

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 148

#### Advert. No. 251/2008 – CT/2608/2008

#### Tender for Developing Leaders for Change and Innovation in Tourism Business Development and CPD for Tourism Senior Management

This call for tenders was published in the Government Gazette and the EU Journal on 5.12.2009.

The closing date for this call for offers was 27.01.2009 and the estimated contract value was € 3,407,925

Three (3) different tenderers submitted their offers.

Following receipt of notification that their offer could not be considered further having been adjudicated administratively non-compliant and therefore excluded from this open tender procedure, which process had subsequently been cancelled, Messrs EMCS Consortium filed an objection on 9.03.2009 against the decision taken in regard by the General Contracts Committee.

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 20.04.2009 to discuss this objection.

Present for the hearing were:

#### **Economic and Management Consultancy Services Ltd (EMCS) Consortium**

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Representative

#### **Where's Everybody**

Mr Lou Bondi	Representative
Mr JP Vassallo	Representative

#### **Malta University Consultancy (MUC)**

Mr Josef Grech	Representative
Ms Ruth Debrincat	Representative

#### **EMCS**

Mr Adrian Said	
Mr Stefano Mallia	

#### **Malta Institute of Management (MIM)**

Mr Lawrence Mizzi	
Mr Ruben Xuereb	
Mr George Papagiorcopulo	

#### **Malta Tourism Authority**

Dr Michael Psaila	Legal Representative
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Dr Kurt Hyzler  
Mr J. Formosa Gauci

Legal Representative

**Evaluation Committee:**

Mr Francis Albani  
Mr John Magri  
Ms Sarah Azzopardi  
Mr Jonathan Sciberras  
Mr Patrick Attard

Chairperson  
Member  
Member  
Member  
Secretary

**Department of Contracts**

Mr Francis Attard

Director General (DG)

After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Dr Adrian Delia, on behalf of EMCS Consortium, explained that via letter dated 25<sup>th</sup> February 2009 the Contracts Department had informed his client that his offer had been found *administratively non-compliant since the appropriate original bank statements were not submitted.*

Dr Delia then referred to clause 3 (c) (page 3 of the tender document) and quoted thus:

*Selection Criteria*

*Article 50 – of the Public Contracts Regulations – Evidence of Financial and Economic Standing*

*(1) Proof of operator's economic and financial standing by supplying the following:*

*(i) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;*

Dr Delia pointed out the contrary to what had been indicated by the Director General Contracts, the tender document and the Public Contracts Regulations make no reference to the term 'original'. He added that eventually it transpired that the shortcoming was limited to the bank statements submitted by the Malta Institute of Management Ltd (MIM).

Furthermore, Dr Delia referred to Regulation 50 (2) of the Public Contracts Regulations which provided that:

*An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.*

Dr Delia gave the following interpretation to this provision: if only one out of the four entities involved was judged, according to Contracts Department and the Evaluation Committee, to have its statements not in order – even though he maintained that that bank statement was in order – the matter should have been resolved by resorting to Regulation 50 (2) and take into account the other entities that made up the consortium.

As a matter of fact, Dr Delia remarked that it was being claimed that the statement in respect of MIM Ltd was not actually a bank statement and that it had been manipulated with since a note in pencil had been inserted (indicating MIM Ltd). Dr Delia contended that the regulations and the tender document did not request a bank statement but appropriate statements from banks and that his client had submitted them.

At this stage, it was noted that the statement in respect of MIM Ltd listed four bank account numbers with the balance against each, apart from the addition of a note in pencil indicating MIM Ltd. Dr Delia maintained that the contracting authority was contending that that was not a bank statement whereas he retained that it was a statement from the bank. He added that it appeared that the contracting authority was stating that the document submitted was not appropriate, was not the original and was not a bank statement. However, Dr Delia maintained that the regulations and the tender document requested neither an original nor a bank statement but “appropriate statements from banks”.

Dr Michael Psaila, legal representative of the Malta Tourism Authority, remarked that from one of the statements submitted – that in respect of MIM Ltd – one could not deduct that that statement actually belonged to MIM Ltd.

At this stage the Chairman PCAB remarked that one had to establish what was meant by a bank statement, i.e. did it mean bank balances or did it include the transactions. He added that it could be the case that a bank account could have had a low or negative balance for a long time but then, the account holder would win the super 5 and put his winnings in the account resulting in a very healthy balance which amount could then be withdrawn the day after. The Chairman PCAB remarked that the balance alone did not reflect the financial standing of an entity but the transactions did.

Dr Delia pointed out that the evaluation report indicated that:

*The names of the companies – which later on it transpired that these referred to MIM Ltd and MUC Ltd– that the statements belonged to were only identifiable by the name of the company being written in pencil on the document, creating doubt as to the authenticity of some*

Dr Delia stated that this showed that the evaluation committee had only a doubt, however, he contended that as with other documents submitted in any tender one had to rest with the declarations made by bidders and if at some stage it would result that such declarations were false then that bidder had to suffer the consequences for that.

Dr Psaila stated that the contracting authority required these statements as proof of the financial and economic standing of the bidder. According to Dr Psaila, the most serious shortcoming was that the account holder was not identifiable so much so that the bank that issued the statement did not identify the account holder by name but that was added on in pencil and the same was applicable to the statement submitted with regard to MUC Ltd. He stated that the way the statements were presented the contracting authority was not sure of who were the holder/s of those bank accounts.

With regard to the statement marked MUC Ltd, Dr Psaila confirmed that (i) it was generated from the internet by the BOV system which statement was acceptable and (ii) that apart from the balance it also showed the transactions.

The Chairman PCAB remarked that the contracting authority, through the Department of Contracts, could have obtained that information from the banks. He added that, nowadays, an electronic bank statement was legally acceptable and that most banks

identify an account by its number and not by the holder's name. The Chairman PCAB held that the contracting authority, through the Department of Contracts, could have sought a clarification on that as that did not amount to negotiation or to a change in the information submitted.

Dr Delia reiterated that in the evaluation report it was indicated that the statements were identifiable, even if through the insertion of the names in pencil, and so the evaluating committee could in actual fact identify the account holders.

Mr Francis Albani, chairman of the evaluating committee, under oath, confirmed more than once that, for the evaluating committee, for a bank statement to be appropriate it had to

- (i) display the account balance
- (ii) be issued by an official and reliable source *and*
- (iii) clearly indicate the name of the account holder

The Chairman PCAB made reference to the statement submitted in respect of MIM Ltd and pointed out that in that case one had the

- (a) balance of each account
- (b) entity that issued the statement was BOV Ltd *and*
- (c) number against each account

The Chairman PCAB argued that, therefore, it would appear that, according to the evaluating committee, what rendered this statement inappropriate was that the name of the account holder was missing.

Mr Albani confirmed that the bidder was excluded because the evaluating committee was not sure that the statements as presented actually belonged to MIM Ltd and to MUC Ltd. Mr Albani remarked that the evaluating committee discussed this matter prior to reaching its decision and that he had an accounting background. Mr Albani confirmed what was stated in the evaluation report dated 19th February 2009 regarding the reasons for disqualification.

Dr Delia remarked that it was pertinent to point out that as further proof of the company's economic and financial standing, besides the statements from banks, the tender document also requested at clause 3 (c) (ii) *the presentation of balance-sheets or audited accounts for the years 2005/6/7 and extracts of 2008* which his client had submitted.

Mr Albani confirmed that when evaluating administrative compliance the evaluating committee took also into account the submission of the audited accounts. He added that since this tender involved EU funding one had to be extra vigilant because the EU auditors would look into all the details of the contract. The Chairman PCAB stressed that a tendering process had to be correctly and meticulously carried out not because EU funds were involved and so the tender was subject to EU scrutiny but the process should be carried out with equal competence even when Maltese tax payers' funds were involved because even local auditors should scrupulously scrutinise the process. He remarked that EU funds were lost not because of the process itself but because of

mistakes committed, such as in the case under reference, which delayed the process unnecessarily.

It was ascertained at that stage that although the tender document did not request the 'original' statements from the banks, the appellant had submitted the original ones.

The Chairman PCAB remarked that from what he had heard that far, he felt that the evaluating committee did not have a clear idea of what was meant by the term 'appropriate' in the context of the tender because bank account balances did not ascertain the economic and financial standing of a firm. He added that from the evidence given it clearly emerged, time and again, that the evaluating committee judged the appellants' offer as administratively non-compliant because the statements from the banks did not display the name of the companies concerned. The Chairman PCAB declared that that was not a good enough reason for exclusion because an account number was verifiable and that banks dealt with account numbers and not with proper names.

Dr Delia submitted statements from BOV and HSBC to the effect that bank statements generated through the respective bank's secure internet site reflected the current position of that account.

Dr Delia concluded that

- (i) what was requested in clause 3 (c) (page 3 of the tender document) was exactly what was required in regulation 50 of the Public Contracts Regulations
- (ii) his client submitted all that was requested with regard to statements from banks – no reference was made to the production of originals
- (iii) it was clearly indicated to the evaluating committee to whom the bank statements belonged but it had doubts because the company names were put down in pencil and argued that that was one of the cases where it was justifiable for the evaluating committee – if it felt the need - to seek a clarification and
- (iv) the evaluating committee was also in possession of the appellant's audited accounts to collaborate certain financial data.

Dr Psaila submitted that

- (i) in two instances - in respect of MIM Ltd and MUC Ltd - the banks did not identify the account holder by name and, in his view, those statements could not be considered appropriate
- (ii) in order to have proof of economic and financial standing the statement had to contain a transaction history – at that stage the Chairman PCAB drew the attention of Dr Psaila that that consideration was never raised by the evaluating committee but that it was himself (the Chairman PCAB) who introduced that argument

- (iii) insisted that the PCAB should also look into whether the statements from bank submitted by the appellant that did not feature the account's transaction history constituted an appropriate statement from the banks as laid down in the tender document

The Chairman PCAB remarked that it was not the function of the PCAB to carry out a fresh evaluation exercise but the PCAB had to examine whether the evaluating committee had conducted its evaluation exercise correctly.

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 12.03.2009, and also through their verbal submissions presented during the public hearing held on the 20.04.2009, had objected to the decision taken by the General Contracts Committee;
- having also noted the argument brought by appellant Company relating to Regulation 50 (2) of the Public Contracts Regulations;
- having heard appellant Company's legal representative contend that (a) the tender document did not request a bank statement but 'appropriate' statements from banks and that his client had submitted them (b) the fact that the name of the account holder was written in pencil on a bank statement did not, in any way, trivialise the legality of the document presented, (c) apart from MIM Ltd being written in pencil, the statement in respect of the same Company listed four bank account numbers with the balance against each;
- having also heard the contracting authority's representatives claim that (a) from the statements submitted one could not deduct that the said statement actually belonged to a particular Company and (b) the contracting authority required these statements as proof of the financial and economic standing of the bidder;
- having taken cognizance of Dr Delia's remark regarding the fact that as further proof of the company's economic and financial standing, besides the statements from banks, the tender document also requested at clause 3 (c) (ii) *the presentation of balance-sheets or audited accounts for the years 2005/6/7 and extracts of 2008* which his client had submitted;
- having observed that in the evaluation report it was stated that the names of the companies that the statements belonged to were only identifiable by the name of the company being written in pencil on the document, creating doubt as to the authenticity of some;
- having carefully considered Mr Albani's testimony wherein, under oath, the latter confirmed, more than once, that, for the evaluating committee, for a bank statement to be appropriate it had to (a) display the account balance, (b)

be issued by an official and reliable source and (c) clearly indicate the name of the account holder;

- having noted that, in line with Mr Albani's evidence, the statement submitted in respect of MIM Ltd (a) contained a balance of each account, (b) the entity that issued the statement was clearly stated as BOV Ltd and (c) the number against each account;
- having heard Mr Albani confirm that the bidder was excluded because the evaluating committee was not sure that the statements, as presented, actually belonged to MIM Ltd and to MUC Ltd;
- having taken note of Mr Albani's comment regarding the fact that since this tender involved EU funding one had to be extra vigilant because the EU auditors would look into all the details of the contract;
- having also taken note of the fact that during the hearing it was established that albeit the tender document did not request the 'original' statements from the banks, the appellant had submitted the original ones;

reached the following conclusions, namely:

1. The PCAB opines that the evaluation committee had erroneously interpreted the term '*appropriate original bank statements*' and,
  - a. instead of placing emphasis on the fact that the appellant company had included bank balances whilst refraining from submitting bank statements including transactions, which, for evaluation purposes, are more important as detailed bank statements tend to give a better view of a bidder's economic standing and overall capability to meet its periodical financial obligations,  
  
the same evaluation committee, as clearly manifested during the public hearing,
  - b. judged the appellant Company's offer as administratively non-compliant because the statements from the banks (i) were not original, (ii) were photocopied or downloaded from the internet and, (iii) did not display the name of the companies concerned, an issue which was considered to be extremely indispensable in view of the fact that all account numbers were available;
2. The PCAB reiterates its stand that the contracting authority, through the Department of Contracts, could have easily sought a clarification as to whether it was acceptable for the latter to obtain formal confirmation from the banks that the names of companies written down in pencil were actually the ones being assigned to the account numbers submitted with the tenderers' documents. This would have not constituted a negotiation but a simple confirmation regarding the authenticity of information already supplied;

3. The PCAB feels that it is becoming increasingly evident that in tenders relating to public procurement which involves EU funding some of the evaluating committees are being excessively cautious to the extent that, occasionally, common sense does not prevail giving rise to anomalous decisions which are causing greater delays in the adjudication process in view of the fact that aggrieved parties are quite swift to resort to lodge a formal objection. The PCAB would like to stress the point that a tendering process has to be correctly and, meticulously, carried out not because EU funds are involved thus being subject to EU scrutiny, but the process should be carried out with equal competence even when the total of the tender value involves 100% Maltese tax payers' funds because this is the correct way to do things and because even local auditors should scrupulously scrutinise similar processes;
4. The PCAB argues that it feels that the evaluation committee was wrong in considering the appellants' bid as administratively non-compliant, excluding it from proceeding further in the open tender procedure, particularly, when considering the reasons submitted during the hearing which are not considered to be sufficient in view of alternative clarifications which could have been easily sought from the banks through the Department of Contracts,
5. The PCAB further concludes that, perhaps, there could have been other more valid reasons for a similar conclusion to have been reached (namely exclusion of the appellant Company from proceeding further) but this can only be arrived at if the contracting authority were to evaluate further the appellant company's tender following recommended clarifications made.

As a consequence of (1) to (5) above, this Board finds in favour of the appellant Company and recommends that the tenderer be re-admitted in this open tender procedure for further evaluation, including the clarifications which should have taken place prior to the same committee reaching the conclusion it had reached, namely to disqualify the appellant Company's bid.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*28 April 2009*