

QORTI TAL-APPELL

IMĦALLFIN

S.T.O. PRIM IMĦALLEF JOSEPH AZZOPARDI
ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
ONOR. IMĦALLEF NOEL CUSCHIERI

Seduta ta' nhar it-Tnejn 29 ta' April 2019

Numru 8

Appell numru 388/2018

IOT Malta Limited (C-75588)

v.

**Kunsill Lokali Valletta u
CVA Technology Company Limited
(C37879) għal kull interess li jista' jkollha**

1. Dan huwa appell ta' *IOT Malta Limited* ["*IOT*"] minn deċiżjoni tal-1 ta' Novembru 2018 tal-Bord ta' Reviżjoni dwar Kuntratti Pubbliċi ["il-Bord ta' Reviżjoni"], imwaqqaf taħt ir-Regolamenti tal-2016 dwar l-Akkwist Pubbiku [L.S. 174.04]. Il-każ quddiem il-Bord ta' Reviżjoni kien dwar oġġezzjoni ta' *IOT* kontra deċiżjoni tal-Kunsill Lokali tal-Belt Valletta ["il-Kunsill Lokali"] illi jwarrab offerta ta' *IOT* għal kuntratt biex jitwaqqaf *parking management system* għall-Belt Valletta u illi l-kuntratt jingħata lil *CVA Technology Company Limited* ["*CVA*"].

2. Il-fatti rilevanti seħnew hekk: kienet saret sejħa mill-Kunsill Lokalii għal offerti għal “*Design, Development, Supply, Installation and Testing for a Parking Management System Including Parking Availability Sensors for Valletta as part of Civitas Destinations Project*”. Fost il-kondizzjonijiet tas-sejħa kien hemm dik li tgħid hekk:

»The solution proposed by the bidder must be interoperable with the VaTIS app. The Valletta Travel Information System (VaTIS) is designed to aggregate and disseminate travel related information in Valletta. The VaTIS server is designed to communicate with various data nodes through RESTful APIs¹. For a data-node to be integrated with VaTIS, it needs to expose APIs for VaTIS to consume and process. This therefore also requires a dedicated server at the data-node end that sends the respective data to VaTIS. The bidder has to provide a real-time data structure with the status of every parking sensor and send it to the VaTIS server.²«

3. Fost dawk interessati li jagħmlu offerta kien hemm min talab aktar tagħrif dwar para. 2.6 miġjub fuq:

»Kindly provide us with the name and contact details of the supplier of the VaTIS application, such that we can contact the company directly in order to ensure that the system we provide is fully interoperable with the VaTIS app.«

4. It-tweġiba tal-Kunsill Lokali kienet din:

»This information will be provided after award of contract. Tenderers should note that all this VaTIS supplier need[s] is an update of all the parking sensors, logged in an xml file which is generated every few seconds. This xml file is then exposed online from where they can harvest it.«

5. Tefgħu offerti CVA, IOT u terzi. B’ittra tal-24 ta’ Marzu 2018 il-Kunsill Lokali talab lil IOT tiċċara xi partijiet mill-offerta tagħha, u IOT wieġbet fit-2 ta’ April 2018. Imbagħad b’ittra tal-10 ta’ Settembru 2018 il-Kunsill

¹ *Representational state transfer application programming interface.*

² *Technical Specifications/Terms of Reference, para. 2.6.*

Lokali għarraf lil *IOT* li kienet sejra tintlaqa' l-offerta ta' *CVA* u għarrafha wkoll, dwar l-offerta tagħha, illi:

»The Evaluation Committee is of the opinion that despite the clarification note, this offer is deemed to be incomplete on the following basis:

»The costs to have the service integrated to VaTIS is not known. Moreover, it was concluded that the committee is not in a position to establish / derive to a fixed value at evaluation stage, prior awarding the contract. Thus, the final value to operate and maintain the system is not final.

»In terms of article 1.1 of the Instructions to Tenderers and Notes to clause 7.1, the bidder was requested to clarify some issues as mentioned above. However, it was noted that the reply was not adequate and thus the offer is deemed to be incomplete *vis-à-vis* the financial aspect. Thus, this offer is being rejected.«

6. L-offerta ta' *CVA* intgħażlet għalkemm ma kinitx l-orħos: l-offerta ta' *CVA* kienet ta' mija u tmienja u ħamsin elf, tmien mija u ħamsa u sittin euro (€158,865); l-orħos offerta kienet dik ta' *IOT*, li kienet ta' mija u erbatax-il elf, disa' mija u ħames euro (€114,905).
7. *IOT* talbet illi tingħata tifsira aħjar għala l-offerta tagħha twarrbet iżda l-Kunsill Lokali wieġeb li ma kellu xejn xi jżid mal-ittra tiegħu tal-10 ta' Settembru 2018.
8. B'ittra tal-20 ta' Settembru 2018 *IOT* ressqet oġġezzjoni kontra d-deċiżjoni tal-Kunsill Lokali quddiem il-Bord ta' Reviżjoni b'talba li ti-tħassar id-deċiżjoni li l-kuntratt jingħata lil *CVA*, li l-offerti jitqiesu mill-ġdid u li l-kuntratt jingħata lil min għamel l-orħos offerta..
9. Bid-deċiżjoni tal-1 ta' Novembru 2018, li minnha sar dan l-appell, il-Bord ta' Reviżjoni iddeċieda hekk dwar l-oġġezzjoni ta' *IOT*:

»This board,

»Having noted the objection filed by *IOT Malta Limited* (hereinafter referred to as the Appellants) on 20 September 2018, refers to the contentions made by the same Appellants with regards to the award of tender awarded by the Valletta Local Council (hereinafter referred to as the Contracting Authority)

»... ..

»Whereby the Appellants contend that:

- »a) their offer was rejected due to a change of goal posts by the Local Council, during the evaluation stage. In this regard, the Appellants refer to the information requested by the evaluation committee, pertaining to new information which was totally outside the terms of the tender;
- »b) the Contracting Authority, in its letter of rejection did not specify the real deficiencies in their offer.

»This board has also noted the Contracting Authority's reasoner letter of reply dated 27 September 2018 and its verbal submissions during the public hearing held on 16 October 2018, in that:

- »a) the Valletta Local Council contends that there was no change of goal posts at all. The information requested by the Contracting Authority pertained to technical amplifications on items so listed and described in the tender document. In this respect, the Appellants' request was incomplete and does not satisfy paragraph 2.6 of Technical Specifications;
- »b) the Contracting Authority also maintains that the letter of rejection dated 10 September 2018 specified where the Appellants' offer was in default.

»... ..

»This board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that there are two main issues which deserve due consideration, namely:

- »i) the change of goal posts;
 - »ii) the reasons for rejection of *IOT Malta Limited's* offer.
- »i. Change of goal posts

»This Board would refer to paragraph 2.6 of Section 4 of the tender document, as follows:

»"2.6 – VaTIS Application

»"The solution proposed by the bidder must be interoperable with the VaTIS app. The Valletta Travel Information System (VaTIS) is designed to aggregate and disseminate travel related information in Valletta. The VaTIS server is designed to communicate with various data nodes through RESTful APIs³. For a data-node to be

³ *Representational state transfer application programming interface.*

integrated with VaTIS, it needs to expose APIs for VaTIS to consume and process. This therefore also requires a dedicated server at the data-node end that sends the respective data to VaTIS. The bidder has to provide a real-time data structure with the status of every parking sensor and send it to the VaTIS server.”

»The above mentioned clause clearly denotes that VaTIS application is to be included as part of the technical requirements and, at the same instance, this board notes that the VaTIS application has been clearly and vividly described as to the works/services involved in such an application. In this regard, this board is aware of the fact that such an application was not clearly indicated in the Appellants’ original submissions, so that, quite appropriately, the evaluation committee gave the opportunity to the Appellants to rectify and clarify shortcomings in their original submissions as follows:

»“The Evaluation Committee noted the following shortcomings with regard to your submission:

»“— if system is to use existing CVA infrastructure, what guarantees does *CVA Technology* provide that services can continue using their infrastructure?

»“— bidder to confirm provision of metered power supply at 0 cost;

»“— tenderer must specify the type of “support” provided as part of the tender requirements. Definition of support must be provided alongside the costs of support, (hourly rate, damage replacement, extension costs per sensor), beyond the testing and implementation of the works stipulated in this contract;

»“— tenderer must specify their commitments to integrate the parking management system with VaTIS. All tenderers must declare the costs, (if any) of integrating with VaTIS or other 3rd party system;

»“— tenderer must confirm that all communication costs of sensor to servicer are included in the price of the tender;

»“— tenderer to confirm that cost listed in 2.01 is a global sum for all communication infrastructure, (irrespective of the number);

»“— tenderer to confirm explicitly that system can be extended to other areas;

»“— tenderer to confirm explicitly that system can reliably detect any type of vehicle that may be making use of the bay;

»“— can the tenderers confirm what mitigation measures will be put in place to support gateway redundancy?”

»This board notes that all the points mentioned in the above clarification request relate directly to items mentioned, as requisites, in the technical specifications and bill of quantities of the tender document, so that there are no new or additional specifications being requested and, at the same instance, this

board was not presented with any evidence of any particular item which was not requested to be included in the original submissions, yet mentioned in the clarification request.

»This board would also refer to item 3.01 of the Technical Specifications wherein it is being requested that:

»“3.01 Provide, install and set up Central Management Software as per Technical Specifications.”

»In this regard, Section 4 para 2.6 provides clearly that what is being offered must be interoperable with the VaTIS application, so that the latter must be included in the technical specifications of the tender and obviously had to be incorporated in the price being quoted for item 3.01 of the bill of quantities.

»This board justifiably establishes that the inter-operation with the VaTIS application was clearly indicated in the tender document and item 3.01 of the bills of quantities had to incorporate such works as being part of the technical specifications of the tender. This board would respectfully point out that a “change of goal posts” occurs when, during the evaluation process, the contracting authority requests works or services which are not so listed, as requisites, in the tender document. In this case, the inter-operation with the VaTIS application was vividly highlighted in article 2.6 of Section 4, so that it formed part of the technical specifications, and, at the same instance, item 3.01 refers to installation and set-up of the control management software to conform to the technical specifications. In this regard this board opines that the contents requested in the clarification request did not constitute or include items which were not originally requested in the tender document so that this same board does not uphold the Appellants’ first contention..

»i. The reason for the rejection of *IOT Malta Limited's* offer

»With regards to the Appellants, second contention, this board would refer to the reasons given by the Valletta Local Council for the rejection of the latter’s offer, as follows:

»“The Evaluation Committee is of the opinion that despite the clarification note, this offer is deemed to be incomplete on the following basis:

»The costs to have the service integrated to VaTIS is not known. Moreover, it was concluded that the committee is not in a position to establish / derive to a fixed value at evaluation stage, prior awarding the contract. Thus, the final value to operate and maintain the system is not final.

In terms of Article 1.1 of the Instructions to Tenderers and Notes to Clause 7.1, the bidder was requested to clarify some issues as mentioned above. However, it was noted that the reply was not adequate and thus the offer is deemed to be incomplete *vis-à-vis* the financial aspect. Thus, this offer is being rejected.”

»The above mentioned reasons denote that, due to the fact that *IOT Malta Limited*, in their reply to the clarification request, indicated that they quoted an hourly rate of € 50/hour for their system to be integrated with the VaTIS application, no fixed amount or lump sum could be ascertained for such an integration, apart from the fact that the Appellants, through such quoted rate, confirmed that such a mandatory service was not included in their bill of quantities.

»In this regard, this Board notes that the other competing bidder confirmed that costs relating to the integration with the VaTIS application, were included in their offer whilst the fact that the Appellants did not indicate a lump sum for such an application precluded the evaluation committee from ascertaining and comparing the offers on a “like with like” basis. At the same instance, this board upholds the evaluation committee’s decision to deem the Appellants’ reply to the clarification request as being incomplete. In this regard, this board would also refer to clause 17.7, article 18, wherein it is emphasized that the “tender prices must cover the whole of the works as described in the tender document”.

»This board has taken note of the testimony of the witnesses duly summoned and, from such submissions, it was established that both offers received were technically compliant, However, upon a request for clarification to both bidders, it became apparent that *IOT Malta Limited*, in their original submissions, did not indicate that the costs catered also for the integration of their system with the VaTIS application and subsequently quoted a rate per hour, thus rendering their financial offer not definite.

»At the same instance, this board would respectfully point out that the At the same instance, this board would respectfully point out that the principle of proportionality could not be applied as the Appellants’ reply to the clarification request represented an incomplete submission.

»In this respect, this board finds that the reasons given by the Valletta Local Council for rejecting the Appellants’ offer were vivid enough to depict the latter’s offer deficiency and therefore, in this regard, this board does not uphold the Appellants’ second contention.

»In view of the above, this board:

- » i) upholds the Valletta Local Council’s decision in the award of the tender;
- » ii) does not uphold *IOT Malta Limited’s* grievances;
- » iii) recommends that the deposit paid by the Appellants should not be refunded.«

10. *IOT* ressqet appell minn din id-deċiżjoni b'rikors tal-21 ta' Novembru 2018 li għalih il-Kunsill Lokali wieġeb fil-4 ta' Diċembru 2018 u CVA wieġbet fil-5 ta' Diċembru 2018.
11. Qabel ma tqis l-appell ta' *IOT* il-qorti sejra tibda b'talba magħmula mill-Kunsill Lokali biex jitneħħew mill-inkartament id-“dokumenti kollha” ipprezentati minn *IOT* flimkien mar-rikors ta' appell billi din il-qorti “għandha tillimita ruħha għad-dokumenti esebiti” quddiem il-Bord ta' Revizjoni.
12. Ma nġiebx quddiem il-qorti l-inkartament kollu tal-proċess quddiem il-Bord ta' Revizjoni, iżda ċertament mhux id-dokumenti “kollha” huma dokumenti li ma kinux iġiebu quddiem il-bord: id-dokument tas-sejha, l-ittra li biha *IOT* kienet mgħarrfa li l-offerta tagħha ma ntlaggħetx, id-dettalji pubblikati dwar l-offerti li ntefgħu, l-ittra ta' oġġezzjoni u t-twegiba għaliha żgur li kollha kienu quddiem il-bord. Fil-lista ta' dokumenti ta' *IOT* jissemmew ukoll “varji dokumenti prodotti mis-socjetà appellanti quddiem il-Bord ta' Revizjoni”. Għalkemm nota ta' dokument magħmula sew għandha tgħid wieħed wieħed x'inhuma d-dokumenti, u mhux tgħid biss li huma “varji dokumenti”, min-naħa l-oħra l-Kunsill Lokali ma indikax liema huma d-dokumenti li joġġezzjona għalihom. Talba ġenerika għall-“isfilz tad-dokumenti kollha” għal raġuni li ma tapplikax għad-dokumenti kollha ma tistax tintlaqa'. Anzi, talbiet bħal dawn magħmula ġenerikament biex min jagħmel it-talba jiffranka x-xogħol meħtieġ biex ikun aktar preċiż lanqas jistħoqqilhom illi l-qorti tqishom.

13. Il-qorti sejra għalhekk tgħaddi biex tqis l-appell ta' IOT. L-ewwel aggravju jgħid hekk:

»L-ewwel aggravju: It-*tender* kif maħruġ u kif redatt huwa fi ksur tal-prinċipju ġenerali tat-trattament ugwali

»Illi huwa evidenti li s-soċjeta appellata *CVA Technology Company Limited* kellha vantaġġ uniku u enormi fuq il-bqija tal-offerenti għal dan it-*tender* u dan minħabba li diġà kellha esperjenza fil-passat u waħda li hija kurrenti ta' integrazzjoni mal-*VaTIS*. Illi minkejja li tressaq dan l-aggravju fis-smiġħ tal-*letter of objection* fis-16 ta' Ottubru 2018 (kif altrimenti juru l-minuti telegrafici tas-smiġħ) il-Bord ta' Revizjoni ma trattax dan il-punt fid-deċiżjoni appellata. *Ab omisso decisione* lanqas biss ġew trattati dawn il-punti.

»Illi dan ma jfissirx li s-soċjetà appellata *CVA Technology Company Limited* hija projbita milli tipparteċipa f'tali *tender* imma biss tfisser li r-rekwiżit tal-integrazzjoni mal-*VaTIS* messu ġie spjegat aħjar u l-informazzjoni kollha rilevanti messha ġie provduta qabel l-għeluq tas-sottomissjoni tal-offerti. Kien imissu kien hemm ftuħ totali u trasparenza assoluta kif titlob il-liġi, liema rekwiżiti għandhom saħansitra jiġu aktar enfasizzati meta xi ħadd bħall-appellata *CVA Technology Company Limited* tkun qiegħda tikonkorri ma' ħaddiehor.

»Illi f'dan ir-rigward il-liġi, speċifikament regolament 38(1) tar-Regolamenti, hija ċara:

»“The procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process.

»Dan huwa bażilari u allaħares ma jkunx hekk għaliex ikun ksur tal-prinċipji ġenerali tal-akkwist pubbliku, speċifikament, dak li jirrikjedi trattament ugwali tal-offerenti.

»Illi kif irriżulta mis-smiġħ tal-*letter of objection* kien hemm estratt wieħed biss fit-*tender* li jirrelata mal-*VaTIS*

»... ..

»Tant dan l-estratt ma kienx ċar għall-offerenti li kien hemm offerent li saqsa għas-segwenti kjarifika:

»“Kindly provide us with the name and contact details of the supplier of the *VaTIS* application, such that we can contact the company directly in order to ensure that the system we provide is fully interoperable with the *VaTIS* app.”

»u r-risposta tal-appellat Kunsill Lokali kienet:

“This information will be provided after award of contract. Tenderers should note that all this *VaTIS* supplier need is an update of all the parking sensors, logged in an xml file which is generated every few seconds. This xml file is then exposed online from where they can harvest it.”

»Illi s-soċjeta appellanti bir-rispett ma tistax taqbel mal-apprezzament tal-Bord ta' Revizjoni li '*the VaTIS application has been clearly and vividly described as to the works/services involved in such an application*' u li '*the inter-operation with the VaTIS application was*

vividly highlighted in article 2.6 of Section 4 u forsi dan huwa anke sforz li l-kwistjoni ġiet kważi minimizzata mill-appellat Kunsill Lokali waqt is-smiġħ tal-*letter of objection*. Il-qorti tista' tikkonstata independentement minn sempliċi qari tat-*tender* li dan mhux il-każ.

»Però jibqa' l-fatt – li jista' jiġi verifikat independentement u oġġettivament minn din l-onorabbli qorti – li l-informazzjoni provduta fit-*tender* dwar l-integrazzjoni tal-*VaTIS* ma kinetx '*clearly and vividly described/highlighted*' u in vista tal-fatt li l-appellat Kunsill Lokali kien jaf sew li hemm offerent li diġà huwa familjari mal-integrazzjoni tal-*VaTIS* kellu jipprovi informazzjoni ferm aktar dettaljata u dan sabiex jiżgura trattament ugwali bejn is-soċjetà appellata *CVA Technology Company Limited* u l-bqija tal-offerenti, inkluża s-soċjeta appellanti.

»Illi l-liġi hija wkoll ċara f'dan ir-rigward u regolament 53(6) tar-Regolamenti jistipola li:

»“Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.”

»Illi sabiex tiġi ripristinata l-ugwaljanza bejn il-partijiet dan ir-rekwiżit kellu jiġi deskritt aħjar u fl-assenza ta' tali deskrizzjoni kif trid il-liġi għandu jiġi skartat u mhux jintuża bħala bażi sabiex jiġu injorati żewġ offerenti validissimi u jingħata t-tielet offerent li ssottometta l-ogħla offerta.«

14. Tassew illi b'ebda mod ma jista' jingħad illi “*the inter-operation with the VaTIS application was vividly highlighted in article 2.6 of Section 4*”. Tassew illi d-dokument tas-sejħha jgħid illi s-sistema offert kellu jkun “*interoperable with the VaTIS app*” iżda min ma jkollux aċċess għall-arkitettura tal-*VaTIS* ma jkollux tagħrif biżżejjed biex is-sistema tiegħu jagħmlu li jista' jiġihaddem kompatibilment mal-*VaTIS*.
15. Huwa minnu illi, wara talba għal kjarifika, ingħata t-tagħrif illi kull ma kien meħtieġ hu illi s-sistema kull ftit sekondi jiġġenera *.xml⁴ files* li jitqiegħdu *online* sabiex jistgħu jinqraw mill-*VaTIS*. Iżda ma tgħidx sew *CVA* fit-tweġiba tagħha għall-appell illi “Dan kien biżżejjed għal kull offerent u ma kienu jeħtieġu ebda informazzjoni oħra”. Il-kjarifika tgħid ukoll illi aktar tagħrif “*will be provided after award of contract*” u għal-

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eXtensible Markup Language.

hekk l-oblaturi – ħlief, naturalment, CVA li għa kienet tħaddem il-VaTIS – ma kinux setgħu jafu jekk dan it-tagħrif li kellu jingħata aktar 'il quddiem ikollux impatt fuq il-prezz tal-offerta. Għaldaqstant l-oblaturi – bl-eċċezzjoni ta' CVA – ma setgħux raġonevolment iħarsu dak li jgħid u jrid il-para. 18, *tender prices*, fit-Taqsima 3, *special conditions*, tas-sejha għal offerti:

»... .. quoted prices shall be all inclusive of any relevant costs ...

... ..

»... ..

»The tendered rates shall be inclusive of all works as specified, as well as any other works that are of a contingent or indispensable nature for completing the work in its entirety.

»The tender prices must cover the whole of the works as described in the tender documents.«

16. Dan ifisser illi CVA biss kellha t-tagħrif meħtieġ biex tagħmel offerta sħiħa. Dan huwa bi ksur tar-reg. 53(6) ċitat minn *IOT* u huwa biżżejjed biex jintlaqa' l-appell, bla ma hu meħtieġ illi l-qorti tqis l-aggravji l-oħra tal-appell.
17. Għal dawn ir-raġunijiet il-qorti tilqa' l-appell u tħassar kemm id-deċiżjoni tal-Kunsill Lokali u kif ukoll dik tal-Bord ta' Revizjoni.
18. Billi, fiċ-ċirkostanzi, ma jidhirx li hu possibbli li l-offerti jitqiesu mill-ġdid, ladarba l-offerti kollha ħlief dik ta' CVA saru bla ma l-oblaturi kellhom it-tagħrif kollu meħtieġ, il-qorti tordna illi s-sejha għal offerti ssir mill-ġdid, b'dan illi jingħata t-tagħrif kollu meħtieġ sabiex kull oblatur ikun jista' jagħmel offerta, ukoll f'dak li għandu x'jaqsam mal-parti teknika u dik finanzjarja.

19. L-ispejjeż tal-appell iħallashom il-Kunsill Lokali.

Joseph Azzopardi
President

Giannino Caruana Demajo
Imħallef

Noel Cuschieri
Imħallef

Deputat Registratur
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