

PUBLIC CONTRACTS REVIEW BOARD

Case 1216 – CT 2292/2017 – Call for Tenders for the Implementation of a new End to End Submarine Fibre Optic Line between Malta and Gozo

The publication date of the call for tenders was the 29th December 2017 whilst the closing date of the call for tenders was the 6th March 2018 (extended to 8th March 2018). The estimated value of the tender (exclusive of VAT) was € 3,450,000

On the 14th September 2018, Huawei Technologies Italia S.r.l filed an appeal against Malta Enterprise as Contracting Authority on the grounds that their offer was administratively not compliant due to their not submitting the requested information and documentation. A deposit of € 17,250 was paid.

There were two (2) bidders.

On 9th October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Huawei Technologies Italia S.r.l

Dr Jonathan Thompson	Legal Representative
Mr Kevin Camilleri	Representative
Mr Christoph Wernli	Representative
Ms Wei Lin	Representative

Recommended Bidder – Elettra tlc Spa

Dr Stefano Filletti	Legal Representative
Dr Amy Zahra	Legal Representative
Dr Natalia Galea	Legal Representative
Mr Andrea Ridolfi	Representative
Ms Daniela Caruana Sciberras	Representative
Ms Maronna Filletti	Representative

Contracting Authority – Malta Enterprise

Dr Christopher Vella	Legal Representative
Mr Joseph Zammit	Chairperson Evaluation Board
Ms Sarah Bugeja	Secretary Evaluation Board
Mr Karl Azzopardi	Member Evaluation Board
Arch. George Cilia	Member Evaluation Board
Eng. Joseph Mifsud	Member Evaluation Board
Eng. Helga Pizzuto	Member Evaluation Board
Mr Aaron Grech	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
Mr Jason Grech	Representative
Mr Mark Mizzi	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Jonathan Thompson, Legal Representative for Huawei Technologies Italia S.r.l, (Huawei) by way of introduction stated that his clients duly submitted their bid and in due course they were requested to provide certain clarifications. These were uploaded through the TPT system and confirmation was received that they were uploaded correctly. There were further exchanges of communications between his clients and the Contracting Authority over some months. In September 2018 Huawei were notified that they had been excluded as the file with their clarifications was corrupted and could not be opened; thus they were considered to have failed to submit the requested clarification. There was no prior indication, until then, that the file could not be opened and no contact from the Contracting Authority on that point. All tender specifications had been adhered to and Appellants data was not corrupted. He then asked for witnesses to be heard.

Ms Sarah Bugeja (48188M) testified on oath that she was the Head of Procurement and Legal Services at Malta Enterprise and Secretary of the Evaluation Board. Her role was to attend all evaluation meetings and, when necessary to seek guidance from the Director of Contracts. The original submissions by Appellant had opened successfully but the later clarification zip file with four attachments failed to open. To questions from Dr Thompson, witness replied that she had tried to open the file on her laptop by double clicking, but she had not tried decrypting the file contents. She passed the file to a colleague, Aaron Grech, who told her that he will look into the problem. He later told the witness that he could not access the file and he would be forwarding it to Jason Grech at the Department of Contracts. According to witness she was not aware that the file was then sent to the Greek Service Provider. Witness stated that she was not familiar with

tender preparation work (a tool to upload necessary tender documents) and during the evaluation process had not referred to the Economic Operators Users Manual.

Mr Mark Mizzi (255374M) testified under oath that he was an Assistant Director at the Department of Contracts. He confirmed the exchange of e-mails earlier referred to with Ms Sarah Bugeja, and that it was the Department's policy not to allow further clarifications after a first clarification. He was asked for advice on the opening of a zip file and his reply was that they should first consult the IT Department and then the Service Provider of the e-PPS. According to witness Procurement Regulation 62 limits rectification of a bid to only once, and therefore he did not consider suggesting asking bidders regarding opening of the file as he considered this to be a further clarification.

Mr Aaron Grech (314379M) testifies on oath that he was the Head of IT at Malta Enterprise and was sent a link with a file, ending 'tender.zip' and asked to try to open it. He confirmed that through the file extension this seemed to him to be a normal zip file. He was not part of the tender team and to him this was an ordinary file independent of any system. He tried opening the file using Windows and 7 ZIP but both programmes indicated that the file was corrupt. He was not aware of the email sent by the Service Provider, and at this stage he did not take any further action.

In reply to a question by Dr Thompson, witness said that he had not referred to the Economic Operators Users Manual (EOUM) to try to open the file. He was then referred to Page 94 of the said Manual which dealt with the opening of zip files, and he replied that he was not aware that the file was encrypted.

At this stage witness was asked to withdraw and a discussion ensued between the legal representatives of Appellant and the Authority whether Page 94 of the Manual applied in this case as the wording refers to the creation of a tender rather than a clarification or a rectification process.

On resuming his testimony Mr Grech repeated that he was not aware that the file was encrypted – to him it was an ordinary zip file. As he was unable to open it he, therefore, returned it to Ms Sarah Bugeja.

Mr Jason Grech (185071M) testified on oath that he is an Assistant Director at the Department of Contracts responsible for the e-PPS system. He did not try to open the zip file himself but he requested the Service Provider to investigate if they were able to open it-in their reply they said that they did not identify any corruption, and he passed this information to the Contracting Authority. Witness further stated that the file could not be opened because decryption can only happen at the opening stage of the tender offers and he went on to describe the process. When asked he replied that he did not follow this matter up as he is aware that an encrypted file can only be opened at the time the offer is submitted. In his 5 to 6 years in this job this is the first time he had come across such a thing. In his experience there is no way that such a file can be

opened. Witness went on to explain that an offer is encrypted and uploaded, the system then unlocks and decrypts the offers which are then viewed by the evaluation committee. If a clarification or rectification is necessary this is done through the e-PPS. At this stage files must not be encrypted.

Referred to Chapter 10 of the EOUM witness confirmed that it does not deal with instructions to economic operators on submission of clarifications and rectifications. The use of the TPT system is to provide security to bidders. He then went on to describe the process of preparing tenders manually or automatically, and how the system indicates any errors. The system accepts only one encrypted file and any clarifications have to be submitted on files such as Zip, Word, Excel etc. There is no warning device existing in the system to advise bidders of problems with clarification files. Finally, witness confirmed that Pages 62, 63 and 64 of the EOUM refer to clarifications only at the evaluation process stage and that there are no instructions to use the PTP system.

Mr Christoph Wernli, Representative of Huawei Technologies Italia, testified under oath. He started by giving a chronology of his firm's tender submission. This was the first time that they were tendering on a contract in Malta so they had to understand how to operate the TPT system. On May 2nd Huawei received a clarification request using the TPT system as set forth in Section 1.01 of the tender documents. There was no further communication with the Contracting Authority for the next couple of months except that they were repeatedly requested to agree to extend the offer by 30 days at a time. On September 4th they were advised that their bid was administratively non-compliant – this came as a surprise to them as up to then they had had no hint that there was anything wrong in their submissions. Huawei carried out an internal investigation to find out if they had done anything wrong in their bid, but as it seemed that there was no wrong doing on their part they appealed the decision.

At this stage they were surprised to find out that that the matter of their non-compliance had been discussed four months before they were notified of it. It was not clear to them what had gone wrong so they enlisted the services of OMG – a data recovery company - to discover what happened. The conclusion of this forensic examination was that the clarification file submitted by them was not corrupted and everything was regular as required by the system. The file was still available on the e-PPS system.

On further questioning witness said that the request for the extensions was received through the e-PPS, and that the format used in their communications with the Contracting Authority was the same in both instances – it was the contents that were different. He agreed that Section 1.1 of the tender documents refers to the entire tender and covers the issuing, submissions, clarifications and decisions of the Contracting Authority.

Mr Kevin Camilleri (343869M) testified on oath that he was a Data Recovery Engineer who owned OMG Data Recovery with 30 years experience in forensic data recovery. He testified that he had been given the parameters of a brief to determine if a particular TPT file prepared under

the e-PPS system had been corrupted. The original 'tender.zip' file was an archive of another four files. He had established that the files were correctly outputted by the system. He had eliminated all possible causes of corruption through a repeat process of the correct system.

At this stage witness was requested to withdraw whilst legal representative argued points of law.

Dr Agius, Legal Representative of the Director of Contracts objected to the line of questioning because witness did not have access to the TPT file on the e-PPS system and could not therefore comment on that file.

Dr Thompson stated that the contention of the Appellant and the reason for the exclusion was precisely that the Contracting Authority did not use the correct method of opening a 'zip file' because it was not a 'zip file' even though the file extension was 'zip'.

Resuming his testimony Mr Camilleri confirmed that the file created by the tender bidder was not a zip file; it did not have the structure of a zip file and had been made thus by the bidder for security purposes. They had used the extension 'zip' as a fake name for a 'zip file' – unfortunately it was the incorrect use of the word 'zip'. It was misleading to try to make the computer open such a file – he had arrived at this conclusion by examining the files in their binary form which was different to a 'zip file' which starts with one character and ends with the same character. This file could only be opened by the process listed in the e-PPS manual and it was not possible to decrypt the file as he did not have the key.

Mr Joseph Zammit (84072M) testified under oath that he was the Chairman of the Evaluation Committee, and that they had contacted the bidder regarding the extension of dates, sent to both bidders, and clarification of documents. The only reply received to the rectification request was an encrypted file. He agreed that there were some communications with bidder through e-mails, although normally everything was done through the e-PPS system. The only time when e-mail was used was to clarify some misunderstanding and to facilitate the process, and this was from the Director of Contracts not from Malta Enterprise.

(At this stage Ms Sarah Bugeja confirmed that by then the Evaluation Report had been submitted to the Director of Contracts and was no longer accessible to Malta Enterprise).

Continuing with his testimony, Mr Zammit stated that immediately on submission of the zip file they tried to open it and the Evaluation Committee decided that the bid was not compliant as they did not have the documents they asked for – they could not take it any further.

Dr Jonathan Thompson, in his submissions, stated that evidence had been produced that his client had been excluded because a file could not be opened. The Evaluation Committee had not even tried to access this file on the assumption that it was a zip file. It is clear that the Contracting Authority was not using the correct tools – no evidence or indication was produced that the Authority tried to encrypt the file. Experts confirmed that it was clear that they were not using the correct tools to try to open this file, and they did not produce any evidence or

indication that they tried to encrypt it in the appropriate manner. The Authority had failed to communicate with his clients and he referred to PCRB Case No. 1165 (MM JV) where the Board held that more practical communication methods could have been adopted. No attempt had been made to contact bidder or to obtain further information. He again referred to another PCRB Case – No.1164 (CMC di Ravenna) where it was stated that every effort should be made to save a tender. In the JMP Joint Venture Case it was decided that it was not reasonable that the tenderer should not be heard any further after submission of a rectification. Nowhere is there provision that rectification or clarification cannot be sought more than once. Note 2 allows more than one clarification or rectification, more so in this Case when the information was supplied but could not be accessed.

Dr Franco Agius said that the PCRB Cases referred to by Dr Thompson were not applicable in this instance as they both dealt with situations where there was a failure to reply – in this case there was a reply which could not be opened. The exclusion was made at the administrative stage prior to going to the technical evaluation. Tender documents had to be interpreted in line with Regulation 62.2 – that is only one clarification allowed. The Authority cannot give one bidder a longer time limit as this would go against the principal of equal treatment. He referred to the Court of Appeal Case – Bonnici Bros vs Ministry of Health where it was held that the means of communication in a tender must be via the e-PPS system. Huawei had decided to encrypt the file and their bid could not be read. Allowing them further clarifications would have given them a longer time limit and they could have changed their offer. The Court of Appeal, in the Case Micallef J A vs Director of Contracts had established what was ‘missing information’ and what was ‘incorrect information’.

Dr Christopher Vella, Legal Representative for Malta Enterprises, stated under Public Procurement Regulations 5.3 and 7.2 bidder was obliged to submit information fully and totally. The clarification facility should not be abused as it would become too burdensome on the Contracting Authority. Huawei had not clarified therefore they were not compliant. In PCRB Case 825 it was held that if a submitted folder was corrupt it could not be downloaded.

Dr Thompson again stated that the file was not corrupt – the issue of corruption did not arise – the only point that has been stressed is that the file could not be opened. There was a formal request for clarification in a zip folder through the PTP system – the correct format was used as created by that system but no attempt was made to open the file or decrypt it. Evidence had been produced that it was possible to identify ways to open that file and decrypt it. Article 62 does not limit the number of clarifications, which had, in any case, been submitted within the time limit. There was no evidence of transparency or equal treatment on the part of the Contracting Authority. Bidder had not been negligent and it was in everyone’s interest that there should be no abuse of power or disservice to the general public.

Dr Agius quoted EJC 559 and said that the Authority could not be selective in encryption of files – the other party did not encrypt its files, and this was an only instance. Giving Huawei a longer

period to respond would lead to unequal treatment. The expert provided by the bidders had testified that the tender preparation was not in a zip file form.

DR Thompson said that if the Regulations do not specify the number of clarifications allowed then we should not put our interpretation on it. A request for clarification does not give an advantage to that party. The expert witness had said that they could not decrypt file and not that the file could not be decrypted – he simply did not have the necessary key to perform that task.

Dr Stefano Filletti, Legal Representative for Elettra tlc SpA, said that it was a fact that the Preferred Bidder was compliant and Appellant was not. The Contracting Authority sought clarifications within a set time frame. The Appellant chose the method to reply to the clarifications – was that a valid submission? This is tantamount to Appellant submitting a locked case full of documents without sending the key to unlock it.

A compliant bidder suddenly becomes non-compliant as he is asked to continue running in this case. In a 2013 EJC case it was stated that in seeking to clarify a tender the tenderers must be treated equally and fairly. The Contracting Authority cannot be seen to be chasing a non-compliant bidder to make them compliant – if it persisted in seeking information it would be unfair and an abuse. In this instance they acted correctly; they gave bidder the chance to be compliant but they did not respond correctly.

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

This Board,

having noted this Objection filed by Huawei Technologies Italia srl, (hereinafter also referred to as the Appellants), on 14 September 2018, refers to the contentions made by the same Appellants with regard to the award of the Tender of Reference CT 2292/2017 listed as Case No 1216 in the records of the Public Contracts Review Board, awarded by the Malta Enterprise, (hereinafter also referred to as the Contracting Authority)

Appearing for the Appellants: Dr Jonathan Thompson

Appearing for the Contracting Authority: Dr Christopher Vella

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellants contend that:

- a) **Their main objection is that they had submitted the reply to the clarification requests through the system, within the dictated timeframe, whilst the Contracting Authority alleges that it could not open the file with the requested information and no access was possible for the latter to process the same. In this regard, Huawei Technologies Italia srl maintain that their offer should not have been rejected because of a technical communication error which is not attributed to their lack of diligence in transmitting the requested information. At the same instance, the Appellants insist that they should have been informed immediately it became obvious that the Contracting Authority could not access the replies to the request for clarification.**

This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 20 September 2018 and its verbal submissions during the Public Hearing held on 9 October 2018, in that:

a) Malta Enterprise contends that, every effort was made to have access to the information submitted by the Appellants without any success. In this regard, the Contracting Authority received confirmation from the service provider that the information was sent through an encrypted file which cannot be read. As a result, Malta Enterprise was not in receipt of the replies to the clarification request and the Appellants' offer was deemed to be administratively not compliant.

This same Board has also noted the testimony of the witnesses namely,

- 1. Ms Sarah Bugeja duly summoned by Malta Enterprise;**
- 2. Mr Mark Mizzi duly summoned by Malta Enterprise;**
- 3. Mr Aaron Grech duly summoned by Malta Enterprise;**
- 4. Mr Jason Grech duly summoned by Malta Enterprise;**
- 5. Mr Christopher Wernli duly summoned by Huawei Technologies Italia srl;**
- 6. Mr Kevin Camilleri duly summoned by Huawei Technologies Italia srl;**
- 7. Mr Joseph Zammit duly summoned by the Department of Contracts.**

This Board has also taken note of the documents submitted by Huawei Technologies Italia srl which consisted of diverse correspondence

made between the same Appellants and the Department of Contracts regarding the transmission of the requested clarification.

This Board, after having examined the relevant documentation pertaining to this Appeal and heard submissions made by the parties concerned, including the lengthy testimonies of the witnesses, opines that the issue to be considered is the reply submitted by Huawei Technologies Italia srl with regard to the request for clarification.

- 1. This Board would respectfully point out that this is an IT technical issue so that substantial reliance on the testimony of the technical witnesses duly summoned, had to be taken into consideration by this Board, in arriving at its deliberations;**
- 2. The issue of this Appeal is not whether Huawei Technologies Italia srl submitted the reply to the clarification request but rather whether the Evaluation Board were in a position to access the information so received. It is an established fact that what has been submitted by the Appellants could neither be ascertained nor assessed by the Evaluation Committee, so that, for all intents and purposes, the information sent by Huawei Technologies Italia srl was not within reach of and accessible by the Evaluation Committee, within the stipulated period.**

3. Huawei Technologies Italia srl maintain that the submitted information was not a corrupt file and if the Malta Enterprise applied the proper tools, the file would have been uploaded and read. From the documentation in possession of this Board, the latter notes that various communications were made by the Evaluation Committee both internally and with the service provider, to try and access the information contained therein, but to no avail. At the same instance, this Board refers to a reply from the service provider, explaining what had happened, as follows:

“Dear Jason,

In the evaluation clarification of CFT “CT 2292/2017 Tenders for the Implementation of a New End to End Submarine Fibre Optic Link between Malta and Gozo”, the EO “Huawei Technologies Italia S.r.l.” has uploaded the encrypted file as generated by the TPT. The encrypted files cannot be accessed, thus the user is receiving the related message. It seems that when the user responded to the received clarification request

re-submitted his tender package, (i.e. the encrypted tender file), instead of providing the information that the CA requested.

Best regards,

Dimitra”

From the above mentioned correspondence, it is being confirmed by the service provider, that the Appellants used an encrypted file in replying to the clarification request and it was also asserted that the encrypted file cannot be accessed. Regarding this issue, this Board would establish two important factors in that, the file was encrypted and not a corrupt file and the Appellants inadvertently used the incorrect application in transmitting the information through the E-Tendering System. At this stage of consideration, this Board would point out that the fact that Huawei Technologies Italia srl transmitted the information, through the wrong application of the system, does not render the Malta Enterprise responsible for not being able to access the information submitted, but rather due consideration should be given to the fact that the onus for sending the reply through the correct application, rested solely on the

Appellants' ability to use the proper communication procedure, as duly instructed by the Contracting Authority, in its communication.

- 4. This Board would also point out that the request by the Evaluation Committee was specifically indicated as an opportunity for Huawei Technologies Italia srl to rectify their offer through the reply and this Board refers to the conditions accompanying such a request, as follows:**

“In terms of Article 1.1 of the Instructions to Tenderers, you are hereby being given the opportunity to rectify these shortcomings by not later than Wednesday 9th May 2018 at 16:00pm.

The requested information is to be submitted through the appropriate Electronic Public Procurement (ePPS) module. Should separate documents be required, kindly zip all documents in a folder prior uploading or include all documentation in one document.

Tenderers who fail to rectify the shortcomings identified in this communication shall be deemed to be non-compliant.

This rectification opportunity is being sent without any commitment whatsoever on the part of the Contracting Authority and does not imply that your offer will be accepted as it may still be deemed administratively, technically or financially non-compliant during the evaluation process.”

At the same instance, this Board notes that specific instructions were denoted in the request as to how the Bidder is to submit the requested information, through the ePPS module. In this regard, this Board takes into consideration the fact, that, according to the service provider, Huawei Technologies Italia srl did not follow such instructions in replying to the Malta Enterprise’s request. This Board was made aware that decryption was not possible at this particular stage of the Tendering process, as such an application is only possible on the opening stage of the offers. If a clarification or rectification is necessary, this is performed through the ePPS and at that moment the file must not be encrypted.

- 5. This Board would respectfully point out that the Evaluation Committee applied the principle of proportionality and prudence, by requesting**

information from Huawei Technologies Italia srl, whereby the same were given the opportunity to rectify any shortcomings in their offer so that it could be assessed on a level playing field, with the other Bids and thus save the Appellants' offer. The fact that the Contracting Authority was not in possession of the reply to the request for clarification from the Appellants, rendered the latter's offer non compliant

- 6. With regards to Huawei Technologies Italia srl's claim that the Malta Enterprise should have informed them of their inability to access their reply, this Board is credibly convinced that every effort and means were applied by the Evaluation Committee to open such an encrypted file, however, as duly confirmed by the service provider, the file through which the Appellants submitted the information was an encrypted file which could not be accessed. At the same instance and with regard to Appellants' quoted decisions taken by the Public Contracts Review Board, the latter would respectfully point out that in both mentioned cases, there was a failure to submit a reply at the administrative stage of the Evaluation process yet in this particular case, there existed a reply which could not be read and such an event occurred during the technical assessment of the evaluation process. If the Evaluation**

Committee, after having noted that Huawei Technologies Italia srl's reply could not be accessed, opted to give another opportunity to the Appellants to resubmit their reply through the proper application, the same Committee would have breached the principle of equal treatment, apart from the fact that there was no way of establishing that their offer could have been changed.

7. This Board, after having considered the merits of the Appellants' contention and after having heard the testimony of the technical witnesses, concludes that:

- i) the file so submitted by Huawei Technologies Italia srl was an encrypted file, which could not be accessed by the Evaluation Committee;**
- ii) the information which was requested by the Malta Enterprise, in its request for rectification, was during the technical evaluation stage;**
- iii) the Appellants were well advised as to the procedure which they had to adopt in their submission to the request for rectification. In this**

regard, Huawei Technologies Italia srl applied a different procedure in transmitting the information so requested by the Malta Enterprise;

iv) The Evaluation Committee acted in a proportionate and prudent manner;

For the above reasons:

Huawei Technologies Italia srl's grievances are not being upheld. However, due to the fact that this Board consider the Appellants' application used in transmitting the information as being inadvertently unpurported, this same Board recommends that 50%, (fifty per cent), of the deposit paid by the same is to be refunded.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

15th November 2018