

Public Contracts Appeals Board
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Case No. 5

Report of the Public Contracts Appeals Board

**Appeals regarding the tender for the Supply, Installation and Commissioning of
Medical Equipment and Related Services for the New Hospital, Malta
Ref: CT/2611/2001**

Date: 28th October, 2003

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1.0 Preamble

The Public Contracts Appeals Board, constituted by

Mr Alfred R. Triganza..... Chairman
Mr Anthony Pavia.....Member
Mr Maurice Caruana..... Member

submits this Report regarding the two appeals lodged in connection with the tender for the Supply, Installation and Commissioning of Medical Equipment and Related Services for the New Hospital, Malta Ref: CT/2611/2001 to the DG Contracts in terms of Paragraph 17 of the Ninth Schedule to the Public Service (Procurement) Regulations, 1996

2.0 Introduction

The building of the new hospital is a cluster of many projects, very often run simultaneously. One of these important projects is by far the installation of medical equipment as well as the supply of related services.

The Foundation for Medical Services (FMS) was entrusted with the New Hospital project.

A call for tenders was issued for the Supply, Installation and Commissioning of Medical Equipment and Related Services for the said hospital.

On 1st August 2001 the Board of Directors of The Foundation for Medical Services appointed an Adjudication Board composed of:

Chairman	Judge Victor Caruana Colombo
FMS, Vice President	Mr. Albert Attard
CEO, Foundation for Medical Services	Mr. Emanuel Attard
FMS, Board Member	Arch. Paul Camilleri
Consultant Advisor, Ministry of Gozo	Prof. Maurice Cauchi
FMS, Board Member	Mr. Emanuel Micallef
CEO, MITTS	Mr. David Spiteri Gingell

3.0 Background

A formal tender with an estimated contract value of Lm 25m was published in the Government Gazette accompanied by the Tender Documents dated 01.11.2001. The closing date for the call for offers was 31.01.2002 which was eventually extended to 14.02.2002.

In the schedule of tenders received dated 14.02.2002 it was stated that five tenderers had submitted their offers, namely,:

- a. Simed International BV
- b. Sagexport
- c. Siemens AG
- d. Hospitalia International GmbH
- e. Inso SpA

The Adjudication Board appointed three groups of advisers in their various fields of specialization to evaluate the offers and report their findings to the same Board. The three reports would cover the financial, legal and technical aspects of these tenders.

For the purpose of this exercise the Adjudication Board decided to appoint the following companies, namely:

- i. Grant Thornton Certified Public Accountants & Auditors & Management Consultants as financial advisers
- ii. Muscat Azzopardi & Associates as legal advisers
- iii. Secta Group Ltd. as technical advisers

Clause 4.0 of the Report to the FMS Board by the Medical Equipment Adjudication Board of the 30.04.2002 stated that:

“The consultants worked in continuous contact and liaison with the Adjudication Board and the Adjudication Board gave procedural directions as necessary.

The Adjudication Board decided to initially assess the first three tenders, namely those submitted by INSO SpA, Hospitalia International GmbH and Simed International BV reason being that there was a substantial difference between these three tenders and the next two tenders namely Siemens AME and Sagexport, as regards the total amount of the tender as quoted. However, Siemens/AME and Sagexport tenders were also assessed, although at a lesser level of detail from the technical aspects due to time/cost considerations.”

Following analysis of the contents of the said report the Adjudication Board gave its recommendations to FMS as follows:

“The Adjudication Board unanimously concludes that Hospitalia International GmbH’s tender is the most advantageous offer as regards to technical compliance, cost and overall quality. The Adjudication Board recommends the tender to be awarded to Hospitalia International GmbH in terms of the Tender Documents as published on 1st November 2001.

Whilst drawing particular attention to what has been submitted in the Clauses under 6.2 of this report, The Adjudication Board recommends to start negotiations with Hospitalia International GmbH, as this offer presents a solid basis for concluding a Contract with this tender” (Clause 9.2)

The total prices quoted in the 'Schedule of tenders received' in respect of the three main tenderers were as follows:

INSO SpA	Euro 64,746,103
Hospitalia International GmbH	Euro 73,499,652
Simed International BV	Euro 74,841,305

It is to be noted that according to item 5.0 of the Adjudication Report, the figure of Euro 64,746,103 was eventually adjusted to Euro 63,915,397 "*in view of arithmetical adjustments confirmed by the tenderer.*"

The substantial difference in price quotes by Messrs. INSO SpA vis-à-vis the other two tenderers prompted the Contracts Committee to decide to seek clarifications from Messrs. INSO SpA.

Initially, the FMS Board expressed strong reservations against this decision.

The DG Contracts in a letter to the FMS President dated 23.08.2002, amongst other things, stated that

" ... the General Contracts Committee had authorized the undersigned to hold meetings with FMS officials, SECTA and representatives of INSO Spa with a view to seeking clarifications regarding technical aspects of the Italian company's tender.

This exercise is in conformity with the relevant provisions of the tender document and is also in line with the normal procedure followed by the General Contracts Committee whereby the lowest priced bidder is afforded by them the possibility to clarify his offer with regard to its technical aspects.

The above should in no way be construed as any lack of confidence in your Adjudication Board, or indeed, in the FMS board. The latter shall always retain its right to either stand by its original recommendations or to change it if it considers that circumstances so warrant after the completion of this exercise. The final decision, however, rests with Government."

The then President of the Foundation for Medical Services, Dr. Joseph L. Pace, replied on the 26.08.2002 to the DG Contracts to the effect that

"FMS has been legally advised that paragraph 3 of your letter safeguards appropriately the position and concerns of the FMS Board members in this issue. In the circumstances, Mr. E Attard, FMS CEO, will now arrange for further SECTA visits as necessary and costs will be covered by FMS ..."

The view of the DG Contracts as expressed in a letter dated 26.08.2002 to Grech Vella Tortell & Hyzler Advocates, in reply to various letters sent by the latter to the DG Contracts, was that "*Government has every right to request additional technical information or to seek clarifications of a technical nature from a tenderer who, prima facie, has submitted the lowest priced bid.*"

The Contracts Committee proceeded with this exercise with INSO SpA utilizing the services of SECTA Group Ltd.

Following meetings which took place in Malta between the 17th and the 24th September, 2002, a report was compiled by SECTA Group Ltd., entitled 'Re-Evaluation Exercise of the Inso Tender' and this was presented to the DG Contracts in the following month.

On the basis of the findings of this report the Contracts Committee agreed unanimously that the contract should be awarded to INSO SpA.

Following the publication of this decision, Grech Vella Tortell & Hyzler Advocates, on behalf of their clients, Messrs. Hospitalia International GmbH, issued a motivated letter of objection (dd. 11.12.2002) in terms of para.2 of the Third Schedule to the Public Service (Procurement) Regulations, 1996.

Messrs. Fenech & Fenech Advocates, on behalf of their clients, Messrs. Simed International BV also filed a motivated letter of objection (dd. 10.12.2002) against the award with the Director of Contracts.

An *Analysis Report* stating the reasons which led to the objections lodged by Messrs. Grech Vella Tortell & Hyzler Advocates and Messrs. Fenech & Fenech Advocates respectively, was compiled by the DG Contracts.

The Public Contracts Appeals Board was appointed on 26.01.2003 to consider appeal cases in accordance with the provisions of the Public Service (Procurement) Regulations 1996 – Legal Notice 70 of 1996.

Due to the urgent nature of this case the Board decided to deal with these appeals as a matter of utmost priority.

The first public hearing session in connection with the said objections was held on 03.03.2003. This hearing session allowed the parties concerned to agree to a ‘modus operandi’ for subsequent sessions with the only point of contention at the time remaining the accessibility of interested parties to specific documentation pertinent to the case.

During this hearing the PCAB and the respective legal representatives came to an agreement that due to a substantial amount of common ground, it was considered more effective and expedient for both objections to be heard concurrently with all parties concerned being allowed the possibility to make their own presentations, submissions, call witnesses and conduct cross-examinations.

The legal representatives, in the presence of DG Contracts, requested to be allowed to view the documentation subject to information of a commercial nature not being disclosed. In acceding provisionally to the request, PCAB stated that it would be doing so subject to legal advice being sought in the ‘interim’ period.

Following this legal advice, on 14.03.2003, the PCAB wrote to the interested parties stating amongst other things that

“ ... the Appeals Board decided to slightly alter its initial ruling given on the day of the public hearing as follows:

- a. legal representatives filing objection on behalf of respective clients to confirm in writing the specific subject matter upon which they would have based the objection / appeal and for which now it is requested that pertinent documentation be viewed by their representatives;*
- b. legal representatives to request the specific part of the pertinent documentation required for viewing;*

- c. *legal representatives to state 'a priori' the ultimate use of such proof emanating from documents required.*

The Appeals Board had agreed to limit the number of those viewing the said documentation (at a site and time schedule to be determined) to two representatives of the legal firms representing INSO, HOSPITALIA and SIMED. Consequently, it would be appreciated if you could supply the Appeals Board the two names designated by your firm as well as their respective association with the case in question ...”

An informal meeting between the PCAB and the legal representatives was held on the 21.05.2003 during which meeting the Board made it amply clear that it would not allow what are termed “*fishing expeditions*”.

In a subsequent letter addressed to the legal representatives dated 04.06.2003 the PCAB stated that

“After carefully considering matters discussed in both formal and informal meetings held to date with legal representatives of interested parties, the Board strongly believes that

- a. *it should hold on to its line of thought, namely that legal representatives should not be deprived from viewing documentation and other relevant material provided that the said parties indicate precisely the specific item/s they wish to view;*
- b. *the request for viewing of documentation and relevant material should be accompanied by a pertinent explanation as to the bearing the legal representatives feel that such item may have towards the resolution of the case.*

The Board would like to reiterate that following adherence to points (a) and (b) mentioned above it would still be the said Board's prerogative whether to accede to or deny such requests and extent of explanation given.

As a conclusion, however, the Board stated that “in the absence of such specific request, the Board will proceed as it considers appropriate and expedient, in the circumstances.”

This matter was re-stated to all parties concerned following another informal meeting with legal representatives held on 10.06.2003.

During this meeting, procedures to be followed such as the summoning of witnesses, cross examinations, and other matters were agreed upon.

These procedures were formally outlined in a letter sent on 12.06.2003 to the parties in question by the PCAB wherein it was stated that:

“The Board has decided to initially concentrate the proceedings on three key witnesses, namely

- i. *Secta*
- ii. *The Foundation for Medical Services*
- iii. *Department of Contracts*

Needless to say that following the exhaustion of questions addressed to and clarifications required from the above, the rest of the proceedings shall become subject for further discussion between interested parties.”

Following this letter the PCAB proceeded with formal public hearings of the case.

In total, between 03.03.2003 and 11.09.2003, seven public sessions were held, namely:

<u>Date</u>	<u>Session Ref.</u>
03.03.2003	Session 1
02.07.2003	Session 2
03.07.2003	Session 3
18.07.2003	Session 4
29.07.2003	Session 5
01.08.2003	Session 6
11.09.2003	Session 7

The persons who participated in the proceedings included:

- a. the legal representatives of the three interested parties who were

Prof. Ian Refalo and Drs. Anton Micallef and Andrea Gera de Petri (AMVT Advocates) representing INSO SpA.

Drs. J.J. Vella and Albert Grech (Grech Vella Tortell & Hyzler Advocates) representing HOSPITALIA International GmbH

Drs. Joseph Fenech and Raphael Fenech Adami (Fenech & Fenech Advocates) representing SIMED International BV

- b. the legal representatives of the Foundation for Medical Services (FMS)

Drs. Godwin Muscat Azzopardi and James Muscat Azzopardi (Muscat Azzopardi & Associates Advocates)

- c. *Mr. J. V. Spiteri (DG Contracts)*

The following sixteen witnesses took the stand and gave evidence under oath:

1 CEO, Foundation for Medical Services	Mr. Emanuel Attard
2 DG Contracts Department	Mr. J.V. Spiteri
3 Chairman Adjudication Board	Judge Victor Caruana Colombo
4 Grant Thornton Certified Public Accountants & Auditors & Management Consultants	Mr. Kenneth Bonnici
5 Former President, Foundation for Medical Services	Dr. Joseph L. Pace
6 Consultant, Secta Group Ltd.	Mr. Kim Lovick
7 Consultant, Secta Group Ltd.	Mr. Nigel Draper
8 Hospitalia International GmbH	Mr. Jurgen Umbach
9 Medical Equipment Manager, Foundation for Medical Services	Mr. Chris Attard Montalto
10 Medical Officer i/c of Decompression Unit St. Luke's Hospital	Dr. Ramiro Cali' Corleo
11 Chairman, Medical Equipment Committee, St. Luke's Hospital	Dr. Joseph Zarb Adami
12 Area Manager, Simed International BV	Mr. Ferry Dubbers
13 Technical Consultant, MEDEA	Mr. Ivan Vassallo
14 Medical Equipment Manager, Foundation for Medical Services	Mr. Chris Attard Montalto
15 General Manager, INSO SpA	Mr. Fabrizio Pucciarelli
16 Director, Medical Equipment, INSO SpA	Mr. Sergio Arrigo

4.0 Basic Considerations

This Board noted that the Adjudication Board, in conducting the financial evaluation of the bids, had made an observation to the effect that *“one of the principal concerns was that the tender prices quoted did not provide a definite price on which the Adjudication Board could base its decision.”*

Of the two courses of action suggested by the financial advisers, the Adjudication Board opted *“to consider CIF (Cost, Insurance and Freight) prices, i.e. without levies, duties and VAT to establish a common basis for price comparison.”* (see Clause 5.0 of the Adjudication Report). The PCAB after examining the two options agreed that the one preferred by the Adjudication Board was more sensible in the circumstances.

It was also noted that none of the offers was fully compliant. This was stated under oath on more than one occasion by Mr. E. Attard, CEO, Foundation for Medical Services and was fully substantiated by the three reports drawn up by the three advisers.

This Board was also faced with a question as to whether it should accept the validity of the three reports submitted by the advisers.

As far as Muscat Azzopardi & Associates Advocates and Grant Thornton Certified Public Accountants & Auditors & Management Consultants are concerned, none of the contesting parties queried in any way or at any time the validity of their respective reports.

On one occasion, during the hearing session of the 29.07.2003, the PCAB was required to give the following ruling:

“The Board feels that the legal representatives may be trying to show that an abuse has been committed in the evaluation of Inso’s bid by SECTA and are seeking documentation to obtain proof of this abuse.

As it is widely known, the Board has already expressed itself against fishing expeditions of any sort and feels that if the representatives have any proof at all, no matter how tenuous, that abuse has been committed, they should bring this matter to the attention of the Board who will then determine how to proceed ...”

During the discussion that ensued the lawyer representing Simed International BV stated *“Yes of course but I did not say there is abuse ... if there was abuse I would have said it bluntly ...”*

The PCAB therefore feels that, in general, the fact that no substantial proof was produced as regards the technical incompetence of SECTA Group Ltd. and that any possibility of abuses have been ruled out, it should not preclude the adoption of the three reports as a good basis for its further deliberations.

Following the consideration of the points mentioned above, the PCAB proceeded by

- perusing the documentation relating to this tender prior to and following the decision to award the tender to INSO SpA;
- thoroughly examining the evidence given under oath during the public hearing sessions;
- examining the points raised in the written and oral submissions by the respective legal representatives;

- taking cognizance of the fact that the appeal has to be judged within the legal framework prevailing in Malta at the time of the adjudication

This Board then proceeded to examine in the first instance the claims made against the decision taken by the Contracts Committee to award the contract to INSO SpA.

5.0 INSO SpA

Both Hospitalia International GmbH and Simed International BV raised objections against the decision of the General Contracts Committee to award the Tender to INSO SpA.

Hospitalia International GmbH's Claims

According to the "Analysis Report" submitted by the DG Contracts, Hospitalia International GmbH, through their legal representatives Grech Vella Tortell and Hyzler Advocates, in their letter of objection, claimed that:

- Hospitalia International GmbH's offer was the only one opened for public scrutiny and published when the tender bids were opened
- Sections 24.3 and 26.1 of the Tender Documents were breached by the General Contracts Committee
- INSO SpA was allowed to revise its offer during the evaluation stage
- Meetings were held between INSO SpA and Secta Group Ltd. between the 17th and 20th September, 2002 during which an estimated 40% modifications were offered
- Despite these modifications, the INSO SpA bid remained inferior and did not fully meet the requirements of Section 25.7 of the Tender Documents
- Of the items offered by INSO SpA, approximately 60% complied with the specifications; almost 25% did not comply with the specifications but were functional and the remaining 15% did not comply with the specifications and could not be considered as functional

Consequently, the adjudication procedure was in "*evident breach of the tendering regulations currently in force in Malta*".

Following the oral and documentary evidence obtained during the public hearings held between the 2nd July and 1st August, 2003, Hospitalia International GmbH's legal representatives, were in a position to supplement further their claims through their written and oral submissions presented during the public hearing held on 11th September, 2003.

In essence, Hospitalia International GmbH finally maintained that:

- In deciding to award the contract to INSO SpA, the DG Contracts' prime consideration was price and not the best tender submitted. By so doing, the DG Contracts dismissed the technical expertise which recommended the best offer and opted for what '*prima facie*' appeared to him to be the cheapest offer
- The technical experts described INSO SpA's offer as "*poor*" and "*technically inferior*".
- Besides being technically inferior, INSO SpA's offer included a high priced 5-year warranty
- Substantial changes were made to INSO SpA's offer in breach of Clause 24.3 of the Tender Documents

- Secta Group Ltd. had considered INSO SpA's offer as the least desirable of the three short-listed bids and recommended the award of the contract to Hospitalia International GmbH's which was 92% compliant
- The tender re-evaluation process initiated by the DG Contracts was restricted to the INSO SpA offer
- The series of meetings held between the DG Contracts, Secta Group Ltd. and INSO SpA between August and September, 2002, were solely intended to bring INSO SpA's offer to an acceptable standard. This notwithstanding the level of compliance reached (82.92%) was still lower than Hospitalia International GmbH's 92%
- Clause 24.3 of the Tender Documents was breached because INSO SpA's bid was modified after the deadline set for the submission of tenders. Mr Lovick of Secta Group Ltd. stated under oath that INSO SpA contacted a number of suppliers who were not previously contacted.
- The resulting changes were of three types, namely,
 - (a) supply of information previously missing
 - (b) offering of new products made by the same manufacturer and
 - (c) offering of new products supplied by different manufacturers

Mr Lovick (Secta Group Ltd.) confirmed that INSO SpA had to attempt to change items in order to meet the specifications. He described the resulting changes to the INSO SpA tender as being significant (*from 54.4%% to 82.92%*)

- Clause 25.7 of the Tender documents which establishes criteria for the evaluation of each tender, was breached because the Client did not select the *"tender which, while offering goods and services of a sufficiently high standard as to fully meet the tender requirements, is also financially the most advantageous"* - INSO SpA's original offer lacked the high standards expected and did not fully meet the tender requirements. The evaluation process was not to be exclusively based on the cheapest price but was to take also into account the goods offered and the quality offered had to be of a sufficiently high standard
- Clause 28.4 of the Tender Documents stipulates that price was not to be the only criterion. The decision to award the tender to INSO SpA as being the cheapest tender, was in breach of Clauses 25.7 and 28.4
- Clause 17.1 of the Tender Documents emphasizes that factors other than price would be used in the selection procedure and specific reference was made to the type of documentary evidence that was to be included in the offer. According to Secta Group Ltd., INSO SpA failed to supply documentary requirements for more than 20% of the items
- Clause 26.1 was also breached because the Client was obliged to seek clarification in writing and no changes in the prices or substance of the tender were to be sought, offered or permitted. According to the Tender Documents, the Client was the Foundation for Medical Services and not the DG Contracts
- Clause 30.2 of the Tender Documents was also breached as a result of the scope of the meetings held at the DG Contracts's offices during August and September, 2002
- Secta Group Ltd. were instructed to re-phrase certain terms initially used in their final report and also to ensure that the exercise would be considered as one of *"re-assessment"* and not as a revision of the bid (amended tender) as Secta Group Ltd. had originally called it. Secta Group Ltd. were even instructed how their report should be named. Mr Lovick was reluctant to accept these conditions (changes) and consulted Mr Draper (Director, Secta Group Ltd.) whose response by e-mail was:

"I think this one could be important as it states that although we have called the report a re-evaluation exercise we in fact regard it as a re-tender and the change is only made at the Client's instructions".

Finally, the Hospitalia International GmbH legal representatives maintained that, should the PCAB find that the whole adjudication and award exercise was not conducted correctly and within the framework of the law and the Tender documents, then the PCAB should follow the decision taken by the Client (The Foundation for Medical Services) and award the contract to Hospitalia International GmbH, as having presented the best tender, because the PCAB did not have the power to open the case.

Simed International BV's Claims

According to the "Analysis Report" submitted by the DG Contracts, Simed International BV, through their legal representatives Fenech & Fenech Advocates, in their letter of objection, claimed that:

- INSO SpA's options should never have been accepted since they do not fall within the Tender specifications. They were in conflict with the actual expectations of the hospital departments in question and will definitely meet the objection of the end users. In this context, even the "functionality compliant" interpretation was questioned
- Secta Group Ltd. had in their initial technical evaluation stated that some of INSO SpA's original submissions were non-compliant
- INSO SpA had not sought after sales service quotes from Medea Ltd., which, according to them, was Malta's largest hospital technical service organization
- Simed International BV's bid was prejudiced by not being indicated as being the next cheapest bid after INSO SpA's
- Simed International BV's lowest cost option was not taken into consideration during the ranking of bids
- INSO SpA's bid should have been rejected outright and should not have been considered at the evaluation stage

As in the case of Hospitalia International GmbH, as a result of the oral and documentary evidence obtained during the public hearings held between 2nd July and 1st August, 2003, Simed International BV's legal representatives, reinforced further their claims through their written and oral submissions presented during the public hearing held on 11th September, 2003.

Simed International BV maintained that:

- After the conclusion of Secta Group Ltd.'s second "final" report, INSO SpA still had 218 (17.04%) items of their bid which were not evaluated or were still not acceptable
- INSO SpA, according to the Secta Group Ltd. report, had submitted Euros 2.59 million worth of un-priced items

- INSO SpA failed to quote for the Stereoactic Breast Biopsy system and also failed to include (and also quote for) the Gamma Camera which was a specified mandatory item
- In terms of Clause 26.1 of the Tender Documents, clarifications could only be requested in writing by the Client and not verbally by the DG Contracts
- To become compliant, INSO SpA held direct discussions and also offered changes in models and manufacturers on the recommendation of the technical advisers (Secta Group Ltd.). This opportunity was not given to the other bidders and was therefore illegal
- Secta Group Ltd.'s first report (April, 2002) found INSO SpA's offered equipment only 53.72% compliant to specifications. Following the re-evaluation exercise, Secta Group Ltd.'s second report (October, 2002) declared the equipment items 82.96% compliant. Radical changes were effected to models (2.97%) and manufacturers (3.91%). Secta Group Ltd. considered the exercise as one of modification and re-negotiation of the tender
- INSO SpA, in terms of their letters dated 8th, 9th and 24th August, 2002, also resorted to soliciting in breach of Clauses 30.2 and 36.1 of the Tender Documents
- INSO SpA's bid, based on the life cycle costs, valued at Euros 98,404,412 (cfr. Secta Group Ltd.'s first report) is the most expensive of the three bids, whilst Simed International BV's "main offer" (the only one considered for adjudication purposes) was the cheapest at Euros 96,996,316, which, according to the financial advisers, could be reduced further by Euros 6.3 million if Simed International BV's cheapest alternative offer is considered
- INSO SpA's bid, based on the Tender Base Cost plus 5-year maintenance cost, is also the most expensive
- The specifications of the Hyperbaric Chamber offered by INSO SpA did not comply with the revised specifications determined by the Foundation for Medical Services in their reply to the clarifications sought
- INSO SpA failed to support their declaration of compliance for each item with brochures and literature, as requested in terms of Clause 17.1 of the Tender Documents
- INSO SpA did not contemplate any local after sales services in terms of Clause 28.4b
- The total cost of INSO SpA's bid to form the contract price based on the criteria of evaluation (Tender base Cost + Post Warranty 5-year Service and Maintenance Contract + Mandatory Spare parts for 5 years) is Euros 97,951,710, excluding the cost of un-priced and un-quoted items. This had to be compared with the "contract price" quoted by the other two bidders
- The criteria of evaluation as established by the Tender Documents, was illegally changed by the Adjudication Board. Of the same opinion were the financial advisers and also the DG Contracts

DG Contracts' counter-submissions

The claims made by the legal representatives of the two aggrieved bidders (Hospitalia International GmbH and Simed International BV) concerned the rejection of the INSO SpA offer and the reversal of the Contracts Committee's decision to award the contract to INSO SpA.

The DG Contracts, in his written submissions dated 1st September, 2003, reiterated his oral statements made when giving evidence under oath stating '*inter alia*' that:

- Government, through the Office of the DG Contracts, had every right and obligation to seek additional details and literature from the tenderer who quoted the cheapest offer (INSO SpA) - this, in order to establish categorically (which in fact it did) that the firm's offer was also technically acceptable
- He was not personally responsible for any contacts made by INSO SpA during the clarification exercise and was therefore not in breach of the provisions of Clause 26.1 of the Tender Documents. To corroborate this statement, he attached copies of the relative correspondence he exchanged with the Attorney General's Office during the 18th and 19th August, 2003
- Only Simed International BV's main offer, quoting total costs in excess of INSO SpA's by almost Euros 10 million, could be considered for adjudication purposes because it was clearly stipulated in the addendum to the Tender Documents that the tenderers were obliged to submit a global total for each alternative offer
- Secta Group Ltd. had confirmed that the INSO SpA tender, as clarified, was of an acceptable calibre and the Foundation for Medical Services declared that the compliancy level of the INSO SpA tender resulting from the clarification exercise, rendered the firm's offer as equally acceptable as that of Hospitalia International GmbH
- The General Contracts Committee had acted correctly and definitely in the national interest in awarding the contract to INSO SpA.

INSO SpA's representations

INSO SpA's legal representatives, Prof. I. Refalo and Dr. A. Micallef (AMVT Advocates), both during the cross-examination of the witnesses who took the stand and also in their final written and oral submissions, maintained that:

- None of the bids were fully compliant
- INSO SpA's bid was "*most financially advantageous and wholly in order*"
- Clause 26.1 provides for clarification of tenders subject to the condition that "*...no change in the prices or substance of the tender shall be sought, offered or permitted*"
- The clarifications submitted by INSO SpA, at Secta Group Ltd.'s request, were all documented
- The exercise was essentially a "*technical re-appraisal of the bid in order to definitely establish whether the bid was compliant and functional and the extent to which it was so*"
- The Foundation for Medical Services expressed willingness to the conducting of the re-appraisal exercise
- INSO SpA's award was based on Secta Group Ltd.'s re-evaluation report and Clause 25.7 of the Tender documents;
- The Foundation for Medical Services endorsed the General Contracts Committee's decision

- The clarification exercise did not result in any “*change in substance*”
- Actual changes made were 3.37% of value to change in model and 3.09% to change in manufacturers. These were minimal changes.
- Secta Group Ltd.’s final report “*eliminated misunderstandings and errors arisen in the first evaluation process....*”
- The evaluation criteria established by the Tender Documents (Clause 28.2) allowed for flexibility to achieve a level playing field
- The “*one year warranty*” was mandatory but the “*5-year post warranty maintenance and service*” was not. Provision of spare parts is included in the service
- INSO SpA’s bid was the most financially advantageous even if evaluated on the “*life cycle cost*” basis
- The Hyperbaric Chamber offered by INSO SpA was fully compliant
- The involvement of end-users during the evaluation stage was not a requirement
- INSO SpA’s bid included reference to the engagement of local personnel and organizations to ensure optimum after-sales/technical services
- INSO SpA’s bid was not modified after the dead-line for submission of tenders
- When Secta Group Ltd. revisited the INSO SpA tender, it was found that most of the items which had originally been offered were compliant and functional. It was the first evaluation by Secta Group Ltd. that was flawed, although it was not deniable that there were certain minor changes.

PCAB’s findings

This Board, in the first place, rejected the claim made by Hospitalia International GmbH’s legal representatives to the effect that in the event that it decided to uphold the aggrieved parties’ objections against the decision to award the tender to INSO SpA, it had to endorse the Client’s original recommendation to award the Contract to Hospitalia International GmbH because, according to the legal representatives, the PCAB did not have the power to open the case.

The same Board contends that the Public Service (Procurement) Regulations, 1996, clearly provide for situations where more than one party may register an interest following the publication of the notice of objection – this in terms of paragraphs 3 and 4 of the Third Schedule to the said Regulations. In fact, paragraph 4 even considers the situation where the “*... deposit shall only be refunded if the tender is finally awarded to the tenderer filing a registration of interest.*”

The PCAB does not feel that it should enter into the merits as to whether any options or specifications would meet the expectations of the hospital departments in question or the end users. In its consideration this Board limited itself to the specifications as laid down by the client, i.e. the Foundation for Medical Services.

The PCAB feels that the fact that the DG Contracts decided to initiate the process of re-evaluation of the INSO SpA bid by a phone call does not, in this particular case, amount to a material deviation from the procedure to be followed as stipulated in the Tender Documents. This Board acknowledged the fact that during the hearing it became evidently clear that any further action required or taken as well as proceedings of formal and informal meetings between the parties concerned were recorded in writing.

This Board does not consider that the scope of the meetings held at the DG Contracts' offices during August and September, 2002 and INSO SpA's letters dated 8th and 24th August, 2002, to have breached Clauses 30.2 and 36.1 of the Tender Documents.

This Board, after carefully examining the evidence brought before it, is not convinced that the changes agreed to between Secta Group Ltd. and INSO SpA during the re-evaluation exercise, could be construed as not having been either sought, offered or permitted.

Clause 24.3 of the Tender Document was subject to a considerable amount of scrutiny during the deliberation phase. The PCAB came to the conclusion that Clause 24.3 was breached and that the tender was actually modified after the deadline for submission of tenders. As a matter of fact, during his testimony Mr. Lovick (Secta Group Ltd. consultant) admitted that "*there was more than one*" technical change to the original tender.

During the public hearing held on the 3rd July, 2003, Mr. Lovick confirmed that there were 3% approximate changes to the original INSO SpA offer as regards the models in question and a further 3% approximate change in the manufacturers.

It also resulted to this Board that INSO SpA were, during this "*clarification*" exercise, occasionally aided by the same person (Mr. Lovick), even in his personal capacity, when he was supposed to clarify issues and not encourage modifications to the tender or changes in manufacturers. This resulted from the evidence which Mr. Lovick himself gave on the 2nd July, 2003 where amongst other things he mentioned suggestions made to INSO SpA during discussions held in Malta in relation to change in manufacturers of a ventilating system. The names of a few suppliers, including, Stryker, Jake & White Hospequip and Crystallmade were all suggested to INSO SpA by Mr. Lovick.

The PCAB cannot accept the notion that by a clarification exercise one would be implying the possibility of one tenderer having access to a new list of suppliers that, according to the same Mr. Lovick, were being suggested by him, on his own initiative, as the items which were supplied by these manufacturers were "*compliant with the standards*".

Undoubtedly, price is a key contributor to any decision-making process, particularly when one is dealing with public funds. Yet, Clause 28.4 of the Tender Document clearly states that "*in addition to price quoted in accordance with the Instructions to Tenderers Clause 15, one or more*" factors shall be taken into account. Such factors are listed in items (a) to (e) of the same Clause. However, in predominantly focusing on the price factor, this Board could not overlook the fact that significant changes were made during the re-evaluation of the INSO SpA bid.

As a consequence, this Board agreed that these changes are "*material*" as regards "*substance*" and hence amount to a breach of Clause 26.1 of the Tender Document.

This Board also considered the fact that in Mr. Draper's e-mail to Mr. Spiteri dated 02.10.2002, the former, states that:

“... I think it is fair to say that with the amount and nature of the changes that have been made by INSO during our recent work at least part of their submission has to all intents and purposes been a revision of their original bid ...”

Although the DG Contracts begged to differ with this claim, yet the PCAB feels that Mr. Draper’s comments amply demonstrated that the procedure was flawed.

Whatever was initially supposed to be a clarification exercise did not result to be so, for one reason or another, prompting Mr. Lovick during the hearing session of the 2nd July, 2003 to reply to one of the questions posed to him by Dr. Vella as follows:

“(I was) never asked to re-evaluate a tender. You normally go through tender clarifications but not a re-evaluation of a tender ...”

The Board, therefore, reached the conclusion that, irrespective of at what stage the procedure was flawed, the fact could not be denied that the procedure was in fact flawed and consequently, the PCAB found that even Clause 24.3 was breached as the tender was *“modified after the deadline for submission of tender”*.

In conclusion, this Board has decided to uphold the claims made by Hospitalia International GmbH and Simed International BV to the effect that the decision to award the tender to INSO SpA should be rescinded since the oral and written evidence brought forward by both parties during the appeal proceedings do prove that breaches have been committed to Clauses 24.3, 25.7, 26.1 and 28.4 of the Tender Documents.

6.0 Hospitalia International GmbH

This Board, having decided that the contract should not be awarded to INSO SpA proceeded with the examination of the bid submitted by Hospitalia International GmbH.

Hospitalia International GmbH felt aggrieved by the decision of the DG (Contracts) because, they maintained that, by deciding to award the contract to INSO SpA as a result of the procedures claimed to have been illegally conducted in breach of the statutory provisions, i.e the re-evaluation of the INSO SpA tender by Secta Group Ltd., he had ‘*de facto*’ overturned the “*unanimous recommendations of the adjudicating board and the main board of the Foundation for Medical Services – THE CLIENT*” (cfr. concluding statement made in Hospitalia International GmbH’s written submissions).

The Adjudication Board’s recommendations are reproduced hereunder (cfr. Page 40, Clause 9.2 of the Adjudication Board’s report):-

“The Adjudication Board unanimously concludes that Hospitalia International GmbH’s tender is the most advantageous offer as regards to technical compliance, cost and overall quality. The Adjudication Board recommends the tender to be awarded to Hospitalia International GmbH in terms of the Tender Documents as published on 1st November, 2001.

Whilst drawing particular attention to what has been submitted in the Clauses under 6.2 of this report, The Adjudication Board recommends to start negotiations with Hospitalia International GmbH, as this offer presents a solid basis for concluding a Contract with this tender (tenderer)”

On further examining the contents of Clauses 6.2 of the report (pages 20-24) as well as the full ‘original’ text of the legal advice given in terms of section C.1.2 of the legal report, this Board noted that the legal advisers appointed by the Adjudication Board (Muscat Azzopardi and Associates Advocates) had ‘inter alia’ declared:

“We would like to point out that Hospitalia International have submitted their bid subject to Client’s agreement to various amendments to the Tender Documents. These amendments are significant, and concern, inter alia, the Guarantee, the Terms of Payment, the Client’s right to vary quantities the Termination of the Contract by the Client and fiscal issues. We have already addressed this issue in a memorandum submitted to the Client. Our instructions are, however, to proceed with our legal examination of the offer.

We understand that the Client is not accepting any amendments by any Tenderer to the Tender Documents, as has been clarified by the Questions and Answers. We are therefore considering the bid by Hospitalia as governed by the present Tender Documents, without taking any of the requested amendments into account”.

The clarification under reference (Q and A) was also extracted and reproduced in the legal report:

“Q. Is the time for the usual negotiations of contract included in the 30 days?

A. The Contract document which formed part of the Tender, is not for negotiation.”

In their ‘Report Number 3’ (cfr. section C.1.2), the legal advisers presented a Memorandum that addressed the issue of Hospitalia International GmbH’s conditional offer premising the prior acceptance by the Client of a number of listed conditions. The changes to the Tender Documents, as required by Hospitalia International GmbH, were stated in detail through their covering letter dated 11th February, 2002, addressed to the Client.

This Board, after examining the contents of the covering letter under reference which included in the opening statement the condition

“subject to your agreement on an amendment of the tender documents as follows:...”

agreed with the opinion given by the legal advisers to the effect that *the “Tender documents were drafted with the clear understanding that there would be no room for any negotiation with any Tenderers”*. The legal advisers, furthermore, opined that *“Should the Client agree to negotiate the Contract, it is obvious that there will be two main consequences: (a) All other tenderers will be entitled to negotiate and (b) the Client will have to be prepared to accept amendments which will in all likelihood increase the Cost of the Tender to the Client.”*

This Board particularly noted that, notwithstanding this advice, and also notwithstanding the Adjudication Board’s own reiteration that the conditions of the contract are not negotiable, supplemented by their recommendation to the effect that such a position should be maintained (cfr the 2nd para. of Clause 8.1 of their report), the Adjudication Board still proceeded with the recommendation

“... to start negotiations with Hospitalia International GmbH, as this offer presents a solid basis for concluding a Contract with this tender (tenderer)”

... a recommendation which was subsequently endorsed by the Foundation for Medical Services Board and presented to the Contracts Committee for their further consideration..

The DG Contracts in his written submissions stated that *“the many conditions imposed by Hospitalia in their tender, as well as the numerous assumptions listed by them, rendered their offer invalid and unacceptable since the contract document is not negotiable.”*

This Board also considered the claim made by Simed International BV relating to another important reason why Hospitalia International GmbH’s bid should, in their opinion, have been disqualified.

According to Simed International BV, Hospitalia International GmbH failed to quote for consumables which, the former maintained, was a mandatory costly item and a requirement in terms of Clause 15.3 (v) of the Tender Documents.

In this connection, the Board also perused Clause 4.8, page 7 of the Grant Thornton Report regarding their review of the Hospitalia International GmbH tender.

The financial advisers, when commenting on the annual operating costs (consumables), specifically refer to Hospitalia International GmbH’s failure to indicate *“...the annual operating cost of each item as requested in the Tender Documents”*. Grant Thornton, furthermore, stated that *“This was a specific submission requirement and one that in our opinion constitutes an important factor in evaluating the tender”*.

They also extracted and reproduced the declaration made by Hospitalia International GmbH confirming such an omission. The financial advisers stressed this omission which, in their opinion, constituted a *“material non-compliance with the Tender Documents”*.

In this connection, this Board also examined the recommendation made by Secta Group Ltd. in section 5 of their report entitled ‘Consumables Final Report’. In this report, the technical consultants gave their interpretation of ‘consumables’ and also categorized them in the

context of the tender requirements. They also referred to a possible scenario where a “*preferred tenderer did not include a sum for consumables*” ... as was the case with Hospitalia International GmbH.

Secta Group Ltd. recommended that, in such a situation, the Client “...*would, in conjunction with the contract negotiations/equipment provision discussions, require them to have the complete quantified list prepared and categorized as above. Following which, the same negotiations could take place.*”

This Board, having considered that Secta Group Ltd.’s recommendation, in effect, premised the conducting of negotiations with a particular tenderer - a process which, as has already been stated earlier on, was disallowed by the Tender Documents, decided that it could not subscribe to such a recommendation.

This Board noted that the Adjudication Board, when referring to the issue of consumables under Clause 8.3.2 (second paragraph) of their report, stated that, although Hospitalia International GmbH

“...*have not provided a quote for consumables, this is not an essential criterion according to the Tender Documents, and the Adjudication Board’s technical advisers do not consider this to be a significant omission*”.

The PCAB, after considering

- a. the merits of the advice given by the legal consultants appointed by the Client’s Adjudication Board
- b. the provisions of Clause 24.3 of the Tender Documents
- c. the supplementary clarification circulated to all bidders before the closing date in terms of the “Question and Answer”
- d. the claim made by Simed International BV, the other aggrieved party, to the effect that Hospitalia International GmbH’s bid should have been disqualified because, ‘inter alia’, the Tenderer had conditioned their bid to the Client’s prior acceptance of several significant amendments to the Tender Documents
- e. the merits of the contrasting conclusions reached by the financial and technical advisers as regards the “*consumables*”
- f. the opinion expressed by DG Contracts in his written submission regarding the nature of Hospitalia International GmbH’s tender being “invalid and unacceptable” because it was conditional.

finds itself in agreement that the conditional nature of Hospitalia’s offer, which premises *a priori* an amendment of the tender documents and also obliges an amount of negotiations, constitutes grounds for disqualification and therefore the tender should not be allowed to proceed further. Their failure to submit an offer for consumables, which is a mandatory item, further strengthens this Board’s opinion in this respect.

7.0 Simed International BV

This Board then proceeded with the examination of the bid submitted by Simed International BV.

According to the Analysis Report presented by the DG (Contracts) in terms of clauses 8 and 9 of the Third Schedule to the Public Service (Procurement) Regulations, 1996 (Legal Notice 70 of 1996), Simed International BV, in their motivated letter of objection, felt aggrieved by the decision to award the tender to INSO SpA, giving a number of reasons. They particularly claimed that INSO SpA's offer should have never been accepted and should have been rejected outright even at the evaluation stage. Furthermore, Simed International BV's claimed that their bid (their lowest cost option, at Euros 71.5 million) was prejudiced by not being indicated as being the second cheapest bid after that of INSO SpA.

Simed International BV's written submissions, presented and discussed during this Board's final public hearing held on 11.09.2003, focused 'inter alia', on the reasons why both INSO SpA's as well as Hospitalia International GmbH's bids should have been disqualified.

In the case of Simed International BV the technical report drawn up by Muscat Azzopardi and Associates Advocates concludes that:

"We have checked the main contents of the Tender Package to see whether this complies with the specifics laid down by Tender Documents.

We have not verified the technical aspects but from the legal point of view the Tender is responsive to the requirements of the Client as laid down in Tender documents."

This Board also noted that the legal advisers also declared that Simed International BV "have not requested any amendments to the Conditions of the Contract" - cfr. Clause 6.3 of the Adjudication Board's report.

Otherwise, their comments were generally positive even though they did identify a number of areas that required further clarification or follow up action, such as

- a. Simed International BV's relationship (alliance) with Medea and their intention to involve this locally registered company in conjunction with the post warranty service and maintenance – cfr Clause 6.3.1
- b. the authentication of the powers of attorney authorizing representation of the company and
- c. their preference for an ad hoc company resolution in the event of a signing of a final contract – cfr. 6.3.3.

This Board also observed that, when referring to the '5-year Mandatory Spare Parts Agreement', Muscat Azzopardi & Associates Advocates remarked that "*Simed International have not included the List of Spare Parts as specified since they claim that they could not prepare it within the time frame made available for the preparation of the Tender. However they did calculate the cost of 5 years Mandatory Spare Parts for all the respective items.*" - cfr page 5 of the legal report, section C.1.3.

In this connection, this Board also noted the legal advisers' declaration to the effect that Simed's quoted sum includes all related expenditure, including the requested 5 year Post

In their supplementary recommendations regarding ‘Consumables’, Secta Group Ltd., under Clause 5.4.1, put forward certain suggestions following a request they had received when Mr. Lovick attended one of the meetings of the ‘FMS Equipment Bid Selection Committee’ and was asked to give his views on the risk to FMS with regard to the consumables included within the various bids. Specifically, under Clause 5.4.2, Secta Group Ltd. indicated the action that could be taken in conjunction with a scenario where the preferred bidder had included a quote for the consumables (as was the case with Simed International BV). Since Secta Group Ltd.’s recommended action premised the possibility “...to negotiate for a fixed unit cost for the identified useful life of the equipment”, this Board expresses the same ‘negotiation’ reservations raised in connection with the proposal made by Secta Group Ltd. in the case where the preferred tenderer did not include a sum for consumables, as was the case with Hospitalia International GmbH.

As regards the financial considerations, this Board noted that the financial advisers commented on a number of anomalies and discrepancies resulting from an analysis of Simed International BV’s offer. As a matter of fact the financial report drawn up by Grant Thornton indicates that they had “*come across certain anomalies or discrepancies that warrant the attention of FMS and which in (their) opinion, should be taken into consideration when construing the offer made by the Tenderer*”

These are itemized as listed hereunder and fully explained under Clauses 4.2 and 4.19 of the financial advisers’ report:

- a. The application of import levies, Customs duties and VAT
- b. Discrepancies between items/quantities requested by FMS and those submitted by the tenderer on priced Bill of Quantities
- c. Items for which the tenderer has not indicated the cost of training
- d. Items for which the tenderer has not indicated the cost of a 5 years’ supply of mandatory spare parts
- e. Items for which the tenderer has not indicated the cost of a five year service and maintenance agreement
- f. Items for which the tenderer has not indicated annual running costs (operational cost of consumables)
- g. Percentage fee for the management of other contracts
- h. Insertion of alternative items on Price Schedule and addendum to tender form
- i. Omission of annual running costs (operational cost of consumables from Price Schedule and Addendum to Tender Form).

In general terms, the financial experts advised the FMS to investigate these matters carefully and clarify as necessary before arriving at a decision on this tender.

The PCAB noted that the report does not give warning that any of the above discrepancies or anomalies may constitute material non-compliance with the tender documents. The report did not fail to give this warning when it was felt justified in regard to another tenderer.

The Adjudication Board's considerations and comparative appraisal regarding the financial aspect of the three bids are presented in terms of Clause 8.2 of their report. The Adjudication Board's final comments on Simed International BV's offer (Clause 9.1.3) have already been quoted earlier on.

As regards SIMED INTERNATIONAL BV the PCAB feels that there are no definite grounds why this company should be excluded from the tender process. However it is clear that various matters need to be further clarified before their offer can be considered for acceptance.

It is the opinion of this Board that, in the light of the foregoing considerations, Simed International BV's offer qualifies for consideration for acceptance and award of the Tender subject to the condition that the Client, after seeking and obtaining in writing, in accordance with the provisions of the Tender Documents, clear and unequivocal clarification regarding all the items and areas highlighted by the technical, financial and legal advisers commissioned by the Adjudication Board, is satisfied that such clarifications result in Simed International BV's offer obtaining the extent of substantial responsiveness expected in terms of Clause 27.4 of the Tender Documents.

Although the company submitted a number of alternatives to the items that they indicated in their main offer, the Board feels that these were not presented as requested by the tender conditions, i.e. complete with grand total. Therefore they should not be considered at this stage.

The Board, therefore, recommends that the client, the Foundation for Medical Services, should enter into a process of clarification with Simed International BV to obtain a clearer view of their offer. The Board advises that this process should be carried out strictly by written correspondence.

This Board furthermore instructs that the clarification exercise should be carried out in strict compliance with the provisions of Clause 26.1 of the Tender Documents.

At the end of this process the Foundation for Medical Services and the DG Contracts should be in a position to decide whether or not to award the Contract to Simed International BV.

8.0 Conclusions

This Public Contracts Appeals Board

- having heard the oral evidence given under oath by the several witnesses called by the Board and also by the legal advisers representing the three parties, namely,
 - a. Prof.. I. Refalo and Dr A. Micallef o.b.o INSO SpA
 - b. Dr J.J. Vella and Dr. A. Grech o.b.o Hospitalia International GmbH
 - c. Dr. J.M. Fenech and Dr. R. Fenech Adami o.b.o Simed International BV
- having examined the documentary evidence (official documents) procured as a result of the oral evidence given under oath during the appeal proceedings (public hearings) and made accessible to the three interested parties;
- having perused the final written submissions, supported by documentary evidence, presented by the legal representatives by the agreed date (01.09.2003);
- having heard the final oral submissions presented by the legal representatives during the last public hearing convened on 11th September, 2003;
- having, during the sessions held between the last appeal hearing session and the following weeks which preceded this report, deliberated at length on the oral and written submissions by the parties concerned,

decided, on the basis of the several conclusions reached earlier on in this report in respect of each of the three bids under consideration,

- to **annul** the decision to award the tender to INSO SpA
- that the conditional nature of the offer submitted by Hospitalia International GmbH and their failure to submit an offer for consumables disqualifies their tender from proceeding further.
- to **recommend** that:
 - (i) the Client should seek and obtain in writing from Simed International BV, in accordance with the provisions of the Tender Documents, clear and unequivocal clarification regarding all the items and areas highlighted by the technical, financial and legal advisers commissioned by the Adjudication Board.
 - (ii) the tender may be awarded if this clarification exercise results in Simed International BV's offer obtaining the extent of substantial responsiveness expected in terms of Clause 27.4 of the Tender Documents. This exercise should be carried out in strict compliance with the provisions of Clause 26.1 of the Tender Documents and within a time scale which fully safeguards the public interest.

Signed today the 28th day of October, 2003

Alfred R. Triganza
Chairman
Public Contracts Appeals Board

Anthony Pavia
Member
Public Contracts Appeals Board

Maurice Caruana
Member
Public Contracts Appeals Board