ministry for Foreign Affairs & Trade Promotion to award the Tender to ICT Solutions Limited for the price of € 59,269 (Exclusive of VAT) against a deposit of € 400.

On 19 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 Neil Bianco	Representative
Mr Norman Cutajar	Representative
Dr Steve Decesare	Legal Representative

Recommended Bidder – ICT Solutions Limited

Mr Keith Fearn	Representative
Mr Liam Pace	Representative
Dr Simon Schembri	Legal Representative

Contracting Authority – Ministry for Foreign Affairs & Trade Promotion

Mr Joseph Deguara	Chairperson, Evaluation Board
Mr Ferdinand Zammit	Member, Evaluation Board
Ms Cindy Abela	Representative
Mr Vincent Cassar	Representative
Mr Victor Grech	Representative
Mr Eric Pirotta	Representative

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

Dr Steve Decesare, the Legal Representative for Computime Limited opened by giving some backgrounds on the facts. The Tender was issued by the Ministry for Foreign Affairs and Trade Promotion on 28 March 2017 and it was issued for a specific product, Fortinet 90D Wireless. Computime Limited have firewalls which come from a different brand.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what a firewall is for which Dr Steve Decesare, the Legal Representative for Computime Limited replied that a firewall is a security system or software which can prevent viruses. Mr Joseph Deguara, for the Ministry for Finance and Trade Promotion added that a firewall is an equipment which serves as a wall to contain security.

Dr Steve Decesare, the Legal Representative for Computime Limited added that in view of the fact that they do not supply any Fortinet firewalls and also of the fact that the Public Procurement Regulation insists that Tenders are to be open for free competition; they have sent a Clarification on 25 April 2017 where the Appellants drew their attention about the latter and therefore asked about which specifications are needed for the Tender to be satisfied.

The Contracting Authority replied that the advice given by the Malta Information Technology Agency was that the software needed must complement the current Government Infrastructure. Here Dr Decesare quoted part of Clarification 4 which *inter alia* stated,

“The Contracting Authority will also accept other products deemed equivalent by MITA, namely Cisco firewalls (inclusive of Smartnet 8x5xNBD), which have technical specifications equivalent to the Fortinet – 90D Wireless with POE Firewall (Part No FWS-90D-POE) with Yearly Support 8x5xNBD”

Dr Steve Decesare added that the Contracting Authority did not give any indication on which Cisco model can be considered as equivalent to the Fortinet ones. The Appellants therefore, contacted Cisco and asked them for a similar firewall in order to submit an offer for this Tender.

At the end of the Evaluation Stage, Computime Limited received a letter from the Ministry for Foreign Affairs and Trade Promotion, which eventually was the Letter of Rejection dated 17 November 2017 where *inter alia* it was stated that,

“Cisco Meraki MX65W-HW firewall was not equivalent to the Fortinet 90D firewall”

The Appellants' Legal Representative concluded his first intervention by saying that his clients did not understand why their offer was being rejected and following further communication between them and the Contracting Authority, the latter instructed Computime Limited to file an Objection before the Public Contracts Review Board.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that this Board has said many times that the Contracting Authority was bound to send the specific reasons on why offers were rejected so that any prospective Appellants would know for which grounds they were going to object.

Dr Steve Decesare, the Legal Representative for Computime Limited said that they have filed their Objection following an examination of both the Cisco and the Fortinet data sheets to see which specifications were equivalent to each other.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellants whether they have received an extract of the Evaluation Report for which Dr Steve Decesare, the Legal Representative for Computime Limited replied that the extract was only given to them together with the Reasoned Letter of Reply.

The Appellant's Legal Representative added that besides this, this same letter issued by the Ministry for Foreign Affairs and Trade Promotion on 27 November 2017, still did not address certain reasons raised in their Letter of Objection dated on the same date apart from adding a Technical Advisory Report issued by the Malta Information Technology Agency which illustrated where the product submitted by the Appellants was not equivalent to what the Tender Document required. Dr Decesare said that if the requirements were not known, one couldn't know what was equivalent.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board declared that it was the Malta Information Technology Agency which had to deem whether the product submitted by Computime Limited was compliant or not.

Dr Steve Decesare, the Appellant's Legal Representative said that the Malta Information Technology Agency was responsible for the determination of what products satisfied the Tender Requirements.

Mr Joseph Deguara, representing the Ministry for Foreign Affairs and Trade Promotion, said that every Ministry was dependant on the Malta Information Technology Agency. Any IT product must be bought under recommendation of the latter since they had to complement the Government system currently in force.

The products bought by the Ministry are sent to the Malta Information Technology Agency staff in order for these to be configured and eventually sent to the Embassies. It was futile for a Bidder to come with a different product than the one currently used because if it does not configure with the current system, the product in question will not work. The Ministry for Foreign Affairs and Trade Promotion depends on the expertise given by the Malta Information Technology Agency personnel.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the issue at stake was whether the product submitted by Computime Limited was equivalent to the one submitted by the Ministry for Foreign Affairs and Trade Promotion.

Dr Steve Decesare, the Legal Representative for Computime Limited said that his clients have brought with them witnesses to testify on the matter. There was also an issue of principle wherein the Government cannot take any decisions unless there are specific reasons to do so. One cannot choose products on the basis of what another Government Agency recommended.

The principle which should be taken was that of opening the products for all the markets. Besides there was also another issue, continued the Appellants' Legal Representative. Clarification 4 issued by the Ministry for Foreign Affairs and Trade Promotion opened offers for items which were Cisco equivalent.

Dr Decesare continued explaining that Computime Limited have examined the data sheets in order to check which specifications were equivalent and asked Cisco International for guidance. The latter replied by recommending a product which was closest to the Tender Requirements and the Appellants have submitted an offer according to these specifications. Computime Limited could not do better than what they have done.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the witness for the Malta Technology Information Agency could be brought to witness on the matter for which Mr Steve Decesare replied that the witness present was the one who replied to the Clarification.

At this point, Mr Ramon Mangion, a Service Manager for the Networks Services within the Malta Information Technology Agency, holding ID Card Number 487980 M, was summoned by Computime Limited to testify under oath before the Public Contracts Review Board.

At the end of Mr Mangion's testimony, Mr Vincent Cassar another representative for the Ministry for Affairs and Trade Promotion explained that he immediately asked why a specific model was being requested when the Call for Tenders was issued. The Ministry's CIO replied that this was being done following consultation from the Malta Information Technology Agency, in view of the fact that the infrastructure available required that type of model. One must remember that there are also security reasons for doing this since there are Embassies involved.

Mr Cassar's first question at that stage was whether the Contracting Authority should issue a direct order or a call for Tenders and that he was not given guarantees that there was only one product which was compatible and therefore the Tender was issued on the Electronic Public Procurement System. When he asked whether there were other products which were equivalent to the Fortinet the reply was that there was the Cisco brand.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that Mr Vincent Cassar has pointed out the core of the problem and that this Board was considering this as a normal Tender whilst establishing also that the equivalency existed.

Mr Vincent Cassar, representing the Ministry for Affairs and Trade Promotion added that from the Tender was going to consider any equivalents from the first moment it was issued. He saw the Evaluation Report and the same Bidder in his offer said that he was going to submit a partially compliant product. The Evaluation Board requested the Malta Information Technology Agency staff to substantiate Computime Limited's claims. The Appellant's Bid was rejected on the basis of what the Chairperson of the Evaluation Board and the Technical Advisory Report said.

Dr Steve Decesare, the Legal Representative for Computime Limited said that no witness has testified on the fact that the security level for both brands was not the same. The question here was whether both brands were equivalent or not.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the products were not equivalent.

Dr Steve Decesare, the Legal Representative for Computime Limited wondered how one can determine the equivalence. If the data sheets of the two products were to be compared, one would note that no two products were exactly the same.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that one had to also see whether the Technical Data available in the Tender Document was not enough to establish what was really required.

Dr Steve Decesare, the Legal Representative for Computime Limited referred to Section 4 in Page 15 of the Tender Document which *inter alia* said,

“The Contracting Authority requires:

- i. Thirty-Five (35) in quantity firewalls; model: Fortinet – 90D Wireless with POE Firewall. Part No FWF-90D-POE”*

Dr Decesare added that there were other models in the market which had a certain high level but that no two data sheets will be found to be the same. The Law requires Contracting Authorities to have equivalent products which can satisfy the Tender Document in an objective way.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked how many Bidder submitted offers for this Tender for which Mr Joseph Deguara, a representative for the Ministry for Foreign Affairs and Trade Promotions replied that two Bidders have submitted offers for this Tender.

Dr Steve Decesare, the Legal Representative for Computime Limited added that the two Bidders were his clients and the Fortinet representatives.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked the Appellants why they said that the product offered was partially compliant with the Tender Requirements for which Dr Steve Decesare, the Legal Representative for Computime Limited added that if one had to compare the data sheets, they offered the Cisco model which was closer to the Tender Requirements. Dr Decesare added that the Specifications issued in the Tender Document were referring to Fortinet.

Mr Vincent Cassar, a representative for the Ministry for Foreign Affairs and Trade Promotion said that they replied that what the Appellants asked about the current setup within the Ministry was out of scope because of security issues.

Mr Joseph Deguara, another representative for the Contracting Authority added that Evaluation Board could have stopped evaluating the Appellant’s offer the moment they specified the model offered but they wanted further information regarding the architecture and its configuration system.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Appellant’s Bid would have been compliant at that stage for which Mr Vincent Cassar, on behalf of the Ministry for Foreign Affairs and Trade Promotion replied in the affirmative.

Dr Steve Decesare, the Legal Representative for Computime Limited said that his clients have explained why their product was partially compliant through a confirmation by Cisco.

Mr Carmel Esposito, a member of the Public Contracts Review Board remarked that if the product was equivalent the Appellants should have ticked the compliancy box in their offer.

Dr Steve Decesare, the Legal Representative for Computime Limited countered that the Ministry for Foreign Affairs and Trade Promotion has never confirmed that their product was equivalent. This had to be specified by the same Ministry as they did with the Fortinet products. Computime Limited had the product which was closest to the Fortinet product required by the Contracting Authority.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the words, *“Partially Compliant”* meant that the product was not compliant.

Dr Steve Decesare, the Appellant's Legal Representative said that the problem was the word equivalent. If the products were equivalent, then the data sheets had to be exactly the same and this will never happen in two products of two different brands.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked why the Technical Specifications were so compact for which Mr Joseph Deguara, for the Ministry for Foreign Affairs and Trade Promotion replied that the model requested in the Tender Document was a specific one.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that the Contracting Authority could have requested an equivalent specification at least in the Parameters.

Dr Steve Decesare, the Appellant's Legal Representative said that the Contracting Authority could have issued the hardware specifications and the system performance which they needed. Computime Limited has specified this in their Clarifications and had the Ministry given the specifications, the Appellants would have found a firewall which was equivalent to their requests. The Appellant's Legal Representative then quoted Clause 1.2 of the Tender Document which said,

"The subject of this Tender is the supply and delivery of Fortinet – 90D Wireless with POE Firewall at the Ministry for Foreign Affairs, inclusive of 8x5xNBD (8 Hours, 5 Days, Next Business Day Service Level) support".

Dr Steve Decesare continued explaining that his clients have asked what the current setup was in order to see what they could eventually offer. Dr Decesare finally requested the deposit to be refunded since Computime Limited has filed an Objection without knowing the real reasons why their offer was discarded.

At this stage, the Public Hearing was adjourned to Tuesday 9 January 2018 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 Computime Limited (herein after referred to as the Appellant) on 27 November 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference TMFA 002/2017 listed as Case No 1115 in the records of the Public Contracts Review Board, awarded by the Ministry for Foreign

Affairs & Trade Promotion (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Mr Vincent Cassar

Mr Joseph Deguara

Whereby, the Appellant contends that:

- a) The Contracting Authority did not give sufficient reasons as to why their offer was technically non-complaint and due to this deficiency, Computime Limited were unaware of the alleged technical deficiencies in their offer.**

- b) The Appellants contend that the specifications as dictated in the Tender Document related to a particular model. In this regard, the Ministry for Foreign Affairs & Trade Promotion has limited and hindered the principle of fair competition. To counter this, the Appellants provided an equivalent offer, which achieves the same objective.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 27 November 2017 and its verbal submissions during the Public Hearing held on 19 December 2017, in that:

- a) The Ministry for Foreign Affairs & Trade Competition insist that through their “*Letter of Rejection*” sent to the Appellants, they had quoted word for word as to why the latter’s offer was discarded.**

- b) Referring to the Bidder’s Checklist, the Appellant stated that his offer was “*Partially Compliant*”. This left the Evaluation Board with no other option but to deem Computime Limited’s offer as technically non-compliant.**

- c) Although the Tender Document specified a particular brand of product, the same document provided for equivalent products. In this regard, the model of the product so offered by Computime Limited was not technically equivalent to the Tender’s requirement.**

This same Board also noted the Testimony of Mr Ramon Mangion duly summoned by Computime Limited.

This Board has also taken note of the documents submitted by Computime Limited which consisted of a confirmation by Cisco that a product of

theirs, Cisco Meraki MX65W-HW was the most similar Firewall compared to the Fortinet 90D

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the Testimony of the Witness duly summoned by Computime Limited, opines that the two main issues of this Appeal are:

- 1. “*Insufficient Reasons Given for Rejection of Computime Limited’s offer*”, and**

- 2. “*Equivalence of the product offered by Computime Limited*”**

These will be considered as follows:

1. Reasons for Rejection

With regards to Computime Limited’s First Grievance, this Board refers to the “*Letter of Rejection*” dated 17 November 2017 wherein the reason given by the Ministry for Foreign Affairs & Trade Competition for discarding the Appellants’ Bid states:

“Cisco Meraki MX65W-HW Firewalls was not equivalent to the Fortinet 90 D Firewall”

This Board would respectfully refer to the numerous previous decisions of this Board, regarding the importance of rendering the specific reasons to the unsuccessful Bidders for the rejection of their offers. One must also emphasize that, in cases where the reason for rejection is of a Technical Nature, the specific deficient item of the product is to be identified and stated in the “*Letter of Rejection*”, it is only through this established and prudent procedure that the Objector can file an Objective Appeal.

In this particular case, this Board opines that although Computime Limited was informed that he was technically non-compliant, he was not given details as to where his offer was deficient. For any Appeal to be objective, the Appellant must be made aware of his offer’s deficiency so that if he wants to Appeal to the decision of the Ministry for Foreign Affairs & Trade Promotion, he would be in a position to substantiate his defence on the particular item on which he feels aggrieved.

In this respect, this Board opines that the “*Letter of Rejection*” dated 17 November 2017, did not specify at all the area where the

Appellant's offer failed the Test and in this regard, this Board upholds the Appellant's First Grievance.

2. Equivalence of Computime Limited's Offer

With regards to the Appellant's Second Contention, this Board would like to first and foremost, refer to the fact that the Tender Document, as duly confirmed during the Public Hearing, referred to a specific product and although logical reasons were given for such an inclusion, the same Tender Document contained the consideration of an "*Equivalent Product*".

One must however bear in mind that a "*Brand Name*" or "*Equivalent Specifications*" go beyond the Traditional Brand Name Specifications by demonstrating and emphasizing the idea that any Brands or models substantially equivalent to the Branded Product referred to the Tender Dossier will be considered for the contract award. One must also note that the Ministry reserves the right of determining equivalency. At the same instance, the Contracting Authority must also take into consideration that the Brand Name so designated in the Tender Dossier is for reference purposes only and must not be interpreted as a statement of preference.

This Board would also refer to the specifications and their contents, in that, the Technical Specifications define the characteristics of the service, supply or works that the Contracting Authority intends to buy, so that specifications are the most important part of the Tender Document and on a general principle, one must not neglect the fact that the specifications so dictated in a Tender Document have a direct influence on the price.

In this particular case, this Board has been made aware of the reasons for the inclusion of a Brand Name in the Tender Dossier and has also been assured that the inclusion of an “*Equivalent Product*” was present in the same document. In actual fact, from the submissions made by the Technical Witness, it was vividly explained how the Appellants’ were in a position to submit equivalent product, so that, in this respect, there was no limitation to fair competition.

This Board was also made aware that the offer submitted by Computime Limited, as duly stated by them, was “*partially compliant*” and from submissions made, it transpired that the Appellant’s offered the incorrect model. In this regard, this Board considered the Appellants’ explanation for this deficiency; however the same Board does not consider such reasons to justify the Appellants’ submission of a “*partially compliant*” offer.

This Board justifiably opines that Appellants alleged insufficient knowledge of the Technical Requirements as denoted in the Tender Document could have been clarified and even amplified, if the Appellants availed themselves of the remedies available prior to the closing date of the Tender. In this regard, this Board does not uphold the Appellants' Second Grievance.

In view of the above, this Board:

- (i) Upholds Computime Limited's First Grievance;**
- (ii) Does not uphold the Appellants' Second Grievance;**
- (iii) Confirms the Decision of the Ministry of Foreign Affairs & Trade Competition, in the Award of the Tender;**
- (iv) In view of the fact that this Board opines that insufficient reasons were given for the rejection of Computime Limited's offer, same Board recommends that the deposit paid by the same should be refunded;**

(v) It is also being recommended that the Technical Specifications should be more detailed and clearly explained in a Tender Dossier, so that any misunderstandings and misinterpretations are avoided.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

9 January 2018