

PUBLIC CONTRACTS REVIEW BOARD

Case 1632 – T003/21 – Provision of a Corporate Enterprise Resource Planning Solution

24th November 2021

The Board,

Having noted the letter of objection filed by Mr Joe Pullicino and Mr Harpal Mattu acting for and on behalf of Grant Thornton – Myriad Consortium, (hereinafter referred to as the appellant) filed on the 23rd July 2021;

Having also noted the letter of reply filed by Dr Marouska Cilia Barbara acting for the Malta Information Technology Agency (hereinafter referred to as the Contracting Authority) filed on the 2nd August 2021;

Having also noted the letter of reply filed by Dr Katya A Gatt on behalf of Camilleri Preziosi Advocates acting for PwC Consortium (hereinafter referred to as the Preferred Bidder) filed on the 2nd August 2021;

Having heard and evaluated the testimony of the witness Mr Mark Bartolo (Member of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Grant Thornton – Myriad Consortium.

Having heard and evaluated the testimony of the witness Mr Mark Captur (Technical Expert to the Evaluation Committee) as summoned by Dr Marouska Cilia Barbara acting for the Malta Information Technology Agency.

Having heard and evaluated the testimony of the witnesses Mr Rudiger Ellul and Mr Robert Sultana (Members of the Evaluation Committee) as summoned by Dr Alessandro Lia acting for Grant Thornton – Myriad Consortium.

Having heard and evaluated the testimony of the witness Mr Ben Houghton (Representative of Grant Thornton – Myriad Consortium) as summoned by Dr Alessandro Lia acting for Grant Thornton – Myriad Consortium.

Having heard and evaluated the testimony of the witness Mr Joseph Pullicino (Representative of Grant Thornton – Myriad Consortium) as summoned by Dr Marouska Cilia Barbara acting for the Malta Information Technology Agency.

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 30th September 2021, 8th October 2021 and 19th October 2021 hereunder-reproduced;

Minutes

Case 1632–T003/21. Provision of a Corporate Enterprise Resource Planning Solution

The tender was published on the 5th February 2021 and the closing date was the 16th March 2021. The value of the tender excluding VAT was € 2,800,000.

On the 23rd July 2021 Grant Thornton Malta-Myriad Consortium filed an appeal against the Malta Information Technology Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid did not achieve the required threshold under BPQR basis.

A deposit of € 14,000 was paid.

There were five (5) bidders.

On 30th September 2021 the Public Contracts Review composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Grant Thornton Malta-Myriad Consortium

Dr Alessandro Lia	Legal Representative
Mr Mark Bugeja	Representative
Mr Joseph Pullicino	Representative
Mr Chris Farrugia	Representative
Mr Harpal Mattu	Representative
Mr Ben Houghton	Representative

Contracting Authority – Malta Information Technology Agency

Dr Marouska Cilia Barbara	Legal Representative
Dr Karina Di Maggio	Chairperson Evaluation Committee
Dr Danielle Mercieca	Secretary Evaluation Committee
Mr Rudiger Ellul	Member Evaluation Committee
Mr Robert Sultana	Member Evaluation Committee
Mr Mark Bartolo	Member Evaluation Committee
Mr Mark Captur	Representative
Mr Robert Grixti	Representative
Mr Ivan Alessandro	Representative

Preferred Bidder – PWC Consortium

Dr Steve Decesare	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Michel Ganado	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Alessandro Lia Legal Representative for Grant Thornton Malta – Myriad Consortium (GTM) said that the sole basis of the appeal was on the evaluation outcome which was irregular since the objective criteria had been dealt with subjective marking even taking into consideration the leeway usually allowed to the Contracting Authority in such tenders.

Dr Marouska Cilia Barbara Legal Representative for Malta Information Technology Agency (MITA) said that the tender was clear in the way the evaluation was to be carried out. This ensured that the process was clear with detailed expectations and criteria clearly setting out what information was expected and how the marking was to proceed. Page 11 of the tender document laid down the objectivity of the evaluation process. The Evaluation Committee carried out the task clearly with individual marking and assisted by technical advisers to advice on technical points. Bidder was fully aware of how the evaluation was going to be carried out.

Dr Steve Decesare Legal Representative for PWC Consortium (PWC) said that the opening statement by Dr Lia was contradictory in the claim that objective criteria had been treated subjectively. If there was a challenge to the points in the tender this should have been done before the submission of the bid. Reference was made to Court of Appeal case 95/21/1on this point.

Dr Lia said that the tender says what it says. The Authority had a system with 75% basis on matters on which they could allot a range of marks. Appellant expected better marks in certain sections. Although the Public Contracts Review Board (PCRB) had before it all the facts how could it possibly be expected to assess if self limitation had been observed? He referred to PCRB Case involving OK Ltd in 2016 in which case the PCRB had not only to check points awarded but to ascertain if the Public Procurement Regulations (PPRs) had been followed. The issues before the Board are of a technical nature since Appellant is claiming that higher marks were expected. Can the PCRB decide if these technical grievances in the appeal are being addressed; only an expert can decide on Appellant's claim.

Dr Cilia Barbara said that the role of the PCRB is to ensure that the evaluation was carried out correctly and no technical expertise was required to assess the outcome of the evaluation. The Evaluation Committee had the competence to decide on the technicalities and it is up to the PCRB to decide if the evaluation was correctly done.

Dr Lia referred to the Appeal Court decisions regarding the competence of the PCRB to check the technicalities and the obligations on the Board to assess on this.

Dr Decesare stated that the Board is not required to carry out an examination every time someone queries an assessment noting particularly the similarity in the Computime case involving the number of Gigabytes. The Board's responsibility is to decide on the merits of the evaluation and whether it was carried out correctly in line with the principle of self limitation. There is no need to appoint an expert to assess the whole evaluation – if at all there might be a case for appointing an expert to decide on some technical point but certainly not overall.

After a short recess the Chairman said that the Board had decided to proceed with hearing the Case with the production of witnesses at a later date.

SECOND HEARING

On 8th October 2021 the Public Contracts Review composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to hear the objections further.

The attendance for this public hearing was as follows:

Appellant – Grant Thornton Malta - Myriad Consortium

Dr Alessandro Lia	Legal Representative
Mr Mark Bugeja	Representative
Mr Joseph Pullicino	Representative
Mr Chris Farrugia	Representative
Mr Harpal Mattu	Representative
Mr Ben Houghton	Representative

Contracting Authority – Malta Information Technology Agency

Dr Marouska Cilia Barbara	Legal Representative
Dr Karina Di Maggio	Chairperson Evaluation Committee
Dr Danielle Mercieca	Secretary Evaluation Committee
Mr Rudiger Ellul	Member Evaluation Committee
Mr Robert Sultana	Member Evaluation Committee
Mr Mark Bartolo	Member Evaluation Committee
Mr Robert Grixti	Representative
Mr Ivan Alessandro	Representative

Preferred Bidder – PWC Consortium

Dr Steve Decesare	Legal Representative
Mr Michel Ganado	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then reminded the parties that the object of this hearing was to hear the testimony of witnesses.

Mr Mark Bartolo (126969M) called as a witness by the Appellant testified on oath that he was a member of the Evaluation Committee. Directed to certain contested criteria in the Evaluation Matrix witness testified as follows:

- Criterion 4.6 – the marks awarded in this section indicate that the response addressed the requirements but it was not possible to award more marks as the evaluators did not find any

added value, defined by the witness as 'more than requested in the bid'. Added value is what the bidder himself was expected to offer or propose and it was not up to the Contracting Authority to tell bidder what to offer. The points awarded reflect a good description but one that was not very good.

- Criterion 5.1 – the submission in this criterion did not live up to usual BI platform standards. This conclusion was not reached by comparing it to offers of other bidders but by evaluating it on its own merits. The knowledge was based on experience that anyone bidding possesses and also there was no indication of other BI platforms.
- Criterion 1.1 – The solution architecture design is made up of various facets. The Grant Thornton Consortium offer referred to one particular definition found on the internet in Technopedia. There are other sources offering their own version of architecture which were not defined in the tender. Should MITA have put in a definition beforehand in the tender then this point would have been past discussing but as it is no clarification was sought beforehand on this. MITA did not adopt a particular definition of architecture and it was up to each individual bidder to put forward their knowledge of the subject. Various facets were not described. The evaluation was based on the evaluators' knowledge and standard definitions which are there for completeness and if not addressed make the reply incomplete. Witness was not present at the clarification meeting when the query on the product roadmap was raised and is not cognisant with the minutes of that meeting neither is he aware of who attended that meeting.
- Criterion 3.1 – Bidder's response shows a table which lists roles with no names and the columns indicate the stage of the plans and the man days – this is not a resource plan but just a table with no team structure but just a list of roles. The consultants are listed but there is no indication of their role and how they interact with each other; it was up to the bidder to present an understandable form of structure. In the key expert forms the roles are not put forward in order of the structure. Section 2.1 gives details of individual roles and responsibilities in the context of Section 3.1 – the tender was issued in a compartmentalised manner so that the information was expected within those criteria and in the appropriate section. Hence, points were reduced for missing information and lack of details on size and structure which are dealt with together. Witness stated that he was aware of the agreement with subcontractors (Unit 4) but the requirement was for details of contributions from such subcontractors. The Consortium stated that they are making very limited use of subcontractors' resources and thus the conclusion is that there is no indication of their contribution. Witness agreed that he is fully aware that Myriad was not a subcontractor but part of the Consortium and that he saw the documents regarding subcontractors but could not recall the details. He stated that he does not consider Unit 4 as a subcontractor since Grant Thornton and Myriad are a consortium, although in the submission Unit 4 is mentioned as such with no indication of its contribution which is stated to be very limited. MITA in their role as clients were expecting an outline of what expertise contribution the contractor was expecting from the Contracting Authority.

- Criterion 4.1 – On the Mobilisation of Resources Plan the Authority was expecting a plan outlining the use of resources assigned for each task but there was no indication of this.
- Criterion 4.2 – Witness stated that he was present at the demonstration given by Appellant to explain the project management methodology. The bid did not state the methodology as such but only made reference to other unnamed projects – there was no reference that it was based on Prince2. MITA here did not specify a particular approach. As regards the presentation this could not be used to supplement information in the bid and was not taken into account – in any instance the presentation came after the evaluation, and at the time of the evaluation the Authority was not aware of the connection between Unit 4 and Prince2.
- Criterion 5.5 – the tender mandatorily requested that sales and purchases functionality is separate with clear demarcation. The submission mainly concentrated on the processing aspect but the Authority expected more details when it specified ‘elaboration’. The section could not be taken in isolation but in conjunction with the mandatory request for demarcation. The quality and level of a submission must be such as to give peace of mind to the Authority that the bidder is able to undertake the quality level of the tender.
- Criterion 1.2 – Witness pointed out that the Authority should not be expected to cross-reference replies in the bid. As an example it was mentioned that when evaluating section 1.2 the evaluators had not yet reached sections 4.6 and 5.8 and could not interpret information in those sections in relation to other sections. Marks were allotted in the section where the information was given and presented as otherwise marks would be allocated twice. The request in this section was for elaboration on the Solution design and how the necessary aspects of security, scalability, recoverability and availability, were to be achieved. There was no indication of how this was going to be achieved and the bid offers certification rather than implementation to ensure that the requirements will be achieved – in other words the mechanism is not there.

In reply to questions from Dr Marouska Cilia Barbara Legal Representative for MITA, witness explained how the evaluation process had been carried out, with individual evaluations of each bid and with referrals to the technical people if advice was required. A precise table of criteria for marking was established (page 11 of tender). The overall impression of Appellant’s bid was that it was lacking in detail and witness mentioned as examples sections 4.6 and 5.8 where the offer was given good marks but the evaluators were looking for quality in the submission and if it adequately satisfied the criteria. On Section 1, the evaluation could have stopped at that stage as the bid did not reach the necessary pass mark threshold of 60% but the Evaluation Committee continued with the evaluation to be fair to the bidder and to get a better feel of the whole submission. On Section 1.1 the evaluators wished to see a better representation of the system of business architecture design and representation of the technical aspects. The Road Map is a plan of when things will happen and ideally it should be complete. Bidder referred to the Unit 4 portal but there was no indication of what portal it referred to – since the contents of a website may change reference to it was not useful.

Regarding criterion 1.2 which carried 50 points; that is half of the points for this section, there was no cross referencing but the evaluators were expected to go searching for information. In the course of

the evaluation a clarification was issued but still the underlying components were not mentioned and were missing. In Section 1.1 detail was lacking and in 1.2 bidder did not provide the information that the evaluation committee needed. The demonstration was meant to corroborate the written submissions and to add information but merely to confirm that the offer was correctly understood. Section 5.1 did not compare with what is normally expected of a BI platform – Appellant was expected to strive for industry’s standards. Witness confirmed that there was no duplication of questions as each question was specific and each criterion is a discrete one. However, there is inter-linking for different aspects of a solution.

Mr Mark Captur (530478M) called as a witness by the Contracting Authority testified on oath that he is qualified in IT to degree level, has 21 years experience with MITA and extensive IT experience over many years. He drafted the report on Section 1.2 of the tender and the method of its assessment and explained that architecture design shows how to achieve the desired facets – it should have features, timelines and when timelines come in. Bidder’s submission was not a roadmap but a number of features. Criterion 1.2 was specific in indicating what security, availability etc was expected – at least the Authority expected structure but no details were provided and the ‘how’ was not there and without context of time. Referred to extracts from the evaluation report on section 1.2 witness replied that there was the need to mention at least the infrastructure, platform etc but there were no details of how Azure was to be used and therefore one could not assess Appellant’s claim or how it was to be achieved – although measures are given there does not seem to be an indication of how it is going to be implemented. It was clear that there is no proof that the aims are achievable.

In reply to questions from Dr Lia, witness stated that he was responsible only for the draft report and assessment of Section 1.2 and vetting the replies on Sections 4.6 and 5.8 and was not involved in any of the other sections. Witness further said that there are various and many facets of architecture design which are specifically defined in 1.2 and not in a person’s mind. He re-iterated that he had drafted the report on Section 1.2 and had passed it on to the Evaluation Committee for their consideration and that this Section is specific on how to achieve scalability. Witness confirmed that he was aware that in certain sections ‘outline’ was asked for and he understood that to mean a high level textual submission. The interconnection and dependencies shown in different sections do not give the information required as there is no background infrastructure.

Mr Rudiger Ellul (148781M) and Mr Robert Sultana (68677M) both called as witnesses by Appellant testified on oath that they were both members of the Evaluation Committee. In reply to questions from Dr Lia both stated that they were present at the clarification meeting. Mr Ellul stated that he did not pass on to Mr Bartolo the notes on the clarification meeting as these were available on the website. He further confirmed that the clarification meeting set up on the initiative of MITA at which their representatives and technical advisers were present was held to clarify any queries that the bidders might have had.

In reply to a question by Dr Decesare the Legal Representative for the PwC Consortium witness said that precise and specific answers were given to the questions raised at that meeting, no questions were disregarded and no criteria were altered.

Mr Ben Houghton (Passport No 521491501) called as a witness by Appellant testified on oath that there were two previous issues of this tender; namely TO17/19 (2019) which was cancelled due to lack of interest and TO18/20 (2020) which was cancelled after several offers were submitted – in both these tenders the weighting was 40% financial and 60% technical whereas in the current tender the

ratio was changed to 25% to 75% respectively. Myriad was invited by Grant Thornton Malta to form a partnership. Witness stated that he did not attend the clarification meeting but colleagues who attended left with the impression that the information given was specifically pertinent to MITA.

Regarding the meaning of architectural design witness said that the question specifically asked for a solution; in this context, in the past, it was important to provide full details of the infrastructure and build – nowadays there are no problems with the answers provided as servers are virtual and located anywhere externally and not in house. There was no request for infrastructure but just for a solution of architectural design. On Section 1.2 MITA was looking for the ‘how’ but the question asked for ‘outline’ which Appellant provided but now they are asking for the details – convertibility and security are all mentioned in the outline in Appellant’s response. 1.2 merely asks for what was already requested in 1.1 and in an integrated system there are overlaps in these questions as they refer to the same things in a different context.

Appellant’s response in regard to item 1.3 which witness claims overlaps with other sections is that their system had a high degree of configuration and parameterisation and met the requirements of the different scenarios. The offer in section 3.5 is meant to reduce the dependency on the contractor on knowledge transfer and offered to explain how the design would work. In referring to the clarification meeting the point was that it related to the requirements of MITA. The information on the roles was provided in Section 3.1 and though there were no individual details it was possible to extract the roles by extrapolating positions. The information on subcontractors explicitly specified that they had very limited roles largely for the support of staff deliveries. In Section 4.1 a Mobilisation Plan was provided and clearly identifiable. Witness accepted that regrettably an error in the presentation was made in the Microsoft files.

Justification in Item 4.2 was provided in the reference to the CFMS project methodology which is a Unit 4 methodology based on Prince2 and elaborated in the demonstration given to the Evaluation Committee. Witness claimed that in 4.6 there is no mention of added value in this section and if the only thing missing in the offer is added value it is not reasonable to deduct marks so heavily. In 5.1 the question did not ask for a prevalent BI platform but for a solution to support non-technical users. Appellant’s solution would deliver this requirement better than a prevalent BI platform. This was shown at the demonstration given to MITA. On item 5.5 the tender did not ask for a distinction between sales and purchases so Appellant did not provide it – bidder ticked all the mandatory boxes and stated both supplier and client reporting requirements.

Finally witness stated that he was a Chartered Accountant in the UK; was formerly a financial controller and worked in ERP for some 20 years working for clients throughout the world.

Questioned by Dr Cilia Barbara witness confirmed that he was fully aware that the ratio in this tender was 75% technical to 25% financial and was clear on how the marks were to be allocated. He also confirmed that at the clarification meeting it was clearly stated that the responses should be concise but understood that the meeting changed the basis of marking by adding requirements such as added value which is subjective. Witness confirmed that at the clarification meeting no one had mentioned that bidders could give less details or that it stopped Appellant from giving full answers. Witness said that what was being asked in Section 1.2 was clear as it elaborated on what was provided in 1.1 and that the sections must be taken together. According to the witness, in 1.2 Appellant gave outlines as requested and it was up to MITA to impart from that what was offered – the question did not ask for details but for outlines. He added that there was no point in seeking clarification as the request for

an outline was clear. Witness further stated that the methodology was not specifically mentioned and he considered that all mandatory requirements had been complied with.

In reply to questions from Dr Decesare witness stated that the Consortium had not appealed or sought any precontractual remedies against the cancellation of the first two tenders. Regarding the clarification meeting witness confirmed his statement that the procedure was clear and concise and that the format of the tender expected replies for each section. He further stated that it was clear that 1.2 was more important than 1.1 as it carried more marks – however the Appellant did not control the marks but merely provided the answers requested and the question only asked for outline; MITA were evaluating what was in their mind not what was asked for. According to the witness, the title in Item 3.1 is indicative of a person’s role; two project managers were listed and although admittedly no details were provided MITA could have extrapolated the structure.

Mr Joseph Pullicino (576962M) called as a witness by the Contracting Authority testified on oath that Appellants had only provided one example out of many architecture designs.

There being no further witnesses to be heard the Chairman thanked the parties for their submissions and deferred the hearing to the 19th October 2021 at 12.00 noon.

End of Minutes

THIRD HEARING

On 19th October 2021 the Public Contracts Review composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to hear the objections further.

The attendance for this public hearing was as follows:

Appellant – Grant Thornton Malta - Myriad Consortium

Dr Alessandro Lia	Legal Representative
Mr Joseph Pullicino	Representative
Mr Harpal Mattu	Representative

Contracting Authority – Malta Information Technology Agency

Dr Marouska Cilia Barbara	Legal Representative
Dr Karina Di Maggio	Chairperson Evaluation Committee
Dr Danielle Mercieca	Secretary Evaluation Committee
Mr Rudiger Ellul	Member Evaluation Committee
Mr Robert Sultana	Member Evaluation Committee
Mr Mark Bartolo	Member Evaluation Committee
Mr Robert Grixti	Representative
Mr Ivan Alessandro	Representative

Preferred Bidder – PWC Consortium

Dr Steve Decesare
Dr Katya Gatt
Mr Michel Ganado

Legal Representative
Legal Representative
Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then reminded the parties that the object of this hearing was to hear the final submissions.

Dr Alessandro Lia stated that as introductory point which does not affect the present case he would remind the Board that this was the third time that this call has been issued – the first and second calls had an award ratio of 60% technical and 40% financial and both Grant Thornton (GTM) and PwC had divulged their hands with regard to prices with GTM deemed to be the cheaper offer. This time the tender is on 75%/25% basis to be assessed on a BPQR system which has the benefit of allowing the evaluation committee a certain leeway but not to a subjective interpretation of the tender. Everything revolves around a high element of subjectivity in allotting marks on objective criteria. This is different to other decided BPQR cases (reference to PCRB Case 1579) where the Board stated that the Contracting Authority should have a certain degree of leeway within the constraints imposed by the tender without creating uneven subjectivity and flexibility.

In this case the determined element of solution design requested carries more than one definition which have different meanings – the definition by the Authority is more akin to a technical design rather than a solution design and means different things. There was no obligation on the bidder to seek clarification to distinguish between the different solutions as the Authority chose one definition. This was a fatal characteristic in the evaluation as it changes the parameters leading to different adaptations by different bidders and should lead to a revocation of the evaluation process. This was not an instance of pre-evaluation clarification as it is not a case of textual discrimination but of terms that carry more than one interpretation.

The second point, raised by Dr Lia, is regarding the overall process of the evaluation. Testimony was heard that Mr Mark Bartolo was unaware of the MITA meeting, or of the Minutes thereof, giving direction to bidders how to complete the tender. Mr Bartolo should have been aware that MITA directed that submissions must be brief, concise and direct – and this raises the question if he was prejudiced by not being at that meeting or by not having access to the documents since these gave instructions to the prospective bidders as to the length, directness and relevance of answers. The absence of these documents too renders the evaluation revocable.

Dealing next with Appellants' grievances, Dr Lia stated that Criteria 1.1 and 1.2 related to the concept of solution design. It is obvious that the evaluators had a different concept of solution design to others. Mr Bartolo when questioned on this point said that the concept offered was one of the definitions which leads one to conclude that the evaluation was based entirely on a different definition by the Evaluation Committee. No clarification was made in the first sub-criterion as to which definition of solution design bidder was offering and this led to a deduction of points – a clear instance of lack of transparency and self limitation.

In respect of section 1.2 MITA claims that there is no cross referencing between sections; what really matters generally is substance over petty procedure – there should be a level playing field and no discrimination. The offer is entirely clear even if certain requirements are stated in another section and the Authority was wrong to abide by this principle. A technical expert was brought in by MITA to evaluate criterion 1.3 only and to read criteria 1.1 and 1.2; therefore there was no technical advice given in respect of the latter two sections in that the requirements were included in 1.1 albeit that should have been included in 1.2. On the definition of solution design it was decided that despite a correct definition being given it should be ignored. Appellant believes that 1.2 should be revoked and re-evaluated.

In Criterion 1.3 the justification given is that there was no elaboration on the dependence on the sub-contractor. Mr Ben Houghton in his testimony stated that this was fully specified in another section - 3.5 on the transfer of knowledge. The Authority claims that since there was no cross reference regarding transfer of knowledge then points had to be reduced.

As regards section 3.1 the claim is that there is no detail about the structure and size of the team and was only given 42.7 points. Appellant states that a list of all people and their roles in the size and structure of the team was in the bid. MITA's claim that the information is unavailable is totally subjective as the only missing detail was the graphical representation which MITA seemed to expect. In this they went well beyond what is expected in a BPQR procedure.

Dealing with sub-criteria 4.1, according to Dr Lia, Mr Houghton in his testimony explained that in converting the plan into PDF form one standard column of resources disappeared – while conceding this point it must however be accepted that the rest of the specific roles were briefly explained and bidder should have at least been awarded a pass mark. In section 4.2 MITA's comments were that few details were provided on the project methodology. Bidder offered a system which is known to MITA and uses Prince2 and this is clearly mentioned in the submission and claims that there was a lack of cross referencing are countered by the fact that the Authority was obliged to consider this as they are fully aware that the system is used in a Government project. On 4.6 there is a negative comment despite given a mark of 68.9. The Authority claims that they required the addition of some element of value added. This claim does not tally with a borderline 'very good' assessment. The definition of the very good range in page 11 of the tender states that it is to determine if the response is complete, comprehensive and unambiguous but does not mean that the lack of value added should drastically remove bidder to such a lower score. The 76% to 90% scoring scale has a number of elements which if not satisfied should move one down the scale; but if completely satisfied, even without any added value, the given mark should have been at least 75% - again clearly showing that excessive subjectivity was exercised.

In section 5.1 the Authority's comments and testimony is that is that one of the elements in the evaluation was the prevalent Business Intelligence (BI) platform. There was no indication that Appellant's offer was irregular but the Authority had something else in mind - again a subjective assessment on an objective criterion. The Authority, in 5.5 stated that there was no clear separation between the sales and purchases functions indicating that they did not properly understand what the bidder's submission was. Mr Houghton testified that the contracts were not only separated but examples were supplied to make the position clear. Dr Lia concluded by saying that the Board has to rest on two opposing views.

Dr Marouska Cilia Barbara on behalf of the Contracting Authority said the point of this appeal is to ask for additional marks in Appellant's evaluation. MITA's explanations both in the tender document and the assessment guidelines were made very clear to the bidders and were in line with the directions laid down in PCRB Cases 1087 and 1088 in this regard. If Appellant was not comfortable with the terms of the tender there were remedies available – neither GTM nor any of the other parties complained which means they were comfortable with the tender. Appellant claims that it did not understand the criteria fully as evidenced in Mr Houghton's testimony claiming that he did not know that value added was expected. It is up to the bidders to present their best offer and to understand the provisions and requirements of the tender and the scoring range. As to the quoting the OK Case in support of the request to appoint a technical expert it should be noted that that case is very different from this one.

All GTM are claiming is a request for higher marks when there are sorely lacking details in their submission and when an expert witness went into that same submission point by point to analyse what was missing. If GTM were so confident of their submission it was up to them to appoint their own technical expert to explain it to the Board. The briefing session referred to was open to all bidders – because of the value of this tender and since the previous tenders had to be cancelled it was felt preferable by the Authority to have a briefing. It is in MITA's interests not to eliminate anyone and to avoid problems to make sure it does not exclude anyone. There is nothing in the tender to confuse any prospective bidder – it is concise, definitive, brief but comprehensible and nothing was changed in the tender by the briefing meeting. Mr Houghton in his testimony confirmed that no one asked him to change anything in the tender.

The absence of Mr Bartolo from the briefing meeting is no big deal and had nothing to do with the evaluation said Dr Cilia Barbara. Mr Ellul and Mr Sultana attended that meeting simply because they were involved in the drafting of the tender and the evaluation committee may not even have been composed at that stage – there was no evaluation committee at the time of the briefing meeting. As regards the claim that no clarification was sought this can only be done if any information is not clear – the evaluators cannot rectify or clarify information which is not there.

The bidder failed in section 1 but the Evaluation Committee nonetheless went through the entire bid to ensure that they had the entire understanding of the offer. The Committee could have stopped in section 1.1 as the presentation by Appellant pointed to only one definition of a solution design – the requirements of the Authority for more than one definition were not fully understood - all GTM offered was just one graphic presentation of one aspect of solution design. 1.2 clearly shows what MITA was looking for and went far beyond 1.1 – it was up to the bidder to provide an underlying ERP entire solution. If this was not clear to the Appellant it could have asked for a clarification. Section 1.1 also refers to a Road Map to ensure continuous evolution and improvement – the Authority expected a commitment that it was going to happen – these details would eventually form part of the contract, hence their importance.

As a matter of accuracy the technical expert was involved in 1.2 not 1.3. He presented a report to the Evaluation Committee but was not involved in allocating marks – he explained how the criteria were not fully achieved and that what was provided did not give the 'how' and did not add anything. On submission the bids had to be complete with all details and not to refer to a portal for further information. The information presented in section 3 was insufficient and not of a high level and the Authority is bound by the principle of self limitation.

In criteria 3.1 there is no explanation of the roles which the key experts will be taking and their involvement – the evaluators cannot assume who will be doing what. The size and structure required details of subcontractors and responsibilities which was seriously lacking. Criterion 4.1 gave no indication of MITA's involvement and it was hardly mentioned; there was just a suggestion of overseeing the project. Without MITA being involved the project would not work and their role cannot be overlooked. Mr Houghton on his own admission agreed that that the methodology was not mentioned in 4.2 – the subsequent demonstration to which reference was made happened after the tender had closed and all bids submitted and could not be considered at that stage as it would have been unfair to all the other bidders, whilst in 4.6 the above witness clearly showed that he was not aware that the Authority wanted value added. The closeness of the marking in this section indicated how subjective the evaluating process was.

Both sections 5.1 and 5.5 had marks deducted because of information being seriously lacking and there was not enough information on functionality in the latter section. With regard to the Corporate Financial Management Solution (CFMS) project there was no indication of how this was going to integrate in this project and could only evaluate the information provided rather than simply accepting how good TGM was at it.

Dr Steve Decesare said that the focus of this appeal is on the award criteria and the allocation of points. Public Procurement Regulation 239 allows competition and assessment criteria with specific weighting and this focuses the mind of bidders to what is important and fundamental. The tender did not only set out the Evaluation Grid but went further and amplified on each award criteria so tenderers were fully aware of what was required. The question is what did the tender require in respect of the solution design? The bidder had to show how certain factors were to be met. Mr Houghton claims that in the clarification meeting clear, concise and specific instructions were given; however the bidder was always expected to deal with each question and to give pertinent information. Appellant indicated several times that the required information was in elsewhere several places. Answers had to be supplied in the sections required and the Authority could not be expected to go searching for answers in different sections; the Authority was precluded from doing this by the terms of the tender. In Case 179/2013 the Court of Appeal held that the tenderer is obliged to provide all details to enable a proper examination of its bid. GTM did not provide the information to meet all the criteria.

Seeking a precontract remedy was not the only course available – clarifications are also available during the course of a tender, so it is evident that Appellant must have understood what the solution design required. Three witnesses made it clear that what was required in 1.1 was a product Road Map which was not adequately addressed and the solution architecture was presented in graphic form which did not address security, recoverability and scalability as specified. Unit 4 is not a reference to methodology as Mr Houghton claimed. Regarding section 3.1 a reference to the size and structure of a team goes beyond providing names and title roles with no indication of hierarchy and with the same titles for different roles in some instances not specified. The size of a team and their contribution to the project could not be extrapolated from the key expert forms, as claimed; this was a requirement specifically stated in the tender.

Dr Decesare said that Dr Lia had stated that the Evaluation Committee did not have unfettered discretion. This was a fact as they were bound by a matrix that put them in a very strict defined role and which was very objective. (Reference was made to CJEU Cases 252/10 and T 50/05 which have a bearing on this point). Applicant had not shown that the Authority had made any fundamental

mistakes in their assessment and no proof provided that there were any manifest errors in the GTM offer.

Dr Lia said that bidders were led to understand definitions differently in delivering different answers to the same solution project – the problem was that the definition that MITA adopted was in their own minds. The technical side having a higher percentage of marks placed a bigger burden on the Evaluation Committee not to deviate into potential subjectivity. The briefing meeting was intended by MITA to guide and direct prospective bidders to be brief and concise etc. Appellant contends that on the basis of a correct definition of solution design it did not fail to address the requirement and certainly not with the marks allotted.

Dr Cilia Barbara very briefly concluded by saying that criteria 1.2 clearly sets out what the tender required and what bidder should have submitted.

The Chairman noting that there were no further submissions thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 30th September 2021, 8th October 2021 and 19th October 2021.

Having noted the objection filed by Grant Thornton – Myriad Consortium (hereinafter referred to as the Appellant) on 23rd July 2021, refers to the claims made by the same Appellant with regards to the tender of reference T003/21 listed as case No. 1632 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Marouska Cilia Barbara

Appearing for the Preferred Bidder: Dr Steve Decesare

Whereby, the Appellant contends that:

- a) The marks adjudicated in some instances (referring to reasons provided in rejection letter) are underserving and it is this fact which has led to the exclusion of the bid, and not the failure by the Appellant to submit a bid which *de minimis* should have obtained an average technical score of 60% for Section One.

- b) All the details provided in the Objection Letter for sub-criteria 1.1, 1.2 and 1.3 show that if a proper evaluation exercise had been conducted, and also an understanding of the application in our offer was obtained, which is somewhat unique, the Appellant's bid would have obtained the set minimum threshold of 60% and thereby would not have been disqualified.
- c) All the details provided in the Objection Letter for sub-criteria 3.1, 4.1, 4.2, 4.6, 5.1, and 5.5 show that if a proper evaluation exercise and better understanding of the solution proposed, including possibly more questions / clarifications on the above subject matters during the presentation and demonstration of the 10th June 2021, had been conducted, the Appellant bid would have obtained the set minimum thresholds, and thereby possibly could have been awarded the tender, given that it was the cheapest compliant tender – thus obtaining a full 25% mark for its offer.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd August 2021 and its verbal submissions during the virtual hearings held on 30th September 2021, 8th October 2021 and 19th October 2021 in that:

- a) MITA contend that the Evaluation Committee acted in a just, fair and logical manner throughout the whole evaluation process and that the evaluation process was carried out in accordance with the terms and conditions as stipulated in the Tender documents. The Contracting Authority (CA) firmly rebuts the Appellant's objections.
- b) Extracts of two (2) sub-criterion responses:
 - i. Sub-Criterion 1.1 – the Evaluation Committee, after taking in consideration the Advisors report and their own evaluations found that the Appellant included a “diagram showing the logical/business module relationships” and details on each module, but not a complete Solution Architecture Design. With respect to the Product Road Map the Appellant's bid, by its own admission, provided only limited items rather than a full product roadmap. Thus, in line with the principle of self-limitation, the Evaluation Committee could not award a ‘Good’ response to the Appellant.
 - ii. Sub-Criterion 1.2 – in this sub criterion, the Appellant did not elaborate on -indeed did not even provide – the Solution Design. It did not outline the underlying solution architecture components, their interconnections and dependencies. This requirement was completely omitted by the Appellant.
- c) Clarifications – the appellant complains that the Evaluation Committee should have asked more questions / clarifications during the presentation and demonstration. However, it is pertinent to point out that first and foremost it is the bidder's responsibility to ensure that all the information required is submitted within its bid. Clause 5 of the General Rules Governing Tenders (V4.2) provides that *“The Economic Operator must provide all information and documents required by the provisions of the procurement document.”* However, the Appellant seeks to shift the

onus on the Evaluation Committee, holding them responsible to ask further questions and inquire further on requirements which it was duty bound to explain itself. The information submitted by the Appellant was clear. The issue was that it was not sufficient. Clarifications should not be used in order to substantiate or fill in gaps there were left by the bidder, otherwise, the completion of the bid would be done during the Evaluation stage. This would have given an unfair advantage to the Appellant and disrupted the fair playing field. Also, the Evaluation Committee could not ask for additional information / documentation as this would have been tantamount to a rectification, which is precluded under Note 3.

- d) Presentation (Demonstration) – the Evaluation Committee asked most of the bidders to provide it with a demonstration (Article 6.3 of the CfT refers). The tender provides that the demonstration had to ‘corroborate and confirm the assertions made in the tender submission’ and ‘no qualitative score was associated with the demonstration’. The aim of the demonstration was there to provide what was asserted in the bidder’s submission and could not be used as a means to include / submit additional information ex post facto during the evaluation stage. Thus, contrary to what the Appellant is expecting, the Evaluation Committee could not take in consideration any additional information submitted by the Appellant during the presentation. Moreover, it is pertinent to point out that the bidders were specifically asked to focus on specific areas of the Solution during the demonstration. The Appellant submits that he spoke about the ‘project methodology’ to be employed for this project during the presentation but this was not one of the areas asked for in the tender documentation.

This Board also noted the Preferred Bidder’s Reasoned Letter of Reply filed on 2nd August 2021 and its verbal submissions during the virtual hearings held on 30th September 2021, 8th October 2021 and 19th October 2021 in that:

- a) PWC points out that some of the assertions made by the Appellant in the Objection suggest that it did not strictly follow the instructions set out in the tender document when compiling their tender response.
- b) The importance of ‘*a complete and correct compilation and submission of information and documentation*’ was emphasised in the clarification meeting minutes compiled by the Contracting Authority and made available to all tenderers.
- c) In their objection, the Appellant inter alia comment – in relation to sub-criteria 1.2, 1.3 and 3.1 of the QTR – that some of the information relevant to those sub-criteria was included under different sections of their response, and that the Evaluation Committee should have taken such information (included under responses for other sub-criteria) into consideration when scoring for the sub-criteria mentioned.

- d) As regards sub-criterion 4.2, the QTR required the tenderer *“to state and provide details of the project management methodology to be used for this project and a justification why this methodology is adequate for the implementation of this project.”* The evaluation committee concluded that few details were provided on PM methodology and that justification was limited to previous use in a Government of Malta project. In its objection, the Appellant stresses its experience using this methodology in the mentioned Government of Malta project, and states that they discussed and elaborated on this methodology for a full fifteen minutes during their presentation and demonstration with the CA on the 10th June 2021. In reference to the above, PWC must highlight that it is not for the Appellant or any tenderer participating in a call for competition to decide what needs to be submitted, in a response or what requires repetition under each section of a response, and an evaluation committee should not be expected to determine whether the information it asked for is found elsewhere in the entire response. In accordance with the principle of equal treatment, the CA must apply the QTR equally for all tenders. The Evaluation Committee, in assessing the responses received, is likewise confined by the instructions set out in the tender document in accordance with the principle of self-limitation.
- e) The Appellant’s admittance, in its Objection, that certain required information was not provided in its response in the manner required by the tender document is a confirmation by the Appellant itself that it did not comply with the requirements set out in the tender document. It is submitted with respect, that the Appellant’s own admission in this respect should therefore be sufficient for the disqualification to be confirmed.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant’s grievances.

The Board notes:

- a) That the Criteria for Award of this tender are as per article 6.1 of Section 1 of the tender dossier which stipulates *“The contract will be awarded to the tenderer submitting the offer with the Best Price/Quality Ratio (BPQR) ……”* The BPQR was established by weighing technical quality against price on a 75/25 basis respectively. Hence this Board notes the ‘greater’ emphasis placed by the Contracting Authority on the Technical aspect of the prospective bids.
- b) That the tender dossier has been drafted in great detail. The Board makes specific reference to Section 6.2 of Section 1, namely the ‘Evaluation Grid’ on page 10 and the ‘Scores Matrix’ on page 11 of the tender dossier. This specific section, in the Board’s opinion vastly reduces the risk of subjectivity on the Members of the Evaluation Committee.

- c) That after due consideration, the appointment of a technical expert by this Board was not deemed necessary as the grievances of the Appellant and submissions by all parties during the hearings had more to do with procedural matters than with technical matters. This Board, none-the-less, notes the high level of technical input provided by both the members of the evaluation committee and the technical expert to the committee when called upon as witnesses.

Reference is made to the testimony under oath of Mr Mark Bartolo whereby when questioned on different Criteria he stated:

- i. Criterion 4.6 – *“but it was not possible to award more marks as the evaluators did not find any added value”*
- ii. Criterion 5.1 – *“the submission in this criterion did not live up to usual BI platform standards. This conclusion was not reached by comparing it to offers of other bidders but by evaluating it on its own merits.”*
- iii. Criterion 1.1 – *“Various facets were not described”*
- iv. Criterion 3.1 – *“Bidder’s response shows a table which lists roles with no names and the columns indicate the stage of the plans and the man days – this is not a resource plan but just a table with no team structure but just a list of roles. The consultants are listed but there is no indication of their role and how they interact with each other; it was up to the bidder to present an understandable form of structure.”*
- v. Criterion 4.1 – *“On the Mobilisation of Resources Plan the Authority was expecting a plan outlining the use of resources assigned for each task but there was no indication of this”*
- vi. Criterion 4.2 – *“The bid did not state the methodology as such but only made reference to other unnamed projects”*
- vii. Criterion 5.5 – *“the tender mandatorily requested that sales and purchases functionality is separate with clear demarcation. The submission mainly concentrated on the processing aspect but the Authority expected more details when it specified ‘elaboration’.”*
- viii. Criterion 1.2 – *“That the Authority should not be expected to cross-reference replies in the bid. As an example it was mentioned that when evaluating section 1.2 the evaluators had not yet reached sections 4.6 and 5.8 and could not interpret information in those sections in relation to other sections.”*

This Board opines that what emerges from this testimony is that the Appellant’s bid, even though it meets certain criteria required in the tender dossier, lacks in quality and details.

Reference is made to the testimony under oath of Mr Mark Captur whereby he stated:

- ix. Criterion 1.2 – *“Bidder’s submission was not a roadmap but a number of features. Criterion 1.2 was specific in indicating what security, availability etc was expected – at least the Authority expected structure but no details were provided and the ‘how’ was not there and without context of time”*

Reference is made to the testimony under oath of Mr Ben Houghton whereby he stated:

- x. Criterion 1.2 – *“On Section 1.2 MITA was looking for the ‘how’ but the question asked for ‘outline’ which Appellant provided but now they are asking for the details”.*
 - a. This Board makes reference to Qualitative Technical Specifications 1.2. which stated *“Elaborate on the Solution design outlining all the underlying solution components, their interconnections and dependencies. The design should also clearly outline how availability, scalability, recoverability and security would be attained”.* It is the opinion of this Board that the tender dossier was unambiguous and very clear. It required ‘elaboration’, i.e. detail.

After taking cognisance of the above testimonies, this Board further notes:

- d) That the evaluation as carried out by the Evaluation Committee was not subjective. As stated on numerous occasions by this Board, in the BPQR method of evaluation, the Evaluation Committee is to be ‘afforded’ an element of ‘leeway’ in the way it proceeds with its business of evaluation. It is after all their main responsibility for such an appointment in this respective committee. This element of ‘leeway’ needs to be exercised *“...in a professional, detailed and meticulous manner and always within the remit of the Public Procurement Regulations and the specific Tender document in question.”* (PCRB Case Ref: 1577) *“Hence the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, duties and obligations.”* (PCRB Case Ref: 1583) In this regard, the Board opines that no specific evidence has been brought forward to show the contrary.
- e) That a clarification / briefing meeting was held by the Contracting Authority and all prospective bidders were able to join / attend.
- f) That on various criteria the issue of cross referencing (or the lack of) emerged during the hearing. This Board notes that the Appellant did not cross reference any information within its bid but for certain criteria mentions in its letter of objection that information was present elsewhere within its bid, e.g. Paragraph 5 Letter of Objection – point 1.2 *“The justification for a poor score was ‘Response does not include a solution design and the underlying components, interconnections and dependencies.’ The solution design was presented in 1.1, including the interconnectivity and dependencies between the various modules and components, and did not need repeating in 1.2 to remain concise. In 1.2 we listed additional components like identity services, hosting services etc. Another justification was ‘Mentions some aspects of availability, recoverability and security.’ Besides what we listed in our response in 1.2, we also discussed these aspects in 4.6 and 5.8”.* This Board opines that considering how the Tender was structured, i.e. bidders had to pass section 1 of the technical evaluation before proceeding to the next stages, that the evaluation committee would have been going against the concept of Self Limitation had it taken / used information from other sections such as 4.6 and 5.8 of the bid to be used for section 1.2. This for two reasons. First because there was no cross-referencing. Secondly and more importantly, because the bid needs to firstly pass the compliance evaluation of section 1 before

proceeding to the next sections. It is to be noted that the Appellant did not achieve a high enough score to pass Section 1 of the technical evaluation.

- g) That therefore the main issues at hand in this case are more of a procedural nature and no technical expert was required to be appointed by the Board.

Finally, this Board does not uphold Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member