PUBLIC CONTRACTS REVIEW BOARD

Case No. 251

T089/2010 – Development of a Wed Application with a Content Management System for the *myHealth Record*Project

This call for tenders was published in the Government Gazette on 10th August 2010. The closing date for this call for offers with a department estimate of €60,000 (exclusive of VAT) was 27th August 2010.

Five (5) tenderers had originally submitted their offers

CCG Software Ltd filed an objection on 29th October 2010 against the decision by the Malta Information Technology Agency (MITA) to disqualify its offer for failing to meet *mandatory requirement 1* and to recommend the award of tender to Alert Communications Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Friday, 21st January 2011 to discuss this objection.

Present for the hearing were:

CCG Software

Dr John L Gauci	Legal Representative
Mr Carm Cachia	Representative
Mr Marcel Cutajar	Representative

Alert Communications Ltd.

Ms Claudine Cassar	Representative
Dr Tiziana Filletti	Representative

Malta Information Technology Agency (MITA)

Dr Pauline Debono	Legal Representative
Dr Danielle Cordina	Legal Representative

Adjudication Board

Ms Maria Brincat	Chairperson
Dr Hugo Agius Muscat	Member
Mr David Borg	Member
Mr Trevor Grech	Member

After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr John L. Gauci, legal representative CCG Software Ltd, explained that his client received letter dated 25th October 2010 from Malta Information Technology Agency (MITA) informing them that their offer had been disqualified and the only reason cited was that one of the projects failed to meet one of the functionalities mentioned in Requirement 1 which stated that:

> *"Tenderer shall name three projects of a similar nature which were conducted during the last two years, containing the following functionality:*
>
> *a) e-ID authentication & Single Sign-On*
> *b) Corporate Date Repository (CDR)*
> *c) Secure dynamic web content updateable through CMS*
> d) *Backend integration to multiple data sources"*

Dr Gauci remarked that, according to MITA, one of the projects submitted did not cover the e-ID authentication & Single Sign-On aspect.

Dr Gauci pointed out that by limiting the experience from five to two years that could be cited by tenderers, the contracting authority was in breach of the Public Procurement Regulations regarding evidence of technical capacity because Regulations 52(1) and (2)(a)(i) stated that:

> "52. *(1) The technical and, or professional abilities of the economic operators shall be assessed and examined in accordance with sub-regulation (2).*
>
> *(2) Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:*
>
> > *(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct"*

The appellant company's legal representative contended that, had the contracting authority asked the tenderers to name projects of a similar nature executed over the previous five years, his client would have submitted a longer list of similar projects, most of which were carried out on behalf of MITA.

Dr Gauci claimed that two of the projects submitted by his client met all the four functionalities mentioned in Requirement 1 whereas the third project covered three of the four functionalities, namely to the exclusion of the *e-ID authentication & Single Sign-On.* He further stated that his client, did not seek a clarification as to whether that discrepancy would lead to non-compliance

because it did not occur to them that the contracting authority was going to interpret Requirement 1 so rigidly. Dr Gauci added that his clients felt that they had adequately demonstrated their experience by submitting the other two projects which did include the *e-ID authentication & Single Sign-On* function and also because MITA was aware that his client had executed other similar projects prior to the two year period stipulated in this tender.

Dr Gauci argued that it did not transpire from the tender document that each of the three similar projects that had to be submitted by tenderers had to necessarily feature all the four functionalities listed in Requirement 1.

The same lawyer then quoted the reason for rejection given by the adjudicating board:

> *"The Adjudication Board verified that the eHealth Portal and the Patents and Trade Marks meet the required criteria listed above, but the Patient and Waiting list Management System does not meet requirement (a)* - (the e-ID authentication & Single Sign-On)."

Dr Gauci noted that, at the end of the process, only one tenderer met the full requisites as rigidly interpreted by the adjudicating board and that bid turned out to be the highest one.

The appellant company's legal advisor insisted that the submission made by his client clearly demonstrated that the said company was technically capable to undertake this contract.

Dr Pauline Debono, legal representative of MITA, made the following submissions:

- both the tenderers and the adjudicating board had to abide by the published tender conditions and specifications;

- even if in this case the conditions were quite clear, the tenderers had the opportunity to seek either a pre-contractual remedy or a clarification to sort out any doubt arising from interpretation;

- the five year requirement mentioned by the appellant company was not mandatory, so much so, that it was stated at Reg. 52 (2) that "Evidence of the economic operators' technical abilities <u>may</u> be furnished by one or more of the following means ……."

- the reason for requesting the submission of projects carried out within the last two years and not within a longer period was that technology in this sector developed at such a fast pace that technology dating two years back could well be obsolete and irrelevant for evaluation purpose, so much so that, for example, the 'Single Sign-On' system had been developed over the previous two years;

- the purpose of this tender was for the Ministry of Health to commission a new web application 'myHealth record' that would allow Maltese citizens to access their own

personal medical records and for trusted doctors to be granted access to the citizen's personal medical history records;

- the contracting authority had to be strict in the interpretation of mandatory requirements because it could be the case that other contractors refrained from submitting a bid because they had executed only one or two similar applications;

- the recommended tenderer had satisfied the tender requirements in full;

- this tender was to be awarded to the cheapest technically compliant bidder (it was not a MEAT – Most Economically Advantageous Tender); *and*

- MITA tenders and other subsequent documentation were published on the website and interested tenderers were allowed to give their email address so as to be notified with any clarifications and the like. The tender was downloadable at no charge.

The Public Contracts Review Board made the following observations:

- the contracting authority requested three similar projects - and not two or five - as sufficient proof of tenderer's technical capability, in which case, a tenderer who had executed two large contracts was excluded whereas a tenderer who had executed three small/modest contacts was eligible;

- one had to draw a distinction between a mandatory requirement and a benchmark. For example, the Public Contracts Review Board agreed that it was reasonable to term a Malta Environment and Planning Authority - MEPA - permit as a mandatory requirement but in the case of proof of technical ability, one had to consider whether two projects provided the same level of comfort as three projects taking into account the extent and complexity of the projects submitted rather than the sheer number of projects;

- mandatory requirements were one thing and a benchmark was another in the sense that an adjudicating board could assess whether a tenderer reached a certain standard of competence through various considerations and not, solely, and, necessarily, through mandatory requirements; *and*

- one had to be careful when drawing up tender conditions and specifications so as not to limit competition unnecessarily but to, possibly, set adequate but reasonable standards that would allow for as wide a competition as possible.

Dr Debono informed the Public Contracts Review Board that five bids were submitted but, in the end, only the recommended tenderer met all the mandatory criteria.

Dr Gauci insisted that the contracting authority had asked for this information as proof of tenderer's technical abilities and that in their submission his clients had demonstrated without

any shadow of doubt that they had carried out similar projects. He added that his client had performed all the functionalities requested in the tender document, even the e-ID authentication & Single Sign-On function which had featured in two of the three projects submitted. At this point Dr Gauci, again, quoted Reg. 52 (1) which provided that the *"technical and, or professional abilities shall be assessed and examined"* where he stressed the word 'shall' and that one had to carry out a comprehensive assessment in that regard.

Mr Trevor Grech, a member of the adjudicating board and one the team that drafted the tender document, under oath, gave the following evidence. *Inter alia* he stated that:

- initially the contracting authority was going to request the submission of five similar projects in the previous two years but then they realized that that requirement would have excluded practically all the contractors and therefore, through the market research carried out, the contracting authority settled for three similar projects since there were about ten contractors, including the appellant company, that could meet that requirement;

- the project submitted by the appellant company without requirement (a), namely e-ID authentication and single sign-on, was not considered 'of a similar nature' because it referred to an internal application, whereas the other two projects referred to web portals that were publicly available as requested;

- the proposed publicly available web portal involved sensitive data and the contracting authority had to ensure that the selected contractor had to be well versed in this type of technology and that explained the requirement of three similar projects;

- the 'Corporate Date Repository (CDR)' had undergone significant development over the previous two years and, as a consequence, the contracting authority wanted to ensure that bidders had managed this technology; *and*

- in reply to a specific clarification - no. 009 (04) dated 25th August 2010 (closing date of tender 27th August) - as to whether one, instead of three applications, would suffice by way of experience, the contracting authority had indicated that tenderers that do not meet the mandatory criteria will be disqualified as per clause 1.11 of the tender document.

Dr Gauci insisted that the tender document and the clarification did not stipulate that if any one of the three projects submitted lacked one of the four functionalities – as was the case of his client – the tender submission would be disqualified. He also noted that the question mentioned in the clarification concerned the submission of one instead of three projects which was not the case with his client's submission.

The Chairman Public Contracts Review Board remarked that one was not disputing that the selected contractor had to be technically competent but, on the other hand, one had to consider whether the appellant company was, equally, technically competent, when submitting two

instead of three similar projects all the more when the contracting authority had itself reviewed downwards the original number of projects from five to three.

Dr Tiziana Filletti representing Alert Communications Ltd submitted the following remarks:

- 'Requirement 1' referred to a functionality that had four characteristics;

- she claimed that this tender was worth about €50,000 and that Reg. 52 was applicable to those tenders worth €50,000 and over and, as a consequence, the five year requirement was not applicable to this case and the two year period established by the contracting authority was not in breach of regulations; *and*

- if the contracting authority were to accept two instead of three similar projects then that would be unfair on those bidders who had only one or two applications and had thus decided not to submit a bid.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 29th October 2010 and also through their verbal submissions presented during the hearing held on 21st January 2011, had objected to the decision taken by the pertinent authorities;

- having noted the appellant company's representatives' (a) reference to the fact that offer had been disqualified with the only reason cited being that one of the projects failed to meet one of the functionalities mentioned in Requirement 1 – namely, according to MITA, one of the projects submitted did not cover the e-ID authentication & Single Sign-On aspect, (b) claim that by limiting the experience from five to two years that could be cited by tenderers, the contracting authority was in breach of the Public Procurement Regulations regarding evidence of technical capacity, (c) reference to the fact that had the contracting authority asked the tenderers to name projects of a similar nature executed over the previous five years they would have submitted a longer list of similar projects, most of which were carried out on behalf of MITA, (d) reference to the fact that two of the projects they submitted met all the four functionalities mentioned in Requirement 1 whereas the third project covered three of the four functionalities, namely to the exclusion of the *e-ID authentication & Single Sign-On*, (e) argument that they did not seek a clarification as to whether that discrepancy would lead to non-compliance because it did not occur to them that the contracting authority was going to interpret Requirement 1 so rigidly, claiming that they felt that they had adequately demonstrated their experience by submitting the other two projects which did include the *e-ID authentication & Single Sign-On* function and also because MITA was aware that they had executed other similar projects prior to the two year period stipulated in this tender, (f) claim that it did not transpire from the tender document that each of the three similar projects that had to be submitted by tenderers had to necessarily feature all the four functionalities listed in Requirement 1, (g) claim that the submission it made clearly demonstrated that their company was technically capable to undertake this contract, having performed all the functionalities requested in the tender document, even the e-ID authentication & Single

Sign-On function which had featured in two of the three projects submitted and (h) claim that, contrary to what had been stated in the hearing, the question mentioned in the clarification concerned the submission of one instead of three projects which was not the case with his client's submission;

- having considered the contracting authority's (a) reference to the fact that both the tenderers and the adjudicating board had to abide by the published tender conditions and specifications, (b) argument that, even if in this case the conditions were quite clear, ., (c) reference to the fact that the five year requirement mentioned by the appellant company was not mandatory, so much so, that it was stated at Reg. 52 (2) that "Evidence of the economic operators' technical abilities may be furnished by one or more of the following means …….", (d) reference to the fact that the reason for requesting the submission of projects carried out within the last two years and not within a longer period was that technology in this sector developed at such a fast pace that technology dating two years back could well be obsolete and irrelevant for evaluation purpose, (e) claim that the contracting authority had to be strict in the interpretation of mandatory requirements because it could be the case that other contractors refrained from submitting a bid because they had executed only one or two similar applications, (f) statement that the recommended tenderer had satisfied the tender requirements in full, (g) reference to the fact that MITA tenders and other subsequent documentation were published on the website and interested tenderers were allowed to give their email address so as to be notified with any clarifications and the like and this tender was downloadable at no charge, (h) statement that in this call five bids were submitted but, in the end, only the recommended tenderer met all the mandatory criteria, (i) claim that, initially, the contracting authority was going to request the submission of five similar projects in the previous two years but then they realized that that requirement would have excluded practically all the contractors and therefore, through the market research carried out, the contracting authority settled for three similar projects since there were about ten contractors, including the appellant company, that could meet that requirement, (j) reference to the fact that the project submitted by the appellant company without requirement (*a*), namely e-ID authentication and single sign-on, was not considered 'of a similar nature' because it referred to an internal application, whereas the other two projects referred to web portals that were publicly available as requested, (k) reference to the fact that the 'Corporate Date Repository (CDR)' had undergone significant development over the previous two years and, as a consequence, the contracting authority wanted to ensure that bidders had managed this technology and (l) particular emphasis on the fact that in reply to a specific clarification - no. 009 (04) dated 25th August 2010 (closing date of tender 27th August) - as to whether one, instead of thee applications, would suffice by way of experience, the contracting authority had indicated that tenderers that do not meet the mandatory criteria will be disqualified as per clause 1.11 of the tender document;

- having also deliberated upon the issues raised by the recommended tenderer's representative, particularly the fact that (a) 'Requirement 1' referred to a functionality that had four characteristics and (b) if the contracting authority were to accept two instead of three similar projects then that would be unfair on those bidders that had only one or two applications and had thus decided not to submit a bid,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that the contracting authority, by requesting three similar projects - and not two or five - as sufficient proof of tenderer's technical capability, could have, ironically, *prima facie*, excluded a tenderer who would have executed two large contracts as compared to a tenderer who would have executed three small/modest contacts thus rendering the latter projects eligible. This Board concludes that one has to draw a distinction between a mandatory requirement and a benchmark. In so doing this Board feels that, albeit one was not disputing that the selected contractor had to be technically competent yet, on the other hand, one had to consider whether, in this particular instance, the appellant company was, equally, technically competent, when submitting two instead of three similar projects all the more when the contracting authority had itself reviewed downwards the original number of projects from five to three. However, having stated the above, this Board also opines that the tenderers had the opportunity to seek either a pre-contractual remedy or a clarification to sort out any doubt arising from interpretation. In doing so the contracting authority could have established the reason as to why the contracting authority would have requested the submission of projects carried out within the last two years and not within a longer period, which reason was, basically, that technology in this sector developed at such a fast pace that technology dating two years back could well be obsolete and irrelevant for evaluation purposes.

2. The Public Contracts Review Board feels that, whilst reiterating that a tenderer is never at liberty to decide as to what one needs to submit with the offer document being tendered, yet this Board cannot but also take cognisance of the fact that, in reply to a specific clarification - no. 009 (04) dated 25th August 2010 (closing date of tender 27th August) - as to whether one, instead of three applications, would suffice by way of experience, the contracting authority had indicated that tenderers that do not meet the mandatory criteria will be disqualified as per clause 1.11 of the tender document. Needless to say that contracting authorities are not obliged to state why they require specific documents but, nevertheless, the argument made by the authority's representatives in consideration of ever-changing technological developments, is very credible and justified.

3. The Public Contracts Review Board deliberated upon and decided that the fact that *requirement (a)* - namely e-ID authentication and single sign-on - in one of the projects submitted by the appellants - was not considered 'of a similar nature' because it referred to an internal application, whereas the other two projects referred to web portals that were publicly available as requested, was enough valid reason for the evaluation board to reach the conclusion it had reached.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the appellants should not be reimbursed.

Alfred R Triganza	Edwin Muscat	Carmel J Esposito
Chairman	Member	Member

16 February 2011