

PUBLIC CONTRACTS REVIEW BOARD

Case 1219 – VLCT 05/2017 –Tender for the Design, Development, Supply, Installation and Testing for a Parking Management System including Parking Availability Sensors for Valletta as part of Civitas Destinations Project, GA No 689031, Horizon

The publication date of the call for tenders was the 22nd December 2017 whilst the closing date of the call for tenders was 22nd January 2018. The estimated value of the tender (exclusive of VAT) was € 117,323.

On the 20th September 2018, IOT Malta Ltd filed an appeal against the Valletta Local Council as Contracting Authority objecting to being disqualified on the grounds that their offer was incomplete, and therefore technically non-compliant. A deposit of € 586.62 was paid.

There were eight (8) bidders.

On 16th October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – IOT Malta Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Antoine Cremona	Legal Representative
Mr Joseph Miceli Demajo	Representative

Recommended Bidder – CVA Technology Company Ltd

Dr Franco Galea	Legal Representative
Dr Lucio Schriha	Legal Representative
Mr Brian J Gatt	Representative
Mr Anthony Mamo	Representative
Ms Christabel Muscat	Representative

Contracting Authority – Valletta Local Council

Dr Joseph P Bonnici	Legal Representative
Dr L Valletta	Legal Representative
Prof Alexei Dingli	Chairman Evaluation Committee
Dr Joshua Ellul	Member Evaluation Board
Prof Maria Attard	Member Evaluation Board

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

Dr Clement Mifsud Bonnici, Legal Representative of IOT Malta Ltd (IOT), stated that this was a case typical of when the goal posts are shifted during the evaluation stage. In a letter dated 24th March 2018 the Contracting Authority wrote to the Appellants asking for new information which was totally outside the terms of the tender. Having supplied that information, Appellants were then found to be non-compliant, although in the rejection letter it is still not clear what the objection was. Appellants, through lawyers, wrote to the Council asking them to clarify this point but all they got was a curt reply stating “we have nothing to add”. He referred to the rejection letter of the 10th September 2018 in which the Council focused on points that were outside the scope of the tender.

Prof Alexei Dingli (32680M) testified on oath that he was the Chairman of the Evaluation Committee. He referred to the rejection letter of the 10th September from the Council to the Appellants which *inter alia* stated that the cost of integration with VATIS is incomplete ‘since they only specify hourly rate of service’. However, the witness stated that the reason for the rejection was that since Appellants’ reply was not adequate the offer was deemed to be incomplete. Part 2.6 of the tender made it clear that the solution proposed by the bidder must be interoperable with the VATIS app. In the original submission there was no mention of VATIS and this was only brought up in the clarification stage. The Contracting Authority could not quantify the cost of the VATIS integration as it was only stated as a rate of ‘cost per hour’. Appellants requested the name of the VATIS app to check with system supplier if it was interoperable and this information was supplied. In answer to questions from Dr Mifsud Bonnici witness stated that there is one operator in existence that already has access to VATIS.

At this stage Dr Mifsud Bonnici tabled documents in the form of a survey confirming that CVA Technology Company Ltd (CVA) was the only operator with access to VATIS.

In reply to questions from Dr Joseph Bonnici, Legal Representative of the Valletta Local Council, witness stated that the VATIS system had been in operation for over one year and it was easy to integrate it with another system. Witness confirmed that Clause 17.7, article 18 of the tender documents stated that the tender prices shall include all costs in their entirety. Although the installation period is short the system had to be guaranteed for five years. In reply to a question from the Chairman, witness confirmed that although the contract for the installation of the system was for a period of ten weeks it was conditional that the operator had to guarantee it for five years.

Dr Cremona, Legal Representative for IOT Malta Ltd stated this was the whole crux of the appeal – the tender documents stated that the guarantee period was for five years, but then in their clarification the Council wanted to know what happens after five years – the goal posts had suddenly been shifted

Prof Dingli, still under oath, said that the parameters had never changed. The issue was the financial aspect and the rejection letter confirms that the bid was deficient in the financial aspect. The Appellant had indicated a charge of € 50 an hour for VATIS integration – this cannot be quantified.

Prof Maria Attard (64875M) testified on oath that she was an Assistant Professor at the University of Malta, Head of the Geography Department and Director of Environmental Sustainability Institute, specialising in urban transport. She was one of the technical evaluators of the tender. The technical compliance of both IOT and CVA were reviewed and where necessary clarifications sought. It was also ascertained that the Council's specifications in what they were requesting were correct, and a report thereon was submitted. Although the two bids were technically compliant, one of the bidders (IOT) failed to show that their system can integrate with VATIS, and hence a clarification was sent. IOT's reply was that they could provide this at a cost on an hourly basis which could not be valued as it was not definite. CAV said that the integration cost was included in their bid. The evaluators therefore advised the Council that IOT's tender was non-compliant as it was incomplete.

In reply to questions from Dr Cremona witness stated that the integration of VATIS was in the original tender. There was no reference to VATIS in the IOT bid and they therefore sought clarification to ensure that there was total coverage of the tender specifications. Witness agreed that in the tender spreadsheet (Bill of Quantities) detailing the various costs to be included (tabled) there was no request (or box provided) to include the cost of the VATIS integration- despite this the Evaluation Committee wanted to ensure that the cost of integration was included – this was requested of all tenderers who confirmed that the cost was included.

Dr Joshua Ellul (224296) testified on oath that he had a Doctorate in Computer Science, and was a lecturer at the University of Malta and was asked to look at the technical specifications of each tender in isolation to ensure if compliant. Both IOT and CAV were technically compliant, but the former did not specify that they had integrated VATIS. In his opinion it would take about one day to harvest the information from the VATIS app to integrate into a system.

Dr Mifsud Bonnici said that one of the bidders had an advantage as CVA were aware of the VATIS system; the other bidders did not know even who the VATIS operators were and were told that they will be informed after the award of the contract. The Contracting Authority had suddenly brought in the cost element of VATIS - shift of goal posts. This was nothing but a pretext to eliminate one bidder on a minor point. The Bill of Quantities has no live item for an hourly rate charge. There was a difference of € 40,000 in price between the two bids in question and even if you added a day's cost at € 50 per hour to integrate the VATIS app, IOT would still be miles cheaper than CAV who were third cheapest but had an advantage anyway as they were already operating the system. Excluding IOT would not be treating bidders equally as CVA had all the facts.

Dr Franco Galea, Legal Representative of CVA said that Appellant knew exactly what was being contested and the tender criteria. CVA was the cheapest bid that was technically compliant and the VATIS integration was not in doubt and not contested because it was essentially part of the service. The tender documents specified all costs including contingent and indispensable items for service.

Document 3.01 details all the tender requirements including the cost of integration and tenderer should have been aware that they were asked for a lump sum figure not an hourly rate. By submitting an hourly rate IOT excluded themselves by changing their offer. The Contracting Authority made it clear what they wanted bidders to supply in terms of price which cannot be changed – quoting PCRB Case, University of Malta vs Nexos Lighting in support of this argument.

Dr Bonnici said that incomplete replies or any shortcomings are not the responsibility of the Contracting Authority.

Dr Mifsud Bonnici, in conclusion, stated that the Evaluation Committee cannot use VATIS to exclude other parties since CVA have an advantage - their decision is unbalanced because of the involvement of CVA in the process of the survey and their obvious proximity to the Council, who as Contracting Authority had sent a clarification letter outside the bounds of the tender.

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

This Board,

having noted this Objection filed by IOT Malta Limited, (hereinafter also referred to as the Appellants), on 20 September 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference VLCT 05/2017, awarded by the Valletta Local Council, (hereinafter also referred to as the Contracting Authority) and listed as Case No 1219 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Antoine Cremona

Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority:

Dr Joseph P Bonnici

Whereby, the Appellants contend that:

- a) **their offer was rejected due to a change of goal posts by the Local Council, during the evaluation stage. In this regard, the Appellants refer to the information requested by the Evaluation Committee, pertaining to new information which was totally outside the terms of the Tender;**

- b) **The Contracting Authority, in its “*Letter of Rejection*” did not specify the real deficiencies in their offer.**

This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 27 September 2018 and its verbal submissions during the Public Hearing held on 16 October 2018, in that:

- a) **The Valletta Local Council contends that there was no change of goal posts at all. The information requested by the Contracting Authority pertained to technical amplifications on items so listed and described in the Tender Document. In this respect, the Appellants’ reply to this**

request was incomplete and does not satisfy Paragraph 2.6 of the Technical Specifications;

- b) The Contracting Authority also maintains that the “*Letter of Rejection*” dated 10 September 2018, specified where the Appellants’ offer was in default.**

This same Board has also noted the testimony of the witnesses summoned by IOT Malta Limited namely:

- 1. Prof Alexei Dingli**
- 2. Prof Maria Attard**
- 3. Dr Joshua Ellul**

This Board has also taken note of the documents submitted by IOT Malta Limited which consisted of a survey confirming that CVA Technology Company Limited was the only operator with access to VATIS.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witnesses, opines that there are two main issues which deserve due consideration namely:

- i) The change of goal posts;**
- ii) The reasons for rejection of IOT Malta Limited’s offer.**

i) **Change of goal posts**

This Board would refer to Paragraph 2.6 of Section 4 of the Tender Document, as follows:

“2.6 – VaTIS Application

The solution proposed by the bidder must be interoperable with the VATIS app. The Valletta Travel Information System (VaTIS) is designed to aggregate and disseminate travel related information in Valletta. The VaTIS server is designed to communicate with various data nodes through RESTful APIs. For a data-note to be integrated with VaTIS, it needs to expose APIs for VaTIS to consume and process. This therefore also requires a dedicated server at the data-node end that sends the respective data to VaTIS. The bidder has to provide a real-time data structure with the status of every parking sensor and send it to the VATIS server.”

The above mentioned clause clearly denotes that VATIS application is to be included, as part of the technical requirements and, at the same

instance, this Board notes that the VATIS application has been clearly and vividly described as to the works/services involved in such an application. In this regard, this Board is aware of the fact that such an application was not clearly indicated in the Appellants' original submissions, so that quite appropriately, the Evaluation Committee gave the opportunity to the Appellants to rectify and clarify shortcomings in their original submissions as follows:

“The Evaluation Committee noted the following shortcomings with regard to your submission:

- If system is to use existing CVA infrastructure, what guarantees does CVA Technology provide that services can continue using their infrastructure?*
- Bidder to confirm provision of metered power supply at 0 cost;*
- Tenderer must specify the type of “support” provided as part of the tender requirements. Definition of support must be provided alongside the costs of support, (hourly rate, damage replacement, extension costs per sensor), beyond the testing and implementation of the works stipulated in this contract;*

- *Tenderer must specify their commitments to integrate the Parking Management System with VaTIS. All tenderers must declare the costs, (if any) of integrating with VaTIS or other 3rd party system.*

- *Tenderer must confirm that all communication costs of sensor to servicer are included in the price of the tender.*

- *Tenderer must confirm that all communication costs of sensor to servicer are included in the price of the tender;*

- *Tenderer to confirm that cost listed in 2.01 is a global sum for all communication infrastructure, (irrespective of the number);*

- *Tenderer to confirm explicitly that system can be extended to other areas;*

- *Tenderer to confirm explicitly that system can reliably detect any type of vehicle that may be making use of the bay;*

- *Can the tenderers confirm what mitigation measures will be put in place to support gateway redundancy?”*

This Board notes that all the points mentioned in the above clarification request relate directly to items mentioned, as requisites, in the technical specifications and bill of quantities of the Tender Document, so that there are no new or additional specifications being requested and at the same instance, this Board was not presented with any evidence of any particular item which was not requested to be included in the original submissions, yet mentioned in the Clarification Request.

This Board would also refer to item 3.01 of the Technical Specifications wherein it is being requested that:

“3.01 *Provide, install and set up Central Management Software as per Technical Specifications”*

In this regard, Section 4 Para 2.6, provides clearly that what is being offered must be interoperable with the VaTIS application, so that the latter must be included in the technical specifications of the Tender and

obviously had to be incorporated in the price being quoted for item 3.01 of the Bill of Quantities.

This Board justifiably establishes that the inter-operation with the VaTIS application was clearly indicated in the Tender Document and item 3.01 of the Bills of Quantities had to incorporate such works, as being part of the technical specifications of the Tender. This Board would respectfully point out that a “*change of goal posts*” occurs when, during the evaluation process, the Contracting Authority requests works or services which are not so listed, as requisites, in the Tender Document. In this case, the inter-operation with the VaTIS application was vividly highlighted in Article 2.6 of Section 4, so that it formed part of the technical specifications, and at the same instance, item 3.01 refers to installation and set-up of the control management software to conform to the technical specifications. In this regard, this Board opines that, the contents requested in the clarification request did not constitute or include items which were not originally requested in the Tender Document so that this same Board does not uphold the Appellants’ first contention.

ii) The reasons for rejection of IOT Malta Limited's offer

With regards to the Appellants' second contention, this Board would refer to the reasons given by the Valletta Local Council for the rejection of the latter's offer, as follows:

“The Evaluation Committee is of the opinion that despite the clarification note, this offer is deemed to be incomplete on the following basis.

The costs to have the service integrated to VaTIS is not known. Moreover, it was concluded that the committee is not in a position to establish/derive to a fixed value at evaluation stage, prior awarding the contract. Thus, the final value to operate and maintain the system is not final.

In terms of Article 1.1 of the Instructions to Tenderers and Notes to Clause 7.1, the bidder was requested to clarify some issues as mentioned above. However, it was noted that the reply was not adequate and thus the offer is deemed to be incomplete vis-a-vis the financial aspect. Thus, this offer is being rejected.”

The above mentioned reasons, denotes that due to the fact that IOT Malta Limited, in their reply to the clarification request, indicated that they quoted an hourly rate of € 50/hour for their system to be integrated with the VaTIS application, no fixed amount or lump sum could be ascertained for such an integration, apart from the fact that the Appellants, through such quoted rate, confirmed that such a mandatory service was not included in their Bill of Quantities.

In this regard, this Board notes that the other competing Bidder confirmed that costs relating to the integration with the VaTIS application, were included in their offer whilst the fact that the Appellants did not indicate a lump sum for such an application precluded the Evaluation Committee from ascertaining and comparing the offers on a “*Like with Like*” basis. At the same instance, this Board upholds the Evaluation Committee’s decision to deem the Appellants’ final reply to the clarification request as being incomplete. In this regard, this Board would also refer to Clause 17.7, Article 18, wherein, it is emphasized that the “*tender prices must cover the whole of the works as described in the Tender Document*”.

This Board has taken note of the testimony of the witnesses duly summoned and from such submissions, it was established that both offers received were technically compliant. However, upon a request for clarification to both Bidders, it became apparent that IOT Malta Limited, in their original submissions, did not indicate that the costs catered also for the integration of their system with the VaTIS application and subsequently quoted a rate per hour, thus rendering their financial offer not definite.

At the same instance, this Board would respectfully point out that the Principle of Proportionality could not be applied as the Appellants' reply to the Clarification request represented an incomplete submission.

In this respect, this Board finds that the reasons given by the Valletta Local Council for rejecting the Appellants' offer were vivid enough to depict the latter's offer deficiency and therefore, in this regard, this Board does not uphold the Appellants' second contention.

In view of the above, this Board,

i) upholds the Valletta Local Council's decision in the award of the Tender;

ii) does not uphold IOT Malta Limited's grievances;

iii) recommends that the deposit paid by the Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

1st November 2018