

PUBLIC CONTRACTS REVIEW BOARD

Case 1473– CT 2031/2020 – Tender for the Provision of a Comprehensive Cloud Base Solution including Energy Efficient Devices for Students Year 4

Remedy before the Closing Date of a Call for Competition.

The tender was published on the 10th June 2020 and the closing date of the tender was the 14th July 2020 (since extended). The estimated value of the tender (exclusive of VAT) was € 3,150,000.

On the 14th July 2020 Sound Machine Co Ltd filed a Call for Remedy before the closing date of a call for competition against the Ministry for Education and Employment as the Contracting Authority on the grounds that the tender was restrictive and discriminatory. A deposit of € 15,750 was paid.

On 12th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Sound Machine Company Ltd

Dr Norval Desira	Legal Representative
Mr Eman Castagna	Representative

Contracting Authority – Ministry for Education and Employment (MEDE)

Dr Dennis Zammit	Legal Representative
Dr Amanda Spiteri Grech	Legal Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Norval Desira Legal Representative for Sound Machine Co Ltd sought permission to produce a witness.

Mr Steven Agius (220869M) called as a witness by Sound Machine Company Ltd testified on oath that he was the person who had evaluated the tender requirements on behalf of Appellants and had been in contact regarding the software requirements with Samsung plus other major companies like Google. He tabled a list showing a Compliance Analysis comparing the different specification availability from four major software suppliers (Doc 1). This document indicated that two of the requirements of the tender could not be met by any of the companies contacted as they infringed the General Data Protection Regulations (GDPR) legislation of the European Union. Although the tender was asking for a tailor-

made package it still had to be compliant with the GDPR. One cannot give indiscriminate access to a student's tablet without breaking the law, and the technical specifications as drawn up are illegal as nowhere do the tender terms mention that parents' consent will be requested.

Witness stated that the time span from date of the issue of the tender to the submission of the bid is too short for a tailor-made programme to be written and tested, and realistically one would have expected this span to be in the region of three months. Further, the tender indicates that the source code on the development of the software is to become the property of the Authority which is unheard of.

Questioned by Dr Dennis Zammit Legal Representative for MEDE witness stated that he was not aware what particular regulations of the GPRD were not compliant with the tender. With regard to the software witness stated that he did not manage to find any company that produced software that controls screen monitoring but in this context witness could not recall any one single specification in the tender that is not provided in the software of major companies. Witness re-iterated that no software provider contacted by him was prepared to surrender the source code or to produce the required software in the time stipulated in the tender.

Mr Gracio Grixti (200680M) called as a witness by the Public Contracts Review Board testified on oath that he is the E-learning Director at MEDE. He stated that the specification requiring the control over students' screens was based on past experience and teachers' declared preference to have total control over pupils' devices to ensure there is no misuse or even abuse by students. No data can be accessed from students' tablets except the basics already accessible to a teacher like name and surname. Witness said that there are no major changes from the requirements of a tender issued four years previously which tender stipulated that teachers had full control over the students' device. On that occasion Appellants had put in a bid on what was the first phase of this ongoing project.

In reply to questions from Dr Desira witness said his expertise was in applying software not in writing it and he was very familiar with the GDPR requirements. He explained that monitors are controlled by a Learning Management System and teachers have a right to monitor what students are viewing as they are *'in loco parentis'*. The system does not allow teachers have access to what a student is alternatively viewing as that would require access to whichever programme/system the student was watching – there was therefore no infringement of GDPR requirements. Before the tablets are handed over the strict regulations applicable to their use are explained and agreed to by parent and student, since one is dealing in Government property.

In reply to further questions witness stated that he was not aware that the requirement for parents' consent is not mentioned in the tender, nor was he aware if the source code of the tablets currently in use was in the hands of MEDE. The period allowed for the software development was decided by the technical section of MEDE and witness stated he was not involved in this aspect.

Dr Desira said that the basis for Appellants' concern in seeking this remedy was twofold. Firstly, four major software companies state they were unwilling to surrender the source code. This was understandable as it ensured that no one could interfere with, or alter software created by them. Secondly, these same four major companies all stated that they are unable in the short space of time made available

to them to produce a tailor-made programme. If some small company is the only one ready to provide such a programme then it is a case of discrimination against other software suppliers. The GDPR requirements are now much stricter than they were four years ago and cannot be ignored. Nowhere does the tender state that parents' consent is to be obtained and this infringes GDPR. Teachers having unrestricted access to students' monitors again infringe GDPR and justify Appellants concerns about this contract. Tender must be reviewed to correct these irregularities and to give appropriate time to develop a software solution.

Dr Zammit stated that the appeal letter gave no indication of certain fresh points raised and contested in this appeal hearing neither did letter mention what particular regulations of the GDPR were being objected to, particularly since the education sector has certain exceptions in this respect. All Information Technology providers carry a certain modicum of data – this does not necessarily mean that it is abused. The argument that the tender does not oblige the Authority to obtain parents' consent is faulty since it is MEDE that obtains that consent not the system provider. The easiest course for MEDE would have been to go for an off-the-shelf product – it is now being berated for going for a tailor-made system which is more advantageous to students and whose well being is MEDE's only concern. The period for the submissions of offers is not unreasonable except perhaps for major companies that view a small opportunity like this as an interruption to their mainline business.

Dr Desira again mentioned that MEDE seems unable to accept that a cardinal point of the GDPR is that teachers cannot access pupils' tablets without parental consent. Appellants are not claiming that the Authority should buy an off-the-shelf product but merely that the time to produce the alternative is not sufficient – in fact they have now extended the bid date to the 25th August 2020 but still cannot find a supplier in the time available. It is a known fact that no producer of an IT system will ever give up the property rights on the source code of a programme.

In a concluding comment Dr Zammit said that the source code is only being requested on that part of the system that is tailor-made and paid for by MEDE.

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

End of Minutes

Decision

This Board,

having noted this 'Call for Remedy Prior to Closing Date for Competition' filed by Sound Machine Co Ltd (hereinafter referred to as the Appellants) on 14th July 2020, refers to the claims made by the same Appellants with regard to the

tender of reference CT 2031/2020 listed as case No. 1473 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Norval Desira

Appearing for the Contracting Authority: Dr Dennis Zammit

Although not specifically mentioned in their ‘Letter of Objection’, Appellants contend that, two of the requirements so indicated in the tender document refer to:

- a) The fact that, the teacher can access the pupils’ tablet without parental consent goes against the rules of the General Data Protection Regulations (GDPR).**
- b) The Authority stipulated too short a period of time for any major software company to design a ‘Tailor-Made’ software package, whilst small companies might be able to comply so that, discrimination is unnecessarily created against other major and prominent software suppliers.**
- c) The tender document is stipulating that, the software provider must supply the source code of the software package. In this regard, Appellants maintain that, no producer of an IT system will ever give up the property rights on the source of its programme.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 24th July 2020 and its verbal submissions during the virtual hearing held on 12th August 2020, in that:

- a) The Authority maintains that the necessary parental consent for the teacher to access the child’s tablet is sought upon the issue of the tablet and the software to the student.**
- b) The fact that, Appellants’ mentioned suppliers of software feel that the period stipulated for the formulation of the tailored made software package is too short, does not necessarily imply that other IT providers will not be able to abide by the dictated timeframe.**
- c) The Authority contends that it has the right to be provided with the source code of its tailored programme.**

This same Board also noted the testimony of the witnesses namely:

Mr Steven Agius duly summoned by Sound Machine Co Ltd

Mr Gracio Grixti duly summoned by the Public Contracts Review Board

This Board, would, first and foremost, point out that, Appellants’ ‘Letter of Objection’ was generic and the specific points worthy of concern emerged during the virtual hearing. In this regard, due to the very fact that, this procurement is most important and not to allow unnecessary delays in the procurement process, same Board is making an exception in hearing and treating the issues raised during the

hearing, (but not specifically mentioned in Appellants’ ‘Letter of Objection’). This Board would once again emphasize that, this exception, which is not to be regarded as a precedent, is being acceded to, due to the necessity and importance of this particular procurement.

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 duly summoned opines that, the issues that merit consideration are three-fold namely:

- a) Compliance with GDPR**
- b) Timeframe for the supply of tailor-made software and**
- c) The submission of the source code.**

1. Compliance with the GDPR

- 1.1. Appellants are insisting that, the condition in the software system whereby the teacher would be able to access the student’s tablet without parental consent goes against the regulations of the GDPR.**
- 1.2. Appellants also contend that, if parental consent will eventually be obtained, such a condition has not been denoted in the tender document.**
- 1.3. This Board would respectfully point out that, the condition that the teacher would have absolute control on the pupils’ devices is not only justifiable but commendable. One must point out that, the tablets and**

software are and will remain the property of the Government so that, as had been done in a previous procurement process the Authority stipulates certain conditions upon the distribution of the tablets and software and such conditions include that, teachers are authorised to access the pupils' tablets.

1.4. With regard to the alleged fact, that such parental consent is not denoted in the tender document, this Board would respectfully point out that, the tender document was issued for the procurement of the software and tablet devices which will be financed through Government funds so that, the Authority has every right to condition the supply of tablets and software with certain stipulations addressed to the pupils and their parents as it deems fit and proper and within the legal parameters of the GDPR. In this regard, this Board does not uphold Appellants' first contention.

2. Timeframe for Supply

2.1. Appellants maintain that, the time to supply the tailor-made software is too short. In this regard, this Board notes that, the closing date for the submission of offers has been extended to 25th August 2020. It is being acknowledged that, the Authority is not requesting an off the shelf software but rather a tailor-made one, so that, it is quite reasonable to allow a sufficient period for the supply of such software and in this

respect, this Board opines that, a period of two (2) months should be enough to allow any supplier to deliver what is being requested by the Authority.

2.2. This Board takes into consideration the fact that, since there was this ‘Call for Remedy’, the tendering process had to stall and in this respect, same Board opines that a period of 2 months from the date of this decision has to be provided for the supply of software.

3. Supply of Source Code

3.1. In this regard, Appellants are maintaining that, no developer of software will give the source code of the software to the user.

3.2. This Board acknowledges the fact that, developers of software do not release their property rights, such as the source code of particular software. However, consideration must be given to the fact that, this is tailor-made software specifically being designed for the Authority. At the same instance, the Authority is paying for such a specific programme so that, the stipulated condition for the software provider to supply the source code is justified.

In conclusion, this Board opines that:

a) Appellants’ ‘Letter of Objection’ was too generic, and the real specific issues were raised during the virtual hearing. In this regard, an exception was made

by this Board, to treat the specific issues raised by Appellants therein, due to the urgency and importance of this procurement.

- b) With regard to Appellants' first contention, this Board confirms that, as is the normal practice, upon handing out the tablets and software to the students, the relative Authority obtains the necessary parental consent to abide by the regulations of the GDPR, so that, the Authority is abiding by the regulations of the GDPR.**
- c) With regard to Appellants' claim that, the issue of parental consent was not mentioned in the tender document, this Board opines that, the Authority is requesting the procurement of the software only, so that, other details will be included through an agreement between the Ministry for Education and the beneficiary of the tablet and the software. In this respect, this Board confirms that the stipulated conditions in the tender document do not breach any of the regulations of the GDPR.**
- d) A period of two (2) months is being established, as sufficient period of time for the software provider to supply the tailor-made programme.**
- e) With regard to Appellants' third contention, this Board opines that, the Authority has every right to demand the source code of this tailor-made software specifically designed for its justified objectives.**

In view of the above, this Board,

- i. does not uphold Appellants’ contentions except for the fact that, sufficient time should be provided for the software developer to deliver,**
- ii. directs that, the tendering process be resumed without any further delays,**
- iii. directs that, the closing date for the submission of offers be extended to 31st October 2020 at 12.00 hrs (noon),**
- iv. after taking all due consideration of the circumstances and outcome of this ‘Call for Remedy’, directs that an amount of €5750 (five thousand, seven hundred and fifty Euro) be refunded from the deposit paid by Appellants on this appeal.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

26th August 2020