

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 160

Advert. No. CT/15/2009; CT/2555/08; AFM/FO/6604/22/2008

### Tender for the Supply and Service of Breakfast, Lunch and Dinner to Third Country Nationals (Irregular Immigrants) – Armed Forces of Malta (AFM)

This call for tenders was, for an estimated contracted value of € 13,103,500 was published in the Government Gazette on 13.01.2009. The closing date for this call for offers was 10.03.2009.

Four (4) different tenderers submitted their offers.

On 16.06.2009 Messrs GN Consortium filed an objection following the decision by the Contracts Department to exclude its offer from the tendering process whereby due to claimed non-compliance with the tender specifications.

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 3.08.2009 to discuss this objection.

Present for the hearing were:

#### GN Consortium

Dr Louis de Gabriele	Legal Representative
Mr Winston J. Zahra	Representative
Mr John Buttigieg	Representative
Mr Edward D'Alessandro	Representative
Mr Pierre Bartolo	Representative
Mr Claudio Bondin	Representative
Mr Josef Karl Bartolo	Representative
Mr Mario Mifsud	Representative

#### Armed Forces of Malta (AFM)

Dr Mario Spiteri Bianchi	Legal Representative
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#### Evaluation Committee:

Colonel Martin Bondin	Chairperson
Lt Colonel Brian Gatt	Member
Mr John Debattista	Member

#### James Caterers Ltd

Dr Ronald Aquilina	Legal Representative
Mr James Barbara	Representative
Mr Marino Cilia	Representative
Mr Mark Zahra	Representative

#### Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Louis de Gabriele, legal representative of GN Consortium, the appellants, explained that, according to the Contracts Department, his client's offer had been disqualified on the following grounds:

- i. clause 3.6a where it was stated: 'not submitted' and 'wrong certificate submitted/vehicle certificate not submitted'
- ii. clause 3.6e where it was stated: 'submitted' and 'no certificates pertaining to the employee stated are included in the offer'; and
- iii. clause 3.6h where it was stated: 'not submitted'.

Dr de Gabriele added that, in a nutshell, these infringements concerned certificates that were either not submitted and/or certificates that might have been or that were submitted but not according to requirements. The same lawyer maintained that, in all three instances, his client had in fact not only submitted the required documents but the latter were also substantially compliant with requirements and, as a consequence, the decision reached by the evaluation committee to disqualify his client was incorrect.

Dr de Gabriele stated that Clause 3.6 (a) provided for a '*Vehicle Certificate issued by the Health Authorities - as per para. 5 of Annex II 'Technical Specifications'*' which specified that:

*"Vehicles which transport food are to be well kept, clean and in hygienic condition. The vehicles are to be capable of transporting food at the prescribed temperatures. These vehicles are to be marked clearly with the name of the contractor and certified by the Health Authorities to transport food. The relative certificate is to be submitted with the tender (envelope 2)."*

Dr de Gabriele stated that his client did submit this document issued by the Health Authorities and conceded that the choice of words used in this certificate were perhaps not very suitable since at the heading it referred to 'Delivery Vehicle' whereas in the body of this certificate reference was made to 'premises inspection' instead of 'vehicle inspection'. He added that, on seeking clarifications from the health authorities, his client was assured that that was the way in which similar certificates were issued and when the officer who issued the certificate, namely Mr Clive Muscat, was asked to give evidence before the PCAB, he declined claiming that he did not have the permission from his superiors to do so. Nevertheless, he was ready to give evidence should the PCAB direct him to do so – emails had been exchanged to this effect. Dr de Gabriele argued that in this case one was dealing with a state of fact.

Dr Mario Spiteri Bianchi, legal representative of the AFM, the contracting authority, explained that, with regard to Clause 3.6 (a), the submissions just made by the appellant

Company were evidence enough that the certificate presented was not at all clear and that it referred to the 'delivery vehicle'. He added that, following the appeal lodged by the appellants, the AFM had sought clarifications from the department concerned and even consulted the relevant legal provisions and, consequently, his client was satisfied that the certificate submitted by the appellant Company in this regard was according to what was required and, hence, this issue should be considered settled.

Dr Ronald Aquilina, legal representative of James Caterers Ltd, an interested party, while reserving the right to bring up at a later stage other reasons why the appellants' offer had to be rejected, disagreed with the stand taken by Dr Spiteri Bianchi with regard to the certificate presented by the appellants in respect of the vehicle certificate contending that it was not the kind of certificate requested in the tender document. He further claimed that what had, in fact, been presented by the appellant company was the 'inspection report' which covered the periodical inspections that the health authorities carried out on catering premises with regard to hygiene and so on. At this point, the Chairman PCAB questioned the validity of certain conditions in the tender in so far as to what happens when, for some reason, the certified vehicle would be out of service. Dr Aquilina stated that his client had catered for such an eventuality because the said Company had four licensed vehicles. Dr Aquilina then quoted from para. 5 of Annex II, namely,

*“These vehicles are to be marked clearly with the name of the contractor and certified by the Health Authorities to transport food.”*

Dr Aquilina maintained that the tender document did not request the inspection report but it required the certificate in a specific format as those submitted by his client.

Dr de Gabriele stated that his client had referred the certificate submitted with his offer to Mr Clive Muscat, who was the same person approached by the legal adviser of the contracting department, who, apart from conceding that the 'certificate' was not clear in the way it was worded, it also went on to confirm that any reference in the said certificate to premises also included the vehicle. Dr de Gabriele submitted that his client could not be expected to dictate to the competent authority the manner in which to issue its certificates.

Dr Spiteri Bianchi stated that the contracting department was satisfied with the explanation given the health authorities with regard to the *Vehicle Certificate* and, therefore, as far as they were concerned, the issue was considered as settled.

Dr de Gabriele stated that Clause 3.6 (h) provided for the submission of an ...

*“Outside Catering Certificate issued by the Health Authorities - as per article 5 of the Special Conditions which, in turn, provided for: A certificate, certifying that the tenderer is licensed by the Department of Health to manufacture food on an outside contracting basis, is to be submitted with the tender offer. The tenderer is liable to an inspection by the Food Safety Section of the Division of Public Health whose report may be taken into account when awarding the tender.”*

The appellant Company's legal advisor maintained that his client had in fact submitted the certificate requested as part of his original submission and supported his claim with affidavits by the persons who were responsible for compiling the tender documentation and who, actually, delivered the documentation to the Contracts Department. Dr de Gabriele could not throw any light on how the evaluation committee did not come across this certificate but what he could vouch for was that the certificate formed part of his client's tender submissions and, therefore, one was again dealing with a state of fact that had to be verified.

Dr Spiteri Bianchi, explained that the contracting authority, as usual, had detailed an officer, in the person of Bombardier Miruzzi, to pick up the tender documentation from the Contracts Department and to deliver same to the AFM Headquarters. He added that, in this instance, it later transpired that a particular certificate was missing as the officer concerned would demonstrate through his testimony.

Bombardier Miruzzi, under oath, gave the following evidence:

- a) he was responsible for the AFM tenders office and his duties included the delivery of the tender documents from the Department of Contracts to the AFM on the day after the closing date of tenders;
- b) he recalled that on this particular occasion the tender closed on the 10<sup>th</sup> March 2009 but when he contacted the Contracts Department on the following day he was informed that the tender documents were not yet ready and was also told to pick them up on the following day;
- c) he added that all these (four) voluminous document submissions were not packed in separate wrappings and were handed over to him in one cardboard box which box was not sealed such that the lid could be easily opened;
- d) when he opened the offers to draw up the schedule he did not check the contents of the offers, i.e. he did not check if all certificates and papers were in place;
- e) he was not a member on the evaluation committee; and
- f) he confirmed that he only had envelopes 1 and 2 but had no access to envelope 3, containing the financial offer, which he presumed was still held at the Contracts Department.

On his part, Colonel Martin Bondin, Chairman of the evaluation committee, confirmed under oath that:

- a. the tender documents were not wrapped and sealed when it was handed over to the evaluation committee;
- b. no AFM officer was present at the stage when the tenders were opened at the Department of Contracts;

- c. the adjudication was, by and large, carried out with all members present except in circumstances when a member would have been detailed on duty elsewhere;
- d. during the administrative compliance exercise, the committee checked the certificates and documentation submitted against what was required in the tender and that it was at that stage that the committee noted that this particular certificate was missing; and
- e. as Chairman of the evaluation committee, it did not give him peace of mind that the tender documents were handed over to the committee in a way that others could have had access to the contents, in other words, not packed separately and sealed.

The Chairman PCAB remarked that, in the first place, one had to determine whether this 'Outside Catering Certificate' was submitted by the tenderer and if so, at what stage it went missing. He added that, in any case, especially, in the case of a tender involving a considerable amount of money, he would have expected or desired that the tender documents would be sealed once again after tender opening stage. The Chairman PCAB stated that the PCAB was not comfortable with this 'modus operandi' considering it as leaving too much to be desired, adding that the PCAB would make its recommendations in that regard.

The Chairman PCAB read out, for the benefit of all those present, the contents of the 'Outside Catering Certificate' dated 10<sup>th</sup> March 2009 submitted by the appellants.

Col. Bondin reconfirmed that he did not see this 'certificate' at adjudicating stage. He also stated that the evaluation committee did not check whether this certificate was in the records of the *Food Safety Commission*.

Colonel Brian Gatt, a member of the evaluation committee, confirmed under oath that, at the adjudication stage, he did not come across this 'certificate' dated 10<sup>th</sup> March 2009 which, he observed, happened to be the closing date of the tender in question.

Mr John Debattista, another member of the evaluation committee, stated under oath that he did not see this 'certificate' dated 10<sup>th</sup> March 2009 during the evaluation process but added that, following the lodging of the appeal he had checked, once again, whether all the documentation was in place and noted that this particular certificate issued to *Island Caterers Ltd* was there but not signed / initialled whereas the other papers, such as the certificate issued on the 11<sup>th</sup> February 2009 to Papillon Caterers, were endorsed.

Mr Francis Attard, Director General (Contracts), replied under oath to a direct question by the Chairman PCAB that he was not comfortable with the practice that tender documents were handed over by the Contracts Department to the contracting authority unsealed or in such a way that one could add or remove documents, agreeing with the Chairman PCAB that this procedure needed revisiting. Mr Attard remarked that it was normal practice that, when the tenders were opened, the members of the General Contracts Committee (GCC) would endorse those pages / documents that were

considered of particular importance and he noted that while this specific certificate was not endorsed the subsequent one was in fact endorsed.

The PCAB remarked that, just by flicking through the said documents, it was evident that this certificate was not the only document that was not endorsed.

Mr Attard stated that his department did not insist that an officer of the contracting authority would be present at tender opening stage, however, he stated that the contracting authority would know the date and time the tenders would be opened because the tender document itself displayed that information. Furthermore, tenders are always opened at 10.00 hrs on Tuesdays and Thursdays.

The DG Contracts Department could not vouch that papers could not go missing or be added on to during the process. However, as he had already stated, specific documentation of the tender documents considered of particular importance was endorsed by members of the GCC.

At this point Mr Attard informed the PCAB that apart from the original submission, tenderers were also requested to submit a copy of same, which copy was retained by the Contracts Department. He therefore proposed that the sealed bundle containing the copy of the technical submission of Tenderer Nos. 2, 3 and 4, respectively, be opened so as to see if the 'Outside Catering Certificate' was submitted or not with the copy. Tenderer No. 1 did not submit a copy

The Chairman PCAB remarked that he would raise no objection if this copy was opened for the sake of transparency. However he was quick to add that such action would only provide the PCAB with partial comfort because the evaluation committee had deliberated on the original submission and not on the copy and it might have happened that the certificate was placed in the copy but overlooked in the original submission.

As agreed, the sealed bundle containing the technical submissions was opened at this point and, on verification, it resulted that a document marked '10', which referred to the 'Outside Catering Certificate' issued in the name of Island Caterers Ltd, was in fact amongst the said documents.

Mr Attard also informed those present that during the suspension of the hearing – that is, the time taken by the evaluation committee to examine the document presented in connection with clause 3.6e which would be dealt with later on - he had checked how the tender documents were handed over to the contracting authorities and found out that these documents were issued sealed by tape and he even invited the PCAB to see samples thereof. The PCAB declined this invitation because it argued that it had to deliberate on the evidence produced at this particular hearing.

The Chairman PCAB remarked that a recommendation was going to be made such that documents would, in all instances, be issued in a sealed container.

Dr de Gabriele stated that Clause 3.6 (e) referred to a ‘*Catering Management Certificate - as per para. 11 of Annex II ‘Technical Specifications’*’ marked ‘Catering Management Qualifications’ which stated that:

*“On the closing date and time of the tender, the tenderer must hold and submit recognized qualifications in Catering Management, Food Technology Hygiene nutrition and diet food. Since this tender involves food to a high risk group of people, the qualified person has to be employed on a full time basis and form part of the team which prepares the food.”*

Dr de Gabriele remarked that his client had submitted three certificates, namely a:

- (i) ‘Higher National Diploma in Hotel and Catering Administration’ in respect of Ms Kay Elizabeth Minter
- (ii) ‘Cookery for the Catering Industry’ (City and Guilds) certificate in respect of Mr Mario Caruana and
- (iii) Bachelor of Arts with First Class Honours in Hotel and Catering Management in respect of Mr Winston J. Zahra.

Dr de Gabriele added that after the closing date of the tender his client was requested to indicate whether anyone of these three employees was a full time employee with the consortium and that query was complied with by identifying Mr Mario Caruana as the full time employee and that the contracting department had informed his client that no further information was required.

Dr Spiteri Bianchi referred to article 11 of the technical specifications and laid stress on the last sentence, namely on the part which states that *“since this tender involves food to a high risk group of people, the qualified person has to be employed on a full time basis and form part of the team which prepares the food.”*

Dr Spiteri Bianchi stated that this provision was adopted from a previous tender issued for similar supplies whereas Lt. Col. Gatt explained that the ‘high risk’ factor referred to a large number of people confined to an enclosed place and hence, in such circumstances, an infection or a disease could spread with more devastating effect than in normal circumstances. This, argued Lt. Col. Gatt, apart from the fact that illegal immigrants were of different races and cultures and had different dietary requirements.

Dr Spiteri Bianchi further explained that this clause also required that the tenderer should be qualified and employed on a full time basis. He added that the person nominated by the appellant Company, namely Mr Mario Caruana, held a certificate from the City and Guilds of London Institute in ‘Cookery for the Catering Industry’. The contracting authority’s legal advisor further stated that the AFM obtained information from the Education Department as to what course 706 ‘Cookery for the Catering Industry’ covered and it emerged that it referred to ‘basic cookery’ and ‘cookery’. Dr Spiteri Bianchi

explained that the dictionary termed 'cookery' as the art and practice of cooking, and that it did not include the other elements required in the tender document, such as, management, diet food and so on. The same lawyer remarked that it therefore resulted to the evaluation committee that the person identified by Messrs GN Consortium as the 'full time employee' responsible for managing the kitchen to be used for this tender did not possess the required qualification/s.

Colonel Bondin, chairperson of the evaluation committee, remarked that the evaluation board ran a check on the qualification presented in respect of Mr Mario Caruana because it was a City and Guilds Certificate whereas others possessed either a diploma or an advanced diploma and the like that covered management.

In response to a question put forward by the Chairman PCAB, Dr Spiteri Bianchi remarked that out of four bidders, only one bidder met tender requirements in this respect. Dr Spiteri Bianchi argued that, in such circumstances, one had to either give a strict interpretation of the tender conditions, as the evaluation committee did, or else give a wide interpretation of the tender conditions which option he preferred to leave up to the PCAB.

Dr de Gabriele intervened to say that with regard to the course followed by Mr Caruana way back in 1978 his client obtained further information not from the Education Department but from the City and Guilds of London Institute itself and during the same hearing presented to the PCAB and to the contracting authority a detailed document about the course in question. Dr de Gabriele reminded the PCAB that his client had also submitted the qualifications of Mr Winston J. Zahra and Ms Minter. He also mentioned that the 'Outside Catering Certificate' required as per clause 3.6h made it mandatory for a tenderer to have full time qualified employees to act as outside caterers and to have up to standard vehicles and he therefore argued that that certificate by itself already covered the requirements at clauses 3.6a and 3.6e.

At this point, the Chairman PCAB queried

- (i) the reason as to why such a qualified person was mandatory only when dealing with 'high risk' persons whereas other catering establishments that did not cater for 'high risk' persons did not have to provide the services of such a qualified person to manage the kitchen;
- (ii) as to how was the estimated contract value arrived at? Dr Spiteri Bianchi and Lt. Col. Gatt remarked that the estimated contract value was worked out on 2,500 persons for a period of 24 months which worked out at 7.71 Euros per person for breakfast, lunch and dinner.

The Chairman PCAB remarked that, given the technical and financial effort put in by tenderers in making their submissions, the evaluation committee was expected to go through the details of these submissions and to apply the same rigour and yardstick with each and every offer. Dr Spiteri Bianchi could not but agree and added that errors were

usually committed by those who performed and not by those who opted to remain passive. Dr de Gabriele reminded those present that the remedy at the disposal of a tenderer to lodge an appeal in this case was rather burdensome and in fact involved his client a deposit of 58,000 Euros.

Dr Aquilina, explained that with regard to qualifications, his client had submitted certificates issued by foreign universities, duly recognised by the University of Malta and that was the reason why the evaluation committee found no difficulty in accepting them.

At this stage the evaluation committee was handed over a complete copy of the 19-page document that referred to course 706 'Cookery for the Catering Industry' for examinations in 1977 to 1979 by the City and Guilds of London Institute.

The Chairman PCAB requested the evaluation committee to express itself as to whether it would have been satisfied that Mr Mario Caruana, the person nominated by the appellant Company, would have been suitably qualified if this document had been in its possession during adjudication stage.

The evaluation committee retired into the office of the Director General (Contracts) to examine the document and report back. The hearing resumed after twenty-one minutes.

Dr Spiteri Bianchi remarked that from the examination carried out on the document referred to them by the appellant Company, the committee agreed that this document corroborated what it had already verified on its own initiative or, at best, it indicated on page 8 of the document that

*“On completion of the course, the candidate should have achieved ability in:  
(a) practical skills: to understand and utilise the manipulative skill involved in the basic preparatory and cooking processes ... ”*

Dr Spiteri Bianchi added that if one were to refer to what was requested in the tender document, one would find a clear reference to management (para. 11 of Annex II). He remarked that if one were to compare the certificate submitted in respect of Mr Winston J. Zahra, who held a Bachelor of Arts in Hotel and Catering Management, to that submitted in respect of Mr Mario Caruana one could not place them at the same level.

Dr de Gabriele remarked that apart from Mr Mario Caruana certificate, his client had also submitted Mr Zahra's and Ms Minter's respective certificates. The PCAB commented that Mr Caruana's certificate was under scrutiny because he was identified as the full time employee for the purposes of para. 11 of Annex II

Dr Spiteri Bianchi reiterated that, in this instance, the evaluation committee interpreted the provisions of the tender document in a restrictive manner in the sense that it reported on what was submitted in relation to what was requested, no more and no less. The same lawyer remarked that, in the limited time it had at its disposal, it did not result to the

evaluation committee that management skills were covered by the syllabus presented by the appellants.

Dr de Gabriele explained that the syllabus was divided in three parts, i.e. 706-1 concerned basic cookery, 706-2 was about cookery and 706-3 was about advanced cookery which covered, for example, 'Applied Science and Hygiene' (pg 14), 'Legal Aspects Affecting Food', 'Design, Decoration and Display', 'Food, Costing, Related Costs and Quality Control', 'Premises and Equipment' and 'Safety' (pg 15). He argued that, when one considered the part of the syllabus concerning 'Advanced Cookery', one would notice that it covered various aspects of catering. Dr de Gabriele added that Mr Caruana was the executive chef of the group and was responsible for the provision of meals for about a thousand customers.

Dr Spiteri Bianchi remarked that the whole issue boiled down to the presentation of the qualification requested. Dr Spiteri Bianchi stated that, contrary to what was indicated in the email dated 28<sup>th</sup> April 2009, the certificate presented in respect of the person identified as the full time employee did not include catering management qualifications. He added that the same email stated that "*Mr Mario Caruana is the person who will be responsible for managing the kitchen used for this tender. He has been in the company for over 20 years and is highly respected and trusted member of the team.*" Dr Spiteri Bianchi remarked that, whilst he could not shed any doubt on the ability of Mr Caruana who had been in the catering business for a long time, yet he considered that statement as a certificate about the person. Dr Spiteri Bianchi submitted that the certificate presented was not equivalent to the qualifications requested in the tender.

The Chairman observed that it appeared that the certificate submitted with the offer differed from what was requested in the tender with regard to 'management' qualifications.

Mr Winston J. Zahra remarked that Mr Caruana had been the Executive Chef of the group since 1987, with wide experience in catering, had a team of 150 employees under his responsibility and managed a budget of about 14 million Euros per annum and, as a consequence, Mr Caruana knew how to manage things.

Dr Spiteri Bianchi again explained that the evaluation committee was after a qualification in management. He added that, on one hand, the appellants included a person, Mr Winston J. Zahra, who had the appropriate qualification but who was not employed on a full time basis and, on the other hand, the appellants named a full time employee but who did not have the appropriate management qualification. He repeated that the adjudication committee held on to a restrictive interpretation of the tender document.

To a question put forward by the PCAB, Mr James Barbara, representing James Caterers Ltd, stated that Mr Nazzareno Casha was nominated by his firm for the purposes of para. 11 of Annex II and that Mr Casha had about 30 years experience and used to work with the Corinthia Group of Companies. Dr Aquilina intervened to state that his client had

submitted a certificate from the Institute of Tourism Studies (ITS), specifically on management, issued in 1995.

Dr de Gabriele stated that the official ETC (Employment and Training Corporation) list of employees of Island Hotels Group submitted by his client with the email dated 28<sup>th</sup> April 2009, namely, after the closing date of tender, indicated Mr Mario Caruana as an Executive Chef on full time basis. Dr Spiteri Bianchi stated that the evaluation committee adjudicated on the papers submitted with the original submission.

At this stage it was agreed that the ETC would usually list an employee according to the information submitted by the respective employer.

Dr Aquilina, again, quoted para. 11 of Annex II and stated that the appellant Company did not indicate Mr Winston Zahra Jr as the person meeting this requirement. On his part, Dr de Gabriele maintained that the ETC list was submitted at the request of Mr J. Debattista of the AFM and it demonstrated that Mr Caruana was employed on full time basis in the capacity of 'Executive Chef' and, subsequently, Mr Debattista confirmed to his client that he had been presented with all the information requested from *GN Consortium* as per para.11 of Annex II.

Dr de Gabriele explained that a consortium tendering for such a contract could not depend on one person but that there had to be a team responsible for management.

Dr Aquilina, in response to a question by the PCAB, remarked that, by definition, 'recognised qualifications' as indicated in para. 11 of Annex II referred to certificates, by which one could establish the level of qualification.

Albeit the Chairman PCAB conceded that the tender document was quite clear, yet, he put forward the scenario of a person who held a qualification in catering management for two years and another person who had thirty years experience and who used to lecture the relatively newly qualified catering manager. The Chairman PCAB asked how was one to evaluate such a situation keeping in view the risk factor of the customers.

Lt. Col. Gatt remarked that when one applied for a position, say, in the public service, one was usually required to submit a degree or a diploma or a certificate together with experience. He added that from his own experience in providing meals to these high risk groups, he could envisage that if something went wrong and it would result that the person responsible was not in possession of an appropriate qualification then the person responsible for that situation would face a hard time in court. Lt. Col. Gatt agreed that, ideally, a person for this position should be both qualified and experienced and, in fact, during the adjudication process, it resulted that one of the tenderers presented a full time employee with suitable qualifications and experience whereas the appellant Company presented a full time employee with experience and, in addition, had a qualified catering manager within the same consortium.

The Chairman PCAB argued that it appeared that this specific requirement in the tender document was brought about by the high risk element of this particular group because, under normal circumstances, catering establishments apparently were not required to have this full time qualified employee in the kitchen.

Dr de Gabriele maintained that, in his submission, his client presented Mr Caruana as a person with both experience and qualifications in catering. Mr Winston Zahra Jr agreed that in practice the ETC showed the designation of the employee strictly according to what the respective employee would have indicated and added that the Malta Tourism Authority did not carry out any rigorous examination to confirm that nomenclature. Mr Zahra stated that at the end of the day it was the employer who shouldered the responsibility of his employees because the employer risked losing his operator's licence.

Dr Aquilina claimed that experience on its own did not constitute a recognised qualification and, moreover, since the certificate presented by the appellant Company did not cover management, then the person concerned did not meet all the requisites.

Dr de Gabriele rebutted that Mr Caruana was in possession of the required qualification and, in addition to, but not in substitution of, such qualification, was experienced in catering.

Lt. Col. Brian Gatt explained that catering management qualifications meant that the person had to manage the entire establishment. He contended that there was a clear distinction between the Chef, who was responsible for food preparation, and the Catering Manager who was ultimately responsible for the entire establishment and for the tender.

Dr de Gabriele considered that the most worrying element that emerged from this appeal was the incident whereby

- (i) the *Outside Catering Certificate* submitted in terms of clause 3.6h had gone missing from the original submission and, as a result, was not available to the evaluation committee and
- (ii) this certificate was found in the copy of the same tender documentation kept at the Contracts Department.

At this point Dr de Gabriele reminded those present of:

- a. the evidence given by Bombardier Miruzzi in the sense that the tender documents were not sealed on being handed over to AFM for adjudication and thus these documents could have been tampered with;
- b. the fact that it took an extra day for these documents to be made available to AFM, the contracting authority;

- c. the fact that the Director General (Contracts) could not exclude the possibility that papers could have been removed from the original tender submission prior to having been made available to the evaluation committee; and
- d. the fact that the certificate in question then surfaced again as part of the original submission as evidenced during the hearing.

Dr de Gabriele could not offer any explanation as to what happened in this regard. However, he contended that, on the basis of this incident alone, the tendering process should be invalidated as it was tainted by this inexplicable incident. Dr de Gabriele added that, for the sake of equity, one had to ensure, not only that there was a level playing field for all but, also, that such level playing field was evident to all.

The Chairman PCAB asked a clarification from the appellant Company's legal representative as to whether he was requesting the invalidation of the whole process or else that his client's offer should be readmitted in the tendering process for further consideration.

Dr de Gabriele explained that the original appeal requested the readmission of his client's bid into the tendering process but he added that, given the new elements that came to light during the hearing, if his client's offer would not be readmitted into the tendering process then one should consider the invalidation of the whole tendering process.

On his part, Dr Spiteri Bianchi remarked that, in the time available, the contracting authority considered that it had conducted its case in an exhaustive manner and, as a result, no further submissions were being made.

Dr Aquilina disagreed with the concluding remarks made by the appellant Company's legal advisor and contended that since this was a three envelope tender the appellants only had the right to request the readmission of their offer. In spite of the fact that Dr Aquilina conceded that something odd happened with regard to the 'Outside Catering Certificate', yet he pointed out that that certificate carried the same date of the closing date of tender which meant that the certificate had been issued on the 10<sup>th</sup> March 2009 and by about 9am of the same day it was presented as part of the appellants' submission. Dr Aquilina left it up to the PCAB to consider who stood to gain from the extra day allowed for the delivery of the tender submissions to the contracting authority.

Lt. Col. Gatt informed the PCAB that, for the past four years or so, these meals had been supplied partly by direct order, which Dr Aquilina identified his client as the supplier, and partly be the AFM. Lt. Col. Gatt remarked that this matter had also been the subject of a parliamentary question.

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

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 16.06.2009 and also through his verbal submissions presented during the public hearing held on the 3.08.2009, had objected to the decision taken by the General Contracts Committee;
- having established that the estimated contract value was worked out on 2,500 persons for a period of 24 months which worked out at 7.71 Euros per person for breakfast, lunch and dinner;
- having taken note of the fact that there was no longer an issue with any infringement carried out by the appellants in respect of compliance requirements with Clause 3.6 (a) due to the fact that, according to the contracting authority’s legal representative, following the appeal lodged by the appellants, the AFM had sought clarifications from the department concerned and even consulted the relevant legal provisions and, as a consequence, it transpired that the appellant Company had in fact submitted the certificate that was required and that, as a result, this issue should now be considered settled;
- having also taken note of the fact that with regards to Clause 3.6 (h), which contemplated a submission of an “*Outside Catering Certificate issued by the Health Authorities*” - (a) the appellant Company’s legal advisor maintained that his client had in fact submitted the certificate requested as part of his original submission and supported such claim with affidavits by the persons who were responsible for compiling the tender documentation - (b) the contracting authority’s legal advisor claimed that the said certificate resulted as missing at evaluation stage which followed collection and transfer of tender documents from the Contracts Department to the AFM’s Headquarters - (c) the Chairman of the evaluation committee confirm under oath that (1) the tender documents were not wrapped and sealed when the box they were in was handed over to the evaluation committee, (2) no AFM officer was present at the stage when the tenders were opened at the Department of Contracts and (3) during the administrative compliance exercise, the committee checked the certificates and documentation submitted against what was required in the tender and that it was at that stage that the committee noted that this particular certificate was missing and – (d) other members of the evaluation committee, namely, Colonel Brian Gatt and Mr John Debattista stated under oath that they did not see this ‘certificate’ dated 10<sup>th</sup> March 2009 during the evaluation / adjudication process;
- having also taken note of Bombardier Miruzzi’s evidence given under oath wherein the sequence of events was recalled leading to the physical transfer of tendered documents to the AFM’s HQ;
- having also heard Colonel Martin Bondin, Chairman of the evaluation committee, state that as Chairman of the evaluation committee, it did not give him peace of mind

- that the tender documents were handed over to the committee in a way that others could have had access to the contents, in other words, not packed separately and sealed;
- having heard the DG (Contracts) state that he was not comfortable with the practice that the tender documents were handed over by the Contracts Department to the contracting authority unsealed or in such a way that one could add or remove documents, agreeing with the Chairman PCAB that this procedure needed revisiting, albeit he later stated that, in this particular instance, he had checked how the tender documents were handed over to the contracting authorities and found out that these documents were issued sealed by tape;
  - having witnessed the opening of a sealed bundle containing copies of the technical submissions resulting in a document marked '10', which referred to the 'Outside Catering Certificate' issued in the name of Island Caterers Ltd, actually being amongst the said documents;
  - having taken cognisance of the fact that the tender document required that participating tenderers had to submit a '*Catering Management Certificate*' pertaining to a qualified person who had to be employed on a full time basis and who also formed part of the team which was going to prepare the food to a group of people considered to be 'high risk' by the contracting authority, with 'high risk' reflecting a scenario where a large number of people, possibly with different dietary requirements, are confined to an enclosed place wherein an infection or a disease could easily spread resulting in a more devastating effect than one could encounter in normal circumstances;
  - having heard (a) from Dr Spiteri Bianchi that the person nominated by the appellant Company, namely Mr Mario Caruana, held a certificate from the City and Guilds of London Institute in 'Cookery for the Catering Industry', which according to the contracting authority, this referred to a certification relating to a 'basic cookery' course with the AFM stating that the dictionary termed 'cookery' as the art and practice of cooking, and that it did not include the other elements required in the tender document, such as, management, diet food and so on. In the circumstances, this Board heard the contracting authority's legal advisor claim that the person identified by Messrs GN Consortium as the 'full time employee' responsible for managing the kitchen to be used for this tender did not possess the required qualification/s;
  - having acknowledged that Dr Spiteri Bianchi remarked that out of four bidders, only one bidder met tender requirements in so far as the '*Catering Management Certificate*' is concerned;
  - having also heard that, with regard to the course followed by Mr Caruana way back in 1978, the appellant Company had obtained further information on the content of the course in question from the *City and Guilds of London Institute* itself, a

complete copy of this 19-page document detailing the syllabus being tabled during this appeal's hearing;

- having also given the evaluation committee the opportunity during the hearing to assess and establish the validity and the managerial content and relevance of the course frequented by Mr Caruana in the late 70s and having, subsequently, heard from the contracting authority's legal advisor that from the examination carried out on the document referred to them by the appellant Company, the committee agreed that this document corroborated what it had already verified on its own initiative, namely that from the document forwarded to them a few minutes before it did not result to the evaluation committee that management skills were covered by the syllabus presented by the appellants, adding that if one were to refer to what was requested in the tender document, one would find a clear reference to 'management', concluding that the certificate presented was not equivalent to the qualifications requested in the tender specifications;
- having taken note of Lt. Col. Brian Gatt's statement that catering management qualifications meant that the managing person had to manage the entire establishment, contending that there was a clear distinction between the 'Chef', who was responsible for food preparation, and the 'Catering Manager' who was ultimately responsible for the entire establishment and for the tender;
- having also taken note of the appellants' remarks, namely that (a) the 'Outside Catering Certificate' required as per clause 3.6h made it mandatory for a tenderer to have full time qualified employees to act as outside caterers and to have up to standard vehicles thus, argued the appellants' legal representative that that certificate by itself already covered the requirements at clauses 3.6a and 3.6e, and (b) Mr Caruana had been the Executive Chef of the group since 1987, with wide experience in catering, had a team of 150 employees under his responsibility and managed a budget of about 14 million Euros per annum and, as a consequence, Mr Caruana knew how to manage things;
- having also considered Dr Aquilina claim that experience on its own did not constitute a recognised qualification and, moreover, since the certificate presented by the appellant Company did not cover management, then the person concerned did not meet all the requisites;
- having taken particular notice of (a) Dr de Gabriele's remark that, whilst Mr Caruana was in possession of the required qualification and, in addition to, but not in substitution of, such qualification, was experienced in catering, yet one had to realise that a consortium tendering for such a contract could not depend on one person but that there had to be a team responsible for management and (b) Mr Zahra's remark that, at the end of the day, it was the employer who shouldered the responsibility of his employees because it was the employer who risked losing one's own operator's licence;

- having perused the tender specification relating to the holding of management qualifications, i.e. “*must hold and submit recognized qualifications in Catering Management, Food Technology Hygiene nutrition and diet food* ” and ascertained that the clause does not lay down the level of management qualifications required;
- having established that for the past four years or so, these meals had been supplied partly by the AFM itself and partly by direct order given to Messrs James Caterers Ltd, an interested party represented by Dr Aquilina;

reached the following conclusions, namely:

1. The PCAB feels that it is amply clear that from the evidence given by Bombardier Mizzi in connection with the fact that the current system - *being implemented whenever tender documents are opened and are, subsequently, being transferred to apposite contracting authorities after closing date* - needs considerable improving upon. It is inconceivable for the PCAB members to be expected to have peace of mind without being convinced that documents are not so easily possibly misplaced. The fact that the same DG Contracts does not feel comfortable with the current praxis is not comforting but, at least, gives a ray of hope that remedial action by the Contracts Department to rectify this issue will soon be forthcoming with a view to ensure that document security, transparency and accountability are guaranteed throughout the entire tendering process, including the adjudication stage;
2. The PCAB feels that the contracting authority should have shown greater responsibility in ensuring that, at least, a high ranking official be present during the opening of the tender box;
3. The PCAB feels that the delay in handing over the tendered documents to the contracting authority is unacceptable, as much as was the whole ‘modus operandi’ adopted in doing so (e.g. the PCAB (a) still remains uncertain as to whether the box was sealed or not and (b) still cannot comprehend how no proper signing at time of transfer of any documentation took place to ensure accountability with regards to state of documentation at time of transfer and receipt of the said documents);
4. Whilst the PCAB maintains that, under normal circumstances, an Evaluation Committee would only be expected to deliberate solely on documents made available to it, yet, in this instance, the PCAB cannot ignore the fact that the document in question was sighted by the PCAB as included in the offer that had been examined by the evaluation committee and later amongst the documentation submitted as copy of the original. Needless to say that, this could cast doubt on the whole process, albeit the PCAB acknowledges also that it might have happened that the certificate was placed in the copy but overlooked in the original submission;

5. The PCAB, whilst (a) conceding that the tender document was quite clear in so far as regards the necessity for a designated full time employee to hold a ‘*Catering Management Certificate - as per para. 11 of Annex II ‘Technical Specifications’*’, has also taken note that the specification does not lay down the particular academic standard level that is required, (b) being aware of the fact that the designated person by the appellant Company (Mr Mario Caruana), who has been the Group’s Executive Chef since 1987 leading a team of 150 employees and managing a budget of about 14 million Euros and is responsible for the provision of meals for about a thousand customers, is in possession of a ‘Cookery for the Catering Industry’ (City and Guilds) certificate, (c) having established that apart from Mr Caruana’s qualification, the appellant Company had also submitted Mr Zahra’s and Ms Minter’s respective certificates, (d) having considered the contracting authority’s legal advisor’s comments regarding the fact that on one hand, the appellants included a person, Mr Winston J. Zahra, who had the appropriate qualification but who was not employed on a full time basis and, on the other hand, a full time employee but who did not have the appropriate management qualification, acknowledges that (1) a consortium tendering for such a contract could not depend on one person but that there had to be a team responsible for management and (2) given the circumstances, one cannot simply turn oblivious to the fact that qualifications on their own could be as problematic as having an employee conducting managerial duties without proper recognised qualifications. As regards (2) the PCAB cannot state that Mr Caruana’s qualifications are deficient since the City of Guilds certificate that he holds includes such elements of management as costings, personnel management etc, albeit others could be considered more academically qualified. Undoubtedly, whilst remaining fully cognisant of the ‘high risk’ element, as amply and repeatedly stressed by members of the Evaluation Committee, as well as, the contracting authority’s legal advisor, yet the PCAB cannot disregard the fact that running the proverbial ‘show’ for many years, having had to adapt to ever-changing culinary habits and preferences, greater health conscious diets and an ever-increasing demanding customer base, should not work against the professional credibility of the likes of Mr Caruana, whether such people work in the leisure industry or to provide outside catering services for third country nationals (illegal immigrants). The PCAB opines that, in the catering business, whether the likes of Mr Caruana are preparing food for people living in enclosed areas or not, there is always a question of ‘high risk’ with possible health and legal repercussions. In these circumstances, the PCAB concludes that the specifications in the first place, followed by the evaluation committee’s deliberation method, have been considerably conditioned by possible repercussions that one could encounter should anything go wrong in the future. The PCAB feels that in this instance, apart from the fact that no one has dared to tarnish Mr Caruana’s professional capability, the ultimate legal responsibility will have to be shouldered by the awarded tenderer signing the contract (the ‘employer’) with the contracting authority and not the ‘employee’. As a result, the PCAB, whilst

understanding the points and concerns raised by Lt. Col. Gatt regarding the legal ramifications an entity could encounter should anything go wrong (e.g. wrong diets, wrong product type being given to categories of immigrants with specific requirements (health, religious and so forth)), yet, it cannot but agree with the counter argument made by the appellants' representative, Mr Zahra, who stated that at the end of the day, it was the employer who shouldered the responsibility of his employees because the employer risked losing his operator's licence;

6. The PCAB, having established that for the past four years or so, these meals had been supplied partly by the AFM itself and partly by direct order given to James Caterers Ltd, an interested party who was present at the hearing, the PCAB feels that considering all, the arguments raised by the Evaluation Committee and the latter's emphasis on the full time employee's professional qualifications and status in total disregard of the level of expertise demonstrated, goes beyond the scope of the '*Supply and Service of Breakfast, Lunch and Dinner to Third Country Nationals (Irregular Immigrants)*', the title of the tender under review. The PCAB opines that, in similar circumstances, it is increasingly important for contracting authorities to ensure that a level playing field amongst participating members remains always a 'sine qua non' and by reducing the number of participants for eventual continued assessment to just one for reasons which appear to be, perhaps, unreasonably supported given the facts available, is definitely not doing the said cause any justice whatsoever.

As a consequence of (1) to (6) above, this Board finds in favour of the appellants and recommends that proper remedial action, including the reinstatement of the offer submitted by the appellant Company, be taken forthwith.

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 reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*17 August 2009*