

# **PUBLIC CONTRACTS REVIEW BOARD**

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## **Case 1217 – T 070/2017 – Provision of Telecommunication Services**

### **Remedies before Closing Date of a Call for Competition**

The publication date of the call for tenders was the 23<sup>rd</sup> August 2018 whilst the closing date of the call for tenders was the 26<sup>th</sup> September 2018. The estimated value of the tender (exclusive of VAT) was € 400,000.

On the 25th September 2018, Melita plc filed a Call for Remedy before Closing Date against Malta Information Technology Agency (MITA) on the grounds that the tender wording is not clear and unambiguous.

On 11<sup>th</sup> October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Melita plc**

Dr Steve Decesare	Legal Representative
Mr Malcolm Briffa	Representative

#### **Contracting Authority – Malta Information Technology Agency**

Dr Danielle Vella	Legal Representative
Mr Robert Grixti	Representative
Ms Caroline Schembri De Marco	Representative
Mr Wayne Valentine	Representative

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

Dr Steve Decesare, Legal Representative for Melita plc, said that this Call for Remedy was raised because of the lack of clarity on the award of points on the tender issued by MITA. In Section 9.2 the tender provides that after the initial stages, the evaluation proceeds to the awarding of points as stated in the scoring table in the tender. The technical scoring of these points is not in conformity with the award criteria. There are three stages including offers above the minimum requirements. The stage between the 80% and 100% of the criteria is not mandatory. The requirement, which covers Mobile Package 2, is similar to Package 1. The

Public Procurement Regulations are very definite in that tender instructions must be clear and unambiguous to ensure that the process is understood. Whilst the point that the bidder could offer a variety of extras in excess of the mandatory requirements is clear, it lacks clarity in the evaluation of these extras, merely stating that points will be awarded for offers above the established criteria.

Regulation 239 of the PPR provides that specifications have to allow effective competition, and must give the weighting which it gives to each of the chosen criteria and the ECJ in Case 496/99 underlines the principle of equal treatment between tenderers. Apart from the set criteria, tenderers are allowed to offer additional services as, for example, unlimited calls or other mobile calls but there is no indication of how points will be awarded on the different offers, nor indeed if there is a minimum or maximum figure. There would be the difficulty of assessing the extra offers as different clients have different priorities or needs and a there is vast range of possible offers.

Dr Danielle Vella, Legal Representative of MITA, said that the structure of the tender was on the PBQR basis with price having a 60% weighting and quality 40%. The qualitative criteria carried 40 marks in both packages. The reason for this was so that there will be no discriminating against bidders but to encourage the supply of ‘freebies’; there was thus a scoring table for ‘additional’.

Mr Wayne Valentine (42298M) testified on oath that he was the Head of Facilities at MITA and was involved in the drafting of the tender. Three local economic operators offer different packages and they did not wish to favour any package from any single operator; they therefore left it as open as possible to give tenderers the opportunity of offering different options.

In reply to a question from the Chairman, witness stated that all freebies have value which can be translated into monetary value, and they can be prioritised thus.

The Chairman said that the Contracting Authority should provide a list defining extras and prioritising them. This will also subsequently serve as a guideline to the evaluation committee – the objective is to suppress subjectivity in the evaluation of the tender. This Board is of the opinion that the tender should indicate the list of priorities and so provide an indication of what the Contracting Authority requires.

He then thanked the parties for their submissions and declared the hearing closed

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**This Board,**

**having noted this Call for Remedies filed by Melita plc (hereinafter referred to as the Appellants) prior to the closing date of call for competition, on 25**

**September 2018, refers to the contentions made by the same with regards to the award of Tender of Reference T 070/2017 issued by the Malta Information Technology Agency and listed as Case No 1217 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Steve Decesare**

**Appearing for the Contracting Authority: Dr Danielle Vella**

**Whereby,**

- a) the Appellants’ main concern refers in particular to the “*Scoring Table*” and “*Evaluation Grid*” as shown in Section 9 of the Tender Document. In this regard, and with reference to the “*Evaluation Grid*”, Bidders are being requested to list additional services to the mandatory requirements on both Package 1 and Package 2. The Appellants maintain that such intended additional requirement is not clearly defined and will present difficulties in assessing the offers, as extras can be offered in various forms, by the various bidders.**

**This Board also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 1 October 2018 and its verbal submissions during the Public Hearing held on 11 October 2018, in that:**

**a) The Malta Information Technology Agency insists that the contents in Section 9 of the Tender Document were designed to allow, as much as possible, open competition amongst bidders. At the same instance, the same Contracting Authority maintains that all extras being offered have a monetary value so that the evaluation process of offers can proceed without any hindrance.**

**This same Board has also noted the testimony of the witness, namely Mr Wayne Valentine, duly summoned by the Malta Information Technology Agency.**

**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, opines that the issue which raised Melita plc's concern is the "*Extras*" which can be offered by the bidders and their respective evaluation procedure, under Section 9 – Evaluation Grid.**

**This Board would refer to the Evaluation Grid which shows the description of what is being requested and the respective weighting dictated by the Malta Information Technology Agency, as follows:**

**B. Evaluation Grid**

<i>Criteria/Sub-criteria</i>	<i>Weighting (%)</i>
<i>Mobile Telephony</i>	
<i>Mobile Package 1: Bidders are requested to list the free additional services, (if any), being offered over and above the mandatory minimum requirements</i>	<b>40</b>
<i>Mobile Package 2: Bidders are requested to list the free additional services, (if any), being offered over and above the mandatory minimum requirements</i>	<b>40</b>
<i>Mobile Data Service</i>	
<i>Bidders are requested to state, (if any), the free additional data bundle over and above the mandatory requirement of 20GB of Internet use per month</i>	<b>20</b>
<i>Total Criteria Weight</i>	<b>100</b>

This Board notes that, both in Mobile Package 1 and Mobile Package 2, the bidders are requested to list the free additional services which they can offer, over and above the mandatory requirements, the latter of which are appropriately described in paragraph 2.3 of the Tender Document. It is understandable that the qualitative criteria carries 40 marks for both

packages, however this Board cannot establish as to how or on what basis, such extras are to be valued or compared on a “*like with like*” basis. It is a fact that all extras being offered have a “*price tag*” but, during any evaluation process, the principle of adjudication on a level playing field has to be respected and adhered to so that some reliable form of information on what constitutes extras and what are the priorities of the Contracting Authority, must be indicated in the Tender Document. Through such indications the bidders will have a wider view of what type of extra services the Contracting Authority will benefit from and at the same time suppress, as much as possible, the subjectivity element in assessing the most advantageous extra service being offered, during the evaluation process.

**This Board would respectfully point out that technical specifications should:**

- be precise in the way it describes the requirements;
- be easily understood by the prospective Bidders;
- have clearly defined, achievable and measurable objectives;
- not mention any brand names or requirements which limit competition;
- provide sufficient detailed information that allows bidders to submit realistic offers.

**This Board justifiably establishes that the technical specifications relating to extra additional services, needs more clarifications denoting priorities to the Contracting Authority in this regard.**

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

- i) upholds Melita plc's concern;**
- ii) instructs the Malta Information Technology Agency to issue a clarification note listing the additional services which the latter expect to benefit from, in the form of a priority list, which will form part of the Tender Document.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*16<sup>th</sup> October 2018*