

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 135**

#### **Advert No. CT/N/4/2008 - CT 2402/ 2008**

#### **Service Tender for the Provision of ICT Training Programmes on behalf of MCAST (MCAST/BTEC First Diploma in IT Practitioners)**

This call for tenders was, for a total contracted maximum budget of € 600,000 (approximately, Lm 257,590) – departmental estimate which was based on € 2,185 excl. VAT per student - was published in the Government Gazette on 26.08.2008. The closing date for this call for offers was 11.09.2008.

Five (5) different tenderers had submitted their offers.

Computer Domain Ltd filed an objection on 03.10.2008 claiming that the General Contract Committee's intention to allow all tenderers, namely Messrs

- Key Services Ltd /CC Training Ltd
- Future Focus Ltd
- STC Training Ltd
- St Martin's Education Services
- Computer Domain Ltd

to continue to be evaluated in the adjudication process went against the original findings of the Adjudication Board.

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 14.11.2008 to discuss this objection.

Present for the hearing were:

**Computer Domain Ltd.**

Mr Nick Callus	Managing Director
Dr Edward Gatt	Legal Representative

**Key Services Ltd /CC Training Ltd**

Mr Steve Casaletto	
Dr Martin Fenech	Legal Representative

**Future Focus Ltd**

Mr John Galea	
Ms Rosanne Galea	Managing Director
Dr Peter Fenech	Legal Representative

**STC Training Ltd**

Mr Patrick Pullicino	
Mr Paul Vella	

**Malta College of Arts, Science and Technology**

Mr Paul Attard	President of the Board of Governors
Mr Mario Pace	Deputy Director
Dr Peter Caruana Galizia	Legal Representative

**Adjudication Board**

Mr Juan Borg Manduca	Chairman
Mr Peter Camilleri	Secretary
Ms Fabianne Ruggier	Member
Mr Rosario Cuschieri	Member
Mr Ray Mangion	Member

**Department of Contracts**

Mr Francis Attard	Director General Contracts
Ms Jacqueline Gili	Secretary, General Contracts Committee

**Absent**

Albeit St Martin's Education Services, one of the recommended bidders, were informed about the hearing, yet, none of their representatives was present.

The Chairman of the Public Contracts Appeals Board (PCAB) opened the public hearing by laying down the procedure which all parties had to follow during the session ahead.

However, prior to the commencement of the said hearing, the Chairman PCAB made a formal statement about the fact that the hearing had been preceded by extensive media coverage wherein this Board was erroneously implicated for the delays that some 600 students were encountering in starting their scholastic year.

He claimed that, in the first instance, the track record of decisions taken by this Board to date, almost six years after it had originally been appointed, confirmed that the PCAB never procrastinated on cases that were referred to it. Furthermore, the PCAB's Chairman said that the fact that the Board was, at that moment, holding separate hearing sessions in connection with six different appeals, more than amply demonstrated the level of responsibility it shoulders and the efficiency that this Board had managed to achieve since the current set-up was appointed.

Keeping the number of pending cases to an absolute minimum in an environment which incessantly saw a huge annual escalation in work load brought about by a greater propensity of bidders to appeal, sometimes frivolously, was a tremendous task. However, fully cognizant that, regardless of certain parameters which, *ab initio*, may seem untenable, yet it shoulders its responsibility in a way as to ensure that, in all circumstances, in a transparent and equitable manner, to the best of the respective members' analysis of facts, ultimate objective judgement and absolute reasonableness, overall justice could prevail.

Additionally, commented the PCAB's Chairman, the PCAB, without ever distinguishing amongst the value of a tender in deliberating on appeals lodged, does its utmost to ensure that no time is wasted unduly. This objective and efficient 'modus operandi', which follows its *raison d'être*, and applied *sine qua non*, further accentuates itself in instances when delays in the adjudication process could imply that, nationally, Malta could lose out on EU funds in instances where appeals lodged would be relating to tenders which would be, partially, financially supported through EU funding.

Also, stated the Appeals Board Chairman, the PCAB has always given precedence to appeals lodged in connection with the award of contracts relating to issues which are very close to the community at large, particularly health, utilities and education. Undoubtedly, the public hearing convened in this instance fell in one of these category types and, in line with this consistent approach, the PCAB would never contemplate a scenario where, in an irresponsible manner, it would be depriving some 600 students from commencing an educational programme, in this instance an ICT course, a programme which should have seen the light of day some couple of months before the hearing of this session.

At this stage, the Board's Chairman made it amply clear that, notwithstanding, the PCAB would never tolerate any pressure from anybody (including a handful of public servants, as well as, anyone who may have a political agenda coming from any side of whichever local political sphere they represent) to push the said Board to arrive at a hasty decision. Albeit the PCAB, emphasised the Board's Chairman, was highly

aware of the fact that some 600 students in question were still waiting for a date to commence their respective studies, yet, regardless of the circumstantial parameters it was deliberating in, the PCAB was also duty bound to ensure that the legal and procedural *iter* had to take its time so that an objective decision could be arrived at. It is not fair, exclaimed the PCAB's Chairman, for, say

- a. public officials and technocrats to, very often, draw up faulty and , occasionally, senseless specifications which give rise to a great amount of misunderstanding, a huge need for endless clarifications and erroneous interpretations of parameters by both Adjudication Boards and tenderers alike and then, should there be an appeal lodged against such award, the PCAB is expected to decide within a few days;
- b. public officials and Adjudication Boards to take months – in a handful of occasions, up to almost two years or so – to award a contract and then, should there be an appeal lodged against such award, the PCAB is expected to decide within a few days.

The Chairman of the PCAB explained that the law gives the said Board the right to view all the relative documentation (pertaining to the tender in connection with an appeal lodged by any complainant) before scheduling dates for the hearing of appeals. He said that in this particular case, due to police investigations which had preceded this public hearing, all relevant documentation had been kept under lock and key. As a consequence, it was not possible for the PCAB to commence its preparatory work before, at least, the 30 October 2008 when the PCAB was informed by the Director of Contracts that it could proceed following receipt of formal instructions received by the Director of Contracts himself from the police force member who had been assigned to investigate some allegations which had been publicly stated in connection with the award of this contract.

Furthermore, it was also pointed out that, following receipt of these instructions, the PCAB needed to seek legal advice to ensure that it was, judicially and administratively, correct were it to convene a public hearing prior to the conclusion and publication of the police investigations. It was pointed out that after receiving the necessary clearance, the PCAB wanted to accelerate matters so that the students would not continue to suffer because of administrative procedures and, as a result, it managed to convene a public hearing within a few days.

Finally, prior to proceeding with the hearing of this appeal, the Chairman, PCAB emphasised that, during the hearing which was about to take place, the Board would not be tolerating 'fishing expeditions' and that all parties had to abide by the reasons in the appellant Company's letter of objection and facts presented. He further explained that the PCAB's only interest was to ensure that the adjudication process was carried out correctly and transparently and that all participants were treated equally.

At this point, Dr Edward Gatt, the legal representative of Computer Domain Ltd, the appellant Company, was invited to explain the motive which led to the objection.

Dr Gatt commenced his intervention by stating that the objection raised by his client was, basically, based on two issues.

He said that their first complaint dealt with the awarding of marks. Dr Gatt explained that it had come to their knowledge that when the marks of the bidders were processed by the Adjudication Board that was evaluating the tenderers' proposals, these, together with their conclusions, were referred to the Department of Contracts. He contended that, at this stage the marks awarded to all bidders, including those given to his client, were conclusive and that these were forwarded to the Department of Contracts as a final report. The appellant Company's legal representative added that they also had information that all other bidders who participated in this tender did not achieve the minimum score required to qualify for this contract. Dr Gatt proceeded by saying that, subsequently, the Contracts Department sought clarifications from the Adjudication Board because, *prima facie*, it seemed that the recommendations being suggested by the Adjudication Board were not in tune with the Tender specifications. Dr Gatt continued by saying that, as a result of this anomalous scenario, the Adjudication Board re-examined the matter and a second set of marks was referred back to the Department of Contracts. The appellant Company's representative claimed that, in this second instance, the marks given to all bidders made them eligible for award. The appellant Company's lawyer maintained that, instead of the tender being awarded to the only tenderer that, in the original report, had exceeded the threshold of 70 marks as stipulated in the tender document, in the second instance, the Adjudication Board recommended that all five participating bidders would be eligible together for the award of the said tender. Dr Gatt sustained that this second exercise, whereby the Adjudication Board had increased the scores of the other bidders, was irregular and should not have taken place. Apart from this, the participants were not informed about this exercise and they got to know about it afterwards.

Dr Gatt said that their second complaint dealt with the selection criteria. He claimed that they were aware that, amongst the other companies who became eligible following the second exercise, there were some of the companies which did not meet the established criteria, such as

- five years work experience in the teaching of ICT
- a valid licence as a tuition centre issued by the Education Department
- premises that are accessible for persons with disabilities.

The appellant Company's lawyer said that after the second exercise, MCAST carried out site visits to establish whether the bidders satisfied the selection criteria included in the tender document. He alleged that, from the site visits carried out, it resulted that the premises of, at least, three of the participating companies did not have disability access and therefore should not have qualified. They contended that such an exercise should have been carried out during the evaluation process.

Dr Gatt claimed that when one considered (i) the incorrect manner in which the marks were changed in the second exercise and (ii) the fact that there were companies which did not satisfy important criteria and, as a result, should not have even been considered in this evaluation process, they were of the opinion that their appeal should be upheld.

In reply to a specific question by the PCAB, Dr Gatt said that after hearing all evidence it would result that the only company that satisfied all the selection criteria of the tender and that should be awarded the tender was Computer Domain Ltd, the appellant Company.

Dr Peter Caruana Galizia, legal representative of MCAST, responded by stating that the appellants' representative did exactly what the PCAB had requested him not to do – a 'fishing expedition'. He contended that all five members in the Adjudication Board agreed that each and every tenderer qualified in their technical offer.

MCAST's lawyer explained that any revisions in points were carried out internally and prior to final adjudication. He insisted that there had been continuous consultation between the Adjudication Board and the Director of Contracts and that the former was continuously guided and acted on the advice given by the latter. Dr Caruana Galizia said that it would be proved that, from the very beginning, the Adjudication Board was unanimous in their opinion that each tenderer qualified for this contract.

With regard to the selection criteria, Dr Caruana Galizia said that the Adjudication Board based its decision on declarations submitted by all the bidders. He contended that if it resulted that such declarations were false then there would be repercussions. For example, stated Dr Caruana Galizia, one of the premises indicated by the appellant Company could not be considered because no MEPA permit had been issued. However, he proceeded by arguing that all the other premises were covered by full MEPA permits and such permits were only issued if the premises had disability access.

Dr Caruana Galizia pointed out that, although it seemed that the appellant Company was not insisting on other reasons indicated in their letter of objection, they were still in a position to contest them all.

Dr Peter Fenech, legal representative of Future Focus Ltd, intervened by stating that, due to the fact that the appellants' legal representative stated that they were aware of certain information, he wanted to draw the PCAB's attention to Clause 14 of the tender document wherein it was specified that if a tenderer had or obtained information during the process of examining, clarifying, evaluating and comparing tenders, such tenderer would be automatically disqualified from these procedures. Dr Fenech explained that he was raising this point so that, if it resulted from this hearing that they obtained such information, the PCAB would be cognizant of this article.

Dr Martin Fenech, legal representative of Key Services Ltd/CC Training Ltd, concurred with Dr Peter Fenech's statement and asked the PCAB to take note of the information that would be mentioned during this hearing because it was not fair that his clients would be subjected to information obtained from the criminal investigation.

At this point, the Chairman PCAB pointed out that one of the legal issues that they had to clarify when the PCAB was informed that it could proceed with the convening of this hearing was that they would not encroach on others' investigations even though the law made a distinction between criminal and civil investigations and

proceedings. However, the PCAB's Chairman continued, that in order to ensure that this Board would, even remotely, not be unjustifiably implicated, the PCAB did not even want to have access to documentation that could be required for police criminal investigations earlier than necessary.

At this point, Dr Martin Fenech clarified that he was not referring to the PCAB but to individuals who could use certain information that was obtained through the criminal investigation.

Dr Gatt said that it appeared that all this was triggered off from his opening statement. He said that they did not have any interest in doing 'fishing expeditions' since their only interest was that justice was done to his client. The appellant Company's lawyer sustained that even his client was subjected to police investigation.

During these proceedings

- Mr Juan Borg Manduca            Chairman, Adjudication Board
- Mr Francis Attard                Director General (Contracts)
- Mr Mario Pace                    Deputy Director ITC Institute
- Mr Peter Camilleri               Secretary, Adjudication Board

took the witness stand and gave their testimony under oath.

At this stage Dr Gatt commenced his cross-examination of Mr Borg Manduca, Chairman, Adjudication Board, who, *inter alia*, testified that the evaluation exercise was carried out in two parts, namely the Adjudication Board availed of the:

- (i) *Administrative Compliance Grid* to assess the compliance of each of the tenderers with the essential requirements of the tender dossier including the selection criteria under 3(c)

and

- (ii) *Evaluation Grid* to assess the technical offers of the tenders which had been established as being administratively compliant.

Mr Borg Manduca said that during the first part they had sought advice from Mr Francis Attard, Director General, Contracts, because they had problems regarding MEPA permits and accessibility facilities. The witness claimed that he was advised to ensure strict compliance with the tender conditions in a way that if, say, the tender document specified the need for premises to have a MEPA permit then tenderers had to provide a MEPA permit and if the tender stipulated that the premises had to be accessible for persons with disabilities they had to ensure that tenderers satisfied this requirement. The Chairman of the Adjudication Board testified that he could confirm that all bidders had formally declared that the premises being offered had access for disabled persons.

With regard to the second part of the evaluation process, which dealt with the Evaluation Grid, Mr Borg Manduca explained that against each of the 10 different items there were 10 points and that, at the back of the tender document, there were

guidelines in respect of each item which were of assistance during the evaluation process. He declared that one of the Board members read the tender response of each bidder and every Board member, on an individual basis, gave points, including remarks where it was felt necessary. After this process, continued Mr Borg Manduca, they gave all the documentation to Mr Peter Camilleri, Secretary of the Adjudication Board who worked out the average and drew up the report, a copy of which was referred to the Director General, Contracts. The witness said that it was normal practice that before the final report was referred to the General Contracts Committee (GCC), a report was examined by the Department of Contracts to ensure that it was in order.

At this stage Mr Borg Manduca stated that the DG Contracts brought to the Board's attention the fact that the final conclusion and recommendation made by the Adjudication Board did not reflect the content of the tender specifications in its entirety as the report's conclusion did not match with particular conditions specifically stated in the Tender document as regards the individual score threshold. Yet, despite the fact that, *prima facie*, it appears that the Board was inconsistent, yet, this was done in good faith as the evaluation process more than amply stated that all bidders were of a highly acceptable standard, an observation which reflected in leading the Board to recommending that all bids would be accepted.

In reply to specific questions by Dr Gatt, Mr Borg Manduca confirmed that in their original report only Computer Domain Ltd had exceeded the threshold of 70 points. Furthermore, the Chairman of the Adjudication Board declared that, during the evaluation process, he was under the impression that the threshold was fixed at 50 points. Mr Borg Manduca insisted that it was a genuine mistake.

He testified that this threshold was not established by the Adjudication Board as this was included on page 9 of the tender document under *Section 13.2 Evaluation of financial offers* wherein it was stipulated that:

*'Upon completion of the technical evaluation, the financial offers for tenders which were not eliminated during the technical evaluation those tenderers which have achieved an average score of 70 points or more will be evaluated.'*

The witness also remarked that in this particular tender they did not need to evaluate the financial offers because the price was already established in the tender document.

Dr Caruana Galizia intervened by stating that, in this particular instance, there was no financial offer because the price was set at € 2,185 (excluding VAT) per student per annum and that the Adjudication Board was only responsible for the evaluation of the technical offers.

When asked by Dr Gatt whether all five members were not conscious of the 70 points threshold, Mr Borg Manduca replied that he was not stating that all five were not aware of this threshold but that he, personally, did not realise that the pass mark was 70 points. The witness explained that he had informed the other members of the Adjudication Board that there was a misunderstanding or a misconception about the

threshold and who wished to revise the points was allowed to do so. He declared that three out of five members decided to revise the marks.

In reply to other questions by the appellant Company's lawyer, the Chairman of the Adjudication Board said that the Board was, ultimately, analysing bids submitted by companies with whom MCAST had already worked for two years and he knew that they were all capable of providing ICT courses. If this was not the case he would not have recommended that all companies should qualify. Mr Borg Manduca acknowledged that there was mental conditioning in the sense that he allocated the points on the basis of a 50% pass mark. He explained that the reason why he had changed the points was that when it was known that the pass mark was not 50 points he had to evaluate on a pass mark of 70 points. At this point Mr Borg Manduca placed emphasis on the fact that, in both instances, the conclusion of the reports was the same and that only the points of all the participating tenderers were changed in the final report.

Dr Gatt said that, once it had been declared that the Adjudication Board was requested to review the report wherein the marks given did not corroborate with the conclusion and in the final report all the ICT providers exceeded the pass mark of 70 points, he understood that there were two reports. Mr Borg Manduca replied in the affirmative while the PCAB confirmed that it had only seen one report.

Dr Gatt insisted that that the first report should also be made available to the PCAB.

During his testimony, Mr Borg Maduca also testified that the purpose of this tender was not for the contracting authority to avail itself solely of the services provided by one tenderer but, preferably, that the said authority would work with all the service providers who would have ended up meeting the established criteria.

When asked by the PCAB to state whether it was possible for one entity to satisfy all of MCAST's requirements, Mr Borg Manduca replied that such a possibility could have materialised had the other bidders fail to meet the established criteria.

The Chairman of the Adjudication Board stated that

- (i) three tenders were issued for different types of courses, namely, MCAST Foundation Certificate in Computing; MCAST/BTEC First Diploma for IT Practitioners; MCAST/BTEC National Diploma in Computing
- (ii) for each tender the bidders had to indicate the capacity of students that they were able to take
- (iii) this particular tender had a capacity of about 170 – 200 students.

When Mr Borg Manduca replied in the affirmative when asked by Dr Gatt to state whether he agreed that his client could accommodate all students, his attention was drawn by the PCAB that, according to the *Summary of Tenders Received* (Single Package Procedure), Computer Domain Ltd's maximum intake was 120 students.

Continuing with the cross-examination of the witness, Dr Gatt asked him to state whether they had physically checked the premises to ascertain that the declarations submitted by the bidders were actually correct. The reply given was that it was not the responsibility of the Adjudication Board to carry out such an exercise. Mr Borg Manduca insisted that their duty was to check the declarations that were actually submitted. The Chairman, PCAB intervened to state that if following the award of contracts it would transpire that bidders had made false declarations, they would suffer the consequences contemplated in the law. He also said that, in this instance, one had to point out that the Adjudication Board did not conduct site visits on any of the premises indicated in the tenderers' offers.

On cross-examination by Dr Caruana Galizia, Mr Borg Manduca declared that, when the 70% financial offer threshold became an issue, the points of all the bidders were altered on a 'pro rata' basis. He confirmed that the Board was satisfied that each bid was of sufficient standard to qualify for ICT courses.

Here, Dr Caruana Galizia wanted to know whether the appellant Company would be insisting on other grounds mentioned in their letter of objection because if he did not renounce he would need the witness's testimony. Dr Gatt said that he was not going to renounce.

Dr Peter Fenech intervened by stating that this was procedurally incorrect because Mr Borg Manduca had already been cross-examined by the appellant Company's legal representative and he had a right to cross-examine the witness. Dr Gatt replied that, procedurally, nothing precluded him from re-examining the witness. Dr Caruana Galizia remarked that the appellants could not re-examine the witness on new issues and that he would object to such questions.

At this point Dr Peter Fenech started with the cross-examination of Mr Borg Manduca. In reply to specific questions, the witness declared that

- (i) the Adjudication Board had to carry out a technical evaluation
- (ii) the tenderers had already provided the service to MCAST
- (iii) initially he had drawn the technical specification of this tender but that the threshold clause under the Evaluation of financial offers was included in the tender document by the Department of Contracts
- (iv) during the evaluation process nobody drew his attention that the pass mark was 70% and not 50%

and

- (v) he took it for granted that it was 5 out of 10, the average, as is usually the case.

At this point the PCAB asked the Chairman of the Adjudication Board to state whether this meant that none of other Board members had read the whole tender document. The witness replied that he did not know what the others did but Mr Borg

Manduca declared that he did not read that part relating to the evaluation of the financial offers because he did not think he needed to do so since he knew that there were no financial offers.

When Dr Gatt asked from where did he get the 50% pass mark, Mr Borg Manduca replied that it was an assumption.

Dr Caruana Galizia intervened to state that the final report was correct and according to the tender requirements.

At this point Dr Gatt requested a representative from the Department of Contracts to exhibit a copy of the first report.

On taking the witness stand, Mr Francis Attard, Director General Contracts was cross-examined by Dr Gatt. During his testimony Mr Attard explained that it was according to normal procedure that, when an evaluation report was received at the Department of Contracts, before this was referred the General Contracts Committee (GCC) it was vetted by the Secretaries of the said Committee. He said that the scope of the vetting was not to influence the conclusions of the report but to ensure that the report was consistent. Mr Attard emphasised that it was the GCC that discussed and decided whether the recommendations in the evaluation report were acceptable or not.

The Director General, Contracts, sustained that in this particular case, they noticed that the conclusion that all bidders had qualified to provide this service was in conflict with the points given since it appeared that not all bidders achieved the pass mark of 70%. Hence, in view of this inconsistency, the report was not considered to be acceptable.

In reply to specific questions by Dr Gatt, Mr Attard confirmed that he had received the first report and that he could not exhibit it because, when Mr Borg Manduca's attention was drawn about the matter, the Adjudication Board agreed to withdraw the report. Apart from this, the witness pointed out that all pages of the report had to be endorsed because only the last page was signed by the members of the Adjudication Board.

Mr Attard declared that (1) the meeting with the Chairman of the Adjudication Board and (2) the withdrawal of the report were not minuted in the relative file. The witness said that, in this particular case, there was the time factor which was very pressing and, as a consequence, everything was done verbally.

On cross-examination by the PCAB, the Director General Contracts testified that

- (i) the threshold of the 70 points was usually used in the Single Envelope System
- (ii) the relevant clause was included in the tender document by the Department of Contracts
- (iii) the price of this tender was already fixed

- (iv) this type of contract was known as a *Framework Agreement*
- (v) a tender could either be awarded to one contractor on the basis of price or else the Contracting Authority could fix the price, evaluate who of the tenderers qualified for the provision of the service and therefore such a tender could be awarded to more than one bidder
- (vi) he could not recall that the points given in the first report were changed on a 'pro-rata' basis in the second report

and

- (vii) the conclusion that all companies qualified was consistent in both reports.

On cross-examination by Dr Caruana Galizia, Mr Attard testified that the Department of Contracts assisted the Adjudication Boards by giving advice on procedural matters only and that they never influenced their conclusions. The Director General Contracts also

- a. declared that the first report was never referred to the GCC
- b. categorically denied that he or the GCC, for all that matters, ever requested the Adjudication Board to revise the points

When asked by Dr Peter Fenech whether Clause 13.2 was a standard clause in tender documents, the reply given by Mr Attard was in the affirmative. The Director General Contracts said that before the evaluation process he had discussed with Mr Borg Manduca the procedure that had to be followed but he confirmed that the issue of the threshold of 70% was not mentioned.

At this point, Dr Gatt asked the PCAB to recall the Chairman of the Adjudication Board to the witness stand once it resulted that the first report was not in possession of the Director General Contracts.

When the appellant Company's lawyer asked the witness whether he could exhibit the first report the reply given was in the negative. However, he provided the PCAB with a draft copy of a document which included the final average score given to all companies in the original report. After a few minutes the Chairman of the PCAB verbally declared that the PCAB had just examined a copy of the said document which, under oath, the Chairman of the Adjudication Board (Mr Board Manduca) declared that it was a draft copy of the report which was originally forwarded to the Director General Contracts for initial evaluation and subsequently withdrawn. The PCAB analysed and compared the marks on this document with those included in the final report and observed that the points had approximately increased proportionately on all tenderers.

In reply to a specific question by Dr Gatt, Mr Borg Manduca confirmed that each member reviewed the marks individually and the Secretary worked out the average score.

When, Mr Mario Pace, Deputy Director ICT Institute was called to take the witness stand, he was first cross-examined by Dr Gatt. This witness, who was not a member of the Adjudication Board, testified that, after the court case, he was directed by the Director, Mr Borg Manduca, to conduct site visits on the premises indicated by the private training providers to verify whether their capacity corroborated with what was indicated in the tenderers' offers and disability access. Here, Dr Gatt pointed out that since then the court case had been withdrawn.

Mr Borg Manduca intervened to clarify that the purpose of the site visits was to establish, or rather, confirm the physical capacity of all companies so that they would know how many students could be allocated. The Director, ICT Institute said that in court he had explained that they were going to do a fair distribution of students between all bidders according to their capacity. He said that the appellant Company wanted to know the percentage of students that would be allocated to them for the three tenders because if the number of students was sufficient (300 students were mentioned) they would withdraw the court case.

Dr Gatt responded by stating that their position was still the same, that is, if they were allocated the number of students that reflected their capacity and those who did not comply with the requirements of the tender were disqualified, they would not even have any interest in continuing with this appeal.

Here, the PCAB pointed out that it had not yet been clearly established who of the tenderers was not capable of providing the service.

Continuing with his testimony, Mr Pace said that he had conducted site visits of the premises of the five service providers to primarily verify that their physical capacity corroborated with that indicated in their offers and also to check accessibility. He confirmed that he had drawn up a report on his findings and forwarded it directly to Mr Borg Manduca and that it was not discussed with anyone. When asked about the outcome of this exercise, the witness replied that the report was internal.

Dr Caruana Galizia pointed out that this report was drawn up after the Adjudication Board's recommendation report while Dr Peter Fenech objected to its exhibition because he sustained that it was procedurally incorrect for the PCAB to take cognizance of a report that was drawn up after the Adjudication Committee's decision.

Dr Gatt responded by stating that the *Administration Grid* was to be filled in to check whether the bidders' declarations were factually true or not. The PCAB drew his attention that the *Evaluation Grid* did not reflect what was carried out after the adjudication process. The appellant Company was invited to discuss facts relating to the adjudication process itself and that it would not tolerate anyone to obtain information from such documentation that had been formulated later and that was extraneous to the adjudication process. Also, it was stated that if, after the award stage, it resulted that a tenderer made a false declaration, a claim may be made under the Performance Guarantee and the penalty clauses in the Tender Document.

Then, Dr Peter Fenech proceeded with the cross-examination of Mr Pace, who confirmed that he himself had typed the report and forwarded a hard and soft copy

directly to Mr Borg Manduca. He confirmed that he did not refer its content to anybody else. Mr Pace said that, in fact, when he referred the report to Mr Borg Manduca, he received two telephone calls from one of the service providers but he refused to speak to any one of them.

The PCAB agreed with Dr Gatt's request to postpone the hearing for 5 minutes since he wanted to consult his client on the availability of witnesses.

When the hearing reconvened Mr Peter Camilleri, Secretary to the Adjudication Board was called to take the witness stand.

On cross-examination by Dr Gatt, Mr Camilleri testified that he understood that his duty as a Secretary to the Board was to collect information and the opinion of the members and to compile a report. He confirmed that they had allocated the marks on the basis of the bidders' declarations. When asked about whether he was familiar with the premises indicated by the bidders, Mr Camilleri said that part of his duties as official of MCAST was to liaise with two of the bidders who used to provide ICT courses and declared that he had visited their premises regularly because he had to report after carrying out inspections.

When the witness was asked to state whether he noticed any shortcomings in the tenders' declarations, such as capacity, Dr Peter Fenech objected to this question arguing that, during the adjudication stage, an evaluator could not make use of outside knowledge but only abide by what was included in the offers.

The PCAB pointed out that their understanding was that the site visit exercise was carried out after the adjudication process on the instruction of Mr Borg Manduca in his capacity as Director, ICT Institute and not as Chairman of the Adjudication Board.

In his testimony Mr Camilleri also confirmed that he was not involved or even aware of this exercise. Dr Gatt remarked that the witness had confirmed that they based their adjudication solely on what was declared by the bidders.

When the PCAB asked the parties whether there were other witnesses, the reply given was in the negative and so they were invited to make their final oral submissions.

Dr Gatt said that from the testimony given by the witnesses it appeared that, during the evaluation process, the Adjudication Board was pre-conditioned not to give marks according to the tenderers' capabilities but to divide the tender between all the companies that bid for this tender. He argued that

- (i) if this pre-condition did not exist the Board would not have carried out the second exercise to increase the marks
- (ii) the capabilities of bidders were reflected in the marks given by each member of the Adjudication Board in the first exercise independently of the Board's recommendations that all companies had qualified or of what the pass mark was

- (iii) the Adjudication Board should not have changed the points according to the pass mark but on the capabilities of each bidder and
- (iv) the ideal situation would be that the evaluators should not even know the pass mark in order to arrive to an objective decision.

The appellant Company's legal representative said that the Director General Contracts had confirmed that, in this case, the Department did not keep a copy of the first evaluation report and minutes regarding the inconsistency between the marks given and the conclusions in the first report and the withdrawal thereof. The only reason given as to why the normal procedure was not followed was the urgency of the matter - a time factor. With regard to the first report, Dr Gatt said that first it was stated that this was forwarded to the Department of Contracts, then it resulted that it was withdrawn by the Adjudication Board and, after a lot of effort, they had the average score.

The appellants' legal representative said that the Adjudication Board did not provide evidence to prove that the increase of marks in the second report was due to certain capabilities which they, through an oversight, did not take into consideration in their first report or because afterwards there were new developments. Dr Gatt said that during these proceedings the only justification given was that members of the Adjudication Board did not know that the pass mark in the tender document was 70, which he contended it was very hard to believe. He alleged that the points of all bidders were increased over the pass mark because they wanted that the other bidders would also become eligible for this contract. The appellants' legal representative sustained that this was completely incorrect.

Dr Gatt explained that they were stating that the 2<sup>nd</sup> set of marks should not be considered for the purpose of the award of this tender because these did not reflect different information or the facts on the capabilities of the bidders but were just aimed at enabling each bidder to reach the threshold. He claimed that the only bidder who in the first selection exercise reached the threshold was his client and that the tender should be awarded to that company that was most capable and compliant with the tender. Dr Gatt said that, in view of the above, they felt that their appeal should be upheld.

In his concluding remarks, Dr Caruana Galizia said that if one took into consideration the reasons of objection it would result that during these proceedings the appellants did not bring any proof that

- (i) there was any conflict of interest between some members of the Adjudication Board and any one of the chosen bidders
- (ii) not all bidders satisfied the five *Selection Criteria* referred to under Section 3 (c) of the tender document – all bidders submitted relevant declarations in their bids

and

- (iii) some bidders had recruited experts from the civil service and other agents of the public administration for this tender.

Dr Caruana Galizia stated that, with regard to point 4 referred to in their letter of objection dated 9 October 2008, which apparently, according to the same legal advisor, was the only basis of objection in this appeal, the most important thing was that in both reports the Adjudication Board concluded that the capabilities of all bidders were above average and recommended that all companies should qualify. MCAST's lawyer said that, apparently, some members of the Board conceded that they made a genuine mistake in that they did not know about the 70% benchmark. He pointed out that this was incorrectly included under the financial offer because there was no financial consideration in this tender as the price was already fixed by MCAST. Dr Caruana Galizia said that the mistake was corrected and corrected in time because the whole tendering process involved the Director of Contracts who confirmed that the Department assisted adjudicating boards in the procedure but did not influence the decision. He emphasised that the recommendations in both reports were consistent in that all bidders had qualified and that the student allocation was to take place among the successful bidders.

With regard to the appellants' submission that the Adjudication Board was pre-conditioned to award this tender to all bidding companies, MCAST's lawyer responded by stating that, from the testimony given by Mr Borg Manduca, it was evident that there was never the idea that everybody would qualify even if they were not competent. He claimed that it was a coincidence that all bidders were up to standard.

Dr Caruana Galizia did not agree with what was stated by Dr Gatt regarding the pass mark, arguing that this was not practical because this was a guideline. He sustained that the Adjudication Board did not change their conclusion because every evaluator knew that all bidders qualified - the allocation of points was simply an academic exercise. MCAST's lawyer said that, from the two reports, it resulted that the marks of all bidders had increased, including those of the appellant. He said that according to the Adjudication Board the change of the pass mark from 50% to 70% affected the allocation of points and these were increased accordingly. He reiterated that this was a genuine mistake although he had reservations on the 70% pass mark because it could be argued that it was applicable to the financial offer which was irrelevant in this tender.

Dr Caruana Galizia concluded by stating that on the basis of the above he felt that the appeal should be withheld.

Dr Peter Fenech maintained that the scope behind the evaluation and conclusion was the quality of offers and not the numbers. With regard to the appellants' argument that there was pre-conditioning regarding the award of tender, he sustained that it was not implied during the hearing that there was any pre-conditioning. Dr Peter Fenech claimed that from these proceedings it transpired that the quality of the bidders corresponded to the expectations of the tender requirements and that all bidders achieved more than the pass mark, thus qualifying for award. Although it was acknowledged that the Adjudication Board did not know the pass mark, the most

important thing was the conclusion, which never changed, namely that all tenderers had qualified and that the tender be awarded to all the successful bidders.

Dr Peter Fenech also pointed out that the evaluators had an advantage because all bidders had already provided ITC courses for MCAST and had already delivered what they were requested to provide. It was argued that this (a) tender was not being awarded to the most competent bidder (b) tender's evaluation process was carried out in a way to ensure that all those who qualified reached the expected threshold. He claimed that, if anything, the most competent should be taken into consideration in the next phase, that is, the student allocation to successful bidders. Dr Fenech concluded by stating that it was clear that the issue of the 70% threshold was an oversight, and although it was logical that all would have preferred had it not happened, yet, such occurrence did not change anything in the conclusion that whoever submitted the bid was competent.

Dr Martin Fenech asked the PCAB to reflect on the fact that his client had a right to qualify for this tender if they achieved the average score of 70 points or more. As a consequence, he contended that once they exceeded this threshold, his client had a right to be considered as one of the successful tenderers and, therefore, this appeal should be withheld.

Mr Francis Attard insisted that he had never requested the Adjudication Board to review the marks and that the GCC was only interested in having a report that was consistent. He claimed that the Adjudication Board could have decided to keep the same marks and change the conclusion.

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 09.10.2008, and also through their verbal submissions presented during the public hearing held on the 14.11.2008, had objected to the decision taken by the General Contracts Committee;
- having considered all the points raised by the appellant Company, as well as, all the other interested parties' legal representatives present during the public hearing;
- having taken note of all that was submitted in relation to the 'modus operandi' adopted by the Adjudication Board up to the stage where the latter formally submitted its recommendations to the General Contracts Committee;
- having taken note of the content of all the pertinent documentation made available to it in connection with the adjudication process leading to the recommendations made to the General Contracts Committee;
- having also taken note of the various declarations and statements made under oath by all the witnesses summoned during the hearing;

- having taken cognizance of the fact that, during the hearing, the PCAB could only examine what was declared to be a draft copy of a specific document, namely the first report submitted by the Adjudication Board to the Director General (Contracts), in view of the fact that it seems that original hard copies or any officially certified soft copy had gone missing or superseded by an updated version and turned into a fresh copy, which, in this context is referred to as the ‘second report’;

reached the following conclusions, namely:

A.

1. the failure of all the Adjudication Board members to analyse all the tender document provisions before proceeding with the assessment of offers. This Board cannot but exclaim its amazement in this regard, questioning in the process, as to how could have the Adjudication Board worked on the assumption that the pass mark was set at 50% of the total score when the Tender document had fixed a threshold of 70%! The PCAB cannot condone such unprofessional conduct no matter what excuses are brought about. This Board cannot but argue that had all the Adjudication Board members properly carried out the work they were entrusted with carrying out in the first place, this objection would, in all probability, have not been raised;
2. with regards to the failure of the Department of Contracts to register all proceedings pertaining to this case, the PCAB contends that this Department should have retained a certified true copy of the original report before returning the original copy to the Adjudication Board for review. Likewise, the Department of Contracts should have formally recorded all the proceedings and directives that were exchanged with the Adjudication Board for any future reference;
3. in so far as regards the deficiency of professional ethics demonstrated and the operative security features manifested throughout the adjudication process, this Board cannot but express its utmost concern, particularly relating to:
  - a. the fact that, as has been repeatedly stated under oath by the Chairman of the Adjudication Board, an entire report was superseded by another report without either a hard or, at least, a soft copy of the original report being retained, showing particular amateurish traits in the Adjudication Board’s ‘modus operandi’;
  - b. the fact that the

- i. findings (including the scores given by the Adjudication Board to participating tenderers) which were included in the Adjudication Board's original draft report (which was superseded following the forwarding of same to the Department of Contracts) and an official copy of which was not retained in any of the respective interested parties' files
- ii. same findings referred to (b) (i) above, were not only leaked to the appellant Company, but even published in a section of the media

cannot but generate a great amount of concern to the PCAB as, unfortunately, it seems that leakages of a highly sensitive and confidential nature pertaining to various public tenders, particularly, reports drafted by Adjudication Boards, are becoming a regular occurrence. As a consequence, the authorities are repeatedly, manifestly, being seen to be very soft in reacting to such abuse which has a tendency to become rampant. Furthermore, the PCAB's concern grows deeper when, over the years, little effort has been noticed to put this Board's mind at rest that corporate ethics are constantly being adhered to;

- c. the amateurish way the relative Tender document was prepared. During the public hearing it was noted that, rather than drawing up a specific document, the apposite Departments carried out a cut-and-paste exercise resulting in a disjointed tender document as evidenced by the fact that the reference to the pass mark was included in the financial section when in this particular case no financial considerations were required. The PCAB expects all contracting authorities to exercise greater caution during the drafting process and, in cases where tenders are of a certain magnitude this Board recommends that, at least, pertinent legal vetting should be sought prior to the publication of the tender document.

B Notwithstanding the various operational flaws that this Board has noticed, yet, it is this Board's opinion that the appellant Company has failed to prove that the Adjudication Board had acted in bad faith;

C The PCAB analysed salient documentation in order to ascertain that, overall, the process made logical sense. When analysing the *Summary of Tenders Received (Single Package Procedure)* (signed by Mr Mario Borg and the members of the GCC on 11.09.2008) it was noticed that the respective tenderers had declared their *maximum* intake, as being

Key Services Ltd /CC Training Ltd	80
Future Focus Ltd	80
STC Training Ltd	200
St Martin's Education Services	40
Computer Domain Ltd	120

which clearly demonstrates that not all can be judged in the same way, regardless of the scores attained.

Also, when during the hearing, the PCAB made a calculation of the unofficial document (draft copy of the first report) submitted to this Board by the Chairman of the Adjudication Board while testifying under oath, it transpired that

- i. whilst it is true that all the other tenderers were given higher percentages between the first and the second report, namely,

From 61% to 70%  
From 66% to 74%  
From 64% to 72%  
From 66% to 73%

with 'pro rata' increases ranging between 10.61% to 14.75% respectively, yet

- ii. it is also true that in both instances (the first and the second report) the appellant Company scored the highest score, namely 72% (first report) and 79% (second report) respectively, which also provides enough evidence that a holistic revision was carried out, albeit, all things being equal, one cannot definitely ascertain the real reason why the upward revision of the appellant Company was lower than that of the lowest of the other four which was + 10.61%.

In spite of the above, the PCAB feels that, whilst in the first report the Adjudication Board would have very much acted in good faith considering 50% as a pass mark, it is also possible that a certain mental conditioning could have impinged on the final scores highlighted in the second report where it was noted that the pass mark was 70%.

Yet, this Board has to consider everything within a context where, both in the first and the second report, the Adjudication Board had reached the same conclusion and that the relative changes in the scores between the first and the second report seemed more to prove a justification as to why the same conclusion was arrived at in both reports.

- D This Board also notices the fact that, during the hearing, the appellant Company, consciously, refrained from pursuing all the points raised in the original objection. The PCAB is against 'fishing expeditions' and

it has repeatedly publicly stated so in many cases it presided over. An assumption of wrongdoing without proof of evidence is tantamount to nothing. In spite of the fact that, whilst deliberating on this particular case, a great amount of effort was made by this Board to try to establish whether salient deficiencies identified during the hearing could have, possibly, been attributed to ill intent, yet, in the absence of proper proof in regard presented by the Appellant Company, this Board is not in a position to act 'ultra vires' and create scenarios which *prima facie* do not feature in any way.

Whilst, as a consequence of (A) to (D) above, this Board finds against the appellant Company, yet this Board also recommends that, *inter alia*, when deciding upon the allocation of intakes per qualifying tenderer, the scores attained should be considered along with the maximum student intake declared by each tenderer. This Board is of the opinion that, in doing so, the Adjudication Board would be giving credit where it deserves most.

In view of the above, considering that albeit there were instances which could have given grounds for a tenderer to cry foul, yet, this Board cannot condone the fact that various items of information were attained in an unorthodox manner and, as a result, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be refunded.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*24 November 2008*