

PUBLIC CONTRACTS REVIEW BOARD

Case No. 489

Adv. KMS/TEN/022/2012

Tender for the Supply of SportMalta iPhone and Android Application for Kunsill Malti għall-Ispport (KMS)

This call for tender was published on the 3rd August 2012 with a closing dated of the 17th August 2012.

The estimated value of the tender was €21,200 (exclusive of VAT).

Three (3) tenderers participated in this call.

Icon Studios Ltd filed an objection dated 5th September 2012 against the decision taken by KMS to award the tender to Hive Information Systems.

The Public Contracts Review Board composed of Mr Joseph Croker A/Chairman and Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on the 9th November 2012 to discuss this objection.

Present for the hearing were:

Icon Studios Ltd (Icon)

Dr Aron Mifsud Bonnici	Legal Representative
Dr Gege Gatt	Representative
Mr Warren Sammut	Representative

Hive Information Systems Ltd


Dr Mark Portelli	Legal Representative
Dr Bernard Gatt	Legal Representative
Mr Clayton Zammit	Representative

Kunsill Malta Għall-Ispport (KMS)

Dr Peter Fenech	Legal Representative
Mr Mario Psaila Savona	Head

Evaluation Board

Mr Bertie Muscat	Chairman
Mr Joseph Ludwig Cassar	Secretary



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

Dr Aron Mifsud Bonnici, on behalf of Icon Studios Ltd, the appellant, made the following submissions:

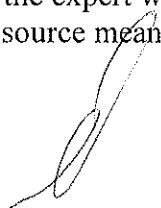
- i. by email/letter dated 30th August 2012 his client was informed that his offer was not accepted since it was not fully technically compliant;
- ii. Clause 31.2 of the tender document imposed upon the contracting authority the obligation to notify unsuccessful bidders with the outcome of the evaluation process and to provide, among other things, the reasons why the tenderer did not meet the technical specifications/notification that the offer was not the cheapest (if applicable);
- iii. his client complained that it was only through his insistence that at last the contracting authority communicated the reasons for disqualification so as to enable him to lodge his appeal and consequently he only just managed to put in his appeal in time; and
- iv. the contracting authority listed various shortcomings which he was going to tackle one by one.

Proprietary Content Management System (CMS)

Dr Mifsud Bonnici submitted that:-

- i. the contracting authority informed his client as follows: *Volume 4 (Financial Bid)*, stated: *Preference for open source CMS*; and then it went on to state that: *KMS had requested that its Content Management System provides an open source solution*;
- ii. tender document stated that the contracting authority had a "preference for open source CMS" and that did not render it a mandatory requirement and therefore it was not correct to state at this stage that "KMS had requested that its CMS provides an open source solution";
- iii. the CMS provided by his client had equivalent, if not superior, functions to any Open Source CMS and the proposed system did not present any disadvantage to the contracting authority;
- iv. with regard to the non-provision of screenshots of the CMS, the contracting authority itself considered that it could have been settled by a clarification; and
- v. in conclusion the contacting authority did not exclude his client because the CMS he proposed was deficient but because it was not open source when, according to the tender conditions, that was a 'preference' and not mandatory.

Dr Peter Fenech, on behalf of KMS, explained that the contracting authority had engaged an expert to report on the technical aspects of the bids received and the evaluation board naturally took his findings into account. He conceded that according to the tender document the 'Open Source CMS' was a preference and not a mandatory requirement however the expert went into that aspect because it had a bearing on the price since an open source meant free distribution or access to the



end product's architecture and design whereas a propriety solution, as that proposed by the appellant, would include an annual licence fee.

Manual Updates

Dr Mifsud Bonnici submitted that:-

- a. his client could not comprehend how the contracting authority came to the conclusion that his proposal did not include the automatic update;
- b. the contracting authority informed his client that:

A clarification issued by the KMS for tender document KMS/TEN/022/2012, specifically Clarification Note 2 issued on August 16th 2012, laid down that: "Competition standings require field relations in such a way to automate the process". In its proposal, ICON states; "Competition standings will also be available by league and competition and updateable through the content management system. The system will cater for various sport disciplines and updating the system is very easy and intuitive for all sport types". Clearly your proposal is not the requested specification since the proposed system does not update competition standings automatically.

- c. according to Section 2 'Timetable' the last date on which additional information could be issued by the KMS was noon of Thursday 16th August 2012 however the clarification issued by the contracting authority which communicated this new automatic update requirement was received by his client on Thursday, 16th August 2012 at 12:28pm, i.e. 28 minutes after the stipulated deadline, by which time the time his client had already submitted his tender; and
- d. in conclusion, it was not fair for the contracting authority to exclude his client on a requirement which was requested after the stipulated time and once it was deemed so crucial by the contracting authority then it could have asked for a clarification even in the light that his client's offer was €5,693.50 cheaper.

Dr Fenech on his part submitted that:-

- i. the automatic update was the principal technical non-compliance aspect of the appellant's proposal;
- ii. the contracting authority clearly requested that: *Competition standings require field relations in such a way to automate the process;*
- iii. the appellant did not provide an automated process so much so that in his proposal he stated that: *Competition standings will also be available by league and competition and updateable through the content management system. The system will cater for various sport disciplines and updating the system*



is very easy and intuitive for all sport types;

- iv. therefore, the system proposed by the appellant required manual input whereas it had to be an automatic system to update a number of sports disciplines otherwise manual updating could easily lead to errors;
- v. the appellant claimed that it did not take much for its proposed solution to update automatically, which statement could perhaps be correct however the fact remained that it was not up to specifications;
- vi. on the morning of the 16th August 2012 someone apparently asked for a clarification with regard to the automatic update and therefore the KMS communicated the clarification to all bidders by email at around 11.15hrs of August 16th i.e. before noon, however, for some reason, in the case of the appellant the email did not reach its destination as evidenced by the notification received at 11:16hrs (Doc A) but eventually the email was successfully relayed to the recipient (warren@icon.com.mt) at 12:28hrs on the same day; and
- vii. the reason given by KMS as to why the clarification was not sent simultaneously to all bidders was, rightly or wrongly, so as not to divulge the identity of the other participating bidders.

Dr Mifsud Bonnici stated that his client was not aware that other emails had been sent other than that received at 12:28hrs


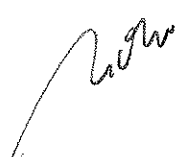
Number of Applications

Dr Mifsud Bonnici remarked that in this regard the contracting authority stated that: *This not to mention that there was one app quoted in one place and two in another, but since we requested 2 it was deemed a tying error.* He added that since the contracting authority itself considered this shortcoming as trivial it was not worth dwelling on. Dr Fenech agreed that this was not an issue.

In conclusion, Dr Mifsud Bonnici declared that the contracting authority should have abided by the provisions set out in the tender document something which it failed to do both in the interpretation of 'preference' to open source CMS and the timely communication of the clarification.

Dr Mark Portelli, obo the recommended tenderer, stated that:-

- a. clause 10.2 of the tender document stated among other things that: *Clarification notes will constitute an integral part of the tender documentation, and it is the responsibility of the tenderers to visit this website and be aware of the latest information published online prior to submitting their tender;*
- b. therefore, according to the tender document itself, the contracting authority was not obliged to send clarifications to bidders via email but it was made clear from the outset that it was the responsibility of the bidders to check the



website of KMS;

- c. the appellant himself had stated that the system he proposed was *updateable through the content management system* which meant that the system had to be updated and that it did not update itself automatically; and
- d. with regard to the appellant's claim that his bid was cheaper, one had to keep in view if his CMS was not open source then that implied that an annual fee was payable which, when added to the price quoted by the appellant, would alter the price of the appellant's bid.

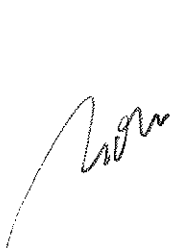
Dr Mifsud Bonnici remarked that in sending an email, it either got through and that was that or one immediately got a 'read' message receipt or a 'failure' message receipt. He added that in this regard one had to consider whether the fact that the clarification had been emailed to his client after the stipulated time prejudiced their case.

Dr Gege Gatt explained that:

- i. on August 16th 2012 there were no problems with Icon's email system and the only email that Icon received on this matter was at 12.28 pm;
- ii. notwithstanding the fact that Icon had submitted its bid prior to the receipt of the clarification in question, still, Icon, aware of the particular needs of the sports sector, had taken the automatic update feature into consideration in its tender submission, both in the design and in the costings;
- iii. Icon's proposal could provide for the automatic update of the competition standings and he could not comprehend how the contracting authority failed to detect that this feature was included in Icon's tender submission; and
- iv. given that the recommended award meant an addition expense of over €5,000, KMS should have sought a clarification.

Dr Mifsud Bonnici explained that the score had to be manually inputted at some stage and then the system would automatically update the competition standings automatically which feature had been included in his client's tender submission. He added that perhaps what one could debate was the level of automation which issue should have been clarified by the contracting authority prior to reaching its decision.

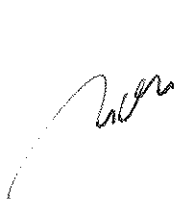
Dr Fenech concluded that it was correct that Icon received the clarification at 12.28hrs of August 16th but still the appellant had one full day, i.e. up to noon of the 17th August 2012, to either submit a fresh tender submission or else submit an addendum to take into account the clarification issued on the 16th August. He added that it was not correct to imply that KMS failed to evaluate Icon's tender submission correctly because it was evident that the appellant did not propose an automated system as requested by the contracting authority.



At this point the hearing was brought to an end.

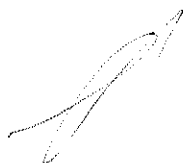
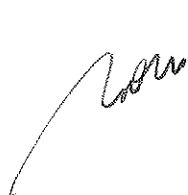
This Board,

- Having noted that appellant, Icon Studios Limited, by letter dated 4th September 2012 and through verbal submissions during the hearing held on the 9th November 2012 objected to the decision taken by the Contracting Authority, Kunsill Malti għall-Isport (KMS) to award the tender to Hive Information Systems;
- Having noted appellant's representative's submission that by email/letter dated 30th August 2012 his client was informed that his offer was not accepted since it was not fully technically compliant; that clause 31.2 of the tender document imposed upon the contracting authority the obligation to notify unsuccessful bidders with the outcome of the evaluation process and to provide the reasons why the tenderer did not meet the technical specifications/notification that the offer was not the cheapest (if applicable); that his client complained that it was only through his insistence that the contracting authority communicated the reasons for disqualification so as to enable him to lodge his appeal and consequently he only just managed to put in his appeal in time; and that the contracting authority listed various shortcomings which he was going to tackle one by one; (A) **Content Management System (CMS)** (a) the contracting authority informed his client as follows: "*Volume 4 (Financial Bid), stated: Preference for open source CMS*"; and then it went on to state that: *KMS had requested that its Content Management System provides an open source solution*"; (b) tender document stated that the contracting authority had a "preference for open source CMS" and that did not render it a mandatory requirement and therefore it was not correct to state at this stage that "KMS had requested that its CMS provides an open source solution"; (c) the CMS provided by his client had equivalent, if not superior, functions to any Open Source CMS and the proposed system did not present any disadvantage to the contracting authority; (d) with regard to the non-provision of screenshots of the CMS, the contracting authority itself considered that it could have been settled by a clarification; and (e) the contacting authority did not exclude his client because the CMS he proposed was deficient but because it was not Open Source when, according to the tender conditions, that was a 'preference' and not mandatory; (B) **Manual Updates** (a) his client could not comprehend how the contracting authority came to the conclusion that his proposal did not include the automatic update; (b) the contracting authority informed his client that: "*A clarification issued by the KMS for tender document KMS/TEN/022/2012, specifically Clarification Note 2 issued on August 16th 2012, laid down that: "Competition standings require field relations in such a way to automate the process"; in its proposal, ICON states: "Competition standings will also be available by league and competition and updateable through the content management system. The system will cater for various sport disciplines and updating the system is very easy and intuitive for all sport types"*"; (c) according to Section 2 'Timetable' the last date on which additional information could be issued by the KMS was noon of Thursday 16th August 2012 however the clarification issued by the contracting authority which communicated this new automatic update requirement was received by his client on Thursday, 16th August



2012 at 12:28pm, i.e. 28 minutes after the stipulated deadline, by which time the time his client had already submitted his tender; (d) it was not fair for the contracting authority to exclude his client on a requirement which was requested after the stipulated time and once it was deemed so crucial by the contracting authority then it could have asked for a clarification even in the light that his client's offer was €5,693.50 cheaper. (C) **Number of Applications** (a) the contracting authority stated that: *This not to mention that there was one app quoted in one place and two in another, but since we requested 2 it was deemed a tying error*; appellant's representative note that since the contracting authority itself considered this shortcoming as trivial it was not worth dwelling on which was corroborated by the Contracting Authority's representative; that the contracting authority should have abided by the provisions it had set out in the tender document something that it failed to do both were the interpretation of 'preference' to open source CMS and the timely communication of clarifications the explanation that on August 16th 2012 there were no problems with Icon's email system and the only email that Icon received on this matter was at 12.28 pm; notwithstanding the fact that Icon had submitted its bid prior to the receipt of the clarification in question, still, Icon, aware of the particular needs of the sports sector, had taken the automatic update feature into consideration in its tender submission, both in the design and in the costings; Icon's proposal could provide for the automatic update of the competition standings and he could not comprehend how the contracting authority failed to detect that this feature was included in Icon's tender submission; and given that the recommended award meant an addition expense of over €5,000, KMS should have sought a clarification and that the score had to be manually inputted at some stage and then the system would automatically update the competition standings automatically which feature had been included in his client's tender submission, and that perhaps what one could debate was the level of automation which issue should have been clarified by the contracting authority prior to reaching its decision;

- having also taken note of the replies tendered by the Contracting Authority's representative that an expert was engaged to report on the technical aspects of the bids received and the evaluation board naturally took his findings into account; it was correct that according to the tender document the 'Open Source CMS' was a preference and not a mandatory requirement however the expert went into that aspect because it had a bearing on the price since an open source meant free distribution or access to the end product's architecture and design whereas a propriety solution, as that proposed by the appellant, would include an annual license fee. the automatic update was the principal technical non-compliance aspect of the appellant's proposal; the contracting authority clearly requested that: *Competition standings require field relations in such a way to automate the process*; the appellant did not provide an automated process so much so that in his proposal he stated that: *Competition standings will also be available by league and competition and updateable through the content management system. The system will cater for various sport disciplines and updating the system is very easy and intuitive for all sport types*; therefore, the system proposed by the appellant required manual input whereas it had to be an automatic system to update a

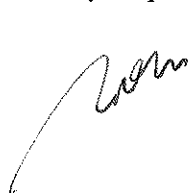


number of sports disciplines otherwise manual updating could easily lead to errors; the appellant claimed that it did not take much for its proposed solution to update automatically, which statement could perhaps be correct however the fact remained that it was not up to specifications; on the morning of the 16th August 2012 someone apparently asked for a clarification with regard to the automatic update and therefore the KMS communicated the clarification to all bidders by email at around 11.15hrs of August 16th i.e. before noon, however, for some reason, in the case of the appellant the email did not reach its destination as evidenced by the notification received at 11:16hrs but eventually the email was successfully relayed to the recipient (warren@icon.com.mt) at 12:28hrs on the same day; and the reason given by KMS as to why the clarification was not sent simultaneously to all bidders was, rightly or wrongly, so as not to divulge the identity of the other participating bidders; that it was correct that Icon received the clarification at 12.28hrs of August 16th but still the appellant had one full day, i.e. up to noon of the 17th August 2012, to either submit a fresh tender submission or else submit an addendum to take into account the clarification issued on the 16th August; that it was not correct to imply that KMS failed to evaluate Icon's tender submission correctly because it was evident that the appellant did not propose an automated system as requested by the contracting authority;

- having also noted the recommended tenderer's representative's statements that clause 10.2 of the tender document listed among other things that: *Clarification notes will constitute an integral part of the tender documentation, and it is the responsibility of the tenderers to visit this website and be aware of the latest information published online prior to submitting their tender*; therefore, according to the tender document itself, the contracting authority was not obliged to send clarifications to bidders via email but it was made clear from the outset that it was the responsibility of the bidders to check the website of KMS; the appellant himself had stated that the system he proposed was *updateable through the content management system* which meant that the system had to be updated and that it did not update itself automatically; and with regard to the appellant's claim that his bid was cheaper, one had to keep in view if his CMS was not open source then that implied that an annual fee was payable which, when added to the price quoted by the appellant, would alter the price of the appellant's bid;

came to the following conclusions:

- a. that though the appellant was not informed at the outset of the reasons why his offer was not fully technically compliant, he was eventually given the reasons in time to submit his appeal within the stipulated timeframe;
- b. that contracting authorities should be careful to abide strictly by the Public Procurement Regulations in all respects so that tenderers may be given all the opportunities legally available to submit appeals in time, should they require to;

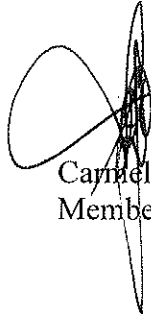


- c. that an open source CMS was not obligatory but was 'preferred' and as such tenderers had the right to submit their choice of system and no tenderer could be excluded because he chose to submit a proprietary CMS;
- d. that any system though automated would at one stage require human input especially where the recording of scores in the case of sporting activities were concerned and though the system proposed by the appellant required this human element to function it could not be discarded on this count and an in-depth assessment of the appellant's submission should have been carried out to eliminate any possible doubt.

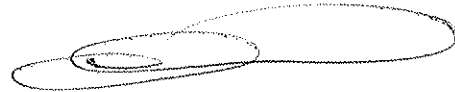
In view of the above this Board finds in favour of the appellant and recommends that (1) his bid be reintegrated into the adjudication process (2) his offer be re-assessed in terms of technical compliance with the tender's specifications, preferably by a different technical expert so that the offer may be examined with a fresh pair of eyes. The Board further recommends that the deposit paid by appellant be reimbursed.



Joseph Croker
A/Chairman



Carmel Esposito
Member



Paul Mifsud
Member

20th November 2012