

Case No 20

CT 2139/2004, Advert No. 88/2004, DH 75/04

Supply of FRUITS AND VEGETABLES to the Health Department

On March 10, 2004, the Director General (Contracts) received a formal request from the Director General (Health Division) for a call for tenders for the supply of fruit and vegetables to be issued.

The value of the tender was estimated to be Lm 42,700.

Following the publication on, 4 April, 2004, of a call for offers in the Government Gazette, the Adjudication Board decided to recommend to the Contracts Committee the award of the tender in respect of the various categories of fruit and vegetables requested as follows:

- a. the offers submitted by Mr Ray Abdilla in respect of oranges, apples, pears, melons, peaches, plums and bananas;
- b. the offer submitted by Mr Anthony Mifsud in respect of vegetables.

This decision excluded in the process the offer submitted by Messrs. Gaetano Mifsud because “Mr Raymond Mifsud, who signed the tender documents, is a registered Pitkal” and clause 2 of the tender document specifically places major emphasis on outright disqualification from the said process as a result of a corresponding contravention of the same terms and conditions.

The decision by the Contracts Committee based on the recommendation of the Adjudication Board prompted a formal objection being lodged on 1 July, 2004, to the Contracts Department by Dr Toni Abela LL.D acting “*on behalf of Raymond Mifsud on behalf and in the interest of Gaetano Mifsud Limited*”.

On 4 August 2004, the Public Contracts Appeals Board (PCAB) convened a public hearing in order to discuss this objection.

Present for this hearing were the following:

The Public Contracts Appeals Board:

Mr Alfred Triganza (Chairman)
Mr Anthony Pavia (Member)
Mr Edwin Muscat (Member)

Representing Messrs. Gaetano Mifsud Ltd

Dr Toni Abela LL.D
Mr Raymond Mifsud

Representing the Government’s Health Division

Mr Joe Degiorgio (Chairperson Adjudicating Board)

Representing himself, Mr Raymond Abdilla

The appellant's legal representative, Dr Toni Abela LL.D., acting on behalf of Messrs Gaetano Mifsud Ltd / Mr Raymond Mifsud, enquired about the Adjudication Board's decision which led to the exclusion of their tender, he was informed that, although Gaetano Mifsud Ltd quoted the cheapest prices, their offer was not accepted because Mr Raymond Mifsud, the person who had signed the tender documents, was a licensed/registered 'Pitkal' ('government vegetable broker'). According to the Agriculture Produce Marketing Regulations, a *pitkal* cannot purchase agricultural produce in order to sell it on his own account or sell agricultural produce otherwise than by way of a public auction. Clause 2 of the specifications and conditions of the tender stipulated that "*Tenders which are in contravention of the Agriculture Produce Marketing Regulations will be disqualified.*"

Dr Abela contended that his client was unfairly excluded because notwithstanding the fact that although it was a fact that the person who had signed the tender document namely, Mr Raymond Mifsud, was a government vegetable broker, the tender was submitted by Gaetano Mifsud Ltd which company itself was not a broker. He claimed that

Mr R Mifsud did not sign the form on his own behalf but on behalf of the company. As a matter of fact, Mr Mifsud's legal representative argued that the tender document itself stated *inter alia* that:

'... the person signing the tender should be and is considered to be fully authorised to act on behalf of the Company or Partnership for all purposes relating to the tender.'

Notwithstanding this, Dr Abela said that the Adjudication Board, through an oversight, on seeing that the form was signed by a *pitkal*, decided to exclude Gaetano Mifsud Ltd's offer.

At this stage Dr Abela drew the attention of those present that, despite the fact that the Commercial Partnerships Ordinance (Ord. X of 1962) referred to in the tender document was replaced by the Companies Act, 1995, the forms referred to in the said tender were not updated. The truth of the matter is that the forms in question refer to an Ordinance which does not exist anymore, Dr Abela emphasised.

Mr Joe Degiorgio, in his capacity of Chairman of the Adjudication Board confirmed that the offer submitted by Gaetano Mifsud Ltd was the cheapest.

However, he proceeded by stating that in the tender form submitted by Mr Raymond Mifsud, the latter had given his personal details, namely, his home address as well as the telephone number of his stall (no. 5) located at Ta' Qali's Marketing Centre. As a result, since Mr Raymond Mifsud had applied personally as a broker, Messrs. Gaetano Mifsud Ltd's submission had to be excluded because it was in contravention of the tender specifications as far as the *Agriculture Produce Marketing Regulations* were concerned.

Mr Degiorgio added that Mr Mifsud did not present a Company's resolution or authorisation to represent it and, as a consequence, he had no right to tender on behalf of Messrs. Gaetano Mifsud Ltd.

The Chairperson of the Adjudicating Board said that, according to the list of Directors attached to Registration No C 3587 which was issued by the Malta Financial Services Authority in terms of the Companies Act, 1995 and which was duly submitted to the Public Contracts Appeals Board, Mr Raymond Mifsud was not a Director of Gaetano Mifsud Ltd. In this respect, Mr Degiorgio contended that Mr Mifsud had no say or juridical connection with the said company; one could easily describe Mr Mifsud as a freelance.

Dr Abela intervened by stating that a person did not necessarily need to be a Director to represent a company. A person could be authorised to represent a company either by a resolution or by a verbal appointment. He drew the Board's attention to the fact that during this hearing it was only now that it was being stated that the tender submitted by Messrs. Gaetano Mifsud Ltd. was excluded because Mr Raymond Mifsud had no representation approval by the company and because he gave his personal details in the tender documents. He emphasised that he did not appeal on these considerations for the simple reason that these issues were not even mentioned during the adjudication process. If this were to be the case, he would have proved that Mr Raymond Mifsud had the necessary authorisation from the company to represent it.

Mr Mifsud's lawyer said that the fact that Messrs. Gaetano Mifsud Ltd was not included in the list of brokers referred to earlier was proof enough that the company which tendered for this contract was not a broker (*pitkal*). He claimed that the Adjudication Board had to decide whether the company was excluded either because it was a broker or because it was not correctly represented. Furthermore, he was of the opinion that, in the prevailing circumstances, the Board should have sought clarifications from the said company.

In his concluding remarks, Dr Abela emphasised that the offer was not invalidated or unaccepted because otherwise the Adjudication Board would have rejected it.

During a short intervention, Mr Raymond Mifsud said that, should the contract be awarded to Messrs Gaetano Mifsud Ltd, they would work it together as the company would provide the fruit and he would provide the vegetables.

At the end of the hearing this Board considered further the points raised by the appellant.

One of the major issues that were deliberated upon concerned the fact that it was evident that not enough discussion had taken place during the hearing as regards the allegation made by Dr Abela in his formal complaint, that the awardee of the tender, himself was employed by a pitkal. As a consequence it was decided to seek further clarification on this specific subject matter. Letters were sent to the two parties requesting them to submit more information on this point.

No reply was received from Dr Abela. On the other hand, the Health Department not only confirmed that Mr Anthony Mifsud is not a registered broker but stated that "the adjudicating board ... could not disqualify" Mr Mifsud, even though "he is employed by another "pitkal".

This Board, having considered all the points raised during the hearing as well as the contents of the clarification received

- understands
 - a. the reasoning behind and the needs for the Department's policy not to accept tenders submitted by registered brokers ("pitkala");
 - b. that such restriction could provoke the engineering of various stratagems to be employed to enable brokers to circumvent current policy parameters;

- takes note that:
 - a. during the meeting the said appellant gave clear indication that the would be supplying the vegetables while his brothers in the company would be supplying the fruit, and that
 - b. the appellant is indeed a 'bona fide' broker ('pitkal');

decides that it cannot uphold the appellant's appeal.

However, this Board recommends that in future similar tenders, the Department of Health should re-examine its policies in this regard to ensure that possible ploys adopted by registered brokers ('pitkala') or other persons who may in some way be associated with them, aimed at circumventing the restrictions imposed upon them under the conditions of the tender document, should not be allowed.

Also, the Public Contracts Appeals Board notes that Dr Abela's point relating to the reference to obsolete legislation in the tender document was valid and that the Department should take the necessary action to review the specifications, terms and conditions forming part of future tender documents ensuring conformity with current legislation.

Finally, the Board gives consideration to the fact that there seems to be quite an opaque and somewhat flawed perception as regards the extent of the eligibility of brokers or associated persons to tender for goods in question.

As a result, this Board feels that the appeal was not totally frivolous and decided to authorise the reimbursement of 50% of the deposit paid.

Alfred Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

01.09.2004