

PUBLIC CONTRACTS REVIEW BOARD

Case No. 476

MCA-0/MC/11-0635

Tender for the Provision of Internal Audit Services – Malta Communications Authority

This call for tenders was published in the Government Gazette on the 29th November 2011. The closing date for this call with an estimated budget of € 20,000 per annum (excl. VAT) was the 13th January 2012.

Two (2) tenderers submitted their offers.

James Grech Risk – Advisory – Internal Audit filed an objection on the 30th August 2012 against the decision of the Malta Communications Authority to recommend tender award in favour of RSM Malta.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 26th October 2012 to discuss this objection.

Present for the hearing were:

James Grech Risk – Advisory – Internal Audit

Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative
Mr James Grech	Partner
Ms Anneliza Grech	Partner

RSM Malta

Dr Henri Mizzi	Legal Representative
Dr Steve Decesare	Legal Representative
Ms Maria Micallef	Representative

Malta Communications Authority

Dr Antoine Cremona	Legal Representative
Dr Nicholas Borg	Legal Representative

Evaluation Board

Mr Lawrence Briffa	Chairman
Ms Celia Falzon	Member



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

Dr Adrian Delia, legal representative of James Grech Risk – Advisory – Internal Audit, the appellant firm, submitted that:-

- i. by email dated 23rd August 2012 the contracting authority informed the appellant firm that its offer was not adjudicated as the most economically advantageous offer and it was provided with the following evaluation criteria grid which featured the points given to the two remaining bidders following the re-evaluation exercise after the reintegration of the said appellant firm in the process on winning the first appeal:-

Evaluation Criteria	Weighting	James Grech	RSM
1. Overall price of the services provided. Bid Price	30%	30	26
		€19.5	€22.42
2. Quality and suitability of the proposal submitted and bidder's • The bidder's clear understanding of the Terms of Reference of the ITT. • The quality and suitability of the project plan submitted; • The bidder's experience in providing similar services. Qualification and experience of staff assigned on the engagement.	35%	24	30
3. Education, including related continued professional education courses undertaken in the past two years, position within the organisation and years experience on Internal • Qualifications of the Internal Audit Team to be assigned; • Previous Internal Audit experience of the Internal Audit team assigned; • Assurance of staffing continuity from one year to the next.	35%	28	32
Total Score		82	88

- ii. the bidder should be informed not only of the points awarded according to the above grid but also of the workings and the reasoning as to how the evaluation board arrived at those marks.

A) Wrong Interpretation by the Evaluation Committee

Dr Delia submitted that:-

- a. this tender was adjudicated on the basis of the 'most economically advantageous tender';
 - b. according to the evaluation grid the price was given a weighting of 30% and, as a result, the appellant firm was awarded the full marks for having quoted the cheapest price;
- and
- c. the evaluation board should explain how it concluded to award 26 points to the recommended tenderer.

Dr Antoine Cremona, legal advisor of the Malta Communications Authority, rejected the claim that the evaluation board had in some manner misinterpreted the evaluation criteria or, worse still, failed the transparency test with regard to the award of marks for the prices quoted. Dr Cremona explained that in awarding the marks on the basis of price the evaluation board applied the following formula which was broadly used and which was considered both transparent and objective:-

$$\frac{\text{lowest price offered}}{\text{price being considered}} \times \text{max. points} = \frac{19,500}{22,420} \times 30 = 26 \text{ points}$$

Dr Cremona argued that if one were to adopt the recommendation made by the appellant firm in its letter of objection [(iii) of its concluding requests], namely that the cheapest should be given full marks (30) and RSM Malta given none, then, with the same measure in the case of the other criteria, RSM Malta should be awarded full points (70) and James Grech Risk – Advisory – Internal Audit, none.

Mr Lawrence Briffa, chairman of the evaluation board and an accountant/auditor by profession, under oath, confirmed that the points in connection with the price were allocated as indicated by Dr Cremona.

**B) Quality and suitability of the proposal submitted and bidder's experience.
Qualification and experience of staff assigned on the engagement.**

Dr Delia questioned how the evaluation board awarded the points on the basis of the sub-criteria that featured in the evaluation criteria, in other words, the methodology used by the board, because, in all instances, the appellant firm had not only met but also exceeded the minimum criteria.

Dr Henri Mizzi, legal representative of RSM Malta, the recommended tenderer, submitted that the appellant firm should not be allowed to widen the parameters of its appeal, which was limited to the issue of price. He added that it was frivolous on the part of the appellant firm to base its appeal on the issue of price because that was an objective mathematical criterion and the adjudication board had opted for an objective and transparent formula.

Dr Cremona submitted the following:-

- a. whilst the contracting authority acknowledged that the appellant firm was a valid contender for this tender so much so that it was awarded 82 out of 100, yet, it turned out that there was another bidder who was better and scored 88 points out of 100;
- b. whereas the Malta Communications Authority had an obligation to feature in the tender document the criteria which would be used for award and their weighting, however, the Malta Communications Authority was not in any way required by law or jurisprudence to disclose the methodology it would use to award the points to the relevant bids, namely the scoring methodology;

3

- c. the European Court of Justice made the following distinctions (1) the court distinguished between the award criteria and the machinery to apply them and (2) the court concluded that there was no general obligation to disclose the latter;
 - d. therefore the appellant firm's claim that the Malta Communications Authority was obliged to supply the grading schemes was legally incorrect;
 - e. in this case the Malta Communications Authority not only displayed the evaluation criteria together with the points and weighting but even subdivided them further;
 - f. the appellant firm had based its appeal on two items, namely misinterpretation and grading schemes but both of them referred to the issue of price and, as a consequence, the appeal should deal only with that aspect
- and
- g. it was becoming evident that the moment the price did not remain an issue then the appellant firm was turning its attention to the other criteria.

Dr Delia rejected the claim that the appellant firm's appeal was limited to the price so much so that [i] of its concluding requests in its letter of objections read "*to declare the reasons for exclusion by MCA are null and void.*" He insisted that the firm's appeal included the other evaluation criteria where the appellant firm had satisfied the minimum criteria and the firm wanted to know how its submission was rated in those respects.

Mr Briffa, still under oath, gave the following evidence:-

- i. the minimum mandatory requirements set out in clause 3.2 'Pre-requisites', which had to be met by bidders to qualify for technical evaluation, read as follows:

The selected bidder is to have at least three (3) years previous direct experience in carrying out similar Internal Audit engagements.

The staff to be assigned on the engagement is to be fully qualified and must also have previous direct experience in similar engagements.

The selected bidder should also indicate how the quality of staff over the term of the engagement will be assured.

The selected internal auditor must prove to be independent from the the MCA management and staff and from the authorised operators regulated by the MCA (reference can be made to the MCA's authorised undertakings register:

<http://www.mca.org.mt/authorisations-licensing/register-authorised-undertakings>).



The selected bidder (in the case of a firm, a consortium or joint venture, at least one of the members of the firm, the consortium or joint venture who will be appointed for the provision of the services) must be in possession of a Certified Public Accountant (CPA) warrant.'

- ii. Initially, there were six participants, one was disqualified at the initial stage whereas the remaining five, among them, James Grech Risk – Advisory – Internal Audit, RSM Malta, Grant Thornton and KPMG, were evaluated using the price formula already discussed and by comparing the bids in terms of quality and experience with regard to the other criteria;
 - iii. none of the other bidders contested the award recommendation to RSM Malta except for James Grech Risk – Advisory – Internal Audit and that was how there remained only two bidders;
 - iv. following the re-integration of James Grech Risk – Advisory – Internal Audit a clarification was sought from the said firm and the evaluation board re-evaluated its offer on the basis of that information;
 - v. there was no need to re-evaluate RSM Malta so much so that it retained its original scores;
 - vi. regarding criteria no. 2 and 3 the evaluation board could not apply a mathematical formula as in the case of the price but it compared the quality of the bids and, in this case, this comparison exercise was rendered less difficult since there remained only two bidders;
 - vii. the evaluation board carried out an exhaustive exercise, which was attached to the evaluation report, where it brought out the strengths and weaknesses in each criteria and sub-criteria of the two bids and the points were awarded according to the quality of the respective bid;
 - viii. point no. 2 dealt with the experience of the firm as the bidder, whereas point 3 dealt with the experience of the staff;
 - ix. with regard to experience of staff, James Grech Risk – Advisory – Internal Audit provided two staff members both accountants, certified information systems auditors, members of the Institute of Internal Auditors and one of them a certified internal auditor whereas RSM Malta provided a team of six, which included an accountant/certified fraud examiner, a chartered member of the Institute of Internal Auditors UK and Ireland with a Government Internal Audit Certificate, two accountants/ certified information systems auditors and a certified internal auditor;
- and
- x. the weighting of 30/70 *vis-a-vis* price and technical criteria was established by the contracting authority and it was published in the tender document and, as a



result, bidders were well aware of it and their participation meant that they accepted it.

The Public Contracts Review Board noted an inconsistency at page 5 of the evaluation report where, with regard to bidder's experience under 'weaknesses', it was stated in respect of RSM Malta that '*No specific experience as an Internal Auditor Service provider was demonstrated in the submission*' and the, on the same page, it was indicated, with regard to RSM Malta, that '*A list of various internal audit and related assignments was provided.*' The Chairman Public Contracts Review Board felt that that remark was rather unfortunate because it did not do justice to RSM Malta as Ms Maria Micallef had considerable experience in the sector.

Mr James Grech, also representing the appellant firm, remarked that:-

- i. the contracting authority was not correct to request a certified public accountant warrant by way of qualifications because the functions of an internal auditor were quite different from those of an accountant;
- ii. the partners of the appellant firm had specialised in internal auditing and they had a number of years of experience in internal audit and even acquired a warrant from the US Internal Audit Institute;

and

- iii. RSM Malta itself had started offering internal audit services only as from April 2012 and produced a public announcement to that effect.

Dr Delia argued that one had to determine whether this tender, which only required the service of 40 hours per month and in a flexible manner, could be ably carried out by the appellant firm, which was composed of two adequately qualified and experienced professionals in internal audit.

Ms Maria Micallef, also representing RSM Malta, explained that:-

- a. the two remaining bids had satisfied the minimum requirements and were evaluated further each on its merits;
- b. RSM Malta, besides its in-house expertise and experience, also had at its disposal the experience of RSM (UK) which had extensive experience in internal audit in the public sector;
- c. it was not correct to state that RSM Malta only started offering internal audit services in April 2012 because she, herself, had been engaged on internal audit duties since 1995;

and

- d. the public announcement referred to the formal launch of risk management services, which included internal audit, but in effect RSM Malta's experience in internal audit dates back many years before 2012;



In conclusion Dr Delia made the following verbal statement that as a matter of fact, the contracting authority did not make the evaluation report available to the appellant firm.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 29th August 2012 and also through their verbal submissions presented during the hearing held on the 26th October 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant firm's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 23rd August 2012 the contracting authority informed the appellant firm that its offer was not adjudicated as the most economically advantageous offer and it was provided with an evaluation criteria grid which featured the points given to the two remaining bidders following the re-evaluation exercise after the reintegration of the said appellant firm in the process on winning the first appeal, (b) the bidder should have been informed not only of the points awarded according to the above grid but also of the workings and the reasoning as to how the evaluation board arrived at those marks, (c) this tender was adjudicated on the basis of the 'most economically advantageous tender', (d) according to the evaluation grid the price was given a weighting of 30% and, as a result, the appellant firm was awarded the full marks for having quoted the cheapest price, (e) the evaluation board should explain how it concluded to award 26 points to the recommended tenderer, (f) questioned how the evaluation board awarded the points on the basis of the sub-criteria that featured in the evaluation criteria, in other words, the methodology used by the board, because, in all instances, the appellant firm had not only met but also exceeded the minimum criteria, (g) the appellant firm rejected the claim that the appellant firm's appeal was limited to the price so much so that [i] of its concluding requests in its letter of objections read "*to declare the reasons for exclusion by MCA are null and void.*" (h) the firm's appeal included the other evaluation criteria where the appellant firm had satisfied the minimum criteria and the firm wanted to know how its submission was rated in those respects, (i) (j) the contracting authority was not correct to request a certified public accountant warrant by way of qualifications because the functions of an internal auditor were quite different from those of an accountant, (k) the partners of the appellant firm had specialised in internal auditing and they had a number of years of experience in internal audit and even acquired a warrant from the US Internal Audit Institute, (l) RSM Malta itself had started offering internal audit services only as from April 2012 and produced a public announcement to that effect, (m) one had to determine whether this tender, which only required the service of 40 hours per month and in a flexible manner, could be ably carried out by the appellant firm, which was composed of two adequately qualified and experienced professionals in internal audit and (n) in conclusion, Dr Delia made a formal verbal statement wherein he stated that the contracting authority did not make the evaluation report available to the appellant firm;



7

- having considered the contracting authority's representative's reference to the fact that (a) the contracting authority rejected the claim that the evaluation board had in some manner misinterpreted the evaluation criteria or, worse still, failed the transparency test with regard to the award of marks for the prices quoted, (b) in awarding the marks on the basis of price the evaluation board applied a formula which was broadly used and which was considered both transparent and objective, (c) if one were to adopt the recommendation made by the appellant firm in its letter of objection [(iii) of its concluding requests], namely that the cheapest should be given full marks (30) and RSM Malta given none, then, with the same measure in the case of the other criteria, RSM Malta should be awarded full points (70) and James Grech Risk – Advisory – Internal Audit, none, (d) whilst the contracting authority acknowledged that the appellant firm was a valid contender for this tender so much so that it was awarded 82 out of 100, yet, it turned out that there was another bidder who was better and scored 88 points out of 100, (e) whereas the Malta Communications Authority had an obligation to feature in the tender document the criteria which would be used for award and their weighting, yet, the Malta Communications Authority was not in any way required by law or jurisprudence to disclose the methodology it would use to award the points to the relevant bids, namely the scoring methodology, (f) the European Court of Justice made the following distinctions (1) the court distinguished between the award criteria and the machinery to apply them and (2) the court concluded that there was no general obligation to disclose the latter, (g) the appellant firm's claim that the Malta Communications Authority was obliged to supply the grading schemes was legally incorrect, (h) in this case the Malta Communications Authority not only displayed the evaluation criteria together with the points and weighting but even subdivided them further, (i) the appellant firm had based its appeal on two items, namely misinterpretation and grading schemes but both of them referred to the issue of price and, as a consequence, the appeal should deal only with that aspect, (j) it was becoming evident that the moment the price did not remain an issue then the appellant firm was turning its attention to the other criteria, (k) minimum mandatory requirements were set out in clause 3.2 'Pre-requisites', which had to be met by bidders to qualify for technical evaluation, (l) initially, there were six participants, one was disqualified at the initial stage whereas the remaining five, among them, James Grech Risk – Advisory – Internal Audit, RSM Malta, Grant Thornton and KPMG, were evaluated using the price formula already discussed and by comparing the bids in terms of quality and experience with regard to the other criteria, (m) none of the other bidders contested the award recommendation to RSM Malta except for James Grech Risk – Advisory – Internal Audit and that was how there remained only two bidders, (n) following the re-integration of James Grech Risk – Advisory – Internal Audit a clarification was sought from the said firm and the evaluation board re-evaluated its offer on the basis of that information, (o) there was no need to re-evaluate RSM Malta so much so that it retained its original scores, (p) regarding criteria no. 2 and 3 the evaluation board could not apply a mathematical formula as in the case of the price but it compared the quality of the bids and, in this case, this comparison exercise was rendered less difficult since there remained only two bidders, (q) the evaluation board carried out an exhaustive exercise, which was attached to the evaluation report, where it brought out the strengths and weaknesses in each criteria and sub-criteria of the two bids and the points were awarded according to

 8

the quality of the respective bid, (r) point no. 2 dealt with the experience of the firm as the bidder, whereas point 3 dealt with the experience of the staff, (s) with regard to experience of staff, James Grech Risk – Advisory – Internal Audit provided two staff members both accountants, certified information systems auditors, members of the Institute of Internal Auditors and one of them a certified internal auditor whereas RSM Malta provided a team of six, which included an accountant/certified fraud examiner, a chartered member of the Institute of Internal Auditors UK and Ireland with a Government Internal Audit Certificate, two accountants/ certified information systems auditors and a certified internal auditor and (t) the weighting of 30/70 *vis-a-vis* price and technical criteria was established by the contracting authority and it was published in the tender document and, as a result, bidders were well aware of it and their participation meant that they accepted it;

- having also considered the recommended tenderers' representatives' references and observations, particularly the fact that (a) the appellant firm should not be allowed to widen the parameters of its appeal, which was limited to the issue of price, (b) it was considered to be frivolous on the part of the appellant firm to base its appeal on the issue of price because that was an objective mathematical criterion and the adjudication board had opted for an objective and transparent formula, (c) the two remaining bids had satisfied the minimum requirements and were evaluated further each on its merits, (d) RSM Malta, besides its in-house expertise and experience, also had at its disposal the experience of RSM (UK) which had extensive experience in internal audit in the public sector, (e) it was not correct to state that RSM Malta only started offering internal audit services in April 2012 because Ms Micallef, herself, had been engaged on internal audit duties since 1995 and (f) the public announcement referred to the formal launch of risk management services, which included internal audit, but in effect RSM Malta's experience in internal audit dates back many years before 2012,

reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the weighting of 30/70 *vis-a-vis* price and technical criteria was established by the contracting authority and it was published in the tender document and, as a result, bidders were well aware of it and their participation meant that they accepted it.
2. This Board also recognizes the fact that the two remaining bids had satisfied the minimum requirements and were evaluated further, each on its own merits.
3. The Public Contracts Review Board is highly cognizant of the fact that the appellant firm had based its appeal on two issues, namely the misinterpretation and grading schemes, and that both of these issues referred to the question of price. Yet, notwithstanding, this Board saw nothing wrong in taking a holistic approach as, after all, it agreed with the appellant firm's argument wherein the latter placed emphasis on the fact that its appeal was not limited solely to the 'price' factor. In this regard, this Board, deliberated thoroughly on the issues which were presented during the hearing and it came to the conclusion that, at this juncture, the subjectivity element of the evaluation board was used in an objective, fair, equitable and transparent manner wherein the allocation of marks was assigned



according to (a) the documents made available to its members and (b) based on a detailed analysis of such documentation. As a matter of fact, this Board did not nurture any doubt as to the efficacy of the methodology used through which the strengths and weaknesses in each criteria and sub-criteria of the two bids were amply highlighted. Whilst it is true that, during the hearing, this Board sought some clarifications regarding the fact that at page 5 of the evaluation report, with regard to the bidders' experience under 'weaknesses', in respect of RSM Malta it was stated that '*No specific experience as an Internal Auditor Service provider was demonstrated in the submission*' and that, on the same page, it was indicated, always with regard to RSM Malta, that '*A list of various internal audit and related assignments was provided.*', yet this Board was satisfied with the clarification and explanation provided by the evaluation board's witness.

4. The Public Contracts Review Board, whilst acknowledging that the appellant firm was a valid contender for this tender so much so that it was awarded 82 out of 100, yet, it turned out that there was another bidder whose bid offered better operational comfort and that, for this reason, it scored 88 points out of 100. This Board places major emphasis on the fact that this tender followed the MEAT principle and an informed subjective analysis is indispensable for one to guarantee a transparent, equitable and fair assessment and it so happens that the Public Contracts Review Board considers the second review of the two bidders' bid carried out by the evaluation board, following this Board's decision in favour of the appellant firm in the first appeal, as just that, namely an overall transparent, equitable and fair assessment.

In view of the above this Board finds against the appellant firm and recommends that the deposit paid by the same firm for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

30 October 2012