

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1260 – T 070/18 – Tender for the Provision of Telecommunications Services.**

The publication date of the call for tenders was the 25<sup>th</sup> August 2018 whilst the closing date of the call for tenders was 2<sup>nd</sup> November 2018. The estimated value of the tender (exclusive of VAT) was € 400,000.

On the 10<sup>th</sup> December 2018 Vodafone Malta Ltd filed an appeal against Malta Information Technology Agency as the Contracting Authority objecting to being disqualified on the grounds that their bid was not the Best Price Quality Ratio offer. A deposit of € 1,960.32 was paid.

There were three (3) bidders and six (6) bids.

On 31st January 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Vodafone Malta Ltd**

Dr Paul Gonzi	Legal Representative
Dr Mattea Pullicino	Legal Representative
Dr Nicholas Borg	Representative
Mr Alex Falzon	Representative
Mr Marcel Grech Mallia	Representative

#### **Recommended Bidder – GO plc**

Dr Matthew Cutajar	Legal Representative
Dr Nicole Attard	Legal Representative
Mr Richard Spiteri	Representative
Ms Elaine Fenech	Representative
Ms Philippa Gingell Littlejohn	Representative
Mr Arthue Azzopardi	Representative
Mr Gunnar Grech	Representative

## **Contracting Authority – Malta Information Technology Agency (MITA)**

Dr Danielle Vella	Legal Representative
Ms Caroline Schembri De Marco	Chairperson Evaluation Committee
Mr Ivan Alessandro	Member Evaluation Committee
Mr Wayne Valentine	Member Evaluation Committee
Mr Jesmond Mizzi	Member Evaluation Committee
Mr Robert Grixti	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Paul Gonzi Legal Representative of Vodafone Malta Ltd said that his clients had three grounds on which they were appealing. MITA's indication of the process carried out to reach their decision left the Appellant wondering how the evaluation had been carried out. The Contracting Authority's reply caused the Appellant more concern as it became obvious that multiple options had been submitted in one tender – which was contrary to the tender instructions. The disqualification was on criteria that are still vague even after the objectives laid down by the Public Contracts Review Board at the previous hearing. Apart from the preferred bidders' offer to possibly provide free services it was difficult to understand how the unlimited services had been evaluated. MITA had made assumptions that were not known to the bidders, and deciding that an offer of unlimited calls was the equivalent to a cap of eight hours per day did not make sense. Bidders were not made aware of these assumptions or given an opportunity to object.

The most crucial objection however was with regards to the various options submitted by GO in the tender. MITA claim that these were options within one tender and not multiple offers. The tender asked for one global price and hence any offers over and above that price had to be free. The evaluation by MITA made it clear that there were four offers by GO when the tender instructions made it just as clear that bidders were not allowed to make multiple bids. What was even more inexplicable was that Option 2 was the winning bid when there were two other bids (3 and 4) which were more advantageous to MITA but had been discarded. Apart from the fact that it was impossible to comprehend why offer 2 had been selected it was still unclear as to what exactly was required.

Dr Danielle Vella Legal Representative of MITA said that the restriction on making multiple bids was an instruction which was not mandatory. There was a basic offer by GO plus four alternative options which offered price upgrades. Points had been awarded mathematically according to the classification of the offers. Vodafone had the cheapest price but the lower technical score.

The Chairman pointed out that under Public Procurement Regulations (PPR) if multiple offers had been submitted they should not have been considered. The Contracting Authority had used the word 'should' in the tender which made the instruction mandatory and the tender contract was binding. In any instance the breakdown of points awarded must be divulged in detail to the losing bidder together with those of the preferred bidder.

Mr Robert Grixti Representative of MITA said that the EPPS once published cannot be changed. Following the first PCRБ hearing a system of sub-divisions had been decided upon and published but the Authority was restricted from including them in the EPPS.

Dr Vella continued by stating that unlimited offers had been allocated full marks and the assumption in the hours was made to make sure that no offer became ineligible. Vodafone had not submitted any clarification to find out if multiple offers were allowed.

The Chairman stated that the basic principle here was that multiple offers were not allowed – bids had to be considered on a like for like basis and it as impossible to compare four offers against one. It was a fact that there were four offers from GO and that there was a lack of adherence to the tender documents – this is the only point worth discussing.

Mr Wayne Valentine (42298M) called as a witness by the Board testified on oath that he agreed that there were four offers from GO who had submitted one offer price and a schedule with offers on four services. Scoring was carried out on the three subsidiary packages and any extras offered were conditional on price.

The Chairman said that it was clear that there were varying prices due to the different options offered. The price had to be fixed according to the tender and not on multiple offers which varied the price. He thanked the parties for their submissions and declared the hearing closed.

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**This Board,**

**having noted this Objection filed by Vodafone Malta Limited, (hereinafter also referred to as the Appellants) on 10 December 2018, refer to the contentions made by the same Appellants with regard to the Tender of Reference T 070/18 listed as Case No 1260 in the records of the Public Contracts Review Board, awarded by the Malta Information Technology Agency, (hereinafter also referred to as the Contracting Authority).**

**Appearing for the Appellants:**

**Dr Paul Gonzi**

**Appearing for the Contracting Authority:**

**Dr Danielle Vella**

**Whereby, the Appellants contend that:**

- a) **the Preferred bidder submitted one Tender with three options, whilst the Tender Documents clearly dictated that prospective Bidders submitting more than one option, should submit multiple Tenders. In this respect, the Appellants maintain that the Evaluation Committee did not carry out the Evaluation process in accordance with the regulations stipulated in the Tender and that the same Committee took into consideration the options submitted by the Preferred Bidder, in their deliberation in the award of the offer**

**This Board has also noted the Contracting Authority's, "*Letter of Reply*" dated 17 December 2018 and its verbal submissions during the Public Hearing held on 31 January 2019, in that:**

- a) **The Malta Information Technology Agency insists that the restriction on making multiple offers was purely an instruction which was not mandatory. The Preferred Bidder submitted one offer with four**

**alternative options and the Contracting Authority chose the most advantageous combination.**

**This same Board has also noted the testimony of the witness namely, Mr Wayne Valentine, who was duly summoned by the Public Contracts Review Board.**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the interested parties, including the testimony of the witness duly summoned, opines that the issue which deserves consideration is, the submission of options by the Preferred Bidder.**

- 1. This Board would point out that the principles of self-limitation, transparency and equal treatment must strictly be adhered to by the Evaluation Committee during the Evaluation process of all the offers.**

**At the same instance, the limits which the Evaluation Committee must respect, are all contained in the Tender Document. In this respect, this Board would refer to Paragraph 5, (Important Note), of the Tender Dossier which states that:**

***“Prospective Bidders are reminded that when submitting more than one option for a particular CFT, they should submit multiple Tenders.”***

**The above mentioned clause has two important implications and objectives namely:**

- **Equal Treatment**

**This basic principle ensures the requirement to compare offers on the same footing and on a like with like basis, so that a realistic and objective comparison of offers is effected without giving any advantage to anyone particular Bidder.**

- **Self-Limitation**

**The above clause also stipulates a condition which serves as a yardstick for the Evaluation Committee to follow. In this particular case, the Tender Document makes it clear when it *reminds* prospective Bidders that, if they decide to submit more than one option, they should submit same through multiple Tenders, in other words the Bidders can submit more than one offer, but as a separate**

**offer to the Tender. This clause limited the Evaluation Committee to consider and evaluate only offers and not options.**

- 2. From the submissions made during the Public Hearing and from a thorough inspection of the Evaluation Report, this Board notes that through the submission of three options which the Evaluation Committee incorrectly opted to consider, the Preferred Bidder had an advantage over the other competing Bidders, so that, from the very initial stages of the Evaluation Process, the Committee itself breached the principle of self-limitation and equal treatment. This Board also notes that during the testimony of the witness namely, Mr Wayne Valentine, it was confirmed that the allocation of points was also carried out on the three subsidiary options and the extras contained therein.**
- 3. The Tender clearly requested a global price and any other considerations offered by the Preferred Bidder in the three options so submitted should have been disregarded. If, on the other hand, the Preferred Bidder wished to submit more than one Bid, he had the opportunity to submit more than one offer, but not through a choice of three other options apart from the main offer. One has to be extremely**

careful and pertinent not to tamper with or adjust the original price submitted by a Bidder and in this respect, by taking into consideration the extra option offered by the Preferred Bidder, a modification and adjustment of that Bidder's original quoted price has been effected. This Board would point out that original quoted prices can only be amended for any arithmetical error.

4. This Board would also refer to the Authority's contention that, the contents of Paragraph 5 – "*Important Note of the Tender*", represents purely instructions. In this regard, this Board interprets and translates the contents of this particular paragraph to mean that, since the Bidders are *reminded*, the same are bound to act accordingly and in the opinion of this Board, the same paragraph clearly dictates that Bidders can submit more than one offer but through multiple Tenders, hence a mandatory requirement.

5. This Board would also remind the Evaluation Committee that, during the Evaluation process and through the adherence to the principle of self-limitation, there should be a clear and objective yardstick by which points are allocated under the Best Price Quality Ratio System; so as to

**avoid assumptions and suppress, as much as possible, the subjectivity element. In this regard, this Board would respectfully recommend that clear and objective principles are to be formulated and stipulated in the Tender Document, with regard to the selection criteria and the allocation of points, especially when assessing free services and other unlimited advantages being offered by the economic operators.**

- 6. This Board will not enter into the merits of the allocation of marks duly allotted, as this issue would have deserved consideration, had the options submitted by the Preferred Bidder been disregarded, which is not the case.**

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

- i) does not uphold the Malta Information Technology Agency's decision in the award of the contract;**
- ii) opines that the Evaluation Process was not carried out in accordance with the conditions as stipulated in the Tender itself;**

**iii) directs that an amount of one thousand five hundred euro (€ 1,500) from the deposit paid by Vodafone Malta Limited is to be retained to cover the costs related to the processing of this appeal;**

**iv) directs that the Tender is to be cancelled;**

**v) directs that a fresh Tender is to be issued to reflect this Board's recommendations and findings.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*13<sup>th</sup> February 2019*