

PUBLIC CONTRACTS APPEALS BOARD

Case No. 158

Advert No. CT 36/2009 – CT 2427/2008

Procurement of a Fixed Wing Maritime Patrol Aircraft (MPA)

This call for tenders was, for a contracted estimated value of € 9,696,497.20 (excluding VAT) was published in the Government Gazette. The closing date for this call for offers was 24.03.2009.

Six (6) different tenderers submitted their offers.

On 23.06.2009 Messrs **Selex Galileo/Galileo Avionica SpA** filed an objection after being informed that their “*offer was not found to be technically compliant*”.

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 8.07.2009 to discuss this objection.

Present for the hearing were:

Selex Galileo/Galileo Avionica SpA

Dr Antoine Cremona LL.D.	Ganado & Associates Advocates
Dr Stefan L Frendo LL.D.	Ganado & Associates Advocates
Dr Lorenzo Micocci	Legal Representative
Dr Melanie Miceli Demajo	Legal Representative
Mr Gianmarco Lupidi	Sales Manager, Bids and Sales Avionic Systems
Mr Norman J Miller	Deputy Managing Director Joseph Cachia & Sons Ltd

Aerodata

Dr Manfred Haverland	Director Strategic Business Development
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Armed Forces of Malta

Dr Mario Spiteri Bianchi	Legal Representative
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Adjudication Board

Lt Col Claudio Spiteri	Chairperson
Maj Clinton O’Neil	Secretary
Maj Mark Said	Member
Maj George Abela	Member
Lt Douglas Falzon	Member
Mr Paul Morley	Member

Contracts Department

Mr Francis Attard	Director General (Contracts)
Mr Bernard Bartolo	Asst Director EU Related Procurement

After the Chairman's brief introduction, the representatives of *Selex Galileo/Galileo Avionica SpA* (hereinafter referred to as "Selex Galileo") were invited to briefly explain the motive leading to their objection.

At the request of Dr Stefan Frendo, one of the appellants' legal representatives, and with the concurrence of those present at the hearing, including the contracting authority, the PCAB agreed that the hearing would be conducted in English so that all foreigners present could follow the proceedings.

Dr Antoine Cremona, also representing the appellants, Selex Galileo, started by stating that, for once, in front of the PCAB they had what they felt to be a straightforward and logical appeal. He claimed that what the appellants were invoking was not something depending on a proper interpretation of a technical standard or technical evaluation that has been carried out on a particular subject or a particular technology but an interpretation of the very rules contained in the tender document. The same lawyer said that the PCAB's approach regarding the strict interpretation and adherence to the words and the wording of the Instructions to Tenders (ITT) had not only given procedural guarantees but had also set a level playing field for all interested economic operators. He contended that in front of this Board of Appeals various interested parties had witnessed tenders being rejected and tenders being re-instated because of strict and accurate interpretation of the terms of the ITT.

Dr Cremona said that the appellants, Selex Galileo, submitted that the procedure adopted by the PCAB and the vast majority of contracting authorities in Malta was the correct approach and that it worked both when the contracting authority excluded a bidder due to lack of strict adherence to the terms of the tender and also worked in favour of the bidder who would have strictly adhered to the terms of the tender documentation. He said that he was mentioning this because in his letter dated 17 June 2009, the DG Contracts informed Selex Galileo that their offer was excluded from the 2nd phase of adjudication on technical issues. Dr Cremona proceeded by saying that the extract of the evaluation committee report that was attached to the same letter indicated that the reasons for the exclusion of their clients' bid were the following:

- (i) DOC - Bidder failed to provide the direct operation costs (DOC) of the aircraft as requested in the technical specifications para 3.13.
- (ii) COMPLIANCY – bidder failed to provide detailed technical information in respect of :
 - Cabin Layout of aircraft in MPA configuration
 - Life-raft Crew/ Life-raft Air Droppable
 - Smoke Flare/Surface Markers

With regard to the reason given for excluding the appellants' tender on the ground that the DOC of the aircraft were not provided in their technical offer, Dr Cremona explained that Selex Galileo had provided all financial information, including the DOC, in Package

Three (3) which, unfortunately, could not be verified by the PCAB because it was still unopened. He contended that, in doing so, his clients had complied with the provisions of the concluding sentence of Section 10.1 under *Clause 10 Submission of tenders* of the ITT wherein it was emphatically stated that:

‘It has to be emphasized that financial proposals are to be submitted ONLY in Package 3’

Dr Cremona explained that all sorts of financial proposals, including the DOC, were to be included in Package 3 and this was what his clients had done. He claimed that Selex Galileo had given all the technical evidence, including that related to DOC, in Package 2 but no costings were provided therein because, had they done this they would have contravened Clause 10 and this would have led to automatic exclusion.

The appellants’ legal representative sustained that bidders were barred by the public procurement regulations from providing financial information in Envelope 2. It was stated that in this case they had a reverse situation where a bidder was being excluded for not having provided something in Envelope 2 when it was mandatory to be provided in Envelope 3.

At this point, Dr Cremona made reference to his introductory submission regarding the strict and narrow interpretation of tender documents which had been adopted in case law by the PCAB. He said that this approach did not only serve as guiding principle to contracting authorities but it had also set a level playing field.

Turning to the 2nd ground of exclusion, namely ‘*Compliancy*’, Dr Cremona sustained that the ITT was the sole guiding document which needed to be taken into consideration in evaluating this tender.

With regards to the Cabin layout of aircraft in Maritime Patrol Aircraft (MPA) configuration, the appellants’ lawyer said that, in this instance, the appellants were being excluded from participating in the third and final stage due to lack of information given on what was being termed as ‘Cabin layout of aircraft in MPA configuration’. Dr Cremona emphasized that no such information was ever requested from bidders in this tender document. He contended that there was no reference at all in the tender documentation for any such requirement to be provided in greater detail the said cabin layout. It was also stated that, by submitting this layout, Selex Galileo had given surplus information to what was actually required.

Dr Cremona insisted that in order to exclude a bidder they needed to have a direct reference to exclusion criteria and that the Adjudication Board could not exclude a bidder on something that was not even requested. He said that, had such information been requested, it would have obviously been supplied. They could not exclude the possibility that if such information were to be supplied by bidders this might have placed the Adjudication Board in a better position to judge, but he reiterated that such information was not requested.

Referring to life-rafts and smoke flares, Dr Cremona said that, in order to put everything into perspective, these two items were always sourced independently and that their cost represented only 0.001% of the total contract value. He said that the life-rafts and the smoke flares cost only € 15,000 and some hundred euros, respectively. On the other hand, the total contract value of the entire aircraft, which was a search and rescue aircraft with highly sophisticated equipment, was around € 10m.

Continuing, Dr Cremona said that in the tender dossier the contracting authority asked bidders to provide one life-raft crew, one life-raft air droppable and smoke flares. He claimed that Selex Galileo's submission stated clearly that they were in compliance with these requirements which meant that they (Selex Galileo) were undertaking to provide exactly what was requested from them.

The appellants' lawyer contended that

- (i) his clients failed to understand how it was stated that what had been provided in respect of the items under reference did not have sufficient information;
- and
- (ii) to-date it was still unknown what other additional details had to be provided

On cross-examination by the PCAB, Dr Cremona explained that letter "C" inserted against details of each specification signified that they were 'compliant' and that their compliance was documented in pages 144 and 145 of their offer.

Lt Col Claudio Spiteri, Chairman of the Technical Evaluation Committee, responded by stating that they had strictly followed the evaluation criteria laid down in the tender document. He said that they were broadly disputing three main issues, namely

- (i) the Direct Operating Costs of the aircraft
- (ii) the cabin layout of a Maritime Patrol Aircraft *and*
- (iii) Life-raft - crew, life-raft - Air Droppable and Smoke Flare/Surface Markers

He claimed that the *Technical Evaluation Matrix* provided in the tender document clearly indicated that the DOC was a technical parameter which would be evaluated at the technical stage and that appropriate marks would have been awarded in that respect. Lt Col Spiteri emphasised that, at no stage, was it mentioned or requested that they were not going to cover the DOC in the technical evaluation stage.

When the PCAB intervened to query as to whether the 'DOC' was more of a 'technical' rather than a 'financial issue', the Chairperson of the Adjudication Board replied that this was definitely a parameter of a technical nature as it was reflected in manner and extent to which a given platform could be operated by the AFM when in service.

Lt Col Spiteri insisted that the DOC was in no way related to the financial allocation of the project itself as the appellants' lawyers were implying and its impact was only relevant to the recurrent budget of the AFM. He said that they had asked for the DOC in the Technical Package because it had no link whatsoever to the financial package.

The Chairperson of the Adjudication Board made reference to Clause 10.1 (b) of the ITT wherein it was specifically stated that:

Package Two: technical specifications including supportive literature, details, designs, samples and any other matter as requested in the tender documents.

He claimed that such a request was clearly made in para 3.13 of the Aircraft specifications.

He said that according to Clause 10.1 (c) of the ITT Package 3 tenderers were required to submit in:

'Package Three: completed price schedules and, or bills of quantities, form of tender, payment terms or other financial arrangement; any covering letter which may provide other pertinent details of a commercial nature.'

With regard to the Adjudication Board's Chairman's statement that the pertinent running costs were included under the technical specifications because of budgetary parameters, the Chairman PCAB said that, as far as the PCAB was concerned, this was something internal, solely relevant to the AFM, the contracting authority.

Lt Col Spiteri replied by stating that this was the reason why they asked for the DOC in Package 2. However, at this point the PCAB drew his attention to the fact that parameters should not change because of something internal as these were guided by the procurement regulations and not by the contracting authority's own exigencies. It was also stated that, apparently, they were asking for something prematurely because a bidder was mentally set to submit anything that was financial, and rightly so, in Package 3. It had to be appreciated, continued the PCAB that a party dealt with documents and not on personal requirements because they expected people to follow documentation. He said that the AFM might have had all the justifiable claims around for it to require such technical matters. However, in requesting these to be submitted in the wrong envelope would tantamount to one contravening the same rules governing public procurement ending up in one giving the impression that one is changing goal posts for specific exigencies. Needless to say that this was not permissible, stated the PCAB.

In reply to a specific question by the PCAB, Mr Spiteri said that in para 3.13 of the *Aircraft Specifications* it was clearly indicated that they wanted to know the fuel costs of the aircraft at the technical evaluation stage. But his attention was immediately drawn by the PCAB that they could not ask for something *a priori* because it was the procurement regulations which dictated that financial parameters should be included in Package 3. It was emphasised that no one had the prerogative to change what the procurement

regulations stipulated or to change or add something that contradicted the spirit of the law because people were guided by the law. It was also pointed out that one of the reasons why the PCAB was set up was to ensure that everyone participated within a level playing field adhering to the same rules of the game. Furthermore, the PCAB made it amply clear that what was being disputed was not that the AFM asked bidders to submit the DOC of the aircraft but the fact that the procurement regulations clearly specified that any type financial data had to be submitted in Package 3. The PCAB also clarified that a financial offer was made up of the capital outlay, the running costs and the maintenance cost, which were all elements that had to be included in Package 3. In concluding its intervention on this specific subject matter, the Adjudication Board's representatives' attention was drawn to the fact that if the DOC were to be inserted in Package 3, as they should have been, these would still have been evaluated at a later stage when the financial offers were opened.

Maj. Clinton O'Neill, Secretary to the Adjudication Board, said that, although he concurred with what was stated by the PCAB regarding the financial package and the procurement regulations, yet, in his opinion, the DOC were purely technical in nature and that these had nothing to do with the contract value of the aircraft.

When Maj. O'Neill's attention was drawn by the PCAB that these were part of the financial offer, he responded by stating that the contents of para. 3.13 clearly show that direct operational costs were correlated to the technical evaluation. The PCAB said that, whilst it acknowledged that a technical person would look at the DOC from a technical perspective, yet:

- an accountant, for example, would look at the issue from a financial perspective when reference is made to operational costs
- the PCAB feels that it is imperative for a contracting authority to ensure that a party at the other end would correctly interpret what would have been written in the tender document

Lt Col Spiteri pointed out that all bidders, with the exception of Selex Galileo, had listed their DOC in their technical offer. The PCAB remarked that it was obvious for such thing to happen considering the mental set one would be driven towards when following what are perceived to be 'correct' parameters.

Dr Cremona said that para. 3.13 stipulated that '*The tenderer must supply with the tender document for evaluation the direct operating costs for both the aircraft and the mission equipment and sensors*'. He claimed that the AFM might have been not technically correct when they stated that the DOC had to be submitted in the 2nd Envelope because reference was made to the whole Tender Document which was made up of the Bid Bond, the Technical Specifications and the Financial Offer. The lawyer said that, in the prevailing circumstances, it could be argued that technically the DOC had in fact been provided in the tender document. Furthermore, he said that on the basis of clause 10.1 of ITT, the DOC was undoubtedly a financial proposal. The appellants' legal advisor also

claimed that budgetary requirements for running and maintenance costs were all financial considerations.

Dr Cremona pointed out that all the elements in para. 3.13, that is, fuel costs, airframe maintenance, engine maintenance and equipment/sensors maintenance, were addressed in Package 2, but, as considered in tune with existing public procurement regulations, his clients stopped short of giving financial details. At this point Dr Cremona remarked that he was surprised to hear that the other bidders had included the DOC in Package 2 because this was in contravention of the procurement regulations.

The Chairman PCAB said that he was not surprised at all because in this particular case the tender document was not in line with procurement regulations and so bidders were led to believe that it was the norm and therefore had to abide by the terms and conditions of the tender document.

With regards to the *Cabin layout of aircraft in MPA configuration*, Lt Col Spiteri said that the appellants' legal advisors' statement that no such information was ever requested in respect of the said layout was, undoubtedly, incorrect. He said that the various requirements for the cabin layout were described under the *Internal Tactical Setup* and additional seating arrangements of para 8 – Cabin Compartment of the Technical Specifications Annex of the tender dossier. He said that the information provided by Selex Galileo on pages 24 and 33 of their technical bid did not address the requirements outlined in the *Technical Annex* because the said bidder simply reproduced a diagram which would normally be found in standard format on some apposite site whilst browsing over the internet.

Lt Col Spiteri contended that, in the Technical Evaluation Committee's opinion, this **cabin** layout diagram referred to a standard 6 seater commuter and was, in no way, suited to provide the information in response to the requirements as laid down in the *Technical Annex*. He claimed that Selex Galileo simply gave an example of a cabin compartment layout. In fact, continued the contracting authority's representative, it was a cross-section, and therefore, in so doing, the bidder failed to provide an indication of the overall cabin layout in a maritime patrol aircraft configuration. Lt Col Spiteri opined that it was very much clear that the cabin layout information was the subject of a requirement laid out in the *Technical Annex* and that Messrs Selex Galileo failed to provide an adequate response to this request.

Dr Cremona intervened by stating that he could not locate where, in the tender document, the Contracting Authority had asked bidders to provide a layout.

Lt Col Spiteri said that in para 8 of the *Cabin Compartment* they had clearly indicated each and every aspect of the internal layout of the Maritime Patrol Aircraft and how it should be done.

When Dr Cremona remarked that point 8.2 *Internal Tactical Setup* referred exclusively to the console and not to the layout, the Chairman of the Adjudication Board replied that he

failed to understand how the appellant Company had provided a diagram depicting a commuter layout. Dr Cremona rebutted by insisting that the Adjudication Board was not empowered to exclude a bidder for providing surplus information that was not even requested.

When the PCAB asked the Chairman of the Adjudication Board to state whether they were given what was requested, the reply given was in the negative. On the other hand, when the PCAB asked the appellants to state whether all the requirements at para 8 had been addressed, it was pointed out that they were excluded for not providing the layout and, therefore, as far as they were concerned, the only issue was the layout.

At this point, the PCAB asked the Adjudication Board to state whether Selex Galileo's bid would have still been excluded if they did not submit the diagram of the cabin layout considering the fact that, as far as items 8.1 to 8.7 were concerned, they had indicated that they were compliant. Maj O'Neil replied that for some of the equipment they had sufficient information on which they could evaluate and give points.

When the PCAB specifically asked Maj O'Neil to confirm that

- a. the exclusion of the appellant Company from the tender under review was attributable to the fact that the said Company had submitted the diagram they submitted in their offer
- b. the contracting authority had actually asked for the layout to be submitted

the reply given by Maj. O'Neil was in the negative. However, Maj. O'Neil added that the tender specifications had requested information but the information made available to them by the appellant Company in their bid was not detailed.

At this point the PCAB observed that, *prima facie* it seemed that, as far as the cabin was concerned, the appellants were excluded solely because the layout was not acceptable.

After consulting his lawyer, Lt Col Spiteri informed the PCAB that this was their position and that they did not have any further comments to make on this point.

With regards to the *Life rafts and Smoke Flares*, the PCAB said that if the same line of reasoning applied for the life rafts and the smoke flares, then there was no need to go over the same arguments. The PCAB observed that on one side they had a claim being made by the appellants that the latter had submitted an offer which was declared to be compliant with tender specifications, terms and conditions, whilst, on the other hand, they had the Adjudication Board members who were stating that the appellant Company did not provide sufficient information.

Replying to Maj O'Neil's comments regarding *Technical Evaluation Matrix* and the method used in the evaluation process, the PCAB said that an Adjudication Board could

not exclude a bidder for giving what was requested / wanted even if other bidders might have given an added feature. It was emphasised that

- (i) a bidder could not be excluded if the basic requirements were met *and*
- (ii) whenever a tenderer confirms compliancy in an offer, this automatically implies that one would be accepting the terms and specifications of the pertinent tender

Dr Cremona questioned whether comparison could be made between someone who said that he was compliant with, another tenderer, who would have provided additional documentation. He also opined that an Adjudication Board could, at best, give more points to a tenderer but, definitely, could not exclude someone for something that was not even requested.

The PCAB explained that the best way that, objectively, one should judge was to look at a tender holistically and should ask whether, intrinsically, the tender conditions had been adhered to. Furthermore, it was stated that, in those instances where a tenderer had offered something beyond the minimum requirement, and therefore a subjective analysis had to be made, it was imperative for the Adjudication Board to retain a level playing field.

Dr Cremona concluded by stating that his clients were only asking to be re-instated in the tendering procedure so that their offer would be evaluated on its financial merits.

He proceeded by saying that their third envelope contained all the financial information, including the DOC, which, rightly so, their clients deemed to be a financial consideration. The appellants' lawyer insisted that the first ground of exclusion was not justified, in fact and at law, because if they included the DOC in Package 2 they would have prejudiced their bid. Furthermore, he said that they would not have appealed if Selex Galileo were excluded for including financial data in Package 2.

With regard to the last two points of the 'Compliancy' issue, that is regarding the life rafts and smoke flares, Dr Cremona said that, when they declared that they were compliant, this was meant to be interpreted as a legal undertaking, *per se*. The appellants' legal advisor said that the answer given to the first question regarding the smoke flares/markers in the clarification letter dated 17 March 2009 was that '*There are no specific types currently being used by the AFM.*' He declared that his clients had confirmed that they were going to provide exactly what was requested.

Dr Cremona also reiterated that if other tenderers had provided something additional they might have been given more points but this should not have led to the outright disqualification of their bid.

Dr Frendo said that the least that could have been done was a request for a clarification rather than for the Adjudication Board to discard his clients' offer.

At this point the AFM were asked by the PCAB to state whether they had sought guidance from the General Contracts Committee or the Contracts Department on these issues and the reply given by the AFM was that the Contracts Department was only consulted on the DOC issue.

Finally, in reply to a specific question by Dr Frendo, Lt Col Spiteri confirmed that they did not seek clarifications from other bidders.

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 23.06.2009 and also through their verbal submissions presented during the public hearing held on the 08.07.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Cremona’s (a) explanation regarding the fact that Selex Galileo had provided all financial information, including the DOC, in Package Three (3) which, unfortunately, could not be verified by the PCAB because it was still unopened, (b) claim that had Selex Galileo given financial details in Package 2 such action would have led to automatic exclusion as it would have contravened public procurement regulations, (c) remark with regards to the Cabin layout of aircraft in Maritime Patrol Aircraft (MPA) configuration claiming that the appellants were erroneously excluded from participating in the third and final stage due to lack of information given, saying that, whilst this was not the case as there was no reference at all in the tender documentation for any such requirement to be provided in greater detail, yet, it is also true that the appellants’ submission had clearly stated that they were in, (d) claim that when the appellants declared in their tender document that they were compliant, this was meant to be interpreted as a legal undertaking, per se, saving anyone from doubting the bidders’ total adherence to tender specifications, terms and conditions; (e) statement wherein he stated that, together with his clients, they could not locate where, in the tender document, the contracting authority had asked bidders to provide a Cabin layout of aircraft in MPA configuration; (f) confirmation that his clients had submitted details pertaining to the console as requested in point 8.2 Internal Tactical Setup; (g) confirmation that his clients were only providing surplus information when including a diagram depicting a commuter layout in their bid;
- having also taken note of the Adjudication Board’s representatives’ statements and claims made during the hearing wherein, *inter alia*, it was stated that (a) they had strictly followed the evaluation criteria laid down in the tender document, (b) the *Technical Evaluation Matrix* provided in the tender document clearly indicated that the DOC was a technical parameter which had to be evaluated at the technical

stage, (c) the DOC was in no way related to the financial allocation of the project itself and, according to the same Adjudication Board, its impact was only relevant to the recurrent budget of the AFM; (d) at the technical evaluation stage, the contracting authority wanted to know the fuel costs of the aircraft; (e) whilst the various requirements for the cabin layout (Cabin layout of aircraft in MPA configuration) were described under the Internal Tactical Setup and additional seating arrangements of para 8 – Cabin Compartment – included in the Technical Specifications Annex of the tender dossier, yet the information provided by the appellants in their technical bid did not address the requirements outlined in the *Technical Annex* because the said bidder simply reproduced a diagram which would normally be found in standard format on some apposite site whilst browsing over the internet thus failing to provide an adequate response to this request; (f) the same line of reasoning followed by the Adjudication Board with regards to the *Cabin layout of aircraft in MPA configuration* applied for the *life rafts and the smoke flares*;

- having also taken note of the appellants’ legal advisor’s insistence that an Adjudication Board was not empowered to exclude a bidder for providing extra information that was not even requested;
- having also heard the Adjudication Board members confirm that they had excluded the appellants for not providing the layout and that, as far as they were concerned, the only contentious issue was the internal layout of the Maritime Patrol Aircraft (MPA);
- having taken full cognizance of Maj. O’Neil’s other declarations relevant to the real reason for the appellant Company being excluded from proceeding with the adjudication process;
- having also taken note of the fact that (a) when asked whether they had sought guidance from the General Contracts Committee or the Contracts Department on any of the issues raised during the hearing, the reply given by the AFM was that the Contracts Department was only consulted on the DOC issue, (b) the Adjudication Board confirmed that they did not seek clarifications from other bidders;

reached the following conclusions, namely:

1. The PCAB feels that direct operational costs (DOC) are to be considered as issues of a ‘financial’ rather than a ‘technical’ nature, noting in the process that by expecting tenderers to submit their DOC in Envelope 2 rather than Envelope 3, the Adjudication Board were asking for something prematurely because a bidder was mentally set to submit anything that was financial, and rightly so, in Package 3, and as a consequence, the grounds given in regard by the Adjudication Board for the appellants’ exclusion were not justified;

2. On the same subject matter (the DOC) the PCAB also concludes that anyone deviating from usual standards (such as the request made to participating tenderers to include DOC in Envelope 2 rather than 3) would be contravening the same rules governing public procurement ending up in one giving the impression that anyone is free to arbitrarily change the goal posts, solely for specific exigencies. Undoubtedly, such '*modus operandi*' is not permissible;
3. The PCAB argues that if the DOC were to be inserted in Envelope 3, as they should have been, these could have still been evaluated at a later stage when the financial offers were opened;
4. The PCAB states that parameters should not change because of something internal as such parameters are guided by formal procurement regulations and not by, for example, the contracting authority's own exigencies (such as the AFM's budgetary issues);
5. As regards the fact that with the exception of *Selex Galileo*, the appellant Company, all other participating tenderers had listed their DOC in their technical offer, the PCAB contends that this is, in no way, surprising because, in this particular case (relating to inclusion of DOC in Envelope 2 rather than in Envelope 3), the tender document was not in line with procurement regulations and so bidders were led to believe that it was the norm and, as a consequence, had to abide by the terms and conditions of the tender document;
6. The PCAB concludes that (a) an Adjudication Board cannot exclude a bidder for giving what was requested (i.e. the basic requirements) even if other bidders might have given just one additional feature (b) more importantly, an Adjudication Board cannot exclude a bidder for giving what was, *ab initio*, not requested in such detail;
7. The PCAB agrees with appellant Company that whenever a tenderer confirms compliancy in an offer, this, automatically, implies that one would be accepting formally the terms and conditions of the pertinent tender

Having given due consideration to points (1) to (7) above, this Board

- a. finds in favour of appellants
- b. directs that appellants should be re-instated in the tendering procedure
- c. in view of the above and in terms of the Public Contracts Regulations, 2005, also recommends that the deposit submitted by the appellants should be reimbursed

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

20 July 2009