

## **PUBLIC CONTRACTS APPEALS BOARD**

**Case No. 131**

**CT 2667/2007 - MCAST/2007/2003**  
**Tender for Cleaning Services at all MCAST Sites**

This call for tenders was published in the Government Gazette on 30.11.2007.

The closing date for this call for offers was 22.01.2008.

Five (5) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', Gafa Safeway Cleaners Ltd filed an objection on 18.04.2008 against the award of the tender in caption to MCCA Co 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 16.07.2008 to discuss this objection.

Present for the hearing were:

**Gafa Safeway Cleaners Ltd**

Mr Joe Sammut	Accountant
Ms Antoinette Gafa	Executive Director

**Evaluation Committee**

Mr Paul Busuttil	Chairman
Mr Kevin Bonnici	Member
Mr Mario Attard	Member

**MCCA Co Ltd.**

Dr Joseph Arrigo	Legal Representative
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**Department of Contracts**

Mr Anthony Cachia	Director (Operations)
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After the Chairman's brief introduction, Mr Joe Sammut, acting on behalf of Gafa Safeway Cleaners Ltd, the appellant Company, was invited to explain the motive which led to the appellants' objection.

Mr Sammut stated that the motives of the objection had been indicated in his reasoned letter of the 21.04.2008. He claimed that the complaints related mainly to 'experience and references' and to 'human and capital resources', alleging that the points allocated under these selection criteria were subjective.

Furthermore, Mr Sammut claimed that when his client had requested information regarding the criteria and the methodology used in awarding points in the course of the adjudication process, the information was not made available to them. He explained that all they knew was that the points were awarded as follows:

- 70% of the marks for price
- 15% of the marks for 'experience and references'
- 10% of the points for 'human and capital resources' at time of submission of tender
- 5% of the points were given for green procurement regulations

With regard to 'human and capital resources', he pointed out that there was a discrepancy between what was stated in the tender document - page 3 under section 4.2 Technical Offer 'Quality Management Plan', viz:

*It must also contain details of Capital Human Resources employed at time of submission of tender...*

and the evaluation grid at Annex V of the tender document where this was referred to as:

*Resources: Human and Capital at time of submission of Tender*

Mr Sammut remarked that, in this case, the Adjudication Board had issued two reports, one on the 11.03.2008 and the other on the 7.04. 2008 with the result that the second report overturned the first two placings that emerged from the first report.

**The issue of two adjudication reports:** Reacting to the appellants' claim and in reply to a specific question by the PCAB, Mr Paul Busuttil, Chairman of the Adjudication Board, explained that they had drawn up two reports because in their first evaluation exercise, under the 'human and capital resources' selection criteria, the Adjudication Board had decided to award points only on human resources because none of the tenderers gave any information on capital. They were of the opinion that, in this way, all tenderers were treated on an level playing field. However, Mr Busuttil added that they had to submit a fresh report because the Department of Contracts requested the Adjudication Board to award points also on the basis of capital as required in the award criteria published in the tender document.

**Capital:** Mr Busuttil stated that with regard to 'capital', none of the tenderers, including the appellant Company, submitted any details or sought any clarification thereon. He explained that although there were different types of capital, i.e. share

capital, working capital and so on, the Adjudication Board decided to award points on the basis of the tenderers' share capital because this was fixed and because such information was obtainable from the Malta Financial Services Authority (MFSA) as it was in the public domain.

At this stage, the Chairman PCAB observed that the fact that none of the five tenderers requested any clarification in this regard meant that it was either (a) crystal clear or else that (b) it was not clear at all and yet the Adjudication Board assumed or decided to evaluate on the basis of 'share capital'; the PCAB's Chairman queried whether any tenderer was penalised by resorting to this exercise.

Mr Busuttill countered that *Annex V* to the tender document was clear enough, placing emphasis on the fact that no one asked for more information with regard to capital. Furthermore, Mr Busuttill argued that if one were to consider other types of capital, apart from share capital, then one would have had to go into the accounts of the companies that submitted tenders.

The Chairman PCAB asked whether the Adjudication Board considered 'share capital' with a view to assessing the viability of the tenderers, in which case, he argued that 'working capital' was another aspect that should have been taken into consideration as it was more relevant. He pointed out that there were examples where firms with a considerable amount of share capital had to fold because of mismanagement and/or poor profitability.

Mr Busuttill explained that the tender document specified the criterion with regard to 'capital'.

Mr Sammut, intervened and remarked that he did not query this aspect prior to the closing date of tender because he claimed that, as a professional accountant, he could not understand what was meant by '*details of Human Capital Resources*' in page 3 of the tender document. Also, the appellants' representative argued that the tender document did not specify if it was referring to 'share capital', 'issued', 'authorised' or 'paid up share capital' and so forth. Furthermore, Mr Sammut claimed that the *Evaluation Grid* did not concern the tenderers as such as it was regarded as a tool to be applied by the Adjudication Board.

The Chairman PCAB stated that in 'management theory' one comes across the technical term 'human capital resources'. Moreover, he remarked that one should not expect tenderers to watch out for missing commas and that it was up to the contracting authority to ensure that the tender document was issued correctly. He observed that, whilst, professionally, he was aware of the difficulties associated with the term 'capital', yet, he added that what troubled him more was an adjudication process that took into account the 'share capital' but did not take into account also the 'going concern' aspect because there were companies with sufficient 'capital' but with no viability. He opined that the contracting authority should gain little comfort in dealing with a company with a lot of capital without assessing its operational performance.

The Chairman PCAB remarked that

- (i) the question was whether 'share capital' was crucial to the adjudication process because, in his opinion, the Adjudication Board should have been more interested in the 'going concern' and the viability of the firm

and

- (ii) it was difficult for him to understand how the Adjudication Board altered the first report with the second one on the basis of 'share capital'. He commented that Mr Busuttil, as a professional accountant, must have felt a bit awkward to adjudicate on this criterion.

PCAB members opined that, in these circumstances, the Adjudication Board should have either opted for a reissue of the tender, or else, it should have requested tenderers to submit the missing information.

Mr Busuttil commented that his Board had to adjudicate according to the tender document. He admitted and agreed that if this call for tenders were to be re-issued this issue would have to be dealt with in a different manner in the tender document. He agreed with the Chairman PCAB that, on its own, the 'share capital' was not good enough to assess whether a Company was sound and healthy. He added that, given the benefit of hindsight, every detail of the adjudication process would be seen under a magnifying glass.

Mr Busuttil drew the attention of those present that this aspect of the adjudication process carried only 5% of the points awarded to which the PCAB observed that, in this particular case, the 5% was enough to tip the balance and so one had to make sure that in future this situation would not arise.

Mr Busuttil explained that the Adjudication Board awarded a point for every reference produced by tenderers arguing that in its deliberations the Board had to reflect the difference between a tenderer that produced, say, ten references and a tenderer that produced, say, fifteen references.

Mr Sammut pointed out that the tender document did neither specify that one point would be given to each reference produced nor did it specify the amount of references required or requested. He expressed disbelief at the approach adopted by the Adjudication Board in this respect and even referred to it as an insult to his intelligence.

The general comment of PCAB members in this respect was that it was not reasonable to allocate one point for each reference produced irrespective of which entity issued the reference and in respect of which job, i.e. whether it was issued by a large company in respect of an extensive contract or issued by a small firm for a one-off job.

Mr Busuttil contended that the Adjudication Board tried to act as fair as possible, however, he did concede that references were rather subjective and that one could not tell what exactly they stood for. He remarked that the points awarded for references constituted only 5% of the total.

The Chairman PCAB observed that, considering that the points awarded to Gafa Safeway Cleaners Ltd and MCCS Co Ltd were 92.9 and 91.9 in the first report and 92.04 and 96.18 in the second report respectively, the points awarded for 'capital' and the points awarded for 'references' were crucial to the final outcome of this adjudication process.

Mr Sammut remarked that he had to again point out that the second report overturned the outcome of the first report adding that, had the tender document indicated that a point would be awarded to each reference produced, his client would have presented one hundred of such references.

Dr Joseph Arrigo, legal representative of MCCS Co Ltd, the recommended tenderer, informed the PCAB that his client could not attend the hearing and that he had no comments to make.

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

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 21.04.2008, and also through their verbal submissions presented during the public hearing held on the 16.07.2008, had objected to the decision taken by the General Contracts Committee;
- having taken note that the Adjudication Board had drawn up two reports;
- having considered the explanation given by Mr Busuttill as to why they had to submit a fresh report which was largely attributed to the fact that the Department of Contracts had requested the Adjudication Board to award points also on the basis of 'capital' as required in the *award criteria* published in the tender document;
- having observed that (a) whilst none of the tenderers, including the appellant Company, had submitted any form of detail as regards 'capital', at the same time, the PCAB also observes that (b) the fact that none of the five tenderers requested any clarification relating to the real meaning as regards 'capital' (i.e. whether this was referring to share capital, working capital and so on), meant that it was either (1) crystal clear, or else, that (2) it was not clear at all;
- having also noted that the Adjudication Board decided to evaluate these tenders on the basis of 'share capital' arguing that if one were to consider other types of capital, apart from share capital, then one would have had to go into the accounts of the companies that submitted tenders;
- having also taken cognizance of the fact that during the hearing, the Chairman of the Adjudication Board admitted and agreed with the PCAB's observation that (a) if this call for tenders were to be re-issued this issue would have to be dealt with in a different manner in the tender document, and (b) on its own, the

‘share capital’ was not good enough to assess whether a Company was sound and healthy ;

- having taken into consideration the fact that, according to the Adjudication Board’s Chairman, the ‘capital’ issue, deliberated upon during the adjudication process, carried only 5% of the points awarded;
- having heard (a) Mr Busuttill how, as part of its deliberation process, the Adjudication Board decided to, arbitrarily, award a point for every reference produced by tenderers, (b) Mr Sammut point out that the tender document did neither specify that one point would be given to each reference produced, nor did it specify the amount of references required or requested;
- having also heard Mr Busuttill concede that ‘references’ were rather subjective and that one could not tell what exactly they stood for;
- having considered the fact that, according to Mr Busuttill, the points awarded for references constituted only 5% of the total;

reached the following conclusions, namely:

1. As regards the use of ‘share capital’ as the only gauge to judge a Company’s financial standing, the PCAB feels that the Adjudication Board should have considered additional key performance indicators (*KPIs*) giving a better overall picture of a bidding Company’s ‘going concern’;
2. Albeit, during the hearing, the Chairman of the Adjudication Board stated that the part concerning the ‘capital’ issue resulted in 5% of the total marks allocated, the PCAB contends that, in this particular case, the 5% was enough to tip the balance, thus turning out to be highly pivotal;
3. The PCAB cannot but strongly disagree with the way the Adjudication Board arbitrarily decided to award one point for each reference produced regardless of which entity issued the reference and in respect of which job, i.e. whether it was issued by a large Company in respect of an extensive contract or issued by a small firm for a one-off job;
4. The PCAB, observes that due to the fact that (a) in the first report, the points awarded to Gafa Safeway Cleaners Ltd and MCCS Co Ltd were 92.9 and 91.9 respectively and (b) in the second report these were 92.04 and 96.18, the anomalous and erroneous methodology adopted and *metrics* used by the Adjudication Board ended up being crucial to the final outcome of this adjudication process, negatively effecting the appellant Company’s bid.

As a consequence of (1) to (4) above this Board finds in favour of the appellant Company.

Furthermore, this Board recommends that this tender be re-issued including a more clearly defined tender document which could be unequivocally interpreted by all prospective interested participants.

Finally, the PCAB recommends that the deposit submitted by the said appellants be refunded in its entirety.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*1 August 2008*