PUBLIC CONTRACTS APPEALS BOARD

Case No. 271

T012/2010
Tender for the Provision of ICT Computing Resources in a Virtualised Environment

This call for tenders was published in the Government Gazette on 4th May 2010. The closing date for this call with an estimated budget of € 750,000 was 21st June 2010.

Eight (8) tenderers submitted their offers.

ICT Consortium Ltd filed an objection on 3rd September 2010 against the decision by the Malta Information Technology Agency (MITA) to disqualify its offer on being found technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Wednesday, 6th April 2011 to discuss this objection.

Present for the hearing were:

ICT Consortium Ltd (ICT)

Dr Joseph Camilleri	Legal Representative
Mr Simon Vella	Manager Engineering Services
Mr Liam Pace	Manager Commercial Services
Mr Keith Fearne	Managing Director ICT Solutions

Megabyte Ltd

Mr Ivan Muscat	Representative

SG Services Ltd

Mr Kenneth Bowman	Representative
Mr Michael Gauci	Representative

Intercomp Marketing Ltd

Ing. Raymond De Battista	Representative

Aplan Ltd (Trading as eWorld – Leader)

Mr Chris Ellul	Representative
Mr Rafael Micallef Trigona	Representative

Malta Information Technology Agency (MITA)

Dr Pauline Debono	Legal Representative
Evaluation Board:-	**Technical Team:-**
Mr Robert Galea	Mr Mark Captur
Mr Keith Mallia	Mr Michael Degiorgio

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

Dr Joseph Camilleri, legal representative of ICT Consortium Ltd, the appellant company, remarked that the issues involved in this case were rather of a technical nature and he would therefore delegate the technical team to deal with those issues. Nevertheless, by way of introduction he wished to bring forth the following legal points:-

i. the tender conditions specified that the tender had to be awarded to the cheapest technically compliant offer and he maintained that his client's offer was technically compliant and that as a result it should proceed to the third stage of the tendering process;

ii. during the adjudication stage the contracting authority could not change the selection criteria set out in the tender document because from the evaluation report it appeared that the evaluators preferred higher standards to the minimum standards set out in the tender document especially since, within certain parameters, the tender specifications gave the opportunity to the bidders to come up with different solutions; and

iii. a tender that met the minimum technical requirements set out in the tender document should not be rejected as non-compliant.

Mr Keith Fearne, an engineer by profession and the managing director of ICT Consortium Ltd, explained that, according to the evaluation report, the offer submitted by ICT Consortium Ltd was rejected basically on three alleged shortcomings, namely:

1) ***"10GB network links have been requested by MITA for use with iSCSI, and 1 GB was offered."***

Mr Fearne explained that the minimum requirements in the tender indicated (a) *"4 x 1 GB network ports for production"* which, he claimed ICT Consortium Ltd complied with, and (b) "*2 x HBA ports if interconnection to Storage and Tape Backup will be done via HBAs or 2 x 10GB ports for Network and Storage"* (page 47).

Mr Fearne pointed out that the minimum requirements provided tenderers with two options and that ICT Consortium Ltd chose the first option, i.e. the 2x HBA ports, and for that purpose provided iSCSI 1 GB HBAs dedicated for Storage. He contended that, contrary to the other option where it was clearly indicated 2 x 10GB port, nowhere in the minimum requirements did the tender document indicate that the 2x HBA ports had to have a speed of 10GB and, as a consequence, the evaluation board could not set new minimum requirements at evaluation stage which were different from those in the tender document.

Dr Pauline Debono, legal representative of the contracting authority, agreed that the award had to be made to the cheapest technically compliant tenderer. Dr Debono remarked that, at times, certain requirements were left a bit open so that the suppliers would be able to propose the best solutions on the market. She added that in spite of the fact that MITA attempted to be as clear as possible regarding its requirements, yet she conceded that there

were instances where perhaps MITA could have been more specific in its requests, e.g. with regard to the 2 HBA ports. Nevertheless, she maintained that the tenderer could have asked for a clarification with regard to the speed of these items.

The Chairman Public Contracts Appeals Board remarked that it appeared that no clarification was necessary in this case but that it was legitimate on the part of the tenderer to propose own solution once the contracting authority was not specific as to the speed of these 2 HBA ports.

2) ***"In addition, the network requirements stated in the tender required seamless integration with existing switches. Based on documentation provided by the bidder, the manufacturer (HP) indicated 3 options to integrate with CISCO devices, of which:***

a. Option 1 requires a change in the current core network, and hence any integration will not be seamless as stated in the tender requirements;

b. Options 2 and 3 will introduce a loop in the network, risking network stability.

Hence the use of network switching device proposed by the bidder (HP Procurve 2810-48G) does not meet the tender requirements."

Mr Fearne explained that the device in question was an *Ethernet Network Switch* which formed part of the contained virtualised environment provided by the supplier, which the tenderer would be responsible to maintain and to support under strict *service level agreements* (SLAs). He added that this item would not be part of the MITA network and would only connect to the network through well defined protocols and policies.

Mr Fearne then referred to page 50 of the tender document which defined the minimum requirements for this device as follows:

> *"2 x Ethernet Network switches with a minimum of 48 ports of 1Gb line rate each. The switches must be configured in a stackable manner, for future scalability. Each switch must have 2 x 1Gb SFP based fibre optic uplinks 1000 base SX. These switches must be able to support multiple VLANs.*
>
> *These switches will have to seamlessly integrate and participate in the failover of the upstream core Data Centre switches, which are Cisco devices, using per VLAN spanning tree protocol."*

Mr Fearne remarked that MITA were claiming that the proposed switches did not meet this requirement and had asked ICT Consortium Ltd to indicate how this requirement could be achieved. Mr Fearne cited the reply dated 4th August 2010 given by ICT Consortium Ltd by way of clarification which read as follows:

> *"If PVST or PVST+ is implemented in the core network, then the proposed HP switches support this automatically without additional configuration,* as *long as*

VLAN1 is not used".

Mr Fearne opined that MITA seemed to have misinterpreted this and instead it was referring to a document in relation to a different protocol RPVST+, which was not what MITA requested in the minimum requirements. Mr Fearne stated that, on the other hand, MITA was not arguing that the switches proposed by ICT Consortium Ltd did not meet these minimum technical specifications, the reason being that ICT Consortium Ltd proposed top-of-the-range switches by HP which was the largest IT company worldwide.

With his company's objection, Mr Fearne submitted a document entitled "*Migrating from Cisco to ProCurve Networks*" where the manufacturer, HP, gave technical details of how the interoperability could be achieved. He added that ICT Consortium Ltd engineers were qualified on both CISCO and HP and they had set up a similar configuration in a lab environment which could be demonstrated to experts who wished to examine it.

Whilst conceding that if MITA had CISCO equipment then it would have been preferable to have CISCO switches rather than HP, yet he stressed that that did not form part of the minimum requirements of the tender.

Mr Mark Captur, technical adviser of the evaluation board, referred to the reply given by the appellant company to the query raised by MITA which read:

> *"If PVST or PVST+ is implemented in the core network, then the proposed HP switches support this automatically without additional configuration,* as *long as VLAN1 is not used".*

Mr Captur stated that ICT Consortium Ltd's statement '*as long as VLAN1 is not used'* represented a condition/limitation in relation to the core network of MITA and that did not satisfy the term 'seamless' set out in the tender document. Mr Captur declared that had the evaluation board received the document furnished by the appellant company with the objection at an earlier stage of the tendering process it would not have changed the board's judgment because the fact remained that the appellant company had imposed a condition upon MITA even though, admittedly, HP was up to CISCO standards.

Mr Simon Vella, an engineer also representing the appellant company, stated that the condition "*as long as VLAN1 is not used*" meant that it could not be used in the infrastructure of the tenderer and not in the infrastructure of the contracting authority. He insisted that the proviso did not restrict the contracting authority's functions in any way but the proviso represented a technical comment on what had to be done to achieve a seamless integration. Mr Vella added that if the contracting authority was going to insist on CISCO then that would eliminate other suppliers who could offer different but suitable solutions. Mr Vella complained that MITA did not communicate any further with ICT Consortium Ltd on this matter but went on to decide to reject ICT Consortium Ltd's offer.

Mr Fearne remarked that what was being termed as a condition in fact was a technical

configuration that had to be taken into consideration to achieve a seamless integration and it did not mean that the seamless integration could not be obtained. He added that ICT Consortium Ltd had confirmed this aspect in its original tender submission.

Mr Captur insisted that the clarification submitted by the appellant company imposed a limitation on the contracting authority whereas the other tenderers did not present such limitations, except for an option submitted by *Aplan Ltd* which was likewise rejected. He remarked that at the time the tender was being drawn up there were instances when MITA could have used the VLAN1 although the trend was that in, say, a few months time it would no longer require it because MITA was trying to eliminate the use of proprietary items.

At one stage two definitions were circulated of the term 'seamless integration' which read as follows:

> "(i) – *The addition of a routine or program that works smoothly with an existing system and can be activated and used as if it had been built into the system when the system was put together*; and (ii) *An addition of a new application, routine or device that works smoothly with the existing system. It implies that the new feature or program can be installed and used without problems. Contrast with "transparent," which implies that there is no discernible change after installation*."

3)"The RedHat Virtualisation Manager proposed* does *not support all guest operating* systems *referred to in the tender".

Mr Fearne remarked that the minimum requirements stipulated that the "*… bidder must propose a Virtualisation tool and appropriate licensing to ensure that all Operating System types and versions can be virtualised on this stack'.*

Mr Fearne stated that they had confirmed this requirement in the sense that all the mentioned operating systems could be virtualised on the *RedHa*t stack proposed by ICT Consortium Ltd which was based on the open source *KVM virtualisation engine.* Mr Fearne explained that the difference between 'open source software' and 'proprietary software' was that the latter was purchased against payment to the manufacturing company whereas the 'open source' was a new method how software was being developed such that it was generic software without paying for the license but having to pay a subscription fee that went towards the further development of that software. Mr Fearne added that the open source method was a way how to keep costs down and support was provided by the various uses of the software whereas in the case of proprietary software the support would be provided by the manufacturer of that software.

Mr Fearne remarked that MITA had either communicated with *RedHat* suppliers or else assumed that since *RedHat* did not include in their support list all the operating systems mentioned in the tender document then the 'missing' operating systems could not be

virtualised. Mr Fearne complained that MITA arrived at this assumption without asking ICT Consortium Ltd for clarifications all the more when it was noted that some of the operating systems omitted on the support list of *RedHat* were indicated as *end-of-life* by their manufacturer, Microsoft, and, therefore, one should not expect *RedHat* to offer support on an *end-of-life* operating system. Mr Fearne insisted that in this respect ICT Consortium Ltd had met the minimum requirements stipulated in the tender document.

Mr Captur explained that open source was a community effort whereas a proprietary item entailed the payment of a fee to purchase the licence to use the product and to obtain support services from the manufacturer. Mr Captur remarked that MITA required comfort from the manufacturer that the programmes would function and that the open source method did not provide the comfort of the manufacturer's backing. The same technical advisor of the evaluation board conceded that the tender document did not specify that the product had to be supported by the manufacturer but, on the other hand, in the case of *RedHat*, the contracting authority met such comments as "a particular software works but with adaptation or within certain parameters". Mr Captur stressed that the inclusion of provisos and the expression of doubts regarding functionality did not provide the required peace of mind that the contracting authority was after.

To Mr Fearne's comment that the contractor was assuming responsibility for the proper functioning of the system failing which substantial penalties would be imposed, Dr Debono remarked that the contracting authority was more concerned with having a system running smoothly and consistently rather than imposing fines for system failure.

At this point Dr Camilleri intervened and made the following observations:-

a) without prejudice, the *RedHat* issue concerned only one of the two options offered by his client;

b) it would not be fair to penalise the tenderer because the tender document turned out to be deficient in certain respects or if the minimum requirements were stepped up in the course of adjudication; and

c) if a tenderer satisfied the minimum requirements of the tender then there was no room for one to seek clarifications from the contracting authority

Dr Debono concluded that the main concern of the contracting authority was for it to have the necessary guarantees that the system acquired would function properly and efficiently.

The Chairman Public Contracts Appeals Board noted that the notice of objection was dated 3rd September 2010 whereas the reasoned letter of objection was dated 4th February 2011 and he therefore drew the attention of both the contracting authority and the tenderers to stick to the regulations and not to allow the lapse of five months for the submission of the reasoned letter of objection and in the process leave the tendering procedure at a standstill.

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 4th February 2011 and also through their verbal submissions presented during the hearing held on 6th April 2011, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) albeit the appellant company was informed that its offer was being rejected, yet nowhere in the minimum requirements did the tender document indicate that the 2x HBA ports had to have a speed of 10GB and, as a consequence, the evaluation board could not set new minimum requirements at evaluation stage which were different from those in the tender document, (b) contrary to what had been argued by the contracting authority, the network switching device proposed by the appellant company (HP Procurve 2810-48G) was an *Ethernet Network Switch* which formed part of the contained virtualised environment provided by the supplier and for which the appellants would be responsible to maintain and to support under strict *service level agreements*, (c) MITA were claiming that the proposed switches did not meet a specific requirement which requested that 2 x *Ethernet Network* switches with a minimum of 48 ports of 1Gb line rate each had to be configured in a stackable manner, for future scalability with each switch having 2 x 1Gb *SFP* based fibre optic uplinks 1000 base *SX* and able to support multiple *VLAN*s, (d) these switched have to "*seamlessly integrate and participate in the failover of the upstream core Data Centre switches, which are Cisco devices, using per VLAN spanning tree protocol*", (e) since MITA were claiming that the proposed switches did not meet specific requirements, in a clarification note the appellant company had stated that *"If PVST or PVST+ is implemented in the core network, then the proposed HP switches support this automatically without additional configuration*, as *long as VLAN1 is not used*" with the phrase "as long as" being misinterpreted, (f) albeit, considering that MITA had CISCO equipment having CISCO switches rather than HP did not imply that such switches did not form part of the minimum requirements of the tender, (g) the condition *"as long as VLAN1 is not used*" meant that it could not be used in the infrastructure of the tenderer and not in the infrastructure of the contracting authority, (h) the proviso did not restrict the contracting authority's functions in any way but the proviso represented a technical comment on what had to be done to achieve a seamless integration and it did not mean that the seamless integration could not be obtained, (i) all the mentioned operating systems could be virtualised on the *RedHa*t stack proposed by ICT Consortium Ltd which was based on the open source *KVM virtualisation engine* and (j) it would not be fair to penalise the tenderer because the tender document turned out to be deficient in certain respects or if the minimum requirements were stepped up in the course of adjudication;

- having considered the contracting authority's representative's reference to the fact that (a) although in the tender document MITA attempted to be as clear as possible regarding its requirements, yet the contracting authority conceded that there were instances where perhaps MITA could have been more specific in its requests, e.g. with regard to the 2 HBA ports even though it was generally felt that the appellant company could have sought a

clarification, (b) based on documentation provided by the bidder, the manufacturer (HP) indicated 3 options to integrate with CISCO devices, of which *(i)* option 1 requires a change in the current core network, and hence any integration will not be seamless as stated in the tender requirements and *(ii)* options 2 and 3 will introduce a loop in the network, risking network stability, (c) ICT Consortium Ltd's statement '*as long as VLAN1 is not used'* represented a condition/limitation in relation to the core network of MITA and that did not satisfy the term 'seamless' set out in the tender document, (d) MITA was trying to eliminate the use of proprietary items, (e) the clarification submitted by the appellant company imposed a limitation on the contracting authority whereas the other tenderers did not present such limitations, except for an option submitted by *Aplan Ltd* which was likewise rejected, (f)) the "*RedHat* Virtualisation Manager proposed by the appellant company does not support all guest operating systems referred to in the tender" and (g) MITA required comfort from the manufacturer that the programmes would function and that the open source method did not provide the comfort of the manufacturer's backing,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board argues that no clarification was necessary in this case but that it was legitimate on the part of the tendering company to propose its own solution once the contracting authority was not specific as to the speed of these 2 HBA ports.

2. The Public Contracts Appeals Board concurs with the evaluation board's decision which came to the conclusion that the inclusion of provisos ('*as long as VLAN1 is not used'*) and the expression of doubts regarding functionality did not (a) provide the required peace of mind that the contracting authority was after and (b) satisfy the term 'seamless' set out in the tender document.

3. The Public Contracts Appeals Board takes cognisance of the fact that, except for an option submitted by *Aplan Ltd*, which was likewise rejected by the evaluation board, no other tenderer presented any limitation whatsoever thus confirming that the tender document requirement for a seamless integration with existing switches was attainable after all and this without any provisos being made by tendering companies.

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 Esposito
Chairman	Member	Member

12 April 2011