

PUBLIC CONTRACTS REVIEW BOARD

Case No. 452

CT/3080/2011

Services Tender for the Design, Preparation, Management, Implementation and Evaluation of Training Programmes in Information Management

This call for tenders was published in the Government Gazette on the 27th September 2011. The closing date for this call with an estimated budget of € 245,852 (excl. VAT) was the 8th November 2011.

Four (4) tenderers submitted their offers.

Computer Domain Ltd filed an objection on the 11th May 2012 against the decisions of the Contracts Department to discard its offer as it was considered to be administratively non-compliant and to recommend the award of the tender to Allied Consultants Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened two public hearings to discuss this objection, the first one on Friday, 24th August 2012 and the second on the 8th October 2012, respectively.

Present for the first hearing (24th August 2012) were:

Computer Domain Ltd

Dr Paul Borg	legal Representative
Mr Nick Callus	Managing Director

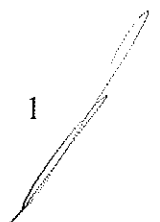
Allied Consultant Ltd

Dr Antoine Naudi	Legal Representative
Dr Victor Axiaq	Legal Representative
Mr Simon Bonanno	Representative
Mr Lorenzo Mule' Stagno	Representative

Centre for Development Research and Training (CDRT) – Office of the Prime Minister

Evaluation Board

Mr George Falzon	Chairman
Mr Jesmond Sciberras	Member
Ms Olivia Camilleri Cortis	Member
Mr Anselmo Bugeja	Secretary



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

Dr Paul Borg, legal representative of Computer Domain Ltd, the appellant company, stated that by letter dated 4th May 2012 the contracting authority informed his client that the company's offer was disqualified as it was deemed to be administratively non-compliant, which decision was the result of six shortcomings, and that the tender was recommended for award to Allied Consultants Ltd. The said shortcomings included:

1. **Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the global price is incorrect and should have rather been €69,720. This proves the offer is unreliable.**
2. **Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the coaching sessions is incorrect. This also proves the offer is unreliable.**

Dr Borg remarked that these two issues were interrelated and his client had conceded that the coaching prices were incorrectly priced, which mistake affected the global price. Dr Borg added that by way of email dated 24th February 2012 addressed to the secretary of the evaluation board, his client communicated the following clarification:-

"We confirm that the prices mentioned in our financial offer under heading entitled 'price inclusive of VAT' are such, that is, prices including VAT and other related taxes.

However, there is a genuine "arithmetic mistake" in the calculation of 'Coaching' total price. The individual prices mentioned in Financial Bid Breakdown A are correct. As a matter of fact all prices (unit prices and total prices) are all correct. The mistake is purely arithmetic when the total coaching price was calculated. Hereunder is a full explanation of the arithmetic (multiplication) mistake:

Item	Maximum number of persons coached per course	Hours of coaching per person	Price per participant per hour (€)	Total price per participant per hour (€)	Mistaken calculation in multiplication (€)	Correct calculation (€)
A	5	8	18.00	18.00	90.00	720.00
B	5	12	18.00	18.00	90.00	1,080.00
C	15	20	18.00	18.00	270.00	5,400.00
D	5	20	18.00	18.00	90.00	1,800.00
E	10	12	18.00	18.00	180.00	2,160.00
F	10	20	18.00	18.00	180.00	3,600.00
G	5	20	18.00	18.00	90.00	1,800.00
H	5	8	18.00	18.00	90.00	720.00
	5	16	18.00	18.00	90.00	1,440.00
TOTAL					1,170.00	18,720.00

Thus the Total Global Price (including VAT and all taxes) was calculated as €50,550 + €1,170 = €51,720.

The Total Global Price (including VAT and all taxes) should have been calculated as €50,550 + €18,720 = €69,270.

It is important to emphasise that all unit prices in the entire financial offer are totally correct. It is very evident from above explanation that the mistake for the calculation of the Global Price was purely arithmetic during the multiplication process.

May I kindly draw the attention to Clause 31 of the Tender Document entitled "Correction of Arithmetical Errors" which clearly states the following:

"Errors will be corrected as follows:

- (a) where there is a discrepancy between amounts in figures and in words, the amount in words will prevail;*
- (b) where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail."*

Dr Borg remarked that albeit the unit price with regard to 'coaching' had remained the same (€18), yet that rate had to be multiplied by the number of hours which, in turn, affected the total price. The appellant company's legal advisor argued that the discrepancy could be remedied in terms of the provisions of clause 31 of the tender document.

Mr Anselmo Bugeja, secretary to the evaluation board, submitted that:-

- i. by email dated 22 February 2012 the contracting authority had drawn the attention of the appellant company as follows:-

'In terms of clause 29.1 of the Instructions to Tenderer, after approval from the General Contracts Committee, the Evaluation Committee has a second request for clarification as on a point made by Computer Domain Ltd in the tender proposal - vide attached. In the tender proposal Computer Domain claimed to be licensed by the Ministry of Education so that no VAT applies.

The Committee points out that the total price submitted in Section C 3 of the Tender Form is at all times considered as inclusive of duties, VAT, other taxes and any discounts. Accordingly the amount submitted in the tender form, once a tender is awarded, it shall be contracted as inclusive of duties, VAT, other taxes and any discounts. This shall mean that any extra costs related duties, VAT and other taxes over and above the quoted price, in connection with the services requested shall not be covered by the contract.

The Committee would like to clarify with Computer Domain Ltd, that they are in understanding that the value of the financial offer cannot be altered and, in any case, the amount in the tender form is contracted as inclusive of duties, VAT, other taxes and any discounts, irrespective of licensing and so forth. Any additional costs in this regard, would be outside the value of the contract.'

- ii. by email dated 24th February 2012 (already reproduced above), the appellant company confirmed that, where applicable, the global price was inclusive of VAT



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and, at the same time, pointed out that the company had committed an arithmetic error in Breakdown 'A' such that the global price had to increase from €51,720 to €69,270;

and

- iii. according to the instructions given by the Contracts Department the global price in the 'Tender Form' could not be altered.

Mr Nick Callus, also representing Computer Domain Ltd, explained that:-

- a. the original price of €51,720 quoted in the tender form reflected the total of Breakdown 'A' (courses) €50,550.00 and Breakdown 'B', namely the coaching sessions, €1,170 per hour which, nevertheless, should have been multiplied by the relative number of hours giving a total of €69,270 (email dated 24th February 2012 already cited);
- b. although it was not necessary that Breakdowns 'A' and 'B' should add up to the global price, in the case of Computer Domain Ltd the global price emerged from the workings contained in those two breakdowns;

and

- c. whereas Computer Domain Ltd submitted all the details/elements with regard to Breakdowns 'A' and 'B' – including the correction to Breakdown 'A' communicated by email dated 24th February 2012 – such that they added up to the global price, it appeared that the recommended tenderer did not submit such full details with the consequence that individual prices might, later on, vary with the inclusion of other elements.
3. **Through an explanation by the VAT Department, it appears that training providers registered under the Education Act, such as Computer Domain Ltd, are exempt from VAT only on the registered educational services and other services, such as, the provision of logistics, catering, hiring of equipment etc would be vatable. This also shows the offer is unreliable given no VAT was quoted, whilst such services were requested.**
 4. **Computer Domain Ltd. declared on its own (in email dated 30 March 2012) that the quoted prices are all inclusive of expenses related to transport and facilities, logistics, administration support and canteen facilities. These are all services traditionally known to incur VAT. This also shows the offer is unreliable given no VAT was quoted.**

Dr Borg declared that his client had informed the contracting authority that Computer Domain Ltd was registered under the Education Act and, as a result, it was VAT exempt as far as educational services were concerned. He added that, with regard to the other services which were not included in the 2010 tender, such as transport and coffee breaks, Computer Domain Ltd was going to absorb not only the relative VAT charges but it was, effectively, providing these additional services at no extra cost since, in order to keep its global price competitive, it had retained the same prices quoted in the 2010 tender, which was awarded to Computer Domain Ltd – emails dated 24th February and 30th March 2012 referred.



Mr Anselmo Bugeja submitted that:-

- a. the VAT Department had furnished the evaluation board with the following advice, viz:

"The VAT Act, under item 12, Part Two, 5th Schedule, exempts "the provision of education ... by a school or institution registered under the Education Act ..."

Therefore, while the educational services supplied by the bidder would be exempt (since you are saying that he is registered under the Education Act), however, this does not mean that anything under the sun provided by this person would also be exempt. It is only the educational services which are exempt and therefore, other services such as the provision of logistics, catering, hiring of equipment, etc. is NOT exempt."

- b. the contracting authority had verified that the appellant company was, in fact, registered under the Education Act;
- c. the contracting authority had drawn the attention of the appellant company that, whilst the price quoted at para. 3 Section C, 'Tenderer's Declaration', of the 'Tender Form' was inclusive of duties, VAT, other taxes and any discount, yet, in the Financial Bid and Breakdowns 'A' and 'B' no VAT had been included;
- d. the appellant company's representative had just stated that the company was going to absorb the VAT due on non-educational services and that was something which had not been revealed in the tender documentation;
- e. previously, tenders were issued only for ECDL services, namely training services and Computer Domain Ltd provided these services for a number of years;
- f. in this instance, apart from ECDL training, the tender called for other ancillary services, such as, transport, coffee breaks, the venue and so on;
- g. from the enquiries carried out with the Education Department it transpired that Computer Domain Ltd was VAT exempt only in respect of Microsoft Courses;
- and
- h. the quote submitted by the preferred bidder included VAT in the global price and against each and every item under Breakdowns 'A' and 'B'.

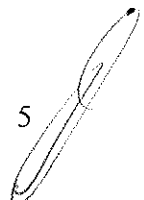
Dr Borg reiterated that his client's Financial Bid clearly indicated that the appellant company would not be charging any VAT and this was re-confirmed in 'General Notes 1 and 2' of an email dated 30th March 2012 which, inter alia, read as follows:-

"General Notes:

- 1. The prices quoted are all inclusive that is training, course material, transport and facilities logistics, administration support, Quality Assurance, canteen facilities, etc.;*
- 2. For public tenders (similar to this one) we have a standard price per hour which*



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includes all the above and is not itemized per element. As a matter of fact, some of the elements are absorbed by the Company as a cost in order to keep our prices competitive without compromising in any way our quality service which we consider to be one of our strengths."

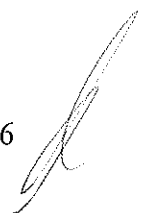
Mr Callus explained that:-

- i. Computer Domain Ltd was VAT exempt without credit as any other school, meaning that it purchased supplies and services, such as computers or chairs, with VAT but it did not charge VAT on the services it rendered to clients and, as a result, VAT was part of its costs;
 - ii. in its tender submission Computer Domain Ltd made it clear that the global price offered was all inclusive of VAT and other taxes – Section C para. 3 of the 'Tender Form';
 - iii. in the clarifications sought by the contracting authority Computer Domain Ltd confirmed, in writing (email dated 30th March 2012), that whereas educational services were without VAT, the VAT due on other services, namely canteen services and transport, was going to be absorbed by Computer Domain Ltd;
 - iv. once an operator was in possession of a MEPA permit to conduct educational services then those services fell under the Education Act;
- and
- v. as far as canteen services were concerned, if a person availed himself/herself of the coffee and two biscuits requested in the tender then no VAT would be charged as that was part of the whole package offered but if that person purchased, say, a chocolate or a cheesecake, which were not included in the package, then VAT was chargeable.

5. In email dated 30 March 2012, Computer Domain Ltd. failed to submit in a period of 2 working days, the details of the constituent elements of the tender offer. An example was provided - i.e. a detailed breakdown of the elements forming the global price. Computer Domain Ltd has rather resubmitted the breakdown of the coaching sessions and failed to submit a detailed breakdown of all the remaining components of the financial offer. Computer Domain Ltd has claimed not to understand what is being asked. However, given reference was made to the article in the public procurement legislation (which empowers the Committee to issue such request) and the legislation is public knowledge, the Committee considers unjustified the tenderer plea for further explanations. The Committee retains this was an attempt to divert from what was being requested.

Dr Borg stated that by email dated 28th March 2012, the contracting authority had requested his client, among other things, as follows:-

"The Evaluation Committee (EC) is agreeing to issue a clarification to Computer Domain in terms of clause 29.1 of the Instructions to Tenderer for the scope of clarifying the tender."



Additionally, the EC would like to request in writing details of the constituent elements of the tender offer, such as a detailed breakdown of all the elements forming the global price."

At this point Dr Borg made reference to Reg. 29.1 of the Public Procurement Regulations 2010 which stated as follows:-

"29. (1) A contracting authority shall be entitled to reject tenders which appear to be abnormally low in relation to the activity to be carried out:

Provided that the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements by consulting the tenderer taking account of the explanations received."

The appellant company's legal advisor insisted that this regulation clearly provided that the contracting authority could request those constituent elements which it considered relevant and, in fact, his client had replied by two emails,

(i) dated 28th March 2012:-

"Honestly I cannot understand what "elements" you are referring to. The Financial Bid constituted two breakdowns of the global price which we provided. May you please inform us EXACTLY what "elements" you are referring to.

So we kindly ask you again to specify in detail what "elements" you are referring so we would be able to provide the information. Please note that we have provided all financial information requested in the tender document. If you require a different breakdown which was not requested in the tender document, then please tell us what EXACTLY you need."

(ii) dated 29th March 2012:-

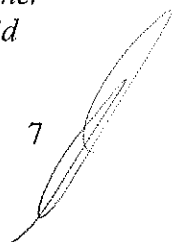
"Maybe I did not explain myself well. We are not seeking any clarifications of the tender per se. We are merely asking you what you mean EXACTLY by your request dated 28th March 2012 so we would be able to reply in full. I am sure you understand that during the clarification meeting of the 11th October 2011 we could not ask clarifications about a query we received from you six months after that clarification meeting. In other words, your query dated 28th March 2012 is not clear enough for us to fully understand what you are asking for. We replied to you immediately based on what we understood but apparently you wanted something different."

Dr Borg continued that, on receiving no explanation from the contracting authority as to which constituent elements it considered relevant, his client answered in good faith through an email dated 30th March 2012 as follows:-

"Since we have not received from you a full explanation of your clarification request, we shall try to reply in full based on our interpretation of your request. Reference is also made to our email of the 24th of February 2012 in reply to another clarification request you had sent us on the 22nd of February 2012 - Financial Bid Breakdown A (already reproduced under points 1 and 2).



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Financial Bid Breakdown B: This stands as is in our original proposal.

General Notes:

- 1. The prices quoted are all inclusive that is training, course material, transport and facilities logistics, administration support, Quality Assurance, canteen facilities, etc.;*
- 2. For public tenders (similar to this one) we have a standard price per hour which includes all the above and is not itemized per element. As a matter of fact, some of the elements are absorbed by the Company as a cost in order to keep our prices competitive without compromising in any way our quality service which we consider to be one of our strengths; and*
- 3. We have rendered our training services to CDRT (and SDO) for many years and we always received very positive feedback throughout."*

Dr Borg concluded that, even in the absence of clear guidelines by the contracting authority as to what it considered relevant constituent elements, his client had, in good faith, provided the above-mentioned full reply.

Mr Bugeja remarked that:-

- a. this was a 'Global Price Contract' and the bidders were not asked to present a breakdown of the global price but were asked to give the price of each course or services as per Breakdowns 'A' and 'B' in case the contracting authority would want to procure more of a particular course or service;
- b. the constituent elements were requested because Breakdowns 'A' and 'B' of the Financial Bid included coaching sessions together with ECDL and MS courses but did not include other items such as transport, hire of equipment, venue and canteen costs and, since the contracting authority was considering the offer abnormally low, it wanted more details of the costs;

and

- c. no problems were anticipated with regard to the venue and the hire of equipment because, in the execution of previous contracts, Computer Domain Ltd had demonstrated that it had these resources.

Dr Borg insisted that, according to Reg. 29 (1), it was up to the contracting authority to specify in writing the relevant constituent elements.

- 6. Lastly, the price difference of the financial bid submitted by Computer Domain Ltd and the 2nd cheapest offer is over €121,000, which is a difference of more than twice their financial bid. The price difference of the financial bid submitted by Computer Domain Ltd. and the 3rd cheapest offer and the 4th cheapest offer is over €143,000 and over €184,000 respectively. There is a clear price gap between the financial bid of Computer Domain and the subsequent 3 offers. This is also an indication that the offer is "abnormally low" and hence should be considered unreliable.**

Dr Borg:-

- i. dismissed the conclusion reached by the contracting authority that the price quoted by his client was abnormally low and pointed out that the prices quoted were the same prices which the appellant company had quoted in the previous call for tenders issued in 2010 and which was awarded to Computer Domain Ltd;
 - ii. argued that the quoted price reflected market prices and he, therefore, concluded that the price offered by the recommended tenderer was on the high side;
- and
- iii. remarked that his client had managed to keep its costs low through past experience and through economies of scale because the company had already had a functional training centre

Mr Bugeja remarked that:-

- a. since some of the bidders might have their own premises, transport and canteen services while others might not, the contracting authority went for the 'global price contract' rather than a 'unit rate per course/service';
 - b. there was no indication whatsoever in the appellant company's tender submission that for the price quoted the tenderer would not be providing any of the services requested in the tender and, as a result, one could assume that the company was going to provide all the services requested;
 - c. given that the preferred bidder quoted the global price of €235,941, the contracting authority assumed that the latter would provide all the services requested;
- and
- d. Breakdowns 'A' and 'B' consisted of the price per participant per hour or the price per programme but they were not meant to add up to the global price.

Mr Callus explained that:-

- i. for the sake of consistency, the same contracting authority had recently issued four tenders and in the case of one of them the cheapest offer by MISCO amounted to €92,000 whereas the next cheapest offer was more than double – the offer by Allied Consultant Ltd was €249,000 – and, in that instance, the same contracting authority awarded the tender to the cheapest bidder and it raised no questions that the offer was abnormally low;
- ii. Computer Domain Ltd had been rendering this same service for the previous ten years and each time the tender was issued Computer Domain Ltd slashed its prices to remain competitive and, over the years, it was commended on the services it offered;
- iii. primarily, the tender concerned ECDL courses which were very basic courses and the prices quoted by Computer Domain Ltd reflected market prices;

and

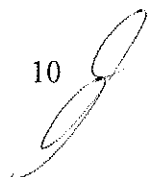
- iv. Computer Domain Ltd operated on a full-time basis and employed about 60 employees with its own transport and canteen services and, as a result, it benefitted from economies of scale.

Mr Lorenzo Mule' Stagno, representing Allied Consultants Ltd, the preferred bidder, remarked that:-

- i. according to the appellant company, the contracting authority was expected to make the following assumptions:
 - a. the venue, which involved costs in terms of rent and maintenance, was going to be provided free of charge;
 - b. the transportation of hundreds of participants from CDRT premises in Floriana to the contractor's premises and back for each session was to be provided free of charge;
 - c. coffee/tea/fruit juice and biscuits plus free flowing water to each participant, which for one session might not be taxing but it would be for about 500 sessions, was to be provided free of charge;
 - d. free administration costs when considering that this project was mostly financed out of EU funds which entailed quite an administration expense by way of progress monitoring and post training evaluation in the years following the end of the course;
 - e. the appellant company was to absorb the VAT element on all services subject to the raising of VAT;
 - f. the number of hours of training and/or coaching requested in the tender for certain courses/participants were higher than previously requested and that was an extra cost;
- ii. whilst it was true that a firm could take certain commercial decisions, such as to operate without making a profit or even at a loss, yet it was the responsibility of the evaluation board to decide whether it was credible that a bidder could offer the services requested at the price quoted;
- iii. the purpose of Reg. 29 was to safeguard contracting authorities from the difficulties that would arise if it were compelled to award contracts to bidders offering abnormally low prices;

and

- iv. apart from the ECDL courses, this tender included several constituted elements which were costly to provide.



The Chairman Public Contracts Review Board made the following observations:-

- a. if a contracting authority wanted a detailed breakdown of the 'all inclusive price' quoted then it should have been clear and specific in its request;
 - b. the tender document only provided templates to fill in the 'Global Financial Bid' together with Financial Bid Breakdowns 'A' (coaching) and 'B' (courses) but it did not include templates that featured the details of such costs as transport, canteen services, administrative expenses and so forth and, as a result, a bidder should not be expected to submit details of costs which were not even requested;
 - c. the Financial Bid in Volume 4 referred to the 'Global Financial Bid' as '*All inclusive financial bid for all services required by this tender document*', which, according to Mr Bugeja, included all the services as per 'Terms of Reference' of the tender;
 - d. with regard to the ECDL and MS courses included in Breakdown 'B', the appellant company did not charge VAT since it considered them as 'educational services' whereas the recommended tenderer charged VAT against each item;
 - e. the global price of the appellant company included no VAT whereas the global price of the recommended tenderer included an 18% VAT across the board - *the recommended tenderer justified the VAT charge on ECDL and MS courses because of the transport and canteen services content which were subject to VAT*;
- and
- f. the recommended bidder charged VAT across the board and, in so doing, it could be that the said bidder ended up inflating its price unnecessarily because educational services, at least, were not subject to VAT.

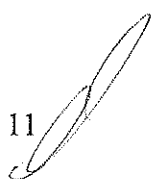
Mr Bugeja concluded that the disqualification of the appellant company was not based on any one particular shortcoming but after taking into account all the listed shortcomings. Yet, Mr Bugeja proceeded, the main issue remained that the appellant company wanted to alter the originally quoted global price which, in his opinion, was not permissible since this was a 'global price' tender.

Dr Antoine Naudi, legal representative of the recommended tenderer, remarked that he wished the VAT Department to determine which of the services requested in the tender document were subject to VAT and which were not because if it would result that the appellant company's tender submission did not abide by VAT legislation then he would contend that the appellant company's tender submission should be dismissed as administratively non-compliant.

The Public Contracts Review Board granted the recommended tenderer and, for that matter, the other parties concerned, 15 days to seek the advice they considered necessary from the VAT Department which advice would have to be submitted to the Public Contracts Review Board for distribution among all interested parties.

At this point the first hearing session was brought to a close.



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PUBLIC CONTRACTS REVIEW BOARD

Case No. 452 (continued)

Present for the second hearing (8th October 2012) were:

Computer Domain Ltd

Mr Nick Callus Representative

Allied Consultants Ltd

Dr Victor Axiak Legal Representative
Mr Simon Bonanno Representative
Mr Lorenzo Mule Stagno Representative

Centre for Development Research and Training (CDRT) – Office of the Prime Minister

Mr George Falzon Chairman
Ms Olivia Camilleri Cortis Member
Mr Jesmond Sciberras Memeber
Ms Marisa Vella Member
Mr Anselmo Bugeja Secretary

VAT Department

Mr Frank Borg Assistant Director (Legal)

The Chairman Public Contracts Review Board informed those present that, when contacted, the VAT Department expressed the view that it would be better for its representative to give oral evidence and to answer any questions that might be put to him/her rather than make written submissions and that was the reason why this meeting was called. He added that it was the intention of the Public Contracts Review Board to limit this hearing to sort out any VAT issues and not to re-visit issues which had already been discussed during the first hearing.

Mr Anselmo Bugeja, secretary of the evaluation board, remarked that:-

- i. the tender covered the outsourcing of training courses, namely the provision of different modules of ECDL including the premises, the equipment, transport and coffee breaks;
 - ii. another aspect of the tender was the provision of coaching, which, after all, meant the provision of courses on a one-to-one basis mainly to senior managers;
- and
- iii. the tender requested one global price for the entire service.



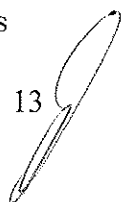
Mr Frank Borg, Assistant Director, VAT Department, under oath, gave the following evidence:

- a. it should be made clear from the outset that it was not the economic operator that was VAT exempt and so forth but it was the activity or activities carried out by that economic operator which was VAT exempt and so on;
 - b. the VAT legislation provided that education services/courses provided by those bodies registered under the Education Act were VAT exempt without credit, namely the service provider would pay VAT on the expenses the latter would have incurred in the organisation/delivery of education courses but one could not charge VAT to those using/purchasing one's educational services;
 - c. once the tender under review requested one global price and the tender concerned, mainly the provision of education courses, as were ECDL courses, then those courses, together with the ancillary services, namely the provision of coffee breaks or transport, would be VAT exempt without credit - so, this was one comprehensive contract with the main service being the delivery of educational courses;
 - d. this was termed as a composite supply, in the sense that if one did not procure the ECDL modules one would not have required the other services, such as transport, coffee breaks and so on;
 - e. if one purchased coffee from the grocer, that would be VAT free, but if one were to have a coffee at a cafeteria then one would have to charge VAT because that was termed 'in the course of catering';
 - f. from what he could gather, coaching meant one-on-one training to senior managers since, given their position, that was more convenient than attending a class, or someone who, for family reasons, could not attend during normal classes, and, as a consequence, coaching formed part of the overall training with the difference that instead of the service being delivered in class it was delivered in, say, the manager's office;
- and
- g. for VAT purposes, education was given quite a wide interpretation.

Mr Bugeja remarked that:-

- i. during the evaluation of the offers it was noted that the appellant company was the only bidder which did not include VAT in its price whereas the other tenderers, including the recommended tenderer, were quoted with VAT;
 - ii. given that picture, the evaluation board had requested the advice of the VAT Department, already cited during the first hearing, and the evaluation board had relied heavily on that advice;
- and
- iii. given the benefit of hindsight, it could well be the case that the evaluation board had not presented an accurate picture to the VAT Department, especially that this

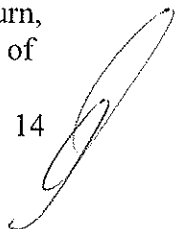


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was one global sum tender where the main service requested was the provision of educational courses.

This Board,

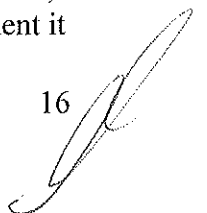
- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 11th May 2012 and also through their verbal submissions presented during the hearings held on the 24th August 2012 and the 8th October 2012, respectively, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 4th May 2012 the contracting authority informed the appellant company that its offer was disqualified as it was deemed to be administratively non-compliant, which decision was the result of six shortcomings, and that the tender was recommended for award to Allied Consultants Ltd, (b) the six shortcomings in question related to the following, namely (b1) *Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the global price is incorrect and should have rather been €69,720. This proves the offer is unreliable* (b2) *Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the coaching sessions is incorrect. This also proves the offer is unreliable* (b3) *Through an explanation by the VAT Department, it appears that training providers registered under the Education Act, such as Computer Domain Ltd, are exempt from VAT only on the registered educational services and other services, such as, the provision of logistics, catering, hiring of equipment etc would be vatable. This also shows the offer is unreliable given no VAT was quoted, whilst such services were requested* (b4) *Computer Domain Ltd. declared on its own (in email dated 30 March 2012) that the quoted prices are all inclusive of expenses related to transport and facilities, logistics, administration support and canteen facilities. These are all services traditionally known to incur VAT. This also shows the offer is unreliable given no VAT was quoted* (b5) *In email dated 30 March 2012, Computer Domain Ltd. failed to submit in a period of 2 working days, the details of the constituent elements of the tender offer. An example was provided - i.e. a detailed breakdown of the elements forming the global price. Computer Domain Ltd has rather resubmitted the breakdown of the coaching sessions and failed to submit a detailed breakdown of all the remaining components of the financial offer. Computer Domain Ltd has claimed not to understand what is being asked. However, given reference was made to the article in the public procurement legislation (which empowers the Committee to issue such request) and the legislation is public knowledge, the Committee considers unjustified the tenderer plea for further explanations. The Committee retains this was an attempt to divert from what was being requested* (b6) *Lastly, the price difference of the financial bid submitted by Computer Domain Ltd and the 2nd cheapest offer is over €121,000, which is a difference of more than twice their financial bid. The price difference of the financial bid submitted by Computer Domain Ltd. and the 3rd cheapest offer and the 4th cheapest offer is over €143,000 and over €184,000 respectively. There is a clear price gap between the financial bid of Computer Domain and the subsequent 3 offers. This is also an indication that the offer is "abnormally low" and hence should be considered unreliable,* (c) with regard to (b1) and (b2) – the appellant company (i) remarked that these two issues were interrelated and the appellant company had conceded that the coaching prices were incorrectly priced, which mistake affected the global price, (ii) stated that, albeit the unit price with regard to 'coaching' had remained the same (€18), yet that rate had to be multiplied by the number of hours which, in turn, affected the total price, (iii) claimed that the discrepancy could be remedied in terms of



the provisions of clause 31 of the tender document (iv) argued that, whilst the original price of €51,720 quoted in the tender form reflected the total of Breakdown 'A' (courses) €50,550.00 and Breakdown 'B', namely the coaching sessions, €1,170 per hour which, however, should have been multiplied by the relative number of hours giving a total of €69,270 (email dated 24th February 2012 already cited), (v) placed emphasis on the fact that, although it was not necessary that Breakdowns 'A' and 'B' should add up to the global price, in the case of Computer Domain Ltd the global price emerged from the workings contained in those two breakdowns and (vi) also claimed that, whereas Computer Domain Ltd submitted all the details/elements with regard to Breakdowns 'A' and 'B' – including the correction to Breakdown 'A' communicated by email dated 24th February 2012 – such that they added up to the global price, it appeared that the recommended tenderer did not submit such full details with the consequence that individual prices might, later on, vary with the inclusion of other elements, (d) with regard to (b3) and (b4) – the appellant company (i) declared that, apart from the fact that the appellant company had informed the contracting authority that Computer Domain Ltd was registered under the Education Act and, as a result, it was VAT exempt as far as educational services were concerned, also, with regard to the other services which were not included in the 2010 tender, such as transport and coffee breaks, Computer Domain Ltd was going to absorb not only the relative VAT charges but it was, effectively, providing these additional services at no extra cost since, in order to keep its global price competitive, it had retained the same prices quoted in the 2010 tender, which was awarded to Computer Domain Ltd – emails dated 24th February and 30th March 2012 referred, (ii) reiterated that the appellant company's Financial Bid clearly indicated that it would not be charging any VAT and this was re-confirmed in 'General Notes 1 and 2' of an email dated 30th March 2012, (iii) explained that Computer Domain Ltd was VAT exempt without credit as any other school, meaning that it purchased supplies and services, such as computers or chairs, with VAT but it did not charge VAT on the services it rendered to clients and, as a result, VAT was part of its costs, (iv) stated that in its tender submission Computer Domain Ltd made it clear that the global price offered was all inclusive of VAT and other taxes – Section C para. 3 of the 'Tender Form', (v) argued that, in the clarifications sought by the contracting authority, Computer Domain Ltd confirmed in writing (email dated 30th March 2012) that whereas educational services were without VAT, the VAT due on other services, namely canteen services and transport, was going to be absorbed by Computer Domain Ltd, (vi) contended that once an operator was in possession of a MEPA permit to conduct educational services then those services fell under the Education Act, (vii) stated that, as far as canteen services were concerned, if a person availed himself/herself of the coffee and two biscuits requested in the tender then no VAT would be charged as that was part of the whole package offered but if that person purchased, say, a chocolate or a cheesecake, which were not included in the package, then VAT was chargeable, (e) with regard to (b5) – the appellant company (i) made reference to Reg. 29.1 of the Public Procurement Regulations 2010, (ii) insisted that this regulation clearly provided that the contracting authority could request those constituent elements which it considered relevant, (iii) made reference to two replies given by the appellant company dated 28th March 2012 and 29th March 2012 respectively, (iv) declared that, on receiving no explanation from the contracting authority as to which constituent elements it considered relevant it answered in good faith through an email dated 30th March 2012, (v) claimed that, even in the absence of clear guidelines by the contracting authority as to what it considered relevant constituent elements, it had, in good faith, provided a full reply, (f) with regard to (b6) – the appellant company (i) dismissed the conclusion reached by the contracting authority that the price it quoted was abnormally low pointing out that the prices quoted were the

same prices which the company had quoted in the previous call for tenders issued in 2010 and which was awarded to Computer Domain Ltd, (ii) argued that the quoted price reflected market prices and, as a result, one could not but conclude that the price offered by the recommended tenderer was on the high side, (iii) remarked that it had managed to keep its costs low through past experience and through economies of scale because the company had already had a functional training centre, (iv) also argued that, for the sake of consistency, the same contracting authority had recently issued four tenders and in the case of one of them the cheapest offer by MISCO amounted to €92,000 whereas the next cheapest offer was more than double – the offer by Allied Consultant Ltd was €249,000 – and, in that instance, the same contracting authority awarded the tender to the cheapest bidder and it raised no questions that the offer was abnormally low, (v) contended that Computer Domain Ltd had been rendering this same service for the last ten years and, each time the tender was issued, Computer Domain Ltd slashed its prices to remain competitive and, over the years, it was commended on the services it offered, (vi) stated that, primarily, the tender concerned ECDL courses which were very basic courses and the prices quoted by Computer Domain Ltd reflected market prices and (vii) placed emphasis on the fact that Computer Domain Ltd operated on a full-time basis and employed about 60 employees with its own transport and canteen services and, as a result, it benefitted from economies of scale;

- having considered the contracting authority's representative's reference to the fact that (a) by email dated 22 February 2012 the contracting authority had drawn the attention of the appellant company's representatives *"that they are in understanding that the value of the financial offer cannot be altered and, in any case, the amount in the tender form is contracted as inclusive of duties, VAT, other taxes and any discounts, irrespective of licensing and so forth. Any additional costs in this regard, would be outside the value of the contract."*, (b) by email dated 24th February 2012 the appellant company confirmed that, where applicable, the global price was inclusive of VAT and, at the same time, pointed out that the company had committed an arithmetic error in Breakdown 'A' such that the global price had to increase from €51,720 to €69,270, (c) according to the instructions given by the Contracts Department the global price in the 'Tender Form' could not be altered, (d) the VAT Department had informed the evaluation board that the *"The VAT Act, under item 12, Part Two, 5th Schedule, exempts 'the provision of education ... by a school or institution registered under the Education Act ... Therefore, while the educational services supplied by the bidder would be exempt (since you are saying that he is registered under the Education Act), however, this does not mean that anything under the sun provided by this person would also be exempt. It is only the educational services which are exempt and therefore, other services such as the provision of logistics, catering, hiring of equipment, etc. is NOT exempt"*, (e) the contracting authority had verified that the appellant company was, in fact, registered under the Education Act, (f) the contracting authority had drawn the attention of the appellant company that, whilst the price quoted at para. 3 Section C, 'Tenderer's Declaration', of the 'Tender Form' was inclusive of duties, VAT, other taxes and any discount, yet, in the Financial Bid and Breakdowns 'A' and 'B' no VAT had been included, (g) the appellant company's representative had just stated that the company was going to absorb the VAT due on non-educational services and that was something which had not been revealed in the tender documentation, (h) previously, tenders were issued only for ECDL services, namely training services and Computer Domain Ltd provided these services for a number of years, (i) in this instance, apart from ECDL training, the tender called for other ancillary services, such as, transport, coffee breaks, the venue and so on, (j) from the enquiries carried out with the Education Department it



transpired that Computer Domain Ltd was VAT exempt only in respect of Microsoft Courses, (k) the quote submitted by the preferred bidder included VAT in the global price and against each and every item under Breakdowns 'A' and 'B', (l) this was a 'Global Price Contract' and the bidders were not asked to present a breakdown of the global price but were asked to give the price of each course or services as per Breakdowns 'A' and 'B' in case the contracting authority would want to procure more of a particular course or service, (m) the constituent elements were requested because Breakdowns 'A' and 'B' of the Financial Bid included coaching sessions together with ECDL and MS courses but did not include other items such as transport, hire of equipment, venue and canteen costs and since the contracting authority was considering the offer abnormally low it wanted more details of the costs, (n) no problems were anticipated with regard to the venue and the hire of equipment because, in the execution of previous contracts, Computer Domain Ltd had demonstrated that it had these resources, (o) since some of the bidders might have their own premises, transport and canteen services while others might not, the contracting authority went for the 'global price contract' rather than a 'unit rate per course/service', (p) there was no indication whatsoever in the appellant company's tender submission that, for the price quoted, the tenderer would not be providing any of the services requested in the tender and, as a result, one could assume that the company was going to provide all the services requested, (q) given that the preferred bidder quoted the global price of €235,941, the contracting authority assumed that the latter would provide all the services requested, (r) Breakdowns 'A' and 'B' consisted of the price per participant per hour or the price per programme but they were not meant to add up to the global price and (s) whilst the disqualification of the appellant company was not based on any one particular shortcoming but after taking into account all the listed shortcomings, yet, it was also a fact that the main issue remained that the appellant company wanted to alter the originally quoted global price which, in the evaluation board's opinion, was not permissible since this was a 'global price' tender, (t) the tender covered the outsourcing of training courses, namely the provision of different modules of ECDL including the premises, the equipment, transport and coffee breaks, (u) another aspect of the tender was the provision of coaching, which, after all, meant the provision of courses on a one-to-one basis mainly to senior managers and (v) the tender requested one global price for the entire service;

- having also considered the views expressed by the recommended tenderer's representatives, namely, (a) according to the appellant company, the contracting authority was expected to make the following assumptions, namely (a1) the venue, which involved costs in terms of rent and maintenance, was going to be provided free of charge, (a2) the transportation of hundreds of participants from CDRT premises in Floriana to the contractor's premises and back for each session was to be provided free of charge, (a3) coffee/tea/fruit juice and biscuits plus free flowing water to each participant, which for one session might not be taxing but it would be for about 500 sessions, was to be provided free of charge, (a4) free administration costs when considering that this project was mostly financed out of EU funds which entailed quite an administration expense by way of progress monitoring and post training evaluation in the years following the end of the course, (a5) the appellant company was to absorb the VAT element on all services subject to the raising of VAT, (a6) the number of hours of training and/or coaching requested in the tender for certain courses/participants were higher than previously requested and that was an extra cost, (b) whilst it was true that a firm could take certain commercial decisions, such as to operate without making a profit or even at a loss, yet it was the responsibility of the evaluation board to decide whether it was credible that a bidder could offer the services requested at the price

quoted, (c) the purpose of Reg. 29 was to safeguard contracting authorities from the difficulties that would arise if it were compelled to award contracts to bidders offering abnormally low prices, (d) apart from the ECDL courses, this tender included several constituted elements which were costly to provide and (e) the recommended tenderer wished that the VAT Department would determine which of the services requested in the tender document were subject to VAT and which were not because if it would result that the appellant company's tender submission did not abide by VAT legislation then one would contend that the appellant company's tender submission should be dismissed as administratively non-compliant,

- having carefully also evaluated Mr Borg's testimony given during the second hearing wherein special emphasis was placed on the fact that (a) it had to be made clear from the outset that it was not the economic operator that was VAT exempt and so forth but it was the activity or activities carried out by that economic operator which was VAT exempt and so on, (b) the VAT legislation provided that education services/courses provided by those bodies registered under the Education Act were VAT exempt without credit, namely the service provider would pay VAT on the expenses the latter would have incurred in the organisation/delivery of education courses but one could not charge VAT to those using/purchasing one's educational services, (c) once the tender under review requested one global price and the tender concerned, mainly the provision of education courses, as were ECDL courses, then those courses, together with the ancillary services, namely the provision of coffee breaks or transport, would be VAT exempt without credit - so, this was one comprehensive contract with the main service being the delivery of educational courses, (d) this was termed as a composite supply, in the sense that if one did not procure the ECDL modules one would not have required the other services, such as transport, coffee breaks and so on, (e) if one purchased coffee from the grocer, that would be VAT free, but if one were to have a coffee at a cafeteria then one would have to charge VAT because that was termed 'in the course of catering' (f) from what he could gather, coaching meant one-on-one training to senior managers since, given their position, that was more convenient than attending a class, or someone who, for family reasons, could not attend during normal classes, and, as a consequence, coaching formed part of the overall training with the difference that instead of the service being delivered in class it was delivered in, say, the manager's office and (g) for VAT purposes, education was given quite a wide interpretation,

reached the following conclusions, namely:

1. With regard to:

“Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the global price is incorrect and should have rather been €69,720. This proves the offer is unreliable.”

“Computer Domain Ltd. declared on its own (in email dated 24 February 2012) that the working of the coaching sessions is incorrect. This also proves the offer is unreliable.”

The Public Contracts Review Board opines that the very fact that the rectification of arithmetical errors is contemplated in public procurement procedures – in this particular instance Clause 31 - should have enabled the evaluation board to take remedial steps prior to it proceeding to decide against the appellant company's bid.

Furthermore, this Board has taken cognizance of the fact that Computer Domain Ltd submitted all the details/elements with regard to Breakdowns 'A' and 'B' – including the correction to Breakdown 'A' communicated by email dated 24th February 2012 – such that they added up to the global price.

With regard to 'coaching' it was evidently clear that the contracting authority had erroneously judged the pricing issues emanating from the inclusion of VAT or otherwise, as, in line with the expert advice provided by Mr Frank Borg, Assistant Director (Legal) VAT Department, 'coaching' meant one-on-one training to senior managers since, given their position, that was more convenient than attending a class, or someone who, for family reasons, could not attend during normal classes, and, as a consequence, coaching formed part of the overall training with the difference that instead of the service being delivered in class it was delivered in, say, the manager's office.

2. With regard to:

“Through an explanation by the VAT Department, it appears that training providers registered under the Education Act, such as Computer Domain Ltd, are exempt from VAT only on the registered educational services and other services, such as, the provision of logistics, catering, hiring of equipment etc would be vat-able. This also shows the offer is unreliable given no VAT was quoted, whilst such services were requested.”

“Computer Domain Ltd. declared on its own (in email dated 30 March 2012) that the quoted prices are all inclusive of expenses related to transport and facilities, logistics, administration support and canteen facilities. These are all services traditionally known to incur VAT. This also shows the offer is unreliable given no VAT was quoted.”

The Public Contracts Review Board has deliberated strongly on the testimony given by Mr Frank Borg, Assistant Director (Legal) VAT Department and it agrees (a) that it was not the economic operator that was VAT exempt and so forth but it was the activity or activities carried out by that economic operator which was VAT exempt and so on, (b) the VAT legislation provided that education services/courses provided by those bodies registered under the Education Act were VAT exempt without credit, namely the service provider would pay VAT on the expenses the latter would have incurred in the organisation/delivery of education courses but one could not charge VAT to those using/purchasing one's educational services, (c) once the tender under review requested one global price and the tender concerned, mainly the provision of education courses, as were ECDL courses, then those courses, together with the ancillary services, namely the provision of coffee breaks or transport, would be VAT exempt without credit - so, this was one comprehensive contract with the main service being the delivery of educational courses and (d) one had to consider the services contemplated in this tender as a 'composite supply', meaning that if one did not procure the ECDL modules one would not have required the other services, such as transport, coffee breaks and so on.



3. With regard to:

“In email dated 30 March 2012, Computer Domain Ltd. failed to submit in a period of 2 working days, the details of the constituent elements of the tender offer. An example was provided - i.e. a detailed breakdown of the elements forming the global price. Computer Domain Ltd has rather resubmitted the breakdown of the coaching sessions and failed to submit a detailed breakdown of all the remaining components of the financial offer. Computer Domain Ltd has claimed not to understand what is being asked. However, given reference was made to the article in the public procurement legislation (which empowers the Committee to issue such request) and the legislation is public knowledge, the Committee considers unjustified the tenderer plea for further explanations. The Committee retains this was an attempt to divert from what was being requested.”

This Board feels that if a contracting authority wanted a detailed breakdown of the ‘all inclusive price’ quoted then it should have been clearer and more specific in its request.

Also, this Board observes that the tender document only provided templates to fill in the ‘Global Financial Bid’ together with Financial Bid Breakdowns ‘A’ (coaching) and ‘B’ (courses) but it did not include templates that featured the details of such costs as transport, canteen services, administrative expenses and so forth and, as a result, a bidder should not be expected to submit details of costs which were not even requested.

4. With regard to:

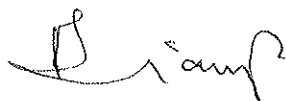
“Lastly, the price difference of the financial bid submitted by Computer Domain Ltd and the 2nd cheapest offer is over €121,000, which is a difference of more than twice their financial bid. The price difference of the financial bid submitted by Computer Domain Ltd. and the 3rd cheapest offer and the 4th cheapest offer is over €143,000 and over €184,000 respectively. There is a clear price gap between the financial bid of Computer Domain and the subsequent 3 offers. This is also an indication that the offer is "abnormally low" and hence should be considered unreliable.”

This Public Contracts Review Board feels that:

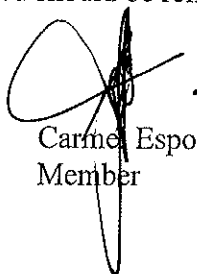
- (a) with regard to the ECDL and MS courses included in Breakdown ‘B’, the appellant company did not charge VAT since, rightly so, it considered them as ‘educational services’ whereas the recommended tenderer charged VAT against each item;
- (b) the global price of the appellant company included no VAT whereas the global price of the recommended tenderer, erroneously, included an 18% VAT across the board

This Board suggests that the recommended bidder charged VAT across the board and, in so doing it may have been the case that the said bidder ended up inflating its price unnecessarily because educational services, at least, were not subject to VAT.

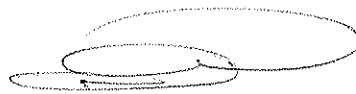
In view of the above, this Board finds in favour of the appellant company and, apart from being reintegrated in the evaluation process, recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.



Alfred R Triganza
Chairman



Carmelo Esposito
Member



Paul Mifsud
Member

26th October 2012