

PUBLIC CONTRACTS APPEALS BOARD

Case No. 50

CT 2223/2005, Advert No 211/2005, ME 494/04 Hire of Self-Drive Cars to the Ministry of Education and Education Division 2005/2006

The call for offers (estimated cost of tender, Lm 65,100) was published in the Government Gazette (closing date 28.07.2005) following a request received by the Contracts Department from the Ministry of Education, Youth and Employment (MEYE).

Following analysis of four (4) offers received, the Contracts Committee decided to award the said tender to John's Garage Ltd.

One of the other tenderers formally appealed against this decision on 26.08.2005 claiming that *"John's garage quoted for vehicles named Perodua bearing 989cc, which vehicles do not meet the specifications required by the Department. On submitting the tender we were aware of these vehicles but did not take them into consideration, as these vehicles do not match the requested specifications."*

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat, respectively acting as members, convened a public hearing on 21.10.2005 to discuss this objection.

During the public hearing, the following entities were represented as follows

Altour Ltd/ Sundrive Car Rentals

Mr Aldo Formosa – Director

John's Garage Ltd

Mr John Farrugia – Managing Director

Ministry of Education, Youth and Employment (MEYE)

Dr Stephen Zammit LL.D. - Witness

Other Witnesses

Adjudication Board

Mr Anthony Caruana – Chairman

Mr Joseph Tanti – Principal Procurement Section

Ms Maria Verin – Ministry Representative

Mr Emanuel Cachia – Officer i/c Transport

Following the Chairman's brief introduction about this case, the appellants' representative was invited to explain the motive leading to their objection.

Mr Aldo Formosa, representing Altour Ltd/ Sundrive Car Rentals, said that they were contesting the General Contracts Committee's decision to award the tender to John's Garage Ltd for Category 'A' vehicles because, notwithstanding the fact that according to the tender specifications the engine capacity of such vehicles had to be from 1000cc to 1499cc, the recommended tenderer had quoted for vehicles bearing engine capacity 989cc.

Mr John Farrugia, representing John's Garage Ltd, confirmed that their offer for the same Category included the supply of *Perodua Kelisa* vehicles bearing engine capacity 989cc. The same company's representative proceeded by explaining that in the motor vehicle industry, cars bearing engine capacity 1000cc did not exist and that 989cc was technically considered as 1000cc. Apart from the fact that this particular vehicle is considered to be one of the most economical vehicles on the market, Mr Farrugia claimed that the difference in the engine capacity made a substantial difference when fuel consumption was considered. At this point, he submitted detailed information regarding fuel consumption and the running expenses of *Perodua Kelisa* as compared to *Hyundai Getz* (offered by the appellant). The comparative analysis showed that by deciding in favour of *Perodua Kelisa*, the MEYE/Education Division would end up consuming 38.5% fuel and spend 17c per litre less. He explained that if 5 litres of fuel per car per year were to be consumed, the client would save Lm 9,252 on 30 units. Furthermore, Mr Farrugia added that savings would increase to Lm 18,760 if fuel consumption increased to 10 litres for the same period and for equivalent number of units. Apart from this, Mr Farrugia also explained that there would be savings of Lm0.49 per day per unit on leasing rates which would ultimately save the client Lm14.70 per day on 30 units or Lm 5,366 per annum.

At the end of the sitting Mr Farrugia tabled his comparative analysis and leaflets of the *Perodua Kelisa*. Copies thereof were distributed to all parties concerned.

The first witness to take the stand was Mr Anthony Caruana, who declared that he was not involved in the tender specifications and that the tender had already been issued when he was appointed Chairman of the Adjudication Board. In reply to a specific question by the PCAB, Mr Caruana confirmed that he was not technically competent. He testified that in their adjudication report, which was forwarded to the Permanent Secretary MEYE through the Director General of Education, it was specified that '*If it is considered that 989cc is acceptable as 1,000cc, as is the norm, then this offer is recommended by the Board for acceptance.*' Here, the PCAB drew his attention that the report was inconclusive in view of the fact that the Permanent Secretary MEYE was not in a position to decide. The PCAB remarked that similar concluding remarks in any report submitted by any Adjudication Board (supposedly including someone technically competent to provide the necessary professional comfort) should not be accepted as these reports should provide definite recommendations and not leave it to the beneficiary to decide what is technically correct or not.

During his testimony the Chairman, Adjudication Board made reference to their report wherein it was stated that '*The total cost of this contract, if awarded as*

recommended, is well within the estimated cost based on the average of cars required from day to day. In fact the daily rates of cars under categories A and B being charged by the present contractor are Lm4.36 and Lm7.08 inclusive of VAT.’ His attention was drawn by the PCAB that in this type of contracts consideration should not only be given to the daily rates but also to fuel consumption and maintenance costs. Mr Caruana pointed out that this was one of the reasons why in the tender document it was specified that ‘*Vehicles more than (3) three years old will not be considered*’. However, the PCAB was of the opinion that it would be more appropriate if matters relating to, say, fuel consumption and maintenance costs, be included ‘*ab initio*’ in the tenders’ specifications.

The second witness to take the stand in these proceedings was Mr Emanuel Cachia, Officer in charge Transport. On cross-examination by the PCAB, Mr Cachia said that he was not sure whether vehicles with engine capacity of 1000cc existed or not. He declared that the specifications of this tender were compiled from previous tenders and that these were modified according to their present exigencies. Mr Cachia confirmed that the tender specifications stipulated that the engine capacity of Category ‘A’ vehicles had to be 1000cc – 1499cc. The tender document submitted by John’s Garage Ltd indicated that the engine capacity of the *Perodua Kelisa* was 1000cc. However, when the Adjudication Board visited the tenderer’s showroom and examined the descriptive literature/log book of the car being offered, they found that the *Perodua Kelisa* had an engine capacity of 989cc.

In reply to a specific question by the PCAB, Mr Cachia replied that one could not exclude the possibility that other prospective bidders could have submitted an offer if it was indicated that 989cc was technically acceptable as 1000cc.

With regard to the above-mentioned Board’s recommendation, Mr Cachia said that they assumed that the General Contracts Committee had an expert on the matter. However, the Chairman PCAB drew Mr Cachia’s attention to the fact that the General Contracts Committee had to decide on the technical recommendations of the Adjudication Board. It is inconceivable to note, exclaimed the Chairman, that certain Adjudication Boards seem to be unaware of the extent of their role and that one expects the Contracts Department to have amongst its ranks all the technical and professional staff required to carry out its work.

The Officer in charge of Transport also stated that the tender specifications stipulated that the cars had to be able to carry four passengers. However, he was doubtful whether the car offered by John’s Garage Ltd could carry five persons (four passengers *plus* a driver). At this stage, his attention was drawn by the PCAB to the fact that, were any of the Adjudication Board’s members, in any way, dubious of any similar restrictions, such concerns should have been made known during the adjudication process but, definitely, not in this forum.

The last witness to take the stand was Dr Stephen Zammit LL.D. who was the legal representative of MEYE/Education Division. He confirmed that Mr Cachia was the Adjudication Board’s technical member who gained his technical abilities through experience. Dr Zammit testified that the drawing of the tender specifications was an ongoing process which reflected the present exigencies of the MEYE/Education Division. He maintained that although in the motor vehicle industry, cars having an

engine capacity of 989cc were considered 1000cc, however, 989cc was not within the specified limits of 1000cc – 1499cc and therefore legally were not acceptable. The lawyer declared that in the circumstances, in spite of the fact that the vehicle offered by John's Garage was technically acceptable, if he were consulted, he would not have recommended 989cc for acceptance.

In his concluding remarks, Mr Farrugia said that it was important to take into account the spirit behind the tender in view of the fact that in the motor vehicle industry, cars having engine capacity of 989cc are technically acceptable as 1000cc. Furthermore, John's Garage Ltd's representative contended that the tender specifications should be made clearer.

The appellants' representative claimed that if they knew that cars having engine capacity of 989cc would be considered valid, they would have offered such cars at cheaper rates.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellant, in terms of his "reasoned letter of objection" dated 26th August, 2005 and also through his verbal submissions presented during the public hearing held on the 21st October, 2005, had objected to the decision taken by the General Contracts Committee;
- having established that there could be a possibility that in the motor vehicle industry, cars having engine capacity of 989cc may be technically acceptable as 1000cc;
- having taken note of the points raised with regards to the long-term cost effectiveness of the assets to the ultimate beneficiary considered to be an important issue when one is assessing any entity's management of its financial resources, particularly when these happen to pertain to the public at large;
- having heard appellants' arguments which placed major emphasis on the fact that, irrespective of the technical issue and merits of the case, yet, in fairness' sake, this should have been stipulated in the Tender Document itself in order to give the same opportunity to all bidders;
- having taken note of the beneficiary's legal representative who, in his testimony, focused on the necessity for this Board to take note of the legal aspect rather than the ambiguous technical interpretations given to the engine capacity of the motor vehicles in question;
- having examined and also interpreted the Tender Document;

reached the following conclusions:-

1. The Adjudication Board should have been more prepared and definite in its recommendations;
2. This Board, albeit it cannot but agree with the best-value-for-money concept, yet, it feels that this issue should be contemplated during the drafting of the Specifications governing the issue of any tender or during the adjudication process itself;
3. The Tender specifications are to be observed according to what they state and not what they could be subjectively interpreted or construed to imply;
4. The issue of giving a level playing-field to all participating tenderers remains a '*sine qua non*' and no tenderer should be allowed to continue participating in any tender when there is a deviation from the legal spirit which governs the Tender Document;

In consequence to 1, 2 and 3 above, the appellant's objection to the decision reached by the General Contracts Committee to award the contract to John's Garage Ltd. is upheld by this Board.

Furthermore, this Board recommends that the appellant should be refunded the entire amount deposited in lodging this claim.

Alfred R. Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

8th November, 2005