

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 130**

**CT M422/08**

**Tender for the Provision of a Government Payment Gateway Service to MITTS Ltd**

This call for tenders was published in the Government Gazette on 24.01.2008.

The closing date for this call for offers with an estimated value of € 200,000 was 03.03.2008.

Five (5) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', *Messrs Alert Communications Ltd* filed an objection on 21.04.2008 against the award of the tender in caption to *Transactium Ltd*

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 25.06.2008 to discuss this objection.

Present for the hearing were:

#### **Alert Communications Ltd**

Dr John Refalo	Legal Representative
Ms Claudine Cassar	Managing Director

#### **MITTS Ltd**

Dr Henri Mizzi	Legal Advisor
Dr Adrian Mallia	Legal Advisor
Dr Pauline Debono	Legal Advisor
Mr Ivan Alessandro	Financial Controller
Mr Victor Camilleri	Department Manager

#### **Adjudication Board**

Mr Gabriel Sultana	Chairman
Mr Martin Camilleri	Member
Ms Rosalynn Muscat	Member

#### **Transactium Ltd**

Dr Ian Vella Galea	Legal Representative
Mr Kenneth Cassar	Managing Director
Mr Conrad Micallef	

After the Chairman's brief introduction, Dr John Refalo, representing Alert Communications Ltd, the appellant Company, was invited to explain the motive of the objection. This was followed by interventions by representatives of the Malta Information Technology and Training Services Ltd (MITTS), the contracting authority, and Transactium Ltd, the recommended tenderer.

Dr Refalo commenced his intervention by declaring that, basically, the complaint raised by his client concerned the subjective way through which points were allocated on the basis of price. Dr Refalo argued that the formula that was used in this respect was based on certain weightings that, in effect, proved detrimental to Alert Communications Ltd. The method used was not that normally applied by the Contracts Department and any departure from that practice should have been explained beforehand. He requested MITTS Ltd to explain in the course of the hearing the way points were awarded since he maintained that the method used had neutralised the advantage that his client had in terms of price. The price of Euro 171,705 quoted by Alert Communications Ltd and the price of Euro 420,000 quoted by the recommended tenderer - amounting to about three times that of the appellant Company - should have been reflected differently in the distribution of points.

Dr Refalo added that this tender did not empower the Adjudication Board to award certain points and, moreover, it had made certain assumptions that worked against Alert Communications Ltd, for example, with regard to the same Company not having been PCI (Payment Card Industry) compliant when in fact it was certified PCI compliant prior to the award of the tender as he claimed would be demonstrated later on during the hearing.

Dr Henri Mizzi, legal representative of MITTS Ltd, opted to rebut what has been said by Dr Refalo at a later stage and, as a result, the first witness called to the stand.

Mr Gabriel Sultana, Chairman of the Adjudication Board, took the stand and gave the following evidence under oath:

- he confirmed that he was aware of the contents of the analysis report endorsed by Mr Victor Camilleri, Department Manager, Strategic Sourcing Advisory Services, MITTS Ltd and that page 4 para. 3 specifically stated, among other things, that:

*....although Alert arguably may have successfully completed the technical evaluation the solution provided by Transactium was considered by the adjudication board to have a distinctively better technical merit in view of the considerably lesser risk involved in the implementation of Transactium's solution;*

- when it came to listing the risks involved with respect to Alert Communications Ltd's proposal, the same paragraph of the analysis report continued as follows:

*The scorings given to Alert for the criteria relative to the bidder and the service requirements reflect the considerations made that the payment gateway solution offered by Alert was not mature (i.e. had not been tried and tested in other similar environments) and that Alert did not, on the basis of the*

*information submitted in its bid, have the necessary resources and expertise in the provision of an electronic payment gateway service;*

- he stated that although Alert Communications Ltd's proposal was not of the same level as that of Transactium Ltd, still, it was acceptable from the documentation submitted;
- he explained that the solution was basically made up of two parts, i.e. the generic part, which was required to operate any payment gateway irrespective of the customer/s, and the second part, which had to be custom made for MITTS so as to connect with existing applications;
- regarding the PCI certification he pointed out that both at the closing date of the tender (3<sup>rd</sup> March 2008) and on the date of the site visit (17<sup>th</sup> March 2008), Alert Communications Ltd did not have this certification. He explained that PCI compliance had to do with the data security standard set by the payment card industry for online payment service providers. Although Alert Communications Ltd claimed that it obtained this certification prior to the deadline, i.e. the date of tender award (23<sup>rd</sup> May 2008), Mr Sultana admitted that the Adjudication Board did not persist to verify whether the said Company did eventually obtain the PCI certification for two reasons because (i) Alert Communications Ltd did not propose the most economically advantageous offer and (ii) the onus was on the Company to inform the Adjudication Board that it did actually obtain this certification, which was a mandatory requirement according to the tender document, and not the other way round. According to the same witness, the Adjudication Board distributed the points on the evidence that it had in hand at the time. Also, according to Mr Sultana, after the site visit, Alert Communications Ltd did not communicate with the Adjudication Board with regard to their status vis-à-vis PCI certification. He further remarked that the fact that the appellants were not allocated any points in respect of the PCI compliance did not have much bearing on the overall result as that carried few marks, 5 marks out of a grand total of 1,900 (Part 1.5 (f) of the GPG Adjudication Total). Mr Sultana emphasised that Alert Communications Ltd were not disqualified for not having this certification.
- the term '*most economically advantageous offer*' meant that, apart from the price, there were other considerations that had to be taken into account - for example, one had to consider the whole package to assess the risks involved. Following the site visit, Alert Communications Ltd did not demonstrate that it had the necessary experience to provide the service required, especially when one considered that Government already had 20 (twenty) merchants and was scheduled to have 7 (seven) more, including the Inland Revenue Department and the VAT Department, both crucial to government revenue and to its public image. Mr Sultana declared that, following the site visit, the Adjudication Board had reviewed the marks awarded to the three bidders (including the appellant Company) according to their findings. At this point the said witness claimed that the whole exercise was transparent and that all tenderers were treated alike.
- *bonus points*: he went on to explain on what basis the Adjudication Board allocated bonus points by quoting from SR3 (page 57 of the tender document):

*The service provider must commit that it will provide all the functional requirements defined in Section 5, Backward Compatibility Technical Requirements within the timeframes being defined for Phase 1 and Phase 2. Service Providers who demonstrate that they are ready to provide some or all of the functional requirements being requested for Phase 2 within the timeframes of Phase 1 will be given preference.*

- When asked by the PCAB whether the term ‘favourably considered’ entitled the Board to award points, he stated that it did because the Board did not only want the tenderer to state that it would provide the items by indicating ‘yes’ but the time of delivery was also important and hence tenderers were explicitly asked to indicate in which phase they were committing themselves to provide the ‘required’ items. The tenderers that committed themselves to deliver these functional requirements in Phase 1 were awarded 5 points for each item with the result that Alert Communications Ltd was awarded 15 points for 3 such answers and Transactium Ltd was awarded 110 points for 22 answers (pages 28 to 35 of Appendix F of the Adjudication Report). Where Alert Communications Ltd and Transactium Ltd did not indicate Phase 1 no bonus points were awarded to both of them. It was pointed out that in page 56 of the tender document it was clearly indicated that:

*Mandatory: implies that this functionality is required from Phase 1 onwards.*

*Requirement: indicates that while the availability of this feature is required in Phase 1, a degree of flexibility in terms of its availability for Phase 1 may be considered depending on the overall impact, at the discretion of MITTS Ltd*

*Bidders are to complete the form by stating:*

- *‘yes’ or ‘no’ under the column ‘Compliant’ if the requirement is marked as mandatory;*
  - *‘Phase 1’ or ‘Phase 2’ under the column ‘Compliant’ to indicate whether the requirement, if not marked Mandatory, will be available as part of Phase 1 or Phase 2.*
- *price: when confronted by the PCAB with what was stated in page 4 of the ‘Analysis Report’, namely that:*

*The prices were objectively assessed using a formula that calculates the prices submitted against the maximum mark which could be achieved by the bidders and the tender value based on what was submitted by all the bidders competing in this open tender procedure...*

and, subsequently asked by the same Board how was this formula arrived at, Mr Sultana stated that he did not compile this formula but it was worked out by an officer competent in financial matters and in his capacity as advisor to the Adjudication Board.

- *bank connectivity*: he stated that during the site visit they asked Ms Claudine Cassar, Managing Director of Alert Communications Ltd, whether her Company had the link with the banks and that the answer was in that the said Company did not have it but was working on it. The same witness remarked that direct links with the banks were considered part of the service that they were requesting and it was considered a risk not to have this link. He added that the site visit was conducted precisely to assess the day-to-day running of the service because if one could not actually visualise what kind of service the tenderers were currently providing how could one be assured that tenderers were capable of rendering the service requested.

At this stage Mr Ivan Alessandro, Financial Controller MITTS Ltd, took the witness stand giving the following evidence:

Mr Alessandro stated that the Adjudication Board had sought his advice to assess the market price. This advice, claimed the witness, was limited to financial matters only. He stated that he provided the Board with a formula which was used by MITTS Ltd in other cases, explaining in the process that the formula was based on the minimum feasible price divided by the bid price multiplied by the maximum mark.

The same witness added that this formula provided a weighting of the total bidding prices against what they considered to be the minimum feasible price taking into account the market reaction with regard to price and their experience in this area. This formula was applied to all tenderers and in the case of Alert Communications Ltd and Transactium Ltd it produced the following results:

- Alert Communications Ltd
  - $298,000$  (minimum feasible price) /  $171,705$  (average Alert Communications Ltd price out of the five quoted – pg 66 of the Adjudication Report) x  $750$  (maximum mark allocated for price) =  $1,301$ . However, the maximum mark that could be awarded was  $750$
- Transactium Ltd.
  - $298,000$  (minimum feasible price) /  $420,000$  (price quoted) x  $750$  (maximum mark allocated for price) =  $532$ .

Mr Alessandro explained that Alert Communications Ltd quoted different prices, namely

- one based on the amount of transactions processed
- one as a percentage of the value of the transactions
- one a mixture of both
- one was a fixed price

The witness said that he had no budget for this tender, however, when pressed by the PCAB to state why there was no estimated price in this case, he added that, technically, there should have been one but he admitted that he did not go into that aspect. Mr Alessandro continued that although, technically, there should have been a budget for this tender, yet, in this particular case, he was not aware that there was one.

The PCAB intervened to remark that there should always be a budget against which one was then to assess whether the prices quoted were reasonably priced or not, i.e. the guiding factor had to be the estimated price.

At this stage, the PCAB showed a document signed by Mr Victor Camilleri, Department Manager, Strategic Sourcing Advisory Services Department, MITTS Ltd, demonstrating that the estimated price of this tender was Euro 200,000. In view of this document, the PCAB argued that an explanation was more than justified considering that the recommended tenderer's bid was more than double the estimated cost of the tender and almost three times the lowest price quoted. Needless to say that, one would feel that it would only be pertinent for an adequate justification to be called for to explain as to how the recommended tender was judged to be the most 'economically advantageous' offer. The PCAB further remarked that if the recommended tenderer quoted more than double the estimated price, then, probably, there was something wrong with the estimated price, albeit one had to assume that it was arrived at by competent officer/s.

Mr Alessandro confirmed that he was not involved in working out the estimated price of this tender and added that that was worked out by Mr Camilleri. Mr Alessandro also remarked that, besides the price, there was also the technical evaluation that had to assess the whole package.

At that stage, Dr Refalo, interjected to remark that the formula used did not reflect correctly the price difference between the offers received such that

- (i) his client was awarded 750 points for an offer that was below the estimated price;
- (ii) Transactium Ltd was awarded 532 for its offer that was more than twice the estimated price and
- (iii) the highest offer of Euro 668,352, more than three times the estimated price, was awarded 334 points

On his part, Dr Henri Mizzi observed that Alert Communications Ltd quoted five prices and all of them were below the estimated price, whereas the other four bids ranged from Euro 420,000 to Euro 668,000.

At this point Dr Mizzi asked if it was normal to have this type of variations and Mr Alessandro stated that, in most cases, prices tended to be rather within a close range.

Mr Alessandro proceeded to explain his workings stating that he considered ...

- a. what MITTS was paying for the current service plus the expected growth
- b. the prices provided by the market through this call for tenders and came out with the figure of Euro 298,000 as the minimum feasible price.

Dr Mizzi observed that

- Mr Alessandro based his workings in arriving at the minimum feasible price of Euro 298,000 on the current contract plus the expected growth
- the current contractor GO quoted the price of about Euro 664,000 for the new service
- that Mr Alessandro advised the Adjudication Board to take as a benchmark Euro 298,000 and not the estimated price (Euro200,000) or the price quoted by Alert Communications Ltd (average of Euro171,705).

Mr Alessandro stated that he did not analyse the difference in the results where he to apply Euro 200,000 and Euro 298,000 as the benchmark.

Dr Refalo stated that the weightings introduced in the formula penalised Alert Communications Ltd because the other bidders should have been awarded less points.

Under oath, Ms Claudine Cassar, Managing Director Alert Communications Ltd, gave the following evidence:

- *bonus points*: in the tender document Alert Communications Ltd had indicated in writing, over and over again, that it would deliver the goods both for Phase 1 and for Phase 2. In fact, in page 21 Alert Communicatians Ltd clearly indicated its commitment to completing the implementation within the timeframe set in Section 3 of the ITT and, *inter alia*, in page 22 stated that:

*If awarded the tender, Alert Communications will immediately dedicate the necessary resources to provide the PGAPI to MITTS Ltd within the specified timeframe*

- by indicating ‘yes’ Alert Communications Ltd agreed to what was written down in the tender document (SR3 pg 57 of tender document) in the sense that:

*the service provider must commit that it will provide all the functional requirements defined in section 5 within the timeframes being defined for phase 1 and 2. Apart from that the document also indicated that: service providers who are ready to provide some or all of the functional requirements of phase 2 within the timeframe of phase 1 will be given preference*

- She admitted that although under the heading Phase 1, Alert Communications Ltd did not state ‘Yes’ under most of the items termed ‘Requirement’, however, she maintained that both Alert Communications Ltd and Transactium Ltd were not entitled to bonus points for delivering items that they had to deliver anyway
- *PCI certification*: she explained that at the briefing held by MITTS Ltd prior to the closing date of the tender it was indicated that tenderers that did not have the PCI certification could submit their bid provided they make a commitment to obtain it by the 23rd May 2008, ie the date of award of the said tender. She claimed that Alert Communications had honoured its commitment made during that briefing and during the site visit as it obtained full PCI certification on the 20th May 2008 – that was why she could not have submitted it in March 2008

when the documents were submitted or when the site visit took place. She added that when the assessor of Turstware Ltd called at Alert Communications Ltd on the 8th and 9th May 2008, respectively, he found the system in order and that they were compliant. However, on being pressed by Dr Ian Vella Galea, legal representative of Transactium Ltd, she admitted that Alert Communications Ltd did not have the formal acceptance and that the final official certificate had still not been received by the appellant Company. Adding on to her claim, Ms Cassar commented that the situation was comparable to that of a student who has passed the examination but was awaiting for the official certificate

- *Connection with the Banks:* Ms Cassar declared that Alert Communications Ltd had been connected with the Bank of Valletta for about 4 years and that it had been processing payments of BOV clients for the same period and, in fact, her Company was chosen as a joint venture partner with BOV to process payments of BOV clients. In fact, Ms Sciberras of BOV had confirmed to Alert Communications Ltd by email dated 21 April 2008 – the subject being ‘Implementation of direct leased line between BOV and Alert Communications Ltd – that

*“BOV does not support direct line communication between the Bank and other gateways. However, rest assured that our ACI commerce gateway’s security is up to the current security standards (as required by Mastercard and Visa)”*

Ms Cassar explained that the connection that Alert Communications Ltd had with BOV did not require a direct physical link because her Company was connected to BOV through the Internet by two fibres with *Go* and *Vodafone* where one was overhead and another one was underground in case the overhead one got damaged. She claimed that it was more secure to use the Internet as was the case with BOV than to use the connection with HSBC using a direct connection through Melita Cable. She confirmed that Alert Communications Ltd had Internet connection with BOV for four years and a direct connection with HSBC through Melita Cable as from 7th April 2008, or seven weeks before the deadline. She declared that the link Alert Communications Ltd had with BOV was according to the tender requirement. She stated that during the site visit she informed the Adjudication Board’s representatives that they had things in place and that they were just waiting for the Melita Cable connection. Ms Cassar also claimed that the site visit lasted only ten minutes and that the Adjudication Board’s representatives did not ask any technical questions but still they remarked that Alert Communications Ltd’s technical personnel were not technically competent enough.

- *The Budget/Estimated Price:* Ms Cassar stated that when she worked out her costings she took into account the tender requirements and included a profit margin. In this case, she claimed to have included a profit margin of 5%, whereas one normally would go to about 50%, and the reason was that Alert Communications Ltd considered this tender as strategically important for it to penetrate further in this line of business. She maintained that she committed herself to provide the service for the price of Euro198,000 (fixed price offer) and that she included a rather slim margin of profit. On being pressed as to whether

Alert Communications Ltd's price reflected the market price, Ms Cassar repeated that (a) that was the price that Alert Communications Ltd would charge for this service, (b) she committed herself to it, (c) Alert Communications Ltd was not going to make a loss from this contract and (d) in her opinion, the other prices quoted were too high. She remarked that from enquiries made with the Contracts Department, she learned that price points were usually awarded proportionately.

- Ms Cassar repeatedly reminded the PCAB that, following the site visit, the Adjudication Board penalised Alert Communications Ltd 145 points (*vide* pages 34 to 49 the Adjudication Report) and that, according to her, this was no joke considering that the total mark was 1900.

Mr Victor Camilleri, under oath, gave the following evidence:

- he confirmed that there was no budget for this tender but a guess estimate because when one considered the developments that had taken place in this field, e.g. PCI compliance and the like, MITTS Ltd was not in a position to arrive at a budget for this service. Therefore, MITTS Ltd based its estimate on the current contract with GO Ltd – i.e. Lm1,000 per month - and on the cost to upgrade that service to become PCI compliant which was an issue that the banks were insisting upon given the ever increasing amount of transactions – amount requested by GO Ltd for this upgrade was of Lm 80,000. Mr Camilleri added that the present tender was the result of a call for tenders and that the considerable cost of the upgrade had induced them to issue a call for tenders to contract this upgraded electronic payment gateway service. The same witness stated that, in his opinion, the estimate of Euro 200,000 was low when he considered the offers submitted and the work effort required to render this service on the basis of the amount of audits and other work involved on the part of MITTS itself.

Again Mr Sultana took the stand and *inter alia*:

- declared that the price offered by Alert Communications Ltd was indicative of an inferior service;
- stated that the service offered by Transactium Ltd was tried and tested;
- commented that the bonus points were awarded to those tenderers that committed themselves to deliver certain requirements in Phase 1 instead of in Phase 2;
- regarding connections with the bank, he stated that the type of links required were reflected in the Service Level Agreement (SLA) where guarantees were being sought for the quality of the service in terms of uptime. In fact, in this respect, MITTS Ltd requested 99.6% uptime in Phase 1 and 99.9% uptime in Phase 2. He added that connectivity over the Internet, with its physical ADSL modem set-ups, might have been adequate for Alert Communications Ltd's requirements but the tender document asked for direct links with banks with firewalls and the like. He added that, when they assessed the whole solution, they were examining if the solution would provide the results requested. He stated that in the case of Alert Communications Ltd, its representative, Mr Caruana, said during the site visit that the software was still under development. Mr Sultana placed emphasis on the fact

that this was the software that connected with the banks required to process payments. According to the same witness, the other software was required at a later stage as it necessitated information from MITTS Ltd since it had to connect with existing applications. Similarly, this was also the case with the hardware and the links with the banks. He stated that, if Alert Communications Ltd had the software in place, during the site visit the Adjudication Board representatives would have asked about the set up regarding monitoring and the system to enable them to investigate disputes when these arose. Yet, since things were not in place one could not go into these technical details. He added that the other tenderers showed them these facilities whereas Alert Communications Ltd did not and that was the difference that emerged between tenderers following the site visits;

- he remarked that the Adjudication Board had the task of ascertaining that at the time of adjudication the service provider was in a position to connect with 20 merchants and to take on the anticipated substantial increase in workload;
- when specifically asked to do so by the PCAB, Mr Sultana opined that it was not possible for Alert Communications Ltd to settle all the pending issues within the two month period between the site visit and the date of award of tender because he was aware of the effort that it would take to address the requirements of the service level agreement and the monitoring requirements in running a government payment gateway;
- he confirmed that, following the site visit, the level of trust and the level of reassurance in Alert Communications Ltd diminished and reflected itself in the reduction of marks previously awarded according to the documentation submitted. The Adjudication Board performed this exercise in respect of all the tenderers, in fact, APCO Ltd was close to what MITTS Ltd were after, however, Endeavour Ltd was very disappointing and the points deducted after the site visit reflected these technical shortcomings.

Mr Martin Camilleri, under oath, then gave the following evidence:

- at the request of Dr Henri Mizzi, Mr Camilleri was asked to explain page 65 section SR10 under Phase 1 of the tender document, which specified that:
  - *SPPGI must be a 24 x 7 service with a minimum guaranteed uptime of 99.6% on a monthly basis (corresponding to a maximum accepted unplanned downtime of 2hrs 52 minutes per month)”*,

and also section SR15 on the same page under Phase 2 which specified that:

- *SPPGI must be a 24 x 7 service with a minimum guaranteed uptime of 99.9% on a monthly basis (corresponding to a maximum accepted unplanned downtime of 8.76hrs 52 minutes per year / 43.2 minutes per month / 10.1 minutes per week). However, the maximum acceptable unplanned downtime in any one incident must not exceed 1 hour 26 minutes per day.*

- Mr Camilleri stated that the electronic payment gateway had to be 'up', i.e. not simply being on but functioning, as continuously as possible, so that payments could be processed in view of the fact that, if this were not the case, if the system would be 'down', payments would not go through. In addition, according to the same witness, there had to be a monitoring mechanism in place to see when and why the system stopped. SR 10 and SR15 were specifying that for Phase 1 the percentage should be 99.6%, which meant that the system was expected to be at a total standstill (downtime) for not more than 2hrs 52 minutes per month whereas during Phase 2 the downtime should be less as the percentage would be raised to 99.9%;
- Mr Camilleri went on to explain the difference between having a direct link and having a link over the Internet with the banks. As in the case of Alert Communications Ltd, it was acceptable for one to provide a link over the Internet but MITTS Ltd knew through experience that it was difficult to maintain a 99.6% and 99.9% uptime using an Internet link because the Internet link was not dedicated to one's traffic only but it took on the traffic of other Internet users. Also, as regards security, when one uses the Internet to make a transaction then one has to use a suitable encryption. In such circumstances, a direct link is solely dedicated to the traffic generated by one's payment gateway system and, therefore, it is also more secure. He admitted that he was not one of those who carried out the site visits, however, he added that from these site visits it resulted that Transactium Ltd, APCO and GO had direct links with the banks. When asked if he would have been happy had all bidders had links over the Internet, Mr Camilleri stated the in that case either they would have had to settle for that as beggars cannot be choosers or else they would have requested bidders to establish a direct link. At this stage, he admitted that, in hindsight, it could have been better for the said 'direct link' to be specified in the tender document.

Dr Refalo intervened to state that, in their reasoned letter of objection, his clients raised various issues, however, one issue that he wanted to stress upon was the way points were awarded by the Adjudication Board with regard to prices as that discriminated against Alert Communications Ltd. He argued that legislation stipulated the estimated price and attached certain aspects to it, such as in that case when one lodged an objection one had to pay a percentage of the estimated price of tender.

At this point the Chairman, PCAB, informed Alert Communications Ltd that the amount deposited in connection with this objection was in excess of requirements stipulated in the Public Contracts Regulations as the 1% was based on the price of the recommended tenderer (Euro 420,000) and not on the value of tender (Euro200,000).

Continuing, Dr Refalo argued that:

- once the regulations stipulated the estimated price then, if there was any need for a formula, it should have been based on the estimated price of Euro 200,000 and not based on a series of variables wherefrom the figure of Euro 298,000 emerged as, in his opinion, the latter figure was a subjective one. He added that had they used the Euro 200,000 in the formula then the results would have changed drastically;

- another thing that worked against Alert Communications Ltd was the fact that the Company, having quoted a price below the estimate, was awarded the maximum points allocated with regard to 'price', ie 750, and would have obtained the same marks even if its price would have been even lower than Euro 171,705, whereas other bidders that quoted above the estimate, say, Euro 350,000 or Euro 400,000, would have got about 700 or 650 points. He added that that meant that the variable used changed the points of all the other bidders but those of Alert Communications Ltd remained static and, as a consequence, any advantage that Alert Communications Ltd might have had in terms of the price it quoted was neutralised. According to their calculation, had the figure of Euro 200,000 been used in the formula instead of Euro 298,000, Alert Communications Ltd would have obtained over 800 points adding that this proved that, on the aspect of price alone, Alert Communications Ltd would have won the contract.
- Alert Communications Ltd's offer was technically compliant, as Transactium Ltd's was, as otherwise it would have been disqualified. He added that even if one bidder was technically slightly better than the other, still Alert Communications Ltd was compliant and the price that it committed itself to deliver the service was about one third that of the recommended tenderer and, therefore, he questioned how one could justify that the other tenderer had the most economically advantageous price.

Following Dr Refalo's intervention, Dr Henri Mizzi put forward the following arguments:

- the point of departure is that the law allowed a considerable amount of discretion to the Adjudication Board to carry out its evaluation in all its aspects and, therefore, judgment should be left in the hands of those given that responsibility by law. He referred to a judgment of the European Court dated 23 November 1978 – Agence Europeene SA v Commission of the European Communities – Case 56/77 wherein, Dr Mizzi claimed, the European Court clearly stated that unless there was a misuse of power or a serious and manifested error of judgment, the judgment should be left up to that body so entrusted by law. In other words, a Board of Appeal should not decide in the sense of how it would have decided this case given the same circumstances, because there could be two or more reasonable decisions, but the Appeal Board's decision should focus on whether the Adjudication Board acted within the parameters of reasonableness. The Board of Appeal might agree or disagree with the decision of the Adjudication Board but the question should be whether the Adjudication Board acted in a reasonable manner. Only in cases of misuse of power – and he claimed that there were no such allegations in this case – or a serious error of judgment, the Board of Appeal is entitled to intervene; otherwise, claimed Dr Mizzi, it should respect the discretion given to the competent authorities in carrying out their assessment with a view to taking a decision;
- *the price*: he agreed that as a matter of principle there should always be a budget for goods/services that were being procured, however, as it emerged from the evidence given by Mr Victor Camilleri, there were difficulties in arriving at a realistic estimate, i.e. one that reflected market prices, for the requested service. Mr Camilleri had explained that he was not aware of market prices for this service

and so he based his estimate on the information he had at the time, that is, (a) the present contract value, Lm 12,000 p.a. – one had to keep in mind that the amount of transactions was expected to increase considerably – (b) the amount of Lm80,000 requested by the present contractor to upgrade the service to become PCI compliant, which estimate works out at about Euro 200,000. He continued that the reaction of the market was such that the offer of Alert Communications Ltd, the one based on a fixed amount – as its other bids were based on assumptions – was of Euro198,000, that of Trasactium Ltd was Euro 420,000, another offer was over Euro 500,000 and the other two offers were almost Euro700,000. Dr Mizzi maintained that this scenario indicated that either the tenderers did not clearly understand what kind of service was being requested or some of the tenderers were allowing a very wide margin of profit or else there was one that applied a very slim profit margin or was even ready to make a loss out of this contract. He argued that it would not have been fair were Mr Alessandro to base his calculations on the cheapest price – as the Contracts Department normally did - because that would have been justified if there wasn't that wide variance between the prices, i.e. in normal circumstances but this was not a normal case. Mr Alessandro had to test what the market was indicating with regard to price and that exercise was not a subjective one as Alert Communications Ltd was suggesting. Dr Mizzi said that the exercise should perhaps have gone beyond that and took into account also that service requested in the tender was of a higher level. He submitted that one should accept that the exercise carried out by Mr Alessandro was a reasonable one, i.e. not necessarily scientifically precise but reasonable. If one were to accept that, then one had to question if the price quoted by Alert Communications Ltd was a reasonable one because it was in the interest of the contracting authority that the successful tenderer would make a profit out of this contract otherwise that might prove problematic later on. That was being said in the light of article 28 (1) of the Public Contracts Regulations which provided for this kind of situation as it stated that:

*A contracting authority shall be entitled to reject tenders which appear to be abnormally low in relation to the activity to be carried out.*

- Therefore, the regulations catered for such a circumstance where a tender could be rejected if it was considered to be very low not necessarily when compared to the estimated price - which was problematic to arrive at in this case - but in relation to the activity to be carried out. Once the price quoted by Alert Communications Ltd (Euro198,000 fixed) was 66% of the minimum feasible price, which in turn was considered low, then the extreme measure that the Adjudication Board could have taken was to disqualify that tender. At this stage, Dr Mizzi submitted that the price offered by Alert Communications Ltd should not have been awarded maximum marks because maximum points should have been awarded to the cheapest price that was realistic and therefore the 750 marks given to Alert Communications Ltd were excessive in this case. Dr Mizzi argued that the PCAB should not go into this matter if it would consider the method used by the Adjudication Board to be a reasonable one. He continued that what Ms Cassar stated, in the sense that she made a strategic decision to offer a low price because she wanted to penetrate this market, could make sense from a business point of view, however, that also proved that Mr Alessandro was correct to suspect that there was something abnormal in the prices and that that aspect had to be taken

into account in assessing this part of the adjudication process because it fell within the discretion of the Adjudication Board to spend public funds judiciously while not taking unnecessary risks when dealing with the provision of such an important service;

- *technical evaluation*: Dr Mizzi remarked that, when considering the technical aspect, the PCAB had to decide if the considerations made by the Adjudication Board were valid and serious. He recalled that, following the site visit, it transpired that there was quite a difference between what Alert Communications Ltd submitted in the tender documentation, which was considered as highly structured, so much so, that high marks were awarded for that, to what the assessors found on site which showed that Alert Communications Ltd did not have much experience in this field and that this might have had a bearing on the fact that Alert Communications Ltd quoted such a low price. A track record was very important in this case and had to be taken into account when adjudicating the tender and not go for the cheapest price, which, then again, he claimed to be completely out of line with the rest of the prices;
- *bonus points*: Dr Mizzi conceded that perhaps the term ‘bonus points’ was not the ideal one in the circumstances. However, he remarked that the Adjudication Board awarded these points to those tenderers that committed themselves to deliver certain requirements, for which there was a degree of flexibility for delivery, in Phase 1 instead of Phase 2. Alert Communications Ltd committed itself in three instances whereas Transactium Ltd committed itself in 22 instances and it was within the discretion of the Adjudication Board to prefer the tenderer that made such a commitment and to consider what weight to give to such a commitment. He added that, during this hearing, one was not reviewing the judgment of the Adjudication Board as such - in fact one might understand that Alert Communications Ltd would not agree with the decision - but one was ascertaining whether that decision was a just one;
- *PCI certification*: Dr Mizzi noted that although Alert Communications Ltd stated that this certificate was going to be issued, the fact remains that, up to that day, the certificate had not been issued. He remarked that if there were developments with regards to software development, links with the banks, PCI compliance and such other shortcomings, it was the responsibility and in the interest of Alert Communications Ltd to keep the Adjudication Board informed and one should not expect the contracting authority to chase the bidder as to whether things had been rectified.

Dr Refalo argued that to prefer tenderer/s for delivering requirements in Phase 1 instead of Phase 2 did not entitle the Adjudication Board to award points for that but to give preference to a tenderer who made that commitment in case other tenderer/s got the same number of marks at the end of the adjudication process. He stated that this practice was *ultra vires* as points were to be awarded only as per schedule.

The appellants’ legal advisor disagreed with the argument that there were difficulties to arrive at an estimated price and added that the fact remained that the estimated price was set at Euro 200,000 and therefore the tender had to be evaluated against that price. He contended that the fact that the Adjudication Board did not work out its

calculations on the basis of the estimated price amounted to a serious error of judgment. He also disagreed that Alert Communications Ltd's price was abnormally low so much so that the Adjudication Board did not mention this aspect but instead awarded the highest mark possible to Alert Communications Ltd on the basis of price.

Dr Ian Vella Galea, legal representative of Transactium Ltd, agreed with the submissions made by Dr Mizzi and wished to add that MITTS Ltd was not obliged to accept the cheapest price but it had to accept the most economically advantageous price. At this stage Dr Vella Galea quoted from regulation 27 (4) of the Public Contracts Regulations which stipulated that:

*“Where the award is made to the most economically advantageous offer, various criteria relating to the subject matter of the contract, including but not limited to, price, delivery date, delivery period or period of completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, after-sales service and technical assistance shall be taken into consideration.”*

He remarked that in Transactium Ltd's reasoned reply dated 6th May 2008, third para. of page 1 they eliminated the price component from the overall points awarded and it resulted that with regard to the other criteria Alert Communications Ltd was awarded 663 points or 58% while Transactium Ltd was awarded 1078.5 points or 94%. He argued that the difference between the solution of Transactium Ltd and that of Alert Communications Ltd was that Transactium Ltd had experience in this sector and its solution was tried and tested whereas the latter still had to obtain the PCI certification. He maintained that the contracting authority was not obliged to accept the bid by Alert Communication Ltd because of the price as that was one of the criteria but not the only criterium.

Mr Kenneth Cassar, Managing Director of Transactium Ltd, explained to the PCAB that in terms of experience, Transactium Ltd had connections with banks in Malta – they ran the system of BOV – Europe and the U.S. and that if Transactium Ltd were to obtain this tender it would increase its business in terms of the number of merchants and transactions by about 10%. He concluded that that was the level of experience and the infrastructure that Transactium Ltd had in this line of business.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 29.04.2008, and also through their verbal submissions presented during the public hearing held on the 25.06.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note of all the documentation presented;

- having during the public hearing heard and subsequently, thoroughly deliberated upon, all points raised by all witnesses and other interested parties' representatives;
- having also noted that whilst the appellant Company was still not certified as PCI (Payment Card Industry) compliant at the time when this tender was being adjudicated upon and even up to date of the hearing, yet it was not disqualified for not having this certification and that, notwithstanding, this requirement, albeit mandatory, did not have much bearing on the overall result;
- having noted the arguments brought against and the justifications raised in favour of the granting of the 'bonus points';
- having also taken cognizance of the issues relating to the site visit conducted at the bidders' premises;
- having taken into consideration the points raised by all parties concerned regarding the estimated value of the tender;
- having reflected on the remarks made during the hearing in connection with the huge variance between the prices submitted by the bidders in their bid;
- having noted and deliberated upon the validity of the arguments brought about by the appellant Company regarding the acceptable profit margin considered in the Company's quoted pricing structure;
- having heard Ms Cassar's explanation in respect of matters relating to connectivity with Banks, as well as, both Mr Sultana's and Mr Camilleri's counter claim in regard

reached the following conclusions, namely, the PCAB:

1. agrees that 'bonus points' should not have been resorted to by the Adjudication Board as these were not contemplated in the Tender Document;
2. acknowledges that with regards to the verification of the attainment of the PCI certification, the onus was on the appellant Company to inform the Adjudication Board, especially, considering that this was a mandatory requirement and that, in any case, the formal certification had not been issued even up to the date of the hearing;
3. is generally satisfied with the explanations given by the Adjudication Board members with regards to pricing issues, especially, anything related to the discussion which ensued during the hearing in connection with a more pertinent market price estimate reflecting more existing scenarios and additional requirements dictated by a more demanding market;
4. notices that, nowhere during the hearing and in the documentation submitted by all parties concerned, has it transpired that the formula used to allot marks for the tendered price was in any way, specifically designed for anyone

participating in this tender since the said formula has been used by MITTS Ltd on various occasions in the past. This Board feels that the Adjudication Board has acted within the parameters of reasonableness. Therefore, the PCAB should not go into the merits of whether the formula was the most suitable in the circumstances and whether if another formula had been used, this would have favoured more the appellant company. To do so would only have the effect of favouring one tenderer over another and would therefore invalidate the whole process.

5. feels that, overall, it is quite evident that, at least, at the time of adjudication, the appellant Company, albeit in many ways compliant, yet, has generally demonstrated a lack of adequate preparedness to provide the contracting authority with the requested comfort as compared to the extent of peace of mind provided by some of the other bidders, particularly the awarded bidder.

As a consequence of (1) to (5) above this Board finds against the appellant Company.

Due to the fact that this Board does not consider the appeal lodged by appellants to have been frivolous, it recommends that the deposit submitted by the said appellants be refunded in its entirety.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*25 July 2008*