

PUBLIC CONTRACTS REVIEW BOARD

Case No. 486

T 106/11

Tender for the Provision of WAN Active Equipment and Related Ancillary Services for Schools

This call for tenders was published in the Government Gazette on the 24th November 2011. The closing date for this call with an estimated budget of € 500,000 (excl. VAT) was the 6th January 2012.

Six (6) offers were evaluated by the evaluation board.

Computime Ltd filed an objection on 28th September 2012 against the decision of the Malta Information Technology Agency not to award it the tender because it was not the cheapest compliant tender and to recommend award to ICT Solutions Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Tuesday, 6th November 2012 to discuss this objection.

Computime Ltd

Dr Adrian Mallia	Legal Representative
Mr Stephen Vella	Representative
Mr Neil Bianco	Representative
Mr Adrew Borg	Representative
Mr Clinton Cutajar	Representative
Mr Anton Farrugia	Representative

ICT Solutions Ltd

Dr Simon Schembri	Legal Representative
Mr Keith Fearn	Sales and Marketing Manager
Mr Simon Vella	Representative

Malta Information Technology Agency (MITA)

Dr Danielle Cordina	Legal Representative
Mr Alan Brincat	Expert in Networks
Ms Rosalyn Muscat	Representative

Evaluation Board

Mr Stefan Briffa	Chairman
Mr Ramon Mangion	Member
Mr Claudio Muscat	Member



The Chairman Public Contracts Review Board declared that this tender had already been the subject of another hearing held on the 26th July 2012 and, as a consequence, the Public Contracts Review Board was making it clear from the outset that it was not going to revisit the merits of the case decided upon on the 31st July 2012 but that it would only consider fresh grounds for an objection.

Dr Adrian Mallia, legal representative of Computime Ltd, the appellant company, made the following preliminary plea:-

- i. Regulation 85 (7) (e) stated that:-

"The Chairman or other member of the Board shall be disqualified from hearing a review in such circumstances as would disqualifying a judge in a civil suit, and in any such case the Chairman or member shall be substituted by another person appointed for the purpose by the Prime Minister"

- ii. similar provisions were found in Chapter 12 – Code of Organisation and Civil Procedure - of the Laws of Malta;
- iii. once the Chairman and one of the members of the Public Contracts Review Board, as composed for this hearing, had already expressed themselves on the facts of this case then the provisions of Reg. 85 (7) (e) should apply and he pointed out that there was no discretion in the application of these provisions;
and
- iv. should the Public Contracts Review Board, as composed, proceed with this hearing then any decisions taken would be subject to a declaration of nullity by the Courts.

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

- a. the Public Contracts Review Board was composed of the Chairman, two members and one substitute member;
- b. whilst it would not be the first instance that the Public Contracts Review Board presided upon more than one appeal on the same call for tenders, yet, in each instance, the appeal would present grounds not decided upon in previous appeal/s;
- c. it was not within the competence of the Public Contracts Review Board, irrespective of how it was composed, to review its own decisions but interested parties could appeal a decision of the Public Contracts Review Board before the Courts under the provisions of Reg. 85 (5) which stated that:-

"Any interested person who feels aggrieved by a decision taken by the Board in terms of this regulation may refer the matter to the Court of Appeal (Inferior Jurisdiction) as constituted in terms of article 41(6) of

the Code of Organization and Civil Procedure within a period of twenty calendar days from the final decision of the Review Board. Such recourse shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision:

Provided that the Department of Contracts and a contracting authority may only refer a matter to the Court of Appeal (Inferior Jurisdiction) in relation to a decision taken by the Board relating to sub-regulation (2)(c) and sub-regulation (3)."

- d. whilst the Public Contracts Review Board's first reaction to the letter of objection under reference was to reject it outright, yet it agreed to the present hearing to determine, in the first place, if there were any fresh grounds for an appeal, different from those decided upon on the 31st July 2012, namely to decide if the Public Contracts Review Board was the right forum to deal with the appeal as presented and so the issue boiled down to a question of admissibility;
 - e. there was an appeal pending before the Courts on the decision taken by the Public Contracts Review Board in this case;
 - f. the review of a decision was invariably taken up by a forum at least one step higher than that which had taken the first decision, e.g. the decision of a magistrate was reviewed by a judge and not by another magistrate, and therefore a decision of the Public Contracts Review Board was reviewed by the Inferior Courts but certainly not by the Public Contracts Review Board itself irrespective of its composition;
 - g. it was evident from the preliminary plea of the appellant company that the merits of the present appeal were the same as those of the first appeal so much so that the appellant company was calling upon the Public Contracts Review Board to consider its position;
- and
- h. the Chairman and Members of the Public Contracts Review Board should not abstain from hearing the merits of an objection but they should abstain only on such issues as conflict of interest, possible collusion and so forth.

Dr Mallia remarked that the facts of the case remained the same and that it was only the arguments that would be put forward which were different and he, therefore, insisted that, once the Public Contracts Review Board would be dealing with the same facts, notwithstanding that the arguments were different, the Public Contracts Review Board Chairman and/or Member/s who decided on the first appeal should not get involved in the second appeal. He stressed that this was a matter of procedure and certainly not meant to raise any doubts about the workings of the Public Contracts Review Board.



Dr Simon Schembri, legal representative of the recommended tenderer, submitted that:-

- a. an appeal had been lodged and was pending before the Courts with regard to the decision of the Public Contracts Review Board taken on this case in July 2012;
- b. it was not admissible to re-open a case before the same court or entity which had already decided upon it for the sake of presenting an argument which one had failed to bring up during the first appeal;

and

- c. the issues being raised by the appellant company at this stage were the same issues raised in the first appeal with the difference that the argumentation might be presented in a different manner.

Dr Danielle Cordina, legal representative of the Malta Information Technology Agency, the contracting authority, remarked that once an appeal was pending before the Courts then the legal points had to be decided upon by that Court.

In concluding, Dr Adrian Mallia made the following statement:-

“Once the Chairman and Member/s of the PCRБ had already expressed themselves with regard to this case in the hearing and subsequent decision of July 2012, they should abstain from hearing this appeal in terms of the provisions of Regulation 85 (7) (e) of the Public Procurement Regulations”.

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 28th September 2012 and also through their verbal submissions presented during the hearing held on the 6th November 2012, 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) Regulation 85 (7) (e) stated that *“The Chairman or other member of the Board shall be disqualified from hearing a review in such circumstances as would disqualifying a judge in a civil suit, and in any such case the Chairman or member shall be substituted by another person appointed for the purpose by the Prime Minister”*, (b) similar provisions were found in Chapter 12 – Code of Organisation and Civil Procedure - of the Laws of Malta, (c) once the Chairman and one of the members of the Public Contracts Review Board, as composed for this hearing, had already expressed themselves on the facts of this case then the provisions of *Reg. 85 (7) (e)* should apply and that there was no discretion in the application of these provisions, (d) should the Public Contracts Review Board, as composed, proceed with this hearing then any decisions taken would be subject to a declaration of nullity by the Courts, (e) the facts of the case remained the same and that it was only the arguments that would


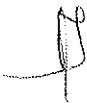


be put forward which were different and that, once the Public Contracts Review Board would be dealing with the same facts, notwithstanding that the arguments were different, the Public Contracts Review Board Chairman and/or Member/s who decided on the first appeal should not get involved in the second appeal and (f) this was a matter of procedure and certainly not meant to raise any doubts about the workings of the Public Contracts Review Board;

- having considered the contracting authority's representative's reference to the fact that, once an appeal was pending before the Courts, then the legal points had to be decided upon by that Court;
- having also considered the recommended tenderer's reference to the fact that (a) an appeal had been lodged and was pending before the Courts with regard to the decision of the Public Contracts Review Board taken on this case in July 2012, (b) it was not admissible for anyone to re-open a case before the same court or entity which had already decided upon it for the sake of presenting an argument which one had failed to bring up during the first appeal and (c) the issues being raised by the appellant company at this stage were the same issues raised in the first appeal with the difference that the argumentation might be presented in a different manner,

reached the following conclusions, namely:

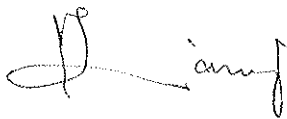
1. The Public Contracts Review Board recognizes the fact that, whilst it would not be the first instance that the Public Contracts Review Board presided upon more than one appeal on the same call for tenders, yet, in each instance, the appeal would present grounds not decided upon in the previous appeal/s.
2. The Public Contracts Review Board contends that it is not within its competence, irrespective of how it is composed, to review its own decisions but interested parties could appeal a decision of the Public Contracts Review Board before the Courts under the provisions of Reg. 85 (5).
3. This Board also, whilst recognising the fact that the Public Contracts Review Board's first reaction to the letter of objection under reference was to reject it outright, yet it agreed to the present hearing to determine, in the first place, if there were any fresh grounds for an appeal, different from those decided upon on the 31st July 2012. This Board established that, first and foremost, it's members had to decide if the Public Contracts Review Board was the right forum to deal with the appeal as presented and so the issue boiled down to a question of admissibility. This Board acknowledges the fact that, during the initial stages of the hearing, namely from the preliminary plea of the appellant company, it became amply evident that the merits of the present appeal were the same as those of the first appeal so much so that the appellant company was calling upon the Public Contracts Review Board to consider its position.
4. The Public Contracts Review Board considered the appellant company's statement during the preliminary plea, namely that should the Public Contracts Review Board, as composed, proceed with this hearing then any decisions taken



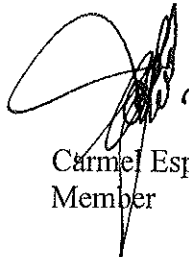
would be subject to a declaration of nullity by the Courts, as an unacceptable precondition for such hearing to proceed.

5. The Public Contracts Review Board contends that, whilst agreeing that Board members should abstain on such issues as conflict of interest, possible collusion and so forth, yet in principle, its members should never abstain from hearing the merits of an objection. Needless to say that this Board reaches this conclusion having the comfort of Reg. 85 (5) which, in so far as re-discussion of the same merit already previously discussed, deliberated and duly decided upon, stipulates that *"Any interested person who feels aggrieved by a decision taken by the Board in terms of this regulation may refer the matter to the Court of Appeal (Inferior Jurisdiction) as constituted in terms of article 41(6) of the Code of Organization and Civil Procedure within a period of twenty calendar days from the final decision of the Review Board. Such recourse shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Review Board's final decision: Provided that the Department of Contracts and a contracting authority may only refer a matter to the Court of Appeal (Inferior Jurisdiction) in relation to a decision taken by the Board relating to sub-regulation (2)(c) and sub-regulation (3)."*

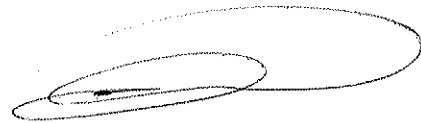
In view of the above this Board concludes that it is not within its remit to proceed with the further deliberation of this objection. Furthermore, this Board concludes that, considering the frivolous nature of the lodgement of this appeal in consideration of Reg. 85 (5), it recommends that the deposit paid by the same appellant company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

19 November 2012