

PUBLIC CONTRACTS APPEALS BOARD

Case No. 51

**RE: CT 2405/2005 – Advert No 254/2005 - Educ 351/2005
Tender for the Purchase of New English Course ‘Way Ahead Series Level 2’
Textbooks for Primary Schools 2005 – 2006.**

This call for tenders was published in the Government Gazette on the 26th July, 2005 and the closing date for the call for offers was 6th September, 2005.

The global estimated value of the contract was Lm 38,500.

A total of six (6) offers submitted by different tenderers were analysed by an Adjudication Committee.

Following the notification that their Company were not selected Messrs Camilleri and Camilleri Ltd submitted a formal reasoned letter of objection on 14th October, 2005 against the decision to award the tender in caption to Messrs. Abbey Book Supplies Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat acting as members, convened a public hearing on 03.11.2005 to discuss this objection.

Present for the hearings were:

Messrs Camilleri and Camilleri

Mr Mr John Camilleri
Dr John Bonello LL.D.
Dr Victor G. Scerri LL.D.

Abbey Book Supplies Ltd

Ms Doreen Camilleri

Macmillan Education

Dr Malcolm Mifsud LL.D.
Dr Cedric Mifsud LL.D.

Ministry of Education,

Dr Stephen Zammit LL.D
Mr Joe Saliba – Asst Director Procurement
Mr Raymond J Camilleri – Director Curriculum Management

Textbook Selection Board

Mr Paul Galea – Chairman
Ms Mary Anne Camilleri
Ms Mary Anne Spiteri
Ms Valerie Sollars

Adjudication Board

Mr Joseph Tanti – Chairman
Ms Carmen Mifsud - Member
Ms Roque Cutajar - Member

After the Chairman PCAB's brief introduction relating to this case, Messrs Camilleri and Camilleri Ltd's representatives were invited to explain the motive behind their objection.

Dr John Bonello started by stating that in their letter dated 14th October 2005 Messrs Camilleri and Camilleri Ltd explained the facts that led to the filing of their objection.

He said that by Notice published in the Malta Government Gazette of the 10th September 2004, the Curriculum Department within the Ministry of Education, Youth and Employment invited authors, book distributors and publishers to submit samples of English Textbooks for evaluation purposes because it was "*in the process of procuring, reviewing and selecting English Textbooks suitable for the primary sector*". Messrs Camilleri and Camilleri Ltd, the appellants, had submitted the Oxford University Press (OUP) publication entitled the "*Happy Series*" for evaluation purposes. Dr Bonello pointed out that his clients were the exclusive distributors for OUP and that schools were already using this series for Years 1 and 2.

He also explained that the submission had to reach the Textbook Selection Board at the Curriculum Centre in Floriana by Monday, 11th October 2004. He claimed that the opening of submissions was not held in public and the results of the reviewing and selection exercise were never published. Then, on 26th July 2005 the Department of Contracts issued a tender for the purchase of new English course textbooks '*Way Ahead Series Level 2 for Primary Schools 2005 – 2006*'.

Dr Bonello argued that the fact that the tender was issued explicitly for a specific product published by a particular undertaking, namely Messrs Macmillan Education, was a direct order disguised as a tender. The lawyer said that his clients had requested the Director of Contracts for a pre-contractual remedy in terms of Regulation 6 of the Public Contracts Regulations in order to consider an equivalent solution. However, no written reply ensued. Dr Bonello declared that, subsequently, during a meeting held with the Director of Contracts, the latter informed him that, technically, the tender was issued under the restricted procedure and not as an open tender.

The appellant's legal representative said that Camilleri and Camilleri Ltd had participated in this tender by offering the equivalent level of the 'Happy Series' and their offer was accompanied by an explanatory letter.

Dr Bonello said that the appellants felt aggrieved by the General Contracts Committee's decision for the following reasons:

(i) the choice of the Education Division and the Director of Contracts to issue a call for tenders for the supply of '*Way Ahead Series Level 2*' textbook was vitiated by the fact that it was not preceded by the formalities that regulated the choice of particular products laid down in Public Contracts Regulations;

- (ii) the Department of Contracts failed to consider the equivalent solution offered by the objectors;
- (iii) the General Contracts Committee failed to consider and evaluate their offer;
- (iv) their tender was superior in quality than the recommended offer; and
- (v) the offer submitted by the appellants was cheaper than that of the other bidders.

The objector's legal representative said that the first ground of objection was the crux of everything. He contended that this tender was not issued under the 'restricted' or 'negotiated' procedure because otherwise the Education Division would have first needed to issue a *notice* of its intention to carry out public procurement under the restricted procedure and then to consult publicly the candidates, who should not be less than five. Furthermore, it needed to obtain the prior consent of the Director of Contracts. Dr Bonello claimed that the 'restricted' procedure was not followed because the so-called "*expression of interest*" was not issued and determined by the Department of Contracts but by the Education Department. He was of the opinion that the fact that the expression of interest was conducted away from public scrutiny, violated the principle of transparency. At this stage it was pointed out that there was no reference to the term "expression of interest" in the present regulations

Dr Bonello said that, notwithstanding the fact that the estimated value of the tender at issue did not fall within the EU thresholds, the general principles of EC Law still applied - contracting authorities were generally bound to follow the spirit of the EC procurement legislative framework. The appellants' legal advisor made reference to the *Commission vs The Netherlands* case, known as the UNIX Case, which was used as a guideline. He stated that, in such circumstances, contracting authorities should include the term 'or equivalent', thus, offers that might contain equivalent or possibly better solutions would not be excluded.

As regards the failure of the General Contracts Committee to consider the equivalent solution offered by the objectors, Dr Bonello said that in line with EC Law, his clients tendered their offer by providing an equivalent solution – the *Happy Series*. He argued that once the Maltese Courts consistently held that the principles of Maltese Administrative Law were derived from the English Administrative Law, in case of a *lacuna* in the former, they had to rely on the English law. At this point he quoted from the 'reasoned letter of objection' wherein it was specified that the position under the English Law could be summarised as follows: '*contracting authorities must always stand ready to accept products which have a demonstrably equivalent performance even if they do not meet the authority's preferred standards.*'

Dr Bonello contended that the product offered by the objectors was better than the one proposed for award because the *Happy Series* had been developed for the European Market whilst the *Way Ahead Series* for the Middle East. The appellants' legal representative tabled a document to corroborate this claim. Other points mentioned were that (a) the *Happy Series* had already been tested in Malta, (b) the product proposed for award had no online material designed for pupils and (c) their product was cheaper.

Dr Stephen Zammit, the Ministry for Education, Youth and Employment's legal representative, explained the process carried out by the Curriculum Department for the procurement, review and selection of English Textbooks suitable for the primary sector. This process was done in two phases, namely (i) an expression of interest for English textbooks for evaluation purposes by a panel of experts was issued and (ii) a call for tenders for the procurement of the selected textbook was subsequently issued. Dr Zammit declared that the product chosen was not covered by any exclusivity agreement and therefore each and every operator could tender. As a matter of fact, he wanted to emphasise that there was more than one agent who submitted an offer for the requested product.

Dr Zammit confirmed that the Education Division was informed by the Department of Contracts about the problems raised by Camilleri and Camilleri Ltd in their letter dated 18th August 2005 and were requested to give their views. Mr Raymond J Camilleri, Director, *Curriculum Management*, replied officially to this letter on the 25th August 2005.

In reply to a PCAB's question regarding the appellants' allegation that the procedure followed was flawed, the Education Department's legal representative stated that they did not breach any regulation so much so that the Department of Contracts continued with the tendering process.

When Dr Zammit expressed his concern about the fact that school children were still without these necessary books, this Board drew Dr Zammit's attention to the fact that the procurement process should have started earlier and that the unusual time (15.45 hrs) in which this public hearing was convened was a proof that the PCAB was conscious of these problems. However, it was pointed out that the PCAB has, irrespective of the time factor, to establish that the process followed was according to law as well as transparent.

Dr Malcolm Mifsud, in the capacity of legal representative for Macmillan Education, an interested party, said that the PCAB was not the appropriate forum to deal with this case because the appellants did not contest the tendering procedure as such but the description of the tender. He declared that although his clients did not tender for this textbook, they had an interest because they were the publishers.

At this point, the Chairman PCAB quoted Regulation 83 (2) (c) under PART XIII - Procedure for the submission of appeals, which specified that:

“Within three working days of the expiry of the fourteen-day period allowed for the filing of a notice of objection, any other tenderer and any person having or having had an interest involved in the call for tenders may register an interest in the proceedings. The registration of interest shall only be valid if accompanied by a deposit amounting to the deposit paid under subregulation (1). The tenderer who had been indicated in the adjudication decision of the Director or the contracting authority as the one to whom the contract was to be awarded, shall be deemed to have registered an interest but does not need to pay a deposit.”

The PCAB informed those present that it did not result that any tenderer or any other person had registered any interest in this call for tenderers. Dr Malcolm Mifsud clarified that they became aware of the objection only recently.

Dr Bonello pointed out that although the tender was recommended for award to Abbey Book Supplies Limited, it did not submit a reply to their reasoned letter of objection and Macmillan Education never registered any interest.

Mr Edwin Zarb, the Director General Contracts, was the first to be summoned as witness. On cross-examination by Dr Bonello, Mr Zarb testified that the Education Division had every right to issue a tender for a particular product and that everybody had the possibility to tender. The appellants' offer was not considered because they offered a different product and, as a consequence, they were out of specifications. When his attention was drawn by Dr Victor Scerri about the fact that the only publishing house of the selected textbook was Macmillan Education, Mr Zarb replied by stating that the tender was open for competition, so much so, that there were a number of tenderers who had submitted their offer for the same product. However, Dr Bonello remarked that within an EU context there was no competition because the only beneficiary was Macmillan Education and Oxford University Press could not offer its books. It was pointed out that this particular tender was governed by LN 177 of 2005 which included the basic elements of the EU Directives. Dr Bonello insisted that LN 177 of 2005 reflected Directive 18 of 2004 which regulated the procurement exercise, that is, the open, restricted and negotiated procedure.

With regard to the *expression of interest*, Mr Zarb said that the technical word was 'restricted procedure'. However, he explained that a restricted procedure necessitated the issue of an expression of interest first. This was purposely done for the short-listing of interested parties. Finally, Mr Zarb continued, only the short-listed candidates would be invited to tender.

Mr Zarb declared that this procurement was not done under the *restricted procedure* and that it was an *open tender*. Dr Scerri intervened by stating that it was not clear whether the procedure followed in this procurement exercise was *restricted* or *open*. Mr Zarb said that the restriction was in the choice of the product.

The Director General Contracts said that he was concerned mostly by the appellants' allegation in their letter dated 18th August 2005 wherein it was stated that '*Essentially, this procurement exercise is a direct order disguised as a tender*' because this was irregular. He clarified that when the matter was referred to the Education Department, it was declared that the Curriculum Department had every right to choose a book which suited better its needs. Mr Zarb declared that, following a thorough analysis of the situation in front of him, he was satisfied that the tendering process for the procurement of this particular book was open for competition.

During his testimony, the Director General Contracts declared that the Contracts Department was not involved with the publication of the *expression of interest*. Mr Zarb explained that the department was only involved in the issue of the open tender for the procurement of the product and proceeded to confirm that the proper procedure had been followed. He reiterated that the restricted procedure did not concern the choice of a product but the short-listing of prospective tenderers.

When Dr Bonello asked Mr Zarb to comment on the so-called 'expression of interest' as published in the Government Gazette of the 10th September 2004, the Director General Contracts said that in his opinion, this was a 'market research' and not an

'expression of interest'. Also the witness testified that although he felt that the opening of submissions for the selection of the textbooks should have been done in public, he pointed out that the procurement regulations were not applicable for that type of exercise.

At this stage, Dr Bonello asked the witness to state why a pre-contractual remedy was not given according to Regulation 6 of the Public Contracts Regulations. Mr Zarb replied that, first and foremost, the Curriculum Department had every right to choose a product which best suited their requirements and, secondly, at the same time that this tender was issued the same Department was deliberating on a similar case wherein more than one candidate tendered for a specific book.

On further cross-examination by Dr Scerri, the Director General Contracts said that he was not aware that the Education Department had accepted books after the closing date of the expression of interest. Although Mr Zarb acknowledged that all books should have been submitted by the 11th October 2005, yet, he emphasized that it was not a tender.

Mr Raymond J Camilleri, Director Curriculum Management, testified that the *expression of interest* was a notification to local agents to provide them with the required books for evaluation purposes and, following the selection exercise, a call for tenders was issued for the procurement of the chosen product. He explained that the choice of the book was made by way of an extensive process which involved many teachers, subject coordinators and other academics. Mr Camilleri pointed out that *The Way Ahead Series Level 2* is currently being used worldwide and that during the selection exercise the Selection Board took into consideration the exigencies of the Maltese students.

The Director Curriculum Management declared that whilst, generally, the same selection procedure is usually followed, yet, when the *Happy Series* was introduced for Years 1 and 2, the books were not referred to schools. He said that in this year's selection exercise the *Happy Series* did not even place second in the ranking order.

Mr Camilleri declared that the procedure followed was according to the procurement guidelines established by the National Audit Office. He confirmed that the expression of interest was simply issued to identify the English Textbooks that were available on the market in order to take an informed decision.

The same witness proceeded by denying the remark made by the appellants' legal representatives, namely that the process was not transparent. Mr Camilleri said that it was in the interest of transparency that the parties did not know who the evaluators were. He explained that when the Board sent the samples of the books to schools, it did not indicate who the local agents were. He said that the books were accompanied by the 'Primary Textbook Evaluation Form' which had to be filled by the teachers who evaluated the books. Mr Camilleri declared that the fact that more than one local agent submitted an offer was a confirmation that there was no exclusivity on the representation of this book.

On cross-examination by Dr Scerri, Mr Camilleri stated that the fundamental issue of 'continuity' was amply considered and deliberated upon when the decision was made to change the series.

According to Mr Camilleri, the sole reason why the formal opening of submissions was not made accessible to the public was due to the fact that the Textbook Selection Board was more interested in the identification/evaluation of the book rather than the local agent/s or publisher/s. However, Dr Scerri remarked that this lack of transparency may have denied the possibility to the interested publics to ascertain that all candidates had satisfied the list of criteria as laid down in the *expression of interest*.

When Dr Bonello asked Mr Camilleri whether Macmillan Education had contacted them during the process, the witness replied in the negative. However, he confirmed that Macmillan Education had contacted him through the Department of Information (DOI) after the evaluation process was finalised. The Director pointed out that he was not involved in the selection or procurement process of the book. He declared that it was a Company Director of the recommended tenderer herself who had informed him that the contract was awarded to Abbey Book Supplies Ltd.

Mr Paul Galea, the Chairman of the Textbook Selection Board, testified that they were involved in the whole process including the issue of the *expression of interest*. He confirmed that the selection exercise was carried out in consultation with selected school representatives and that the books were sent to schools at random. Mr Galea added that schools were given two weeks to respond by filling the Evaluation Form and subsequent to this, the Board short-listed the textbooks and then the specialist group selected the book from those short-listed. He also declared that the scope of the expression of interest was to select a textbook for Years 3, 4, 5 and 6.

At this stage Mr Galea brought to the attention of those present that Abbey Books Supplies Ltd did not participate in the expression of interest.

On cross-examination by Dr Scerri, the Chairman of the Selection Board said that, in spite of the fact that the expression of interest specified that '*Books are to be submitted by not later than Monday, 11th October, 2004.*', not all the submissions received contained the whole series. Mr Galea declared that the decision to accept the books after the closing date was taken by him. Dr Scerri intervened and drew the attention of those present that, if the submissions were opened in front of the public, they would have immediately requested the board to discard such offers.

Mr Galea proceeded by explaining that by the time the evaluation exercise started, the whole series of every submission was made available because those who expressed an interest were only given 15 (fifteen) days within which to submit the missing books. Also, it was established that Camilleri and Camilleri Ltd.'s submission did not include the prices. The witness said that although the price was important at the final stage it was not the competence of the Textbook Selection Board to examine the cost effectiveness of the books. However prices were needed to work out the estimated cost of books in view of the financial thresholds.

At one point, during Mr Galea's testimony, Dr Zammit intervened by stating that the tendering process started with the issue of the tender and that this was not the appropriate forum to discuss the procedures of the selection of the book. However, Dr Scerri insisted that the *expression of interest* affected the tender issued for the procurement of the selected textbook.

As a concluding observation, Dr Zammit stated that it was imperative to make a distinction between the *expression of interest* issued for the selection of a textbook and the issue of a tender for the purchase of the selected textbook. He contended that the tender was not vitiated and that the Education Division had a right to choose and purchase a book which suited better its requirements.

On the other hand, Dr Bonello explained that during these proceedings it was revealed that the Education Division opted to issue a *call for tenders* following a call for *expression of interest*. He contended that in this case, the procedures outlined in the LN 177 of 2005 relating to the Public Contracts Regulations were not followed and that the tender should have been issued under a restricted procedure. He insisted that the Education Department had no authority to purchase a specific book and that the book should have been selected through a competitive process. As a consequence it was imperative for the PCAB to establish whether the decision taken by the Education Department was within the parameters of the law or not.

Finally, Dr Scerri said that in view of Mr Zarb's last statement, which referred to the fact that, the first phase, namely the issue of an *expression of interest*, affected the second one, i.e. the procurement *tender*, the two phases were to be considered as one process. As a consequence, Dr Scerri argued that it was indispensable to take into account what took place in the first phase of the process.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Public Contracts Appeals Board,

- having noted that the tender was awarded to Abbey Book Supplies Ltd;
- having considered the objections put forward in writing by appellants, in terms of their reasoned letter of objection dated 14th October, 2005;
- having heard the reasons given by appellants during the public hearing held on the 3rd November, 2005 for objecting against the Contracting Authority's recommendation to award the tender to Messrs Abbey Book Supplies Ltd;
- having heard evidence given by various witnesses, particularly that by Mr Raymond J Camilleri, Director *Curriculum Management* and Mr Paul Galea, the Chairman of the *Textbook Selection Board* who, in this Board's opinion, gave a highly credible, reasoned, objective and detailed account of the procedures and criteria followed in the technical evaluation;
- having favourably taken into account the validity of the considerations given by the evaluation board relating to the distinction between an '*expression of interest*' and a '*call for tenders*';

- having favourably noted the Director General Contracts' observation that the tender was open for competition, so much so, that there were a number of tenderers who had submitted their offer for the same product and that, therefore this procurement procedure was not *restricted* but followed an *open tender* policy, i.e. open for competition;
- having also favourably considered the points raised by Mr Zarb that in this particular context the restriction was in the choice of the product, not of prospective tenderers, and that in actual fact the 'expression of interests' constituted a 'market research' exercise;
- having established that it could not enter into the merits of the procedure adopted in the 'expression of interest' stage as this did not form part of the formal tender and therefore lies outside the Board's sphere of responsibility;
- having thoroughly examined the issue of transparency in the procedure and noted that the arguments brought forward by both the Director, *Curriculum Management* and the Chairman of the *Textbook Selection Board* were credible enough, placing major emphasis on the fact that the Board was more interested in the identification/evaluation of the book rather than the identification of the local agent/s or publisher/s;
- having taken note of the fact that the appellants' submission did not include the prices thus also falling short of meeting tender requirements;
- having favourably noted that the Ministry for Education, Youth and Employment contends that the tender was not vitiated and that the Education Division has a right to choose and purchase any book which better suits its requirements;

reached the conclusion that the decision taken by the Contracts Committee following recommendations made by the Adjudication Board

- a. was not vitiated
- b. was justified and
- c. in full observance of legal parameters governing such public tenders.

In consequence, the Board decided to reject the appellants' objection.

The Public Contracts Appeals Board recommends that the appellants should not be reimbursed the deposit paid when filing the said objection.

A. Triganza
Chairman

A.Pavia
Member

E. Muscat
Member