

PUBLIC CONTRACTS APPEALS BOARD

Case 84

CT 2298/2005, Advert No. CT/R/5/2005 - Integrated Health Information System Strategic Partnership for the Maltese Public Health Care System

This call for tenders was published in the EU's Official Journal as well as the Maltese Government Gazette on 13 May 2005 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Health, the Elderly and Community Care (MHEC) to invite applicants to offer a holistic, integrated health information system and related services that might be required to supply, implement, integrate, train users and provide the necessary support services to ensure the proper functioning of the system, in a multi-site environment.

The closing date for this call for offers was 21 June 2005 and the global estimated value of the contract was € 50 million over a period of seven years.

The Department of Contracts received submissions from eleven candidates of which six were originally considered as short-listed ones resulting as qualified to be requested to submit a financial proposal.

A further notification to those candidates qualifying to the next stage was sent by the Department of Contracts on 22 September 2005.

Following the completion of the opening of the second envelope, Intracom SA Information Technologies and Communications Services (Intracom IT Services) of Greece filed an objection on 08.06.2006 against the General Contracts Committee's decision which ruled that **their tender "has been adjudicated as not complying with the tender specifications because the software programme should be in English not in Greek"**.

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 28.06.2006 to discuss this objection.

Present for the hearing were:

Intracom SA Information Technology & Communications Services

Dr Norval Desira LL.D.
Mr Spiros Pomonis
Mr Samis Samouil
Mr Edward Licari
Mr Joseph Rizzo

AME International GmbH

Ms Hermine Grubinger Duhaze
Mr Raymond Debattista
Mr Sisto Lombardo
Dr Christian Farrugia

iSoft

Dr Albert Grech LL.D.
Mr Oswald Spiteri
Mr Ian Galea

Ministry for Health, the Elderly and Community Care (MHEC)

Dr Henri Mizzi LL.D. – Legal Representative
Dr Natasha Azzopardi Muscat– Chairperson Adjudication Committee
Mr Claudio Grech – Chairperson, Core Evaluation Committee
Dr Hugo Agius Muscat – Leader, Technical Evaluation Committee
Mr Noel Xuereb – Member, Core Evaluation Committee
Dr Pauline Debono – Secretary, Evaluation Committee

At the beginning of the hearing, Dr Albert Grech, legal representative of *iSoft*, was provided with a copy of the appellants' letter of objection after declaring that they did not receive such letter from the Contracts Department. The representatives of the other interested party, namely, AME International GmbH, confirmed that they had received such document.

Subsequently, after the Chairman, PCAB's brief introduction regarding this case, the representatives of Intracom SA Information Technology & Communications Services were invited to explain the motive leading to their objection.

Dr Norval Desira, legal representative of Intracom SA Information Technology & Communication Services (Intracom IT Services) of Greece, said that his clients filed their objection following the receipt of the Director General Contracts' letter dated 2nd June 2006 wherein it was stated that their tender had been disqualified as it *'has been adjudicated as not complying with the tender specifications because the software programme should be in English not in Greek.'* He insisted that this should not have been a reason for disqualification because the tender specifications did not specify that the proposed software programme had to be made available in English at the moment of tendering. However, he said that Intracom SA Information Technology & Communication Services (Intracom IT Services) had already started the process of translation not only because they were committed, if chosen as the successful tenderers, to provide and implement the required system in the English language but also because they recognised the need to develop the system for further business overseas in the English language market. The appellants' lawyer said that the Imperial College of London (ICL), a key partner in the consortium, were carrying out the final testing of this software programme.

Dr Desira said that in the conclusion of the Adjudication Committee (AC) 's report it was stated that *'In view of the above, it was considered that this Candidate has not demonstrated the ability to provide an IHIS within the terms stipulated in the RFP and was therefore recommended not to qualify for consideration of Package Three.'* He contended that during a site visit that was conducted on 11th and 12th April 2006, Intracom IT Services had demonstrated, to the satisfaction of the verification team, the availability of a proven system in a live environment. He claimed that once the site visit was conducted in a Greek Hospital in Greece it was obvious that the system

was in the Greek Language. The appellants' lawyer pointed out that the hospital viewed by the verification team was chosen by the Adjudication Committee.

At this stage, Dr Desira emphasised that the software bugs, referred to by the Committee did not emerge in the live system but in the demonstration given on a lap top.

The appellants' legal representative argued that if they had a reason to disqualify his clients they should have done so on 8th February 2006 because, when asked specifically about the English language availability of the proposed solution, Intracom had, in its reply to Q.1.18, specified that *"The ERP, LIS, RIS and PACS modules comprising the proposed solution are available in the English language. The English version of IntralHealth is currently being under testing and has been scheduled to be released in Q1 of 2006"*. As a consequence, Dr Desira failed to understand why, after taking into consideration the fact that they knew that Intracom IT Services did not have a live system in the English language, the Adjudication Committee still decided to conduct a site visit.

Dr Henri Mizzi, legal representative for the Ministry for Health, the Elderly and Community Care, responded by stating that the appellants acknowledged that the Software had to be supplied in the English Language. Thus, he insisted that, for the purpose of adjudication, it was indispensable for the verification team to view a proven system in a live environment in the English Language.

In reply to a specific question by the PCAB, Dr Mizzi stated that the site visit was not contemplated in the tender document.

Dr Natasha Azzopardi Muscat, Chairperson of the Adjudication Committee (AC), testified that the AC was assisted by the Core Evaluation Committee (CEC) which, in turn, was assisted by two committees, namely the Technical Evaluation Committee (TEC) and the Hosting Infrastructure Evaluation Committee (HIEC). The latter two committees evaluated the tenders and reported to the CEC which, in turn, reported to the AC. The latter made the final recommendations to the Director General Contracts.

On cross-examination by Dr Mizzi, the witness testified that on 8 February 2006, Intracom were asked to show the Adjudication Committee a demonstration of the IntraHealth software. Yet, whilst the version shown was entirely in the Greek language the same Committee representatives were told that the English language version was still being developed and that it would be completed by the end of March 2006.

Dr Azzopardi Muscat declared that the demonstration given by the other parties during their presentation was in English.

With regard to the site visits, Dr Muscat Azzopardi explained that these were organized because they wanted to verify how the offered systems operated. Contrary to what was stated by the appellants' lawyer, the witness stated that the sites where visits were conducted were selected by the bidders themselves. She said that the CEC reported that Intracom failed to show the entire system in the English Language

operating in a live environment. She said that the verification team was only shown a 'demo' version of the IntraHealth software on a laptop in the English Language.

Dr Azzopardi Muscat maintained that in the briefing session held on the 6th January 2006, which was held before the closing date of tender (17 January 2006), Intracom asked whether the product had to be supplied in the English or Maltese language and the reply given was that it had to be provided in the English language because the working language in Malta's health care service was English. However, she explained that there was a serious concern about the functionality issue due to the non-utilisation of the English language version in the live environment. As a consequence, the witness wanted to stress the point that the Adjudication Committee was not in a position to recommend a product that had not been evaluated, tried and tested in the live environment in the language that would be used.

The Chairperson, Adjudication Committee, drew the attention of those present that the time frame for the start of the implementation of the system was December 2006 and that the opening of the *Mater Dei* Hospital was scheduled for June 2007.

The witness said that, following a thorough examination of the tenders together with the reports submitted by the technical teams, the site visits report and the advice provided by Gartner, the CEC submitted its recommendations to the AC. It was reported that Intracom IT Services '*has not demonstrated the ability to provide an IHIS within the terms stipulated in the RFP and was therefore recommended not to qualify for consideration of Package Three.*' The AC was fully satisfied that the conclusions reached were in the Government's best interest and so they submitted their report for the final deliberations of the General Contracts Committee (GCC), who in turn, after a presentation by the Chairman CEC, endorsed the report submitted by the Adjudication Committee.

In reply to specific questions by Dr Desira, Dr Azzopardi Muscat declared that (i) Intracom IT Services were not disqualified at the briefing session because they were still in the process of evaluation and (ii) that the AC was not responsible to evaluate issues of technical nature because it only had a supervisory role.

Mr Claudio Grech, Chairman Core Evaluation Committee (CEC), in his testimony, gave detailed information on the role and responsibilities of the CEC. He said that the TEC and HIEC were responsible for the evaluation of the software and hardware respectively whilst Gartner, an IT consulting firm in UK, were commissioned to give expert advice. Mr Grech testified that the Integrated Health Information System (IHIS), which had to serve all the Health Care System in Malta, involved a substantial investment of Euro 50 million.

The Chairman, CEC, said that three briefing sessions were held before the closing date of the tender. In the last session of 6 January 2006, in reply to a specific question by Intracom, Mr Arthur Azzopardi, a member of the evaluating team, informed Intracom that the system would be implemented in the English language. He contended that this requirement was a crucial element because the system in Malta had to be operated in English.

Mr Grech testified that, in the preliminary evaluation, when bidders were requested to make a presentation about their product, Intracom only provided screen shots claiming that it was the Greek version of the proposed product. He declared that, in view of the fact that this was not within the scope of the agenda, it was not taken into account in their evaluation.

The witness said that although their original written submission was in English, Intracom IT Services never stated that their English product was not ready or that it was under testing. At this point he tabled extracts of the appellants' Request for Proposal (RFP) for ease of reference. He explained that, after seeking Gartner's advice, it was decided that site visits be organised because, according to them, a *'demonstration of a development version of software can easily be misleading in that it does not necessarily exhibit software that has been 'proven' in service, the demo is not delivered by representative end-users, and the functions demonstrated can be carefully selected and rehearsed to give a flattering impression'* and that a *'health system which has not yet been deployed live in the localised environment has not yet been fully proven.'* Mr Grech declared that the sole purpose of the site visits was to verify that the implementation proposal of a proven system really existed in a live environment. He said that the verification team was composed of Dr Hugo Agius Muscat, Mr Noel Xuereb and Mr Arthur Azzopard and that the sites were chosen by the bidders themselves.

During his testimony Mr Grech tabled four e-mails that were exchanged among Mr Anthony Fava (Department of Contracts), Mr Noel Xuereb (MIIT) and Mr Samis Samouil (Intracom IT Services). He said that in the Director of Contracts' letter dated 23 March 2006, Intracom IT Services' attention was drawn to the fact that:

'the evaluation of the team carrying out the site visit will be based on the clear assumption that the modules demonstrated are the identical ones to those proposed to be implemented in Phase 1, in terms of all provisions and conditions set out in the above-mentioned RFP.

It must also be made clear that the team will NOT consider demonstration sites but only live operational modules'

Dr Desira intervened and said that Mr Xuereb's e-mail of 8 April 2006, Intracom IT Services were requested to ensure that for *'the avoidance of doubt the systems must be in the English language, operating in a live environment and identical to the ones you have proposed for phase 1'*.

However, notwithstanding the above, Mr Grech continued by stating that the verification team reported that IntraHealth software was not demonstrated in a live environment in English but in Greek.

Mr Grech emphasised that Intracom IT Services gave a presentation of IntraHealth software to the verification team at their HQ in Greece, and this they did in a demonstration environment in the English language. As a consequence, on the basis of this verification process, the CEC recommended that Intracom IT Services' offer should be disqualified.

When Dr Desira asked the witness to declare whether in the Request for Proposal (RFP) it was specifically stated that they wanted a proven system in the English language before implementation stage, Mr Grech replied by stating that the RFP made it clear that Government wanted a proven system that was “*bereft of customisation*”.

Mr Spiros Pomonis, General Manager, Intracom IT Services, testified that they would not have participated in this tender if the RFP required candidates to have a ready-made solution in English or Maltese by submission date. However, he contended that Intracom had submitted its offer and all the necessary documentation according to the requirements of the RFP.

Mr Pomonis said that Intracom IT Services had demonstrated a proven IT system in a live environment in the health care sector and that they were committed to implement the system in the English language.

The appellant Company’s General Manager said that the site visits should have only served as a complementary to their written proposal to ascertain whether the tenderers were capable of developing the solutions requested. Apart from this, the witness maintained that the evaluators should not have based the evaluation of a Euro 50 million project on the site visits but on the tenderers’ written proposals. He was of the opinion that the AC acted incorrectly when it decided to organise site visits at that stage because they were not in compliance with Clause 0.72 – the Evaluation Methodology of the RFP.

With regard to IntraHealth software, Mr Pomonis said that this was the only module that was not available in the English language because it was developed specifically for a Greek hospital. However, he maintained that this only constituted about 15% in value of the total IHIS system. The witness declared that the English version of the IntraHealth software has been developed and they were awaiting the final examination by the Imperial College of London.

As far as ‘customization’ is concerned, Mr Pomonis explained that every system, when it had to be adopted to meet the specific requirements and functionalities of the country where it was to be installed, always required a certain degree of customization.

Mr Pomonis testified that when they submitted an offer in other countries, they were committed to deliver the solutions and the products in the language which the governments would ask from them. He confirmed that when they implemented their system in other countries, such as Bulgaria, Jordan and Albania, the software was supplied in the language of each respective country. The witness explained that it was mandatory for them to fulfill the requirement of their customer.

When Dr Mizzi referred the witness to the e-mail of 8 April 2006 wherein it was stated that ‘*For the avoidance of doubt the systems must be in English language, operating in a live environment and identical to the ones you have proposed in phase I*’, the witness replied by stating that if this sentence was included in the RFP they would not have participated in this tender.

On cross-examination by Dr Desira, Mr Samis Samouil, Account Manager, Government Solutions, Intracom IT Services, declared that the first time that Intracom IT Services were requested to demonstrate the system operating in a live environment in the English language was in Mr Noel Xuereb's e-mail dated 8 April 2006. The witness declared that he did not read this message before the site visit because it was sent on Saturday and he did not return to his office before Wednesday as he had to accompany the members of the Verification Team during the site visit. Also, he pointed out that in the Department of Contracts' e-mail dated 23rd March 2006, no reference was even made to the words 'English language'. He argued that, as a consequence, at that point in time, they only knew that during the site visit they had to demonstrate a proven system operating in a live environment in a Greek Hospital.

At this point, Dr Mizzi pointed out that, notwithstanding the fact that, in the Director General Contracts' e-mail referred to above, it was stated that it '*must also be made clear that the team will NOT consider demonstration sites but only live operational modules*', Intracom still showed the English version of IntraHealth in a demo state back at the tenderers' offices.

On taking the witness stand, in reply to a specific question by Dr Desira, Mr Noel Xuereb, member of the CEC, said that although in the e-mail of the 23rd March 2006 no reference was made to the words 'English language', yet this included the words 'identical modules'. He explained that this meant that if the system in Malta was going to be implemented in Greek and the tenderers provided a system in the English language, then the system was not considered identical. However, if the system in Malta was going to be implemented in English, then they expected to be shown a system that was identical to the one being implemented in Malta in a live environment in the English language.

Mr Xuereb confirmed that there was no response from Intracom to his e-mail of the 8 April 2006.

In his testimony, Dr Hugo Agius Muscat MD, Leader of the TEC, explained that the purpose of their site visits was to verify the functionality of the proposed systems operating in a live environment. He gave an account of their site visit in Greece, which included Agia Sofia Hospital wherein they were shown a version of IntraHealth software in the Greek language operating in a live environment followed by a presentation at Intracom's Headquarters, in a demo version of this software.

With regard to Mr Pomonis' statement that IntraHealth constituted only 15% in value of the IHIS, Dr Agius Muscat clarified that such declaration was correct if they were to take into consideration all three phases of the IHIS implementation process. He pointed out that this module constituted 50% of the Phase 1 software requirements, which was critical to the system being procured for the Mater Dei Hospital. However, the witness maintained that such proportions were irrelevant because, being an integrated system it was indispensable for them to have all modules functioning.

On cross-examination by Dr Desira on Intracom IT Services' system, Dr Agius Muscat said that the verification began to be apprehensive soon after the supplier's presentation when it was disclosed that IntraHealth software was only available in the

Greek language. Although it was stated that an English version was being developed and that it would be released in the first quarter of 2006, the fact remained that the English version of the product offered was never tried and tested in a live environment. Apart from this, the process of converting the software from one language to another required customization which involved the modification to the source code of the programme. He said that this was a complicated, expensive, time consuming process and required functional testing. He pointed out that one of the bidders' requirements was to show the 'ability to implement the IHIS within the timeframe set'.

Dr Agius Muscat explained that when they stated that the software had to be 'bereft of customization' they did not mean that it had never been customised in the past but that the offered software did not require any customisation.

At this stage, the hearing was brought to a close and the parties concerned agreed with the PCAB's request to present written submissions to the Board's Secretary in English, agreeing to exchange same amongst themselves, by Wednesday 5 July 2006 and to submit their respective reply to same by Friday 7 July 2006.

WRITTEN SUBMISSIONS

5th July 2006

The Chairman
Public Contracts Appeals Board
Department of Contracts
Notre Dame Ravelin
Floriana.

Dear Sir,

RE: Advert Notice CT/R/5/05

Integrated Health Information System Strategic Partnership for
the Maltese Public Health Care System.

We write on behalf of Intracom SA Information Technologies and Communication Services (Intracom IT Services) of Greece and present hereunder their submissions in support of their appeal against the decision taken in the tender in caption and communicated to Intracom in the Director General (Contract)'s letter of the 2nd June 2006, detailing that Intracom's tender "has been adjudicated as not complying with the tender specifications because the software programme should be in English not in Greek".

a. The primary ground for Intracom's objection is based upon the principal argument that the tender specifications do not specify that an English Language version of the proposed software must be available at the moment of tendering. Appellants wish to emphasise in this regard that the Director General's letter of the 2nd June 2006 specifically states that Intracom's tender has been adjudicated "as not complying with the tender specifications". However, as already argued above, the tender specifications do not contain any specific requirement upon the tenderer to be in possession of a software programme in the English language at the moment of tendering. Nor do such tender documents warn the tenderer of the consequence of disqualification in the event that the tenderer should not be in possession of such a requirement. Consequently, in the absence of such a specific express condition, appellants humbly submit that any attempt to disqualify their offer on such basis would be tantamount to a decision which is ultra vires the powers of the adjudicating panel and/or the Director General, since a disqualification can only take effect if it is specifically contemplated in the tender documents or otherwise if the tenderer has manifestly omitted an expressly-required specification from his offer in such manner that the tenderer would be adjudged to have submitted an

incomplete offer. In this case, appellant humbly submits that it did not omit any required specification from its written offer and consequently must be adjudged to have complied with all the tender specifications and to have proven its capability as a prospective vendor, such as to be permitted to qualify for consideration of Package Three of the tendering process.

b. The above argumentation was indeed, supported by the evidence given by Mr Claudio Grech, Chairman of the Core Evaluation Committee, who explained that, during the briefing session held on the 6th January 2006, tenderers were specifically advised that the system was to be "implemented in the English language". Documents to evidence this fact were provided by the same witness. With all due respect, the term "implement" in the English language, signifies "to execute" or "to put into operation", which only goes to justify appellant's argument that the tenderers were not, in terms of the tender, expected to have, at this stage, a proven system in the English language in a live environment. In fact, the evidence supplied creates ample proof that the first occasion when Intracom were asked to present a system operating in a live environment in the English language was in Mr Noel Xuereb's email of the 8th April 2006, which email was transmitted on a Saturday morning and addressed to Intracom's Mr Samouil, who confirmed under oath that he did not read such message, prior to the Verification Committee's site visit which started the following Monday, 10th April 2006;

c. As correctly stated by Mr Claudio Grech in his evidence, the only requirement contained in the tender documents, was that the Government was expecting a system that has been successfully implemented in a live environment - a requirement which Intracom met successfully on the occasion of the site visit, albeit not in the English language but amply explained to the Verification Committee. As confirmed by Dr Hugo Agius Muscat, Chairman of the Technical Evaluation Committee, a simulated version of the same system was subsequently shown to the verification committee in a live demonstration at Intracom's Headquarters. Hence, by no stretch of any argumentation, could Intracom possibly be adjudged to have failed to demonstrate the availability of a proven system in a live environment.

d. Intracom always made it abundantly clear that it did not possess a system in the English language, which was proven in a live environment. On the contrary, Intracom specifically stated that, whereas the ERP, LIS, RIS and PACS modules comprising the proposed solution were available in the English language, this was not the case in so far as concerned the IntraHealth version. Consequently, it would, in appellant's opinion, unfair to conclude - as was hinted during the testimony given by Mr Claudio Grech - that Intracom attempted to hide this fact from the Adjudication Committee. Intracom believe, in this regard, that they had made it amply clear on the 8th February 2006, that the IntraHealth product had not yet been released in the English language.

e. Some emphasis was also laid on the argument that the Government is seeking to implement a system which is bereft of customization. As explained by Mr Spiros Pomonis in his testimony, a certain

degree of customization would always be required, as the offered system cannot be purchased "off the shelf", but will have to be adapted to meet the specific requirements and functionalities of the country where the system is to be installed. On the other hand, however, the Government cannot expect to purchase a system which is completely free of any translation from anything other than the English language, as this would be tantamount to a discriminatory requirement that the system itself must have originated in the English language.

f. To conclude, Intracom have always stressed their commitment to provide, if chosen as the successful tenderer, an entire system in the English language, a process which Intracom has undertaken, independently of the Malta project, and which is currently awaiting its final examination by the Imperial College of London, a key partner in the tendering team, having widely-experienced and fully-qualified medical consultants. Intracom have, being fully aware of the particular attention required not only to the vital importance of using the precise medical terminology within a user-friendly system, introduced ICL to the tendering team precisely for their vast experience in all related fields.

Intracom do consequently request that the Appeals Board should review and revoke the decision communicated to Intracom in the Department of Contracts' letter of the 2nd June and to rule that Intracom's tender is in fact fully compliant with the tender specifications.

Yours sincerely,

NORVAL DESIRA LL.D.

In the Public Contracts Appeals Board

Intracom S.A.

v

Director of Contracts

Submissions of the Director of Contracts

The following submissions are made with respect:

1. The facts

1.1 The relevant facts in this appeal are straight-forward, and are largely undisputed. They can usefully be summarised as follows:

1.1.1 On 12 October 2005 the Department of Contracts, on behalf of the Ministry of Health, the Elderly & Community Care, issued a Request for Proposal (“RFP”) for an Integrated Health Information System Strategic Partnership (“IHIS”).

1.1.2 Vendor briefings in connection with the RFP were held on 20 October 2005, 29 November 2005 and 6 January 2006.¹

1.1.3 Bids were submitted on 17 January 2005. Amongst them was a bid by Intracom SA, together with a number of sub-contractors (together “Intracom”).

¹ Intracom only asked about the language in which the software ought to be supplied during the last vendors’ briefing session, namely that held on 6 January 2006. See further para 1.1.8 of these submissions.

- 1.1.4 At the time it submitted its bid, Intracom had not developed an English language version of certain core software forming part of the Phase 1 suite of applications.²
- 1.1.5 Intracom was invited to make a presentation to the consultative bodies appointed to advise the Director of Contracts³ on 8 February 2006. On 6 February 2006, a number of questions were put to Intracom concerning their bid.
- 1.1.6 During the presentation Intracom answered a question pertinent to this appeal – namely the English language availability of the proposed solution - by stating that certain modules were available in English but that the English language version of the software known as IntraHealth was being testing and was scheduled for release in Q1 of 2006.
- 1.1.7 Following the presentation, Intracom sent written answers to the questions put on 6 and 8 February 2006. In so far as relevant for the purposes of this appeal, Intracom answered question 1.18 as follows:

“The ERP, LIS, RIS and PACS modules comprising the proposed solution are available in English language. The English version of IntraHealth is currently being under [sic] testing and has been scheduled to be released in Q1 of 2006.”

- 1.1.8 Intracom’s bid did not disclose the fact that the software was not available in English and neither did it disclose the fact that an English language version was being developed. Indeed, Intracom’s road-map for the future development

² Phase 1 is defined, at page 58 of the RFP, to “[reflect] those functionalities that are thought critical to the opening of [Mater Dei] and the delivery of which is therefore closely linked to the target opening date”. Although Mr Pomonis testified that the software in question – the so-called IntraHealth modules – constitute only some 15% in value of the total IHIS package, Dr Hugo Agius Muscat noted that although Mr Pomonis was probably correct if one were to consider all three phases of the IHIS process, the software that was not in English at the time of the visits held in April 2006 constituted some 50% of the Phase 1 software requirements, and was central to the system being procured.

³ As explained by Dr Natasha Azzopardi Muscat and Mr Claudio Grech, the adjudication process in respect of the RFP involved, first, a review of the tenders by a Technical Evaluation Committee and a Hosting Infrastructure Evaluation Committee. These Committees reported to a Core Evaluation Committee, chaired by Mr Grech. The Core Evaluation Committee reported to an Adjudication Committee which made the final recommendation to the Director of Contracts.

of the software did not include its translation into English.⁴ It will be recalled that the bid was submitted on 17 January 2006 and that the presentation took place on 8 February 2006 when, if Intracom's statements are to be accepted, the translation process was already under way.

1.1.9 On the advice of Gartner Consulting, the Core Evaluation Committee decided, following consultation with the Dr N Azzopardi Muscat, Chairperson of the Adjudication Committee, to conduct site visits, the objective of such visits being the verification of the representations and undertakings made by the tenderers.⁵

1.1.10 The visits to sites⁶ serviced by Intracom software took place on 11 and 12 April 2006.

1.1.11 During these visits, the Director's advisers were shown what they were told (by Intracom) was the IntraHealth software operating live in hospitals. The software was in the Greek language, a language not understood by any of the Director's advisers.

1.1.12 They were also shown, at Intracom's offices, a demonstration version of the IntraHealth software in English.⁷

1.1.13 It is accepted by Intracom that the English language version of the software was not complete by 12 April 2006.

⁴ See the testimony of Mr Claudio Grech, Chairman of the Core Evaluation Committee.

⁵ See the testimony of Mr Claudio Grech, Chairman of the Core Evaluation Committee.

⁶ Mr Pomonis testified that the sites were chosen by the Core Evaluation Committee. On the other hand, Mr Grech testified that the choice of the sites was left up to each bidder, notwithstanding the fact that the Core Evaluation Committee had every right to choose the sites. Nothing turns on this point and so it is considered that there is no value in exploring which of the two factual versions presented ought to be accepted.

⁷ In the Adjudication Committee's report on Intracom's bid, it is noted that in the English language version of the software demonstrated at Intracom's offices "...a number of software bugs emerged..." (see page 5 of the said report). This factual assertion is not disputed by Intracom. Indeed it ties in with the evidence of Mr Pomonis, who confirmed that the English language version is still being developed. In particular he confirmed that the language element still has to be reviewed by the Imperial College.

- 1.1.14 It is also accepted by Intracom that the English language version is still being developed.
- 1.1.15 Intracom accepts also that the development of an English language version is a complex exercise and takes many months of work.⁸
- 1.1.16 Both Mr Claudio Grech and Dr Hugo Agius Muscat testified that the process of converting IntraHealth into English involves customisation of the IntraHealth product. As Dr Agius Muscat put it in technical language, this process involves modifications to the source code of the product, a process to be distinguished from that of parameterisation. It must be noted that Mr Pomonis appeared to take a somewhat different view. Nevertheless he accepted that the translation process takes a significant amount of time and that it comprises both technical and linguistic elements. He explained that whilst the technical (presumably code related) aspects are now ready, the linguistic elements are still to be completed.

2. The requirements of the RFP

- 2.1 Section 07.2 of the RFP⁹ provides that the technical evaluation of the bids will take place during stage 2 of the Evaluation Process.
- 2.2 Section 07.2 also provides that submissions that do not satisfy the RFP requirements will not be considered any further.
- 2.3 The RFP sets out, *inter alia*, the following requirements:
- 2.3.1 Under the heading “The Business Strategy Underpinning the [IHIS]”¹⁰, that “in support of the health reform process, the IHIS **must** be able to meet ... **fundamental** business goals”¹¹ which include: “an implementation of the IHIS suite of applications **that is bereft of customisation**. Nevertheless, it is

⁸ The content of paragraphs 1.1.11 – 1.1.15 was confirmed by Mr Pomonis.

⁹ At page 59

¹⁰ Section 03.1 at page 24 of the RFP

¹¹ *Ibid.*

pertinent to underline that the IHIS suite of application must have the ability to allow parameterisation – whether this is necessary to ensure that the application reflects legislative requirements or the need to parameterise a particular health protocol to local needs.”¹² (emphasis added); and

2.3.2 In section 07.3, the “ability to implement the IHIS within the timeframes set.”

3. The appeal

3.1 In its appeal, Intracom first makes the following points, namely that:

3.1.1 The RFP did not include a requirement that the software should be “available at the moment of tendering” (emphasis in the original text);

3.1.2 Consequently, every tender could offer that the English version “would be available at a later date”;

3.1.3 Intracom had stated, both during the presentation held on 8 February 2006 and in the replies in writing furnished on 10 February 2006, that the English language version of IntraHealth was undergoing testing and would be ready for release in Q1 of 2006; and

3.1.4 “The English version of the IntraHealth product was effectively demonstrated to the representatives of the Evaluation Committee during the Athens site visit, which was requested by the said Committee on the 30th March 2006.”

3.2 On the strength of the points listed in 3.1.1 to 3.1.4, Intracom proceeds to argue that:

3.2.1 “once the Evaluation Committee decided to carry out the site visit, it is to be considered as having accepted and acknowledged Intracom’s right to

¹² At page 25 of the RFP. See also Section 04.4.5 at page 47.

demonstrate the English version of the INTRAHEALTH Product during such site visit...”: and

3.2.2 “Intracom met such an undertaking and effectively demonstrated the English version of the INTRAHEALTH Product during such a site visit (in such a manner that Intracom had, between the 8th February and the end of the site visit, demonstrated to the Committee all the aspects of the software programme in the English language).”

3.3 Consequently, argues Intracom, it has “every reason to object against the Contracts Committee’s ruling that the software programme was presented in any language other than the English language.”

3.4 In other words, Intracom argues that:

3.4.1 the “later date” was the date of the Athens visit, a date accepted, in Intracom’s view, by the Government by its conduct;

3.4.2 it had committed itself to have the software ready in English by that date; and

3.4.3 it delivered, by the said date.

4. The Director’s reply

4.1 It is submitted with respect that whether or not an English version of the software had to be available - tried and tested - at the point in time that the bids were submitted is academic. The Director does not rely on an argument to this effect, and so the point need not be dealt with further.

4.2 The Director’s position is that the RFP makes it clear that Government was not seeking a partner who, in relation to the Phase 1 software, could demonstrate an *ability* to develop the same but, rather, a partner who had developed the software and had implemented it successfully in the same manner as it was to be implemented in Malta. The RFP made it clear that

Government wanted tried and tested software, ready for implementation, subject only to parameterisation and, crucially, “bereft of customisation”. The Director accepts that such software could have been made available by not later than the date on which its existence as finalised and tested software, was to be verified, that is by the date of the site visits.

- 4.3 It is on this score that Intracom failed - by its own admission - at the hearing, hence justifying the Director’s decision not to consider Intracom’s bid any further.¹³ Its appeal is based on an allegation to the effect that “the IntraHealth product was effectively demonstrated...during the Athens site visit”. In other words, Intracom contends, *as a matter of fact*, that it delivered what was required of it by what, in its view, was the latest possible date, that is 12 April 2006. As stated, the Director does not contest Intracom’s understanding that it was entitled to prove the availability of the English language version of the software by that date. Indeed, in the Adjudication Report on Intracom’s offer, the following statement confirms that Intracom were afforded the opportunity, based on their own undertaking, to conform by the date in question:

“Questioned on the availability of the system in the English language, the Candidate advised that it was still seeking to translate elements of the solution presented into the English language and undertook to complete the translation of its complete system by the first quarter of the year, thus acknowledging this as a tender requirement. In the light of this undertaking of the Candidate, the evaluation and adjudication of Package Two continued in accordance with the established process.”

- 4.4 However, Intracom’s appeal must fail as its central factual allegation – the availability, and the demonstration on site, of the product on 12 April 2006 - is, at best, misleading. Apart from the evidence tendered by the Director in the form of the testimony of Dr Azzopardi Muscat, Mr Grech and Dr Agius Muscat, Intracom’s representative, Mr Pomonis, testified:

¹³ See relevant RFP requirements set out at para 2.3.1 and 2.3.2 above.

- 4.4.1 that the English version of the software - such as it was - was not demonstrated on site. Although, if one is to be generous, one can possibly understand the term “Athens site visit” as used in para (c) of Intracom’s appeal as a reference, broadly, to the visit to Athens, Intracom could - indeed should - have made it clear in its appeal that the demonstration of the English language software took place at their offices, and not on site as had been requested;
- 4.4.2 (more importantly) that the English language version was nowhere near complete on 12 April 2006; and
- 4.4.3 (significantly) that the English language version is still being developed.
- 4.5 Rather than argue – as it did in the appeal – that it had satisfied the RFP requirements *by the date* of the Athens visit, Intracom now seeks to make the point, repeatedly, that it is *capable*, with the assistance of Imperial College, of converting the software into English.¹⁴ That may or may not be the case, but it is quite irrelevant.¹⁵
- 4.6 As stated above, the Director does not argue with that part of the basis of Intracom’s appeal which is to the effect that it was entitled to prove that the product was complete and available by not later than 12 April 2006.
- 4.7 The Director simply points out that Intracom failed to prove its case. Or, rather, that, by its own testimony, it disproved its own case.

¹⁴ In his testimony Mr Pomonis sought to make the point, on more than one occasion, that Intracom is “committed” to the project; that it has the “capability to develop” the solutions requested; that it can “design the solution” and words to similar effect.

¹⁵ As an aside, however, it must be said that Intracom’s claims regarding capability appear - at least in so far as timing is concerned – to be wanting (it having be kept in mind (see para 2.3.2 of these submissions) that proven ability to meet the Government’s deadlines is of paramount importance). By admission, the English language version of the software was due for release – that is to say, complete, tried and tested - by 31 March 2006. By admission also, only the technical aspects of the conversion of the software into the English language are now, more than 3 months after Intracom’s self-proclaimed deadline, complete. The linguistic aspect is yet to be worked upon by Intracom’s external language consultants. Presumably, the software will then need to be tested for bugs and the like.

4.8 Intracom cannot now change the basis of its appeal, and seek to argue that it can still deliver the product in English at some future unspecified date. This is not permitted from a procedural perspective, in that an appellant is bound by the terms of his appeal. Neither is it permitted from a substantive perspective, in that it is clear that Intracom had to prove availability of a completed, tried and tested product, at the very latest by the date that the existence of that product was to be verified by the Director, that is to say 12 April 2006. Intracom's failure in this regard means that it failed to fulfil a fundamental requirement of the RFP and had to be disqualified.

For these reasons, the Director respectfully submits that Intracom's appeal ought to be rejected.

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**The Chairman
Public Contracts Appeals Board
Department of Contracts
Notre Dame Ravelin
Floriana.**

Dear Sir,

**RE: Advert Notice CT/R/5/05
Integrated Health Information System Strategic Partnership for the
Maltese Public Health Care System.**

We write on behalf of Intracom SA Information Technologies and Communication Services (Intracom IT Services) of Greece and submit hereunder, Intracom's counter-reply to the submissions made by the Director of Contracts on the 5th July 2006.

1. The facts

Intracom agree with the version of facts as presented by the Director of Contracts, saving that they wish to rectify, or otherwise clarify, the following relevant facts:

1.1.1. With reference to the Director of Contract's comment as a footnote to paragraph 1.1.2. of his submissions, it is to be clarified that, during the briefing session held on the 6th January 2006, Intracom specifically asked the question whether the language in which the software ought to be supplied was to be in the English or Maltese language. The reply given to such a question was specifically that the **implementation** was to be in the English language. One need hardly emphasise, in this regard, the meaning of the term "implementation", which, as already explained in Intracom's prior submissions, was justifiably taken to mean that the required system was to be executed in the English language.

The tender specification did not, however – nor was any explanation or clarification offered to Intracom during any briefing or presentation

session, or at any time prior to the email of the 8th April 2006 - that the tenderers were expected to have, at the moment of offer, a proven system in the English language in a live environment. Intracom wish to point out, once again, that it would not have entered into the unnecessary labour and expense of submitting its offer in a situation where the tender specifications would have expressly stated otherwise.

1.1.2. In paragraphs 1.1.7 and 1.1.8 of his submissions, it appears regrettably evident that the Director of Contracts is, in the first place, misrepresenting the facts and, perhaps more importantly, side-tracking from the focal issue which is to be determined by the Appeals Board – **namely whether the tender specifications provided any requirement that the tenderers were to have an English language version of the required software at the moment of submission of the bid or, as is explained in more detail in these submissions, during the stage of evaluation of Package Two.**

Contrary to what is implied under paragraph 1.1.8 of the Director of Contract's submissions, neither Intracom nor any other tenderer was required, under the tender specifications, "*to disclose the fact that the software was not available in English*" or indeed "*that an English language version was being developed*". Moreover, a proper reading of Intracom's answered question 1.18 will provide a clear and unequivocal interpretation that, at the moment of answering:

- a. "...modules comprising the proposed solution were available in the English language" – clearly a reference to **parts of the system itself** that were already available and operating in the English language;
- b. whereas "*the English version of IntraHealth*" was currently being tested and still had to be released – an unequivocal indication that it was the **English version** of the system (and not the system itself) that still had to be released.

Consequently, there can be no possible doubt that, contrary to the Director of Contract's allegations, Intracom did effectively on the 8th February 2006 disclose the fact that the software of the IntraHealth product was not yet

available in an English language version, and that it was then still being developed. If the Evaluation Committee chose to misinterpret this reply or otherwise fail to seek the necessary clarification, then certainly Intracom should not be unduly penalised for such failure – **particularly when, as repeatedly asserted by Intracom, the tender specifications did not require the tenderer to be in possession of an English language version of the system at the moment of offer, nor did the clarifications offered during the briefing session held on the 6th January 2006 affirm such a requirement.**

- 1.1.3 Referring to the Director of Contract’s comment 7 as a footnote to paragraph 1.1.12 of his submissions, Intracom confirm that the English language version of the IntraHealth software has been developed, and is currently pending the final examination process by the Imperial College. Intracom hastens to add, in this same regard, that it is fully aware of its undertaking to **implement the system within the time limits specified in the tender specifications. Thus contrary to what is intimated under paragraph 1.1.15 and the relevant footnote, Intracom can safely confirm that the English language version of the system will be fully developed and released for implementation within the time frames set out in the RFP document.**

The reference to “*a number of software bugs*” under the same comment to paragraph 1.1.12 of the Director of Contract’s submissions, was also already explained during the oral submissions and testimonies given during the appeal hearing. Such software bugs will not appear in a live environment, where the hospital concerned is equipped with a computer room which carries both hardware and software, as opposed to simulated environment shown on a laptop where all is compacted in software mode and where it is more than likely that one could encounter some glitches in the process. Dr. Hugo Agius Muscat testified and confirmed that the simulated environment demonstrated on the laptop was an English version of the system shown in a live environment, and both the witnesses and the report of the Evaluation

Committee confirm that the “software bugs” appeared only in the case of the laptop demonstration.

1.1.4 The contents of paragraph 1.1.6 of the Director of Contract’s submissions also merits some comments. The specific reason for which Intracom was disqualified at this premature stage of the evaluation process, was communicated to Intracom by the Director of Contract’s letter of the 2nd June 2006. This letter was issued in terms of Regulation 82 of the Public Contracts Regulations 2005, which provides, under sub-article (3) thereof, that “*Any decision leading to the discarding of any tender at any stage of the process is to be given publicity ... and the affected tenderer is to be informed of the decision...*”. The **decision** which was communicated to Intracom specifically states that Intracom’s tender was “*adjudicated as not complying with the tender specifications because the software program should be in English and not Greek*”. Intracom’s appeal is limited by reference to the communicated decision, and is based upon the specific complaint that “*the tender specifications do not specify that an English Language version of the proposed software must be available at the moment of tendering.*”

Consequently, it is appellant’s humble yet firm opinion that the Appeals Board is competent to determine solely whether, in its judgement, the tender specifications provided specifically that, **as specifically stated in the Director of Contract’s letter of the 2nd June 2006, the software program should be in the English language at the moment of offer. The Appeals Board should not however allow the Director of Contract’s to alter in any manner the significance of the express decision communicated in the above mentioned letter, by referring to other matters which, albeit contained under the Evaluation Committee’s report, were not expressly stated in the decision contained in the Director of Contract’s letter of the 2nd June 2006.**

Without prejudice to the above submission, Intracom does once again refer to its written submissions presented on the 5th June 2006, with particular

reference to that part of the submissions which deals with the issue of customization, wherein it is argued, as confirmed by Mr. Pomonis in his testimony, that a certain degree of customization would always be required, unless the offered system is purchased “off the shelf.” Moreover, the Government cannot expect to purchase a system which is completely free of any translation from anything other than the English language, as this would be tantamount to a discriminatory requirement that the system itself must have originated in the English language. The process explained under paragraph 1.1.16 of the Director of Contract’s submissions must have therefore undergone a language translation process at some stage, unless the product itself was created in the English language.

2 The requirements of RFP.

2.1 There is no contestation that the RFP provides that the technical evaluation of the bids will take place during stage 2 of the Evaluation Process, and that the submissions which do not satisfy the RFP requirements will not be considered any further. **By analogy, however the Evaluation Process can only take place with strict and limited reference to the RFP requirements, and any attempt to go beyond such a limited reference will, as is being claimed by Intracom, constitute an action which is ultra vires the powers and duties of the Evaluation Committee.**

2.2 With the above in mind, it is to be once again reiterated that the RFP does not under any part of its specific requirements, provide that the software program should be in English at the moment of offer. In fact, Section 07.2 (**The Evaluation Methodology**) of the RFP defines the evaluation process which is to be followed in each Stage of the procedures. Under **Stage 2** (the current stage under appeal) that is the evaluation of Package 2, it is clearly explained that *“the submissions will be evaluated against a set of requirements presented in 07.3. (and) for the avoidance of doubt, the submissions which will be considered for the next phase are those which clearly satisfy the technical requirements set out in 07.3”*.

2.3 Section 07.3 of the RFP document further defines the *Strategic Partnership Evaluation Requirements for Package Two*, where once again we fail to find any requirement that the candidate must be in possession of a system in the English language at the moment of offer.

2.4 Furthermore the same section 07.2. of the RFP document, when referring to procedures to be followed at **Stage 3** of the process, **identifies that it is only at this third Stage of the Evaluation Process (that is when Package Three is opened)** that *“candidates may also be requested to organise site visits to one or more of their reference sites”* such that, at the end of this process all submissions are ranked.

2.5 Moreover the same Evaluation Methodology provided under section 07.2 of the RFP Document, clearly **defines** that it is only at **Stage 4** of the evaluation process, **that is when a letter of intent is effectively issued to the best ranked candidate**, that *“the selected candidate must provide and make available to MHEC ... an evaluation environment (ie: software and server, if applicable) of their proposed solution, for a detailed, hands-on evaluation that could last for a minimum of 20 days and a maximum of 60 days.”* This condition is emphasised under the RFP document, and only goes to prove that it is at Stage 4 of the entire evaluation process that the successful candidate will be expected to provide **live evidence in Malta of a proven system in the chosen language, to the satisfaction of the MHEC.** And it is only after the successful completion of this stage that a letter of acceptance will be issued to the selected candidate while a letter of refusal will be issued to all other candidates.

2.6 Indeed, therefore, neither do the requirements quoted under paragraph 2.3.1 of the Director of Contract’s submissions fall under the specific criteria which are to be evaluated during the Stage of Package 2 of the process. **Besides, it is also to be pointed out that the Evaluation Committee has, when organizing the site visits at the reference sites, already ACTED ULTRA VIRES ITS FUNCTIONS AND POWERS IN SO FAR AS THE EVALUATION PROCESS OF PACKAGE 2 IS CONCERNED,**

and the Appeals Board is consequently invited to totally discard any reference to site visits made by such Committee, or any conclusions derived from such site visits which should never have taken place before the opening of the Third Package.

2.7. As already intimated by Intracom in its submissions, the scope of package 2 is intended to **prove the capability of the candidate on the basis of that specifically contained in the written offer.** In fact a close look at section 0.8 entitled *Response Format* at Page 68 *et sequitur* of the RFP document will confirm the above, namely that the evaluation at this Stage 2 is limited to an evaluation of *the Candidate's Approach to the successful attainment of the Strategic Partnership* (section 2) and of the candidate's *Response (i.e. in written form in Package 2) relating to the 5 requirements segments identified in 07.3.*

2.8. To conclude on this aspect, therefore, even the Evaluation Methodology provided under Section 07.2 of the RFP document, confirms that Intracom is totally justified in its complaint under review, and that the software program offered need not be available in the English language at the moment that the offer is presented – but it only at the Fourth Stage of the entire evaluation process that such a requirement will enter into place, as amply described above.

3. The Appeal.

For the avoidance of further repetition on the submissions made by the Director of Contracts under this heading, Intracom will merely reiterate (without prejudice to what has already been stated above) its confirmation that a software program was presented to the Verification Committee in the English Language during the site visit. Such program is currently pending final examination by the Imperial College.

4. The Director's Reply

4.1 The Director of Contract is, evidently from his comments under paragraph 4.1 of his submissions, trying to shy away from the focal issue which is to be determined by the Appeals Board in this case – **namely whether or not an English version of the software had to be available, tried and tested, at the point in time that the bids were submitted.** As already argued, this is precisely what the Director of Contracts is stating in his letter of the 2nd June 2006, as the only reason for Intracom’s disqualification Stage 2 of the Evaluation Process. Consequently this focal issue is not purely academic, but, more appropriately, the determining issue which is to be decided by the Appeal’s board. With all due respect, the fact alone that the Director is *ex admisis* not relying on an argument to this effect, further confirms that his decision, as dictated in his letter of the 2nd June 2006, merits to be revoked and annulled.

4.2 With reference to the Director’s position as provided under paragraph 4.2 of the submissions, Intracom refers once again to the submissions being put forward under Paragraph 2 above and emphasizes that its replies are provided in its responses to the criteria identified in section 07.3 of the RFP. In other words, Intracom successfully met all the requirements up to Stage 2 of the evaluation process by satisfying all the technical requirements set out in 07.3 - **when only the technical component of the submission (ie: package 2) is to be considered.** The Director is totally wrong in his argument that such software should have been made available as finalized and tested software to be verified by the date of the site visits. As already explained, the verification process is in terms of the same evaluation methodology provided under article 07.2 of the RFP (page 59), to take place only at stage 3 of the evaluation process and the testing stage is only to take place at stage 4 of the adjudication process. It is for this reason that Intracom firmly argues that the Evaluation Committee and the Director of Contracts have acted **ultra vires** their functions and powers at stage 2 of the evaluation process.

4.3 The Director of Contract however keeps harping on the argument that Intracom was obliged to prove the tested availability of the system in the

English language version at the moment of bidding or at any time during stage 2 of the process. This is totally incorrect for reasons which have already been explained. Nowhere in his submissions does the Director of Contracts pin point any of the criteria listed under article 7.3 of the RFP document to justify its decision in terms of the letter issued on 2nd June 2006.

For all the above reasons, Intracom respectfully concludes that it has proven its case sufficiently to merit the revocation of the decision of the Director of Contracts to disqualify Intracom for the reasons defined in his letter of the 2nd June 2006.

NORVAL DESIRA LL.D.

In the Public Contracts Appeals Board

Intracom S.A.

v

Director of Contracts

Reply of the Director of Contracts to the submissions of Intracom SA (“Intracom”)

The following submissions are made with respect:

1. The abandonment of the grounds of appeal

1.2 The submissions presented by Intracom confirm that Intracom has effectively abandoned the grounds on which its appeal was based. Intracom no longer submits, as it did in its appeal, that it “effectively demonstrated [the English version of the IntraHealth software to the representatives of the Evaluation Committee during the Athens site visit”. Indeed it can no longer do so, as that submission was contradicted by the evidence of the Director and of Mr Pomonis.¹⁶

1.3 The Director therefore respectfully submits that Intracom’s appeal cannot but be dismissed.

2 Factual observations

2.1 Although the Director considers that the above submission, seen in the light of his earlier submissions, ought to suffice, he considers that he must make a number of factual observations, for the record:

¹⁶ In paragraph (f) of Intracom’s submissions it is once again confirmed that, contrary to what was submitted in the appeal, the English language version is still not ready.

- 2.1.1 In paragraph (a) of Intracom’s submissions, Intracom submits that it did not have to have the English version of the software at the moment of tendering. As is clear from the Adjudication Committee’s report¹⁷, this point was never in contention.
- 2.1.2 In paragraph (b), Intracom makes the point that the first time it was asked to present the IntraHealth software in English in a live environment was on 8 April 2006. This is Intracom’s interpretation, with which the Director disagrees. On 8 April 2006, the request to view the software as it was to be implemented was merely repeated, it having first been made on 23 March 2006, the English language point simply clarified for the avoidance of doubt.¹⁸ In any event, nothing turns on the Director’s request to view the software in English in a live environment. The decisive, uncontested, fact is the software in English was not ready on the day its existence was to be verified.
- 2.1.3 In connection with paragraph (c) the point must again be made that although Intracom’s failure to demonstrate the English version of the software in a live environment was a significant failure, it was not decisive. What was decisive was the fact that the English language version was not ready.
- 2.1.4 It is simply not true, as alleged in paragraph (d), that Intracom “always” made it clear that it did not possess a system in the English language, which was proven in a live environment. Mr Grech testified that nowhere in Intracom’s submission was it made clear that the software in question was not available in English. Moreover, he also explained that nowhere in Intracom’s submission was it indicated that Intracom had plans to translate the software into English. Indeed the first time that the Director’s advisers were made aware that the software was not available was on 8 February 2006. This notwithstanding it was decided, on the basis of Intracom’s undertaking to have the software

¹⁷ Quoted at para 4.3 of the Director’s submissions

¹⁸ In an email sent on 23 March 2006 Mr Samouil was asked to confirm “that the modules indicated are the same (identical) modules that have been proposed in terms of your response to the RFP...Please confirm also that they are according to the RFP requirements and hence can be implemented in Phase 1 of the Maltese Healthcare.” In his response of 27 March 2006, Mr Samouil said that “the indicated modules can be implemented in Phase 1 in the Maltese Healthcare.” How modules in Greek, as shown, can be implemented in Malta remains a mystery.

ready by the end of Q1 2006, to proceed with the examination and evaluation of its submission. The point that the translation is now happening “independently of the Malta project”¹⁹ was only made, for the first time – and somewhat conveniently for Intracom - by Mr Pomonis in his testimony.

- 2.1.5 Mr Pomonis’ view is contradicted by that of Mr Grech and Dr Hugo Agius Muscat who both testified to the effect that the RFP required a mature system that allows for a high degree of parameterisation, thereby obviating the need for customisation.

The point about discrimination is not understood. The RFP did not exclude software originated in a language other than English. In the case of software originated in another language, the RFP simply required, in effect, the software to have been translated at the point in time that its existence was to be verified.²⁰

- 2.1.6 Somewhat ironically, Intracom ends its submissions, at paragraph (f), with a “commitment” to provide the English language software “which is currently awaiting its final examination” – without even indicating a date. It will be recalled that Intracom had previously committed to have this software in English by the end of Q1 006

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¹⁹ Paragraph (f) of Intracom’s submissions

²⁰ This is a function of the RFP requirements cited at paragraph 2 of the Director’s submissions.

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

The Public Contracts Appeals Board, having made the foregoing considerations, concludes as follows:

1) The question of language

The Board cannot but agree with the written submission of the legal advisor to the contracting authority, namely, that the initial ground of appeal that challenged the statement by the Director of Contracts that the system was required in the English language, during the course of the sitting, and specifically, following the evidence of Mr. Pomonis and, later, in the written submissions, was transformed into one of *when* the English version was required.

Therefore, there appears to be no need for further consideration of whether the Request for Proposals' (RFP) document should have specified the 'English language' as a requirement.

Yet, this notwithstanding the Board still wishes to place on record its remarks regarding the subject.

The Constitution of the independent Republic of Malta lays down that the official languages of the State are *Maltese* and *English* and, for the present, no other language enjoys that status. Therefore, it is not required for tender documents for the supply of goods or services to specify the language required by the tenderer. Indeed, if any question were to exist, it would only be as to whether the required language is to be Maltese or English. The tender document need only specify the required language in the improbable instance when a required language is a foreign one, i.e. another language other than Maltese or English.

2) Customisation of the system

The Board has noted that certain witnesses for the defence have laid emphasis on the provisions of the RFP as regards *customisation vis a vis parameterisation* – 'an implementation of the IHIS suite of applications that is bereft of customisation'.

Indeed, this provision is also referred to in the written submissions which have been received from the contracting authority's legal representative.

The board also noted that the concept of what constitutes customisation as viewed from opposite views differed somewhat.

It is felt that the explanation given by the defence witnesses was persuasive, that a translation of the working language constituted a radical change and therefore constituted 'customisation'. During a live demonstration of the English language version that was made on a lap top computer at the time of the site visit various glitches were evident, whereas the same system in the Greek language seemed to have

worked well. This would also add weight in favour of the opinions expressed by the defence witnesses.

Having said this, however, the Board must point out that the evaluation committee, albeit being aware that the system, as originally offered by the appellants was in the Greek language, yet, they allowed the evaluation process to continue against a promise made by the company that the English version would be available by the 31st of March 2006.

The Board feels that, despite all the good intentions that the Evaluation Committee may have had when they allowed the evaluation process to continue against a promise made by the appellants, yet, in doing so, this Board considers that, notwithstanding, the committee had forfeited any right they may have had to discard the offer by invoking the provisions of the RFP in this respect.

Furthermore, considered within the context of the above, at that stage, the question of what constitutes 'customisation' became one of purely academic value.

3) Time of availability of the English version

The evidence given by witnesses and the written submissions received by the Board, particularly that by the appellants' legal advisor, all make clear that the critical element in this case was *when* the fully functional English version of IntraHealth was required.

The appellants' legal representative has argued that the fully functional English version was required at the time of implementation, i.e. the time of execution of the project. He refers to a question put by the company at a briefing session held on the 6th January, 2006 the reply to which was that 'the implementation was to be in the English language.'

While this argument may or may not have its merits, the Board feels that this is an instance where common sense should prevail.

In the opinion of this Board, the evaluation committee were obliged to choose one of three alternate options:

- (a) keep their decision in abeyance until such time as a fully and perfectly functional system was made available by the appellants;
- (b) go for pie in the sky and allow the offer to proceed for further evaluation processing on the premise that a perfectly operating English version would be supplied eventually by the appellants; or
- (c) decide at that stage, after having given all possible opportunity to the appellants to come up with the appropriate version up to and including the time of the site visit.

This Board opines that if the evaluation committee had adopted any of the first two choices it would have acted irresponsibly. In the first instance, because the potential loss of EU funds and other Government constraints dictated that a quick decision was necessary. In the second case, the reasons are too obvious to require further explanation.

The Board feels that the evaluation committee, no doubt in the interest of allowing the greatest possible number of competitive elements to proceed, acted prudently to a fault when it allowed adequate time for the appellants to come up with a perfectly functional English version of IntraHealth to the extent of including them in the site visit even after such version had not materialised by the promised date of the 31st March.

4) Other issues

In his written submissions, the appellants' legal representative raised certain secondary issues which had not been included in the original appeal and do not appear to have been raised during the hearing. In ordinary circumstances the Board would not consider such submissions but in this case, in the interest of fairness and transparency and, also, because the claims made could have certain implications, the Board has decided to examine the claims made and to pass judgement accordingly.

a) Permissibility of the site visit

Dr Desira questioned whether the site visit was permissible under the terms of the RFP. Indeed, he argues that on the basis of section 07.2 of the document, the site visit should be deemed to be *ultra vires*.

This Board has studied carefully the provisions of the section and considered thoroughly the logic behind it. The Board concludes that the site visit as referred to in the RFP was intended to serve a holistic purpose and not merely to ascertain the technical capability of the system. As such, the visit is envisaged to take place over an extended period '*that could last for a period of sixty days*' and not merely the one day or so of the site visit that was made by the evaluation committee.

The site visit that was organized in this case was restricted purely to technical issues which clearly have their place in the second stage of the evaluation proceedings.

There is nothing in the RFP which can be interpreted to exclude a technical site visit. The visit concerned was not conducted under any form of duress but with the consent of the contending parties.

It is the view of this board that, in fact, the postponement of the committee's decision, which became necessary because of the site visit, could only work in favour of the appellants by giving a further opportunity to finalise the perfectly functional, glitch-free, English version.

Therefore, this Board does not find that the evaluation committee acted *ultra vires* of the RFP in organising the visit.

b) Potential grounds of discrimination on account of language of origin

The appellants' legal advisor has correctly submitted that 'the Government cannot expect to purchase a system which is completely free of any translation from anything other than the English language as this would be tantamount to a discriminatory requirement that the system itself must have originated in the English language'

The uncontested facts that emerged during the hearing show that the evaluation committee had been aware at an early date of the evaluation process that the IntraHealth system was in Greek. They allowed the offer to proceed in the evaluation process against a promise made by the company that the English version would be available by the 31st March and indeed even tacitly extended this period until the date of the site visit. Clearly they did not discard the offer immediately when it became known to them that the system was in Greek.

The Board therefore considers that no possible blame can be attached to the defendants regarding discriminatory treatment on the above grounds.

Having deliberated on the above conclusions and, particularly, with regard to conclusions (3) and (4), the Board has found against the appellants and, therefore, has decided to reject the appeal.

The Board also recommends that the deposit put up by the appellant should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
member

July 26, 2006