

**Case 1120 – HM 23/03/2017 – Request for Proposals: Mobile and Fixed Line Telephony Services to Heritage Malta**

The Publication Date of the Call for Tenders was 31 October 2017 whilst the Closing Date for Call of Tenders was 9 November 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 130,000.

Two (2) Bidders have submitted Four (4) Offers for this Tender.

On 4 December 2017, Vodafone Malta Limited filed an Objection against the decision of Heritage Malta to award the Tender to Go plc for the price of € 50,847 (Exclusive of VAT) against a deposit of € 650.

On 9 January 2018, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

**Appellant – Vodafone Malta**

Dr Nicholas Borg	Legal Representative
Dr Paul Gatt	Legal Representative
Dr Paul Gonzi	Legal Representative

**Recommended Bidder – Go plc**

Ms Elaine Fenech	Representative
Mr Gunnar Grech	Representative
Dr Joseph Camilleri	Legal Representative
Dr Philippa Gingell Littlejohn	Legal Representative

**Contracting Authority – Heritage Malta**

Perit David Zahra	Chairperson, Evaluation Board
Mr Keith Camilleri	Member, Evaluation Board
Mr Kenneth Gambin	Member, Evaluation Board
Mr Vincent Pulis	Member, Evaluation Board
Mr Noel Zammit	Representative
Dr Alessandro Lia	Legal Representative

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

Dr Paul Gonzi, a Legal Representative for Vodafone Malta said that his clients have submitted various grievances but that their main concern regarded the way with which Heritage Malta has arrived to the scorings which determined the assignment of the Tender. The Reasoned Letters of Reply filed by Go plc and the same Contracting Authority said that they have received a breakdown of the scores together with the Letter of Rejection. This was something that the Appellants did not receive but had the opportunity to study the attachments which the Recommended Bidder presented with their Reasoned Letter of Reply.

Dr Gonzi added that they were presenting a witness which both through his testimony and through a signed affidavit can confirm that Vodafone Malta did not receive the breakdown of the scores.

At this point, Mr Marcel Grech Mallia, a Vodafone Malta Representative, holding ID Card Number 136876 M was summoned by the same Appellants to testify under oath before the Public Contracts Review Board.

Following Mr Grech Mallia's testimony, Ms Rita Fenech, a Senior Executive with Vodafone Malta, holding ID Card 36579 M was summoned by the same Appellants to testify under oath before the Public Contracts Review Board.

At the end of Ms Fenech's testimony, Perit David Zahra, the Head of Projects of Heritage Malta who was also the Chairman of the Evaluation Board, holding ID Card Number 383679 M was summoned by the Contracting Authority to testify under oath before the Public Contracts Review Board.

Following Perit Zahra's testimony, Dr Paul Gonzi, a Legal Representative for Vodafone Malta Limited said that there was another question which his clients wanted to clarify regarding the Contract Value, which was below € 135,000. The Appellants were querying what the real value of the Request was for Proposals if the Contracting Authority was insisting on this.

Perit David Zahra, representing Heritage Malta replied that one has to make a distinction between a Request for Proposals and a Tender. This case regarded a Request for Proposals and Heritage Malta chose this way in order to be as transparent and to get the best deal possible. The Contracting Authority spends about € 60,000 each year.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Contracting Authority exceeds the threshold of € 135,000 for two years for which Perit David Zahra, representing Heritage Malta replied in the negative.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the cost was per annum for which Perit David Zahra, representing Heritage Malta replied that they spend about € 90,000 which was way too much for their budget and which the Contracting Authority was looking to drastically reduce costs. Heritage Malta's representative added that in the Request for Proposals they gave the Bidders all the tools required to make their workings.

Dr Paul Gatt, another Legal Representative for Vodafone Malta Limited pointed out that there was no indication in the Request for Proposals that the figure will not exceed the €

135,000. Besides, the Public Procurement Regulations request the Contracting Authority to give a value for the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Contracting Authority gave any indication of the value of the Tender for which Dr Paul Gatt, a Legal Representative for Vodafone Malta Limited replied that the indication given was that the Request for Proposals was valued for € 180,000.

Dr Paul Gonzi, another Legal Representative for Vodafone Malta Limited added that if the Bidders had any indication that the Request for Proposals would not exceed € 135,000, his clients would have worked in another way.

Dr Alessandro Lia, the Legal Representative for Heritage Malta said that he was sure that that Vodafone Malta Limited knew how much the Contracting Authority was spending with regards to mobile telephony since the two parties were working together for the last six years. Dr Lia then quoted the Preface of the Request for Proposals which stated,

*“Heritage Malta invites proposals for the provision of mobile & fixed line telephony services for use by its employees and Heritage Malta. The successful bidder shall be awarded a 2 (two) year contract. Heritage Malta is seeking more financially advantageous offers compared to existing tariffs presently on the market. Users must also be able to benefit from present (or better) offers of bundled devices currently promoted by the provider”*

Dr Nicholas Borg, a third Legal Representative for Vodafone Malta Limited argued that the Request for Proposal did not indicate that the Contracting Authority wanted to decrease the telephony costs for € 135,000. No operator can build a proposal without having an estimated contract value.

With regards to the discount question, Dr Paul Gonzi, another Legal Representative for Vodafone Malta Limited said that the Public Contracts Review Board had to see whether the discount was applied to the various sections in the Request for Proposals. It was clear that the 15% discount proposed was not taken into consideration.

Dr Alessandro Lia, the Legal Representative for Heritage Malta said that the Letter of Objection issued by Vodafone Malta Limited dated 4 December 2017 mentioned many procedural issues while the Public Hearing raised the discount argument. As Perit Zahra has testified, the Request for Proposal was issued in this way for transparency’s sake.

Vodafone’s reply for the clarification issued by Heritage Malta was a clear one. On the other hand, Go plc did not make any condition. The points scored by the two litigants were close as expected, since here the discussion was about the main two telephony companies in Malta. If there was at least a difference of one point, a choice must be made in this direction, in order to safeguard public funds. Heritage Malta’s job was to evaluate in the most objective way possible.

Dr Paul Gonzi, a Legal Representative for Vodafone Malta Limited, countered that Heritage Malta did not take the chance to apply the 15% discount which his clients have offered but only said that they wanted to reduce their expenditure. The Contracting Authority should have been clear if they did not want to exceed the € 135,000 threshold and they also should have sought a Clarification about the matter.

Dr Alessandro Lia, the Legal Representative for Heritage Malta referred to the decision taken by this same Board on 21 November 2017 regarding Case 1090 wherein it was decided that

the Evaluation Board had to make an objective comparison between the offers presented for that Tender.

Dr Joseph Camilleri, the Legal Representative for Go plc pointed out that the scope of this Request for Proposal was for Heritage Malta to be more transparent and objective. If a Bidder was quoting a price and a discount, the latter had to be incorporated in the price. In her testimony, Ms Rita Fenech said that this was convenient business wise but when it comes to Public Procurement this does not make sense since first of all it would be impossible for the Evaluation Board to give an effective scoring. Besides in Public Procurement, Bidders cannot negotiate Bids if the conditions are not respected.

With regards the call rates, Dr Camilleri agreed with Heritage Malta's arguments. The indication given by the Contracting Authority was that the points were to be given to the rate of calls per minute. When the difference is so marginal between the winning Bid and the Appellant's every point of difference is important.

Dr Paul Gonzi, a Legal Representative for Vodafone Malta Limited concluded by saying that he appreciated Dr Camilleri's argument and confirmed that the difference for which his clients filed an Objection was of 0.37. The Public Contracts Review Board had to make an objective Evaluation of both the points given to Vodafone Malta Limited and to Go plc. In the Appellant's opinion, Heritage Malta have applied some discretions, in awarding this Tender, which were unknown to them

At this stage, the Public Hearing was adjourned to Tuesday 30 January 2018 at 09:00 wherein the Public Contracts Review Board will transmit the decision.

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**This Board,**

**Having noted this Objection filed by Vodafone Malta Limited (herein after referred to as the Appellant) on 4 December 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference HM 28.03.2017 listed as Case No 1120 in the records of the Public Contracts Review Board, awarded by Heritage Malta (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Nicholas Borg**

**Dr Paul Gatt**

**Appearing for the Contracting Authority: Dr Alessandro Lia**

**Whereby, the Appellant contends that:**

- a) **The “*Letter of Rejection*” dated 24 November 2017, did not contain a breakdown of the percentage allotment of marks. In this regard, Vodafone Malta, maintains that they were not made aware as to where or how their offer was inferior to the requirements of the Tender;**
  
- b) **Vodafone Malta also maintains that Heritage Malta gave a clear indication that the “*Request for Proposals*” was valued at € 180,000. In this regard, the Contracting Authority is now stating that the value should not exceed the € 135,000 threshold and therefore, the Appellants maintain that through the indicative figure of € 180,000, they were misled in submitting their quote, based on such indicative assumption. At the same instance, the “*Request for Proposals*” did not provide for the possibility of subcontracting;**

- c) **Vodafone Malta also insist that the requirement to maintain the Contracting Authority’s present wiring system breaches the principle of equal treatment.**

**This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 11 December 2017 and its verbal submissions during the Public Hearing held on 9 January 2018, in that:**

- a) **Heritage Malta maintains that it had sent a breakdown of the resultant percentage of 91.64% awarded to the Appellant’s offer, together with the “*Letter of Rejection*” dated 24 November 2017;**
- b) **The Contracting Authority insists that the figures indicated in the “*Request for Proposals*” were to serve as guidelines, yet at the same instance, Vodafone Malta were quite aware of the previous telephone usage and costs. At the same time, Heritage Malta maintains that it is the prerogative of the Contracting Authority to issue Tenders and “*Request for Proposals*” in lots;**
- c) **The Contracting Authority maintains that due to building and location restrictions, any alterations to the existing infrastructure or internal wiring system would create historical, architectural and building constrictions.**

**This same Board also noted the Testimonies of the witness namely:**

- 1. Mr Marcel Grech Mallia duly summoned by Vodafone Malta;**
- 2. Ms Rita Fenech duly summoned by Vodafone Malta;**
- 3. Perit David Zahra duly summoned by Heritage Malta**

**This Board has also taken note of the documents submitted by Vodafone Malta which consisted of:**

- 1. An Affidavit Submitted by Mr Marcel Grech Mallia confirming under oath that appellant had not received the breakdown of points assigned;**
- 2. Documents Submitted by Ms Rita Fenech regarding the scores given by the Evaluation Board to all Bidders;**
- 3. Clarification Note dated 3 November 2017;**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including**

**the Testimonies of the Witnesses duly summoned, opines that the issues which merit consideration in this Appeal are:**

- 1. The “*Non Receipt of Reasons for Rejection of Vodafone Malta’s*” offer;**
- 2. The “*Indicative Information Given in the Tender Document*”;**
- 3. The “*Conditions in Breach of the Principle of Equal Treatment*”;**
- 4. The “*Discount Not Taken into Consideration in Assessing Vodafone Malta’s Offer*” as follows:**

- 1. The Non Receipt of Reasons for Discardment**

**Vodafone Malta insist that Heritage Malta did not submit a breakdown of the overall percentage marks awarded and in this regard, this Board acknowledges the fact that without such an information, the Appellants’ cannot be made aware as to where or why their offer failed the test.**

**Through the testimony of Mr Marcel Grech Mallia, this Board was informed that the Appellants did not receive the breakdown of**

percentage overall mark of 91.64%. In this regard, this Board had to rely substantially on the Testimony of Mr Grech Mallia.

However, the Contracting Authority should ensure, in future, to double check that such information has been received by the Appellants, through more practical means of communication. In this respect, this Board upholds Vodafone Malta's First Grievance.

## **2. The Tender's Indicative Figures**

With regards to the Appellant's Second Contention, in that the figures stated in the Tender Dossier, somewhat misled their offer, this Board would like to, first and foremost, respectfully point out, that the Contracting Authority gave indications as to the expenditure incurred, in the past, for such services.

At the same instance, one has to consider that the indications given were that:

- a) The intention of issuing a "*Request for Proposals*" was primarily to obtain a better deal than that at present and
- b) To save as much as possible on such costs.

**In this regard, considering the circumstances, this Board opines that the Contracting Authority could not have been more transparent.**

**The indications are given in a Tender Document to guide or indicate a direction for the Bidder to be able to assess the magnitude of the Tendered works or services. However, in doing so, the Contracting Authority expressed its objectives for issuing such a “*Request for Proposals*” and that was purely to decrease drastically the costs in this activity, so that, the Appellant should have understood the principle behind such an issue, that of reducing the present costs, meaning of course that the offer should be less than what currently is being spent by Heritage Malta. In this regard, this Board was not presented with any credible evidence that such indications misled the Appellant’s offer,**

***“Heritage Malta invites proposals of mobile & fixed line telephony services for use by its employees and Heritage Malta. The Successful Bidder shall be awarded a 2 year contract. Heritage Malta is seeking more financially advantageous offers compared to existing tariffs presently on the market. Users must also be able to benefit from present (or better) offers of bundled devices currently promoted by the provider”***

**This Board would also like to point out that such a disputed issue on the part of Vodafone Malta could have easily been clarified through remedies which they are well aware of and which remedies were not availed of. In this regard, this Board does not uphold the Appellant's Second Contention.**

### **3. Conditions in the Tender Dossier**

**With regards to Vodafone Malta's Third Contention, this Board would like to respectfully point out that this Appeal concerns a "*Request for Proposals*" and not a Tender.**

**The Conditions are laid out in the proposal for the benefit of the successful execution of the proposed works and at the same time, preserving all that is of a historical and architectural value to the community at large. Such conditions must be reasonable and viable so that the restrictions for potential Bidders are minimal if not negligible.**

**At the same instance, this Board acknowledges the fact that where such circumstances arise, it is the obligation of the Contracting Authority to abide by such regulations and in this particular case, Heritage Malta was obliged to conform with the Local Regulations**

**regarding the maintenance of the same's existing infrastructure so that the very nature of the locations where the fixed telephony is to be installed carries restrictions and constrictions which must be strictly adhered to.**

**At the same instance, this Board justifiably notes that whilst Vodafone Malta were well aware of such conditions, their concern, in this regard, was left “*in limbo*”, apart from the fact that they had the remedies to clarify or query the contested condition prior to the closing date of the “*Request for Proposals*”.**

**In this regard, this Board would like to point out that it is being faced with Appeals that could have been avoided if Bidders availed themselves of the remedies available, however, in this respect, the Appellants failed to seek these remedies.**

**With regards to this issue, this Board opines that the Appellants were well aware of such a condition prior to the closing date of the proposal. At the same instance, the Appellants submitted their offer, thus accepting all the conditions as laid out in the proposal dossier. This Board would also affirm that the condition imposed by Heritage Malta is deservedly justified and in this regard, does not uphold Vodafone Malta's Third Contention.**

#### **4. Discount not taken into consideration**

**From the submissions made during the Public Hearing of this Appeal, Vodafone Malta maintain that the discount proposed in their offer was not taken into consideration during the Evaluation Process. In this regard, this Board would justifiably point out that the discount offered by the Appellants was qualified, in that; the same would apply only if the consumed expenditure would exceed € 5,000 per month. So that, this Board justifiably considers such an offer to be conditional.**

**This Board justifiably notes that the intention of issuing such a “Request for Proposal” was mainly to reduce the costs and it was quite evident that the intended expenditure outlay relating to this particular service would not exceed the amount of € 5,000 per month, so that, to create a “Level Playing Field”, in the evaluation process, the Evaluation Board, quite appropriately, compared both offers on the basis of the intended expenditure outlay, which, as stated by the witness should not exceed the average sum of € 5,000 per month, in order for the conditional discount proposed by Vodafone Malta was not taken into account in the Evaluation Process.**

**In this regard, this Board confirms the method of comparison made by the Evaluation Board, in that, to create a Level Playing Field, one has to create a level ground for comparing offers on a “*Like With Like*” basis. The Level Ground had been assessed not to exceed the monthly expenditure of € 5,000 so that the inclusion of a discount of 15%, applicable only above the monthly usage amounting to € 5,000, does not figure out in the comparison of offers. This Board would also opine that if the Appellants wanted to offer a discount, the latter should have been reflected in the quoted price, without any qualifications.**

**On a general note, this Board acknowledges Vodafone Malta’s concern in that the overall difference of the awarded percentage marks is so minimal that one may doubt the objectivity of such a mode of evaluation process. However, this Board, as had on many occasions, would like to re-emphasize that the MEAT system, now referred to as “*Best Price Quality Ratio*”, is a very fair and objective method of assessing an offer. The same system provides a suppression of subjectivity to a great extent, in that the final average score given by individuals is weighted to provide a fair and objective result. In this regard, this Board upholds Heritage Malta’s decision to disregard the conditional discount of 15% offered by the Appellants.**

**In view of the above, this Board,**

- a) Upholds Vodafone Malta' s First Contention;**
  
- b) Does not uphold the Appellants' Second and Third Contention;**
  
- c) Confirms that the Evaluation Procedure was carried out in a fair, just, transparent and objective manner;**
  
- d) In view of Point a) above, an amount of € 200 from the deposit paid to file this objection is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*30 January 2018*