

PUBLIC CONTRACTS APPEALS BOARD

Case No. 164

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.

A meeting was held at the PCAB meeting hall at the Department of Contracts on Friday, 18th September at 08.45 on the specific subject of the admissibility or otherwise of the objections filed by **(i) Dr Norval Desira LL.D. on behalf of Logos Societa Cooperativa and (ii) Dr Luigi A Sansone LL.D. on behalf of Misco Outlook Consortium.**

Present

Public Contracts Appeals Board:

Mr Anthony Pavia	Acting Chairman
Mr Edwin Muscat	Member
Mr Carmel Esposito	Member

Logos Societa Cooperativa

Dr Norval Desira	Legal Representative
Dr Gaetano Gaglio	

Misco Outlook Consortium

Dr Luigi A Sansone	Legal Representative
Mr Morgan Parnis	
Mr Hilary Caruana	
Mr David Bezzina	

Economic and Management Consultancy Services Ltd (EMCS) Consortium

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Representative
Mr Lawrence Mizzi	
Mr George Papagiorcopulo	
Mr Lou Bondi	

Malta Tourism Authority - Evaluation Committee:

Mr Francis Albani	Chairperson
Ms Sarah Azzopardi	Member
Mr Patrick Attard	Secretary

Department of Contracts

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

At the start of the meeting Mr. Anthony Pavia informed all present that Mr. Triganza, the Chairman of the PCAB had advised him that as he was indisposed he would not be present to chair the meeting and he had asked him to take the Chair in his stead. All interested parties did not find any objection for the hearing to be chaired by Mr Pavia.

In his introductory speech the Acting Chairman emphasised that the sole purpose of this meeting was specifically to discuss the issue of admissibility or otherwise of the objections filed by the appellants and not the grounds that lead to the discarding of their bids. He said that in spite of the fact that PCAB had already examined the issue and formed an opinion and carried out the necessary consultations, for transparency's sake, it was decided to hold this preliminary sitting to hear also the opinion of all the parties involved for this purpose he assured the interested parties that the Board would be keeping an open mind..

Dr Norval Desira, legal representative of Logos Societa Cooperativa (Logos), started by making reference to letter dated 25 February 2009 that was sent by the Department of Contracts to his clients. He said that he was assuming that a similar letter was also sent to all other participating tenderers. He said that in the introduction of this letter it was stated that:

Thank you for participating in the abovementioned tender, however I regret to inform you that this open tender procedure has been cancelled.

He claimed that in previous tenders such letters never started with such a statement, that is, *'the tender procedure has been cancelled'* and his clients could not interpret this to mean otherwise – that the tender procedure was totally cancelled and that it was going to stop there. The lawyer acknowledged that the tenderers were also informed that they could appeal to this decision but he argued that the drafting of the letter indicated that they could have objected to the decision regarding cancellation and not the discarding of their tenders. Subsequently one of the participating tenderers appealed and it appeared that the Director of Contracts did not raise the issue of cancellation, proceeded with the appeal and the appellant's objection was upheld by the PCAB.

Dr Desira said that on 31 July 2009 the Director of Contracts issued another letter as he was obliged to do by law but in this instance, conscious of the mistake or misinformation or confusion created in the first letter, the wording usually used when tenderer/s was/were disqualified was used, namely:

'You are hereby being notified that in terms of Clause 82, Part XII of Legal Notice No 177 Public Contracts Regulations 2005, the General Contracts Committee has recommended that unless any objection is received the financial proposals (prices) relative to the tender which qualified for this stage are to be opened on Thursday 6th August 2009 after 12.00 p.m. at the Committee Room of the Contracts Department.

However, your tender is not among the selected ones since it has been adjudicated as administratively non-compliant'

In this letter they were also informed that they could object to this decision. He said that Regulation 82 (4) of the Public Contracts Regulations *inter alia* specified that *'the affected tenderer and any person having or having had an interest...'* could submit a complaint and therefore, his clients *'having had an interest'* acted accordingly.

Here, Mr Pavia intervened by stating that the bone of contention was whether, after already having been given a period of 10 calendar days in which to appeal, any tenderer or any other interested party could be given another opportunity of four working days to file an objection.

Dr Desira explained that once in the first letter they were informed that the tender had been cancelled they could only appeal against that decision. He alleged that in the first appeal the reason of cancellation of tender was never raised. Logos's lawyer maintained that it was only in this instance that there was the right of appeal to the discarding of tenders. It was sustained that when the Director of Contracts decided to cancel, the tendering procedure was terminated. However, following the PCAB's decision, whereby it recommended that EMCS Consortium be re-admitted in this open tender procedure for further evaluation, the Director of Contracts, evidently, had re-activated the tendering process. Subsequently, the tenderers who have had an interest submitted their complaint.

During the proceedings, when the PCAB asked why they did not file an objection after the receipt of letter dated 25 February 2009, Dr Desira replied that it was the prerogative of the Director of Contracts to cancel the tender and, in his opinion, they could only appeal against that decision.

Dr Luigi A Sansone, legal representative of Market Intelligence Services Co Ltd (MISCO), concurred with the arguments brought forward by Dr Norval Desira. The lawyer sustained that it was clear that the letter of the 25 February 2009 referred to a decision of cancellation of the tender procedure and that the participating tenderers were informed that the tender was being terminated. He said that when tenderers were asked *'If you intend to object to this decision'*, the Director of Contracts was referring to the cancellation of the tender procedure. Dr Sansone argued that, when the appeal by one of the parties was upheld by the PCAB and re-admitted in the evaluation process, the tendering process was automatically re-activated. He sustained that the letter of the 31 July 2009 received by his client, was the first communication that entitled them to appeal against the decision for the discarding of their offer and on the basis of the fact that they *"have had an interest"* in obtaining this particular contract, his clients decided to appeal.

Dr Sansone contended that the argument raised by Dr Delia on behalf of EMCS Consortium in his written submission that their letter of complaint was irregular since it was addressed to the PCAB instead of the Director of Contracts was frivolous. He said that Regulation 82 (4) specified that *'A complaint by the affected tenderer and any person having or having had an interest in obtaining a particular public contracts must reach the Department of Contracts'* and also stipulated that such complaint must be accompanied by a deposit. He maintained that their complaint was valid, considering the fact that (i) their letter was acknowledged as being received at

the Registry of the Department of Contracts and (ii) it was accompanied by the appropriate deposit.

At this point, Dr Desira intervened by claiming that the party that was objecting to the filing of their complaint had no '*locus standi*' in this appeal because their complaint was filed in terms of Regulation 82, that is, after the evaluation of the second package and not Regulation 83, that is, at award stage. He said that EMCS Consortium, being the participating tenderer that has qualified for the final stage, would be considered as having an interest only after the opening of the Third Package. It was explained that the difference between Regulations 82 and 83 was in the procedure for the submission of the appeal, whereby under the former, a complaint could be filed by any tenderer whose tender was discarded at any stage of the Separate Package Procedure, while under the latter, an objection could be filed by any tenderer whose offer reached the final stage of the award procedure. As a consequence, the remaining participating tenderers including the tenderer to whom the contract would be recommended for award would have an interest only after the opening of the Third Package. He contended that after the first or second package the issue would be solely between the discarded tenderer/s and the Director of Contracts. He pointed out that in this case the Director of Contracts did not raise any complaint on the appeals submitted by Logos and Misco. Dr Desira sustained that they should not look at the procedure in a rigid manner. He claimed that the Director of Contracts was the only person who could stand up, declare that he had made a mistake when he communicated the right of appeal and as a consequence would withdraw the relative letter. Alternatively, although he had his doubts, the PCAB could raise an '*ex officio*' on the matter. However, he was certain that the party that was making the objection had no '*locus standi*' in this appeal.

Dr Sansone added that if the objecting party was going to argue on points of procedure that were so frivolous, they would be obliged to point out that EMCS Consortium, that was insisting on the opening of the packages in its favour, was an entity that legally did not exist.

Dr Adrian Delia, Legal Representative of EMCS Consortium, said that he was trying to limit himself to legal matters rather than to allegations or to frivolous issues. He sustained that the most important document that needs to be analysed was the PCAB's decision of the 28 April 2009 wherein it was stated that:

'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 ...'.

Dr Delia claimed that this decision was issued by the highest body in the procedure of the public contracts appeals. The lawyer said that, after hearing the appeal filed by one of the three discarded tenderers (EMCS Consortium), the PCAB decided that the appellant party should be re-admitted in the tendering process. He insisted that the right of appeal was given by law and not as stated by Dr Desira that this was given by Director of Contracts. EMCS Consortium's legal representative said that his clients had appealed from the decision for discarding of their tender in terms of law and the PCAB had issued the relevant decision.

He did not agree with the appellant parties' opinion that they could not appeal following the Director of Contracts' decision to cancel the tender. Dr Delia sustained that the Director of Contracts made a mistake when he gave the tenderers whose tenders had already been discarded another chance to appeal. He said that the appeals procedure was stipulated in the Public Contracts Regulations. It was emphasised that the Director of Contracts had originally cancelled the tender procedure because all three participating tenderers were disqualified. He explained that, in the letters of the 25 February 2009 the Director of Contracts informed each tenderer separately (i) about the reasons for the discarding of their respective tenders and (ii) that they could object to the decision regarding their disqualification. All three tenderers had the opportunity to appeal against this decision in terms of the regulations but two of them chose not to file an objection. The PCAB heard the complaint submitted by the other participating tenderer and decided to re-admit the said tenderer into the evaluation procedure. He said that, if a right of appeal existed, at this stage the other parties could only appeal against the decision regarding the opening of his client's third envelope by indicating the reasons why it should not be opened and not appealing from a decision that was taken in February regarding the disqualification of their tenders. He said that it never happened before that after going through a whole process, including a PCAB's decision, a request was made to start afresh.

With regard to the issue of '*locus standi*', Dr Delia said that he could not understand how Dr Desira arrived at the conclusion that his clients had no '*locus standi*' considering the fact that they had arrived at a stage when their Third Envelope was going to be opened and a decision was subsequently taken not to open it.

Dr Delia said that if there was a mistake in the letter sent by the Director of Contracts to the participating tenderers, it was made when he invited them to appeal from the decision, which ironically was made in the Errata Corrige dated 31 July 2009 whereby those involved were informed that an official objection had to be filed against a deposit €17,000 (not as previously notified €34,000). However, Dr Delia said that such a mistake provided neither rights nor appeals because a right of appeal was provided by law and not by what was stated by the Director of Contracts. He claimed that the basis of their appeal was this letter because previously the other parties never stated that the other tenderer who was re-admitted by the PCAB should not have been re-instated. Dr Delia said that from the documentation presented and from today's submissions, it appeared that the appellants were stating that their right of appeal started from here. He emphasised that from a legal point of view, a right of appeal was provided by the law and not by what was stated by the Director of Contracts.

During these proceedings Mr Francis Attard, Director General (Contracts) and Mr Francis Albani, Chairman of the Evaluation Committee took the witness stand and gave their testimony under oath.

On cross examination by the PCAB Mr Francis Attard, Director General Contracts, explained that around February 2009 none of the offers received for this tender was found to be fully compliant with the tender conditions. He claimed that in the prevailing circumstances they had no alternative but to cancel the tender. Mr Attard said that this decision was published and confirmed that a letter was sent to all parties concerned informing them of their right to object to that decision. He said that only one objection was received, which was upheld by the PCAB. In its decision the

Appeals Board recommended that the tenderer (EMCS Consortium) be re-admitted in the tendering procedure. The Director General (Contracts) said that the Evaluation Committee was obliged to evaluate that offer. He said that they had to await the outcome of this exercise because there was no guarantee that the tender was going to be found fully compliant considering the fact the three participating tenderers were disqualified at an early stage. However, in actual fact, after concluding its evaluation, the Evaluation Board drew a fresh report to the General Contracts Committee, wherein it was indicated that this offer was technically fully compliant while the offers of the other two tenderers were not compliant, and therefore recommended the opening of the 3rd Package of the EMCS Consortium,.

In reply to a specific question by the PCAB the witness said that he did not think that the Evaluation Board had evaluated the other tenderers' offers again.

Continuing, Mr Attard said that after publishing the new recommendations, they gave the tenderers whose offer was discarded the right of appeal from that decision. Replying to another question by the Appeals Board, the witness said that the right of appeal was provided in terms of Regulation 82 of the Public Contracts Regulations, wherein it was specified that any bidder that was disqualified had a right to appeal from that decision.

Here, his attention was drawn by the PCAB that at that stage none of the tenderers was being disqualified. Mr Attard responded by stating that when they were stating that one out of three tenders was fully compliant, then, the other two were being disqualified. However the PCAB pointed out that the other two tenderers had already been disqualified and therefore he thought that at that stage only the bidder who was re-instated in the evaluation process could file an objection, obviously, if found to be not fully compliant. Dr Delia intervened by stating that only one bidder could be disqualified at that stage.

Dr Desira responded by stating that the PCAB's decision did not affect the other participating tenderers because the juridical relationship was between the Director of Contracts and each participating tender individually. To substantiate his argument, Dr Desira said that they were not even a party in EMCS Consortium's appeal. He added that considering the fact that the Director of Contracts had testified that the decision concerned the cancellation of the tender, they could only appeal against that decision and not the discarding of their tender. Here, the PCAB drew his attention that the tender was cancelled as a consequence of the fact that the offers of all participating tenderer were discarded. However, Dr Desira reiterated that, independently from the consequence, the tendering procedure was cancelled. On the other hand, Dr Delia insisted that it had been established that the tender was cancelled due to the fact that all three bids were not found to be compliant. He said that on 25 February 2009 all participating tenderers were informed of the reasons why they were disqualified and therefore if they wanted to be re-admitted in the evaluation process they could have appealed from that decision.

Continuing, Dr Desira insisted that once the tender was cancelled they could only appeal against that decision. He said that in his opinion the Appeals Board made a mistake because first it had to consider whether the decision to cancel the tender was correct or not and such findings should have been part of its decision. Dr Desira

insisted that, in case of disqualification, Regulation 82 did not provide that other participating tenderer had or should be considered as having an interest. He sustained that a participating tenderer was to be considered as having an interest only at award stage. The lawyer, to substantiate his argument that at that stage they had no '*locus standi*', said that they were not even notified about the appeal. He argued that after the PCAB's decision, the Director of Contracts had re-activated the tendering process and as a consequence even the right of appeal was to be re-activated. Dr Desira claimed that the right of appeal started from the moment the process was re-activated because, when the tender was re-activated, the process had to start again from that moment they were disqualified.

Dr Delia said that the regulations did not permit this. He said that the appellants did not state why they did not appeal after the receipt of letter dated 25 February 2009 and which article in the Public Contracts Regulations permitted that a tenderer could appeal twice from the same reason of disqualification. He contended that the appellants were not disqualified in the second stage (after the PCAB's decision) because they had already been disqualified during the first evaluation. He insisted that after the PCAB's decision only one tenderer remained in the process. He said that although in the introduction of letter dated 25 February 2009 they were informed that the 'open tender procedure has been cancelled', in the same letter they were also given the reason for the discarding of their offers and the opportunity to object to this decision. He insisted that a tenderer had a right to appeal from the same decision only once.

When the PCAB asked Mr Attard for his comments on these arguments, it was stated that, in his opinion, every time a decision was taken regarding the discarding of any particular tender, the affected tender should be given a right to appeal. He said that in this case the decision to disqualify was taken twice, that is, in February and in July, and therefore every time a decision was taken, the affected tenderers were given the right to appeal. He explained that after the PCAB's decision, the tendering procedure was re-activated and the Evaluation Committee submitted a fresh report wherein it was stated that one tenderer was fully compliant and the other two were not. Mr Attard sustained that the right of appeal was applicable again on the basis of this decision.

Dr Desira intervened by stating that after the Director of Contracts' decision to cancel the tender there was an appeal which was upheld and consequently the tender procedure was re-activated. He said that there was another evaluation and subsequently they gave the right of appeal to everybody. Here, Dr Delia insisted that it should be established whether there had been a re-evaluation of all tenders.

At this point, replying to a specific question by the PCAB, Mr Attard said that it was the Evaluation Board that could confirm or otherwise if the bids of all tenderers were re-examined. However, he added that the second recommendation was different from the first in the sense that whilst in the first report all tenders were found to be not compliant, in the latter report it was stated that one bidder was compliant and the other two were not.

When asked by the PCAB about the fact that in the letter of the 25 February 2009 the reasons why tenders were not compliant appeared to be secondary to cancellation of

tender, Mr Attard acknowledged that they might have included the conclusion before indicating the details.

On cross examination by Dr Norval Desira, Mr Attard declared that in their letter dated 25 February 2009 the right of appeal was given in terms of Regulation 83 (final award or cancellation) and not Regulation 82 (4) (disqualification). In fact he confirmed that the period within which tenderers were requested to file their appeal was more than the four working days stipulated under latter regulation. It was established EMCS Consortium had filed their appeal after more than 4 working days.

On taking the witness stand, Mr Francis Albani, Chairperson of the Evaluation Committee was cross examination by the PCAB. He testified that they did not re-examine the offers of the appellants because according to the PCAB's decision they had to examine only the offer of the tenderer who was re-admitted in the procedure for further evaluation, namely that of EMCS Consortium.

In his concluding remarks, Dr Desira said that from the testimony given by the Director of Contracts it had been established that in his letter of the 25 February 2009 the participating tenderers were given the right of appeal against the decision concerning the cancellation of tender and not the disqualification of tenderers as EMCS Consortium's legal representative was alleging. This was due to the fact that the tenderers were requested to file their objection by noon of Monday 9th March 2009 which was the period of ten calendar days within which they had to file their objection in terms of Regulations 83, that is, in case of award or cancellation of tenders. It was remarked that this period was more than the 4 working days allowed for filing a complaint under Regulation 82 (4) for the discarding of any particular tender.

Dr Desira reiterated that, at the moment the tender had been cancelled, the tender procedure was terminated and so they had to follow those instructions. He said that his clients did not have '*locus standi*' in EMCS Consortium's appeal because their juridical relationship was solely with the Director of Contracts and not with other participating tenderers.

Dr Desira emphasised that the PCAB did not decide on the Director of Contracts' decision regarding the cancellation of tender but on the disqualification of EMCS Consortium's tender. It was also stated that after the PCAB's decision, the Director of Contracts decided to re-activate the tender process and referred the file to the Evaluation Committee to continue with the evaluation process because the three participating tenderers were found to be non-compliant at an early stage of evaluation of Package Two. The lawyer said that they did not expect the Evaluation Committee to re-evaluate their tender once a decision had already been taken on their bid, but he insisted that their bids were still an integral part of the process.

Dr Desira argued that once (i) the process was re-activated (ii) the evaluation process of Package Two was concluded and (ii) the Evaluation Board drew up a fresh report with its final recommendations, then the Director of Contracts was obliged by law to inform his clients about the decision regarding the discarding of their tender and to give all disqualified tenderers the right to appeal from that decision. The lawyer said that his client, having that right, filed an appeal against the discarding of their tender.

Dr Desira maintained that Dr Delia's argument that, if their appeal would be upheld, the fourth tenderer would have a right to file another appeal did not apply.

Here, Mr Pavia asked Dr Desira to elaborate because in his reference to the letter of the Director General Contracts of the 25th February it appeared that he was disassociating the disqualification from cancellation. Dr Desira responded by stating that, if they knew that there were three tenderers and all three were disqualified, the Director of Contracts could have informed them that they were disqualified and therefore there would be no need to inform them that '*this open tender procedure has been cancelled*' because the right of appeal was stipulated in the law. He argued that, in the prevailing circumstances, it was not the case that the process was cancelled due to the disqualification of all three participating tenderers. Dr Desira said that the process would end automatically either if none of the three participating tenderers filed an appeal or if the three of them would have appealed and lost their appeal. He insisted that the Director of Contracts decided to cancel the tender but not because no one qualified. In actual fact, from the testimony given by the Director of Contracts, it had been established that the right of appeal was given on the basis of cancellation, that is, in terms of Regulation 83 re final decision and not because of disqualification.

In his final verbal submissions, Dr Sansone said that if they were to analyse the contents of the letter of the 25 February 2009, they would notice that the Director of Contracts had informed them about their right of appeal in terms of Regulation 83 (1) of the Public Contracts Regulations which specified that:

Any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement may, within ten calendar days of the publication of the decision, file a notice of objection at the Dept of Cont or the contracting authority involved as the case may be. Such a notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated tender value..'

He explained that between the 25 February 2009 (date of notification letter re decision) and the 9 March 2009 (latest date allowed for filing their objection) there were 10 calendar days and the deposit of Euro 34,000 represented 1% of the estimated tender value.

Dr Sansone remarked that the terminology used in the letter of 31 July 2009 was completely different wherein it was specified that:

'You are hereby being notified that in terms of Clause 82, Part XII of Legal Notice No. 177 Public Contracts Regulations 2005'

and

'the appeal has to be lodged by 12.00 noon of Thursday 6th August, 2009 against a deposit of Euro 17,000.'

Dr Sansone maintained this was the first time that they were requested to submit a complaint in terms of Regulation 82 (4) wherein affected tenderers whose tender had been discarded had a right to appeal against such decision within four working days from date of notification and such complaint had to be accompanied by a deposit of 0.5% of the estimated tender value.

He explained that on 25 Feb 2009 they were notified that (i) everything was cancelled (ii) their tender was administratively non compliant and (iii) they were given the right to present their objection by not later than 9 March 2009 against a deposit of 1% of the estimated tender value, that is, in terms of Regulation 83 (1).

Dr Sansone emphasised that the right to submit a complaint for the discarding of their tender in terms of Regulation 82 (4) was given to his clients only once, that is, on 31 July 2009 because on 25 February 2009 they were given the right to appeal against the decision of cancellation within the period of 10 calendar days within which to appeal in terms of Regulation 83 (1).

Finally, he reiterated that following the receipt of letter dated 31 July 2009, they had submitted their complaint as stipulated in Regulation 82 of the Public Contracts Regulations, because although their letter was addressed to the PCAB, it had reached the Department of Contracts within the stipulated four working days and against a deposit of 0.5% of the estimated tender value.

Dr Delia concluded his verbal submission by stating that he was of the opinion that once the regulations specified that an appeal had to be presented at the Department of Contracts, MISCO should have addressed their letter of complaint to the Director of Contracts and not to the PCAB. He pointed out that Regulation 83 (2) (h) stipulated that:

'The Director shall forward all the documentation related to any appeal case to the Chairman of the Appeals Board who shall then proceed as stipulated in Part XIV.'

He contended that this was a procedural requirement stipulated in the regulations and therefore should have been followed by all appellants.

Dr Delia remarked that in his introductory speech the Acting Chairman PCAB drew the attention of those present that this sitting was purposely held to discuss solely the admissibility or otherwise of the appeals submitted by Logos and Misco. He said once the other party conceded that the right of appeal was given by the law and not by the Director of Contracts, then that issue was resolved.

He explained that there were only two methods of appeals, either 82(4) in case of disqualification of tender or 83 in case of award. Dr Delia emphasised that Regulation that was applicable for the purpose of this sitting was the former because they were discussing whether the appeals submitted by the disqualified tenderers were admissible or not. He contended that their appeals were not admissible because both tenderers were disqualified in February 2009. EMCS Consortium's legal representative said that, however, in spite of the fact that they were notified in

February about their right to object to the decision that their offers were discarded, Logos and MISCO failed to appeal by the 9th of March 2009.

Dr Desira pointed out that when Mr Albani was asked by the Chairperson of the PCAB whether they had re-examined the tenders of the appellants, the reply given was in the negative. It was established that the Evaluation Committee only evaluated the tender submitted by his clients because the PCAB decided that EMCS Consortium had to be re-admitted in this open tender procedure for further evaluation. He sustained that in this instance there was no other disqualification and that the Evaluation Board in its second report reproduced the reason for disqualification in respect of the appellants because their offers were not even evaluated. As a consequence, the Director of Contracts could not give the right of appeal under Regulation 82 (4) because in his letter dated 31 July 2009 reference was made to the previous disqualification. Dr Delia contended that in his letter dated 25 February 2009 the Director of Contracts had already indicated the reason for disqualification and also informed them of their right of appeal. In this letter each participating tenderer was notified that *'The tender submitted by you was administratively non compliant since... (tenderers were notified separately with the reasons why their tender was discarded) If you intend to object to this decision...'*. Dr Delia said that this was the decision for disqualification. He claimed that the appellants were not disqualified twice.

Dr Delia insisted that in view of the fact that their tenders were discarded months ago their objection was not admissible.

Dr Norval Desira said that if Dr Delia's argument was correct then EMCS Consortium's appeal was invalid because the appeal from disqualification should have been presented in terms of Regulation 82 (4). However, Dr Delia responded by stating that they were not discussing that appeal, on which there had already been a decision by the PCAB.

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 both the appellants, had objected to the decision taken by the General Contracts Committee to disqualify their tenders;
- having also noted that prima facie it appeared that the appellants had been granted the right of appeal by the Director General (Contracts);
- having decided to call a meeting with the sole purpose of deciding whether or not the appeals are to be admitted;
- heard the submissions by Dr Norval Desira on behalf of Logos Societa Cooperativa where it was argued that his clients had not submitted their appeal in the first instance because the letter by the Director General (Contracts) stated clearly that the tender had been cancelled and only incidentally referred

to his client's tender being non compliant, and that the right to appeal had only been granted in terms of Regulation 83 of the Public Contracts Regulations;

- having also noted Dr. Desira's contention that the proper right of appeal to his clients was only granted by the second letter of the 31 July 2009 ;
- having heard Dr. L. A. Sansone argue on behalf of his clients, Misco Outlook Consortium the right of appeal given in the letter of the 25.02.09 was only given in terms of Regulation 83 (1), so much so that a period of 10 days was allowed for the submission of the appeal and that the relevant regulation only specified that - *Any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement may, within ten calendar days of the publication of the decision, file a notice of objection at the Dept of Cont or the contracting authority involved as the case may be. Such a notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated tender value..'*
- having also noted Dr. Sansone's contention that the only real right of appeal was granted by the Director General's letter of the 31 July 2009 which stated that - *'You are hereby being notified that in terms of Clause 82, Part XII of Legal Notice No. 177 Public Contracts Regulations 2005' and 'the appeal has to be lodged by 12.00 noon of Thursday 6th August, 2009 against a deposit of Euro 17,000.'*
- having heard Dr. Sansone state that although the letter of appeal had been addressed to the PCAB it had been in fact delivered to the Director of Contracts accompanied by the relative deposit and had been acknowledged by him;
- having noted Dr A. Delia's arguments on behalf of his clients Economic and Management Consultancy Services Ltd (EMCS) Consortium, that the relevant Regulation for the sitting was Regulation 82(4) because the discussion was whether the appeals submitted were admissible or not, and his contention that they were not admissible because both tenderers were disqualified in February 2009 and had failed to appeal by the 9th of March 2009 ;
- having heard Mr. F. Attard's evidence that after the PCAB's decision, the tendering procedure was re-activated and the Evaluation Committee submitted a fresh report wherein it was stated that one tenderer was fully compliant and the other two were not. Mr Attard sustained that the right of appeal was applicable again on the basis of this decision.
- having also heard Mr Attard admit that that in the letter of the 25 February 2009 the reasons why tenders were not compliant appeared to be secondary to cancellation of tender, and that they might have included the conclusion before indicating the details;

- having heard Mr F. Albani state that the adjudication board had not re-examined the tenders of the two appellants in the second instance;

reached the following conclusions, namely:

1. The particular tender is a tender regulated by regulation 82 of LN 177 of 2005.
2. According to sub-regulation 82(4): A complaint by the affected tenderer and any person having or having had an interest in obtaining a particular public contract must reach the Department of Contracts or the contracting authority involved, as the case may be, within four working days from the date of notification of the decision and such complaint shall be accompanied by a deposit of 0.5% of the estimated tender value, which deposit shall only be refundable if the Appeals Board finds in the tenderer's or other person having or having had an interest in obtaining a particular public contract's favour: Provided that the deposit shall in no case be less than Lm250 or more than Lm 25,000.
3. The period granted by law to object to such a decision is therefore four working days to be calculated from the date of notification of the decision. the evidence shows that the notification was given by letter dated 25 February 2009, and that the objections by Logos Societa Cooperativa and Misco Outlook Consortium were in fact filed after the expiry of the four working days.
4. The term established by law is mandatory and any objections filed after that term should be discarded.
5. The fact that at any stage of the proceedings, the appellants might have been misguided by the Director of Contracts or by any other person with respect to the appeals procedure does not change the legal requirements of the appeal.
6. The appeals should therefore be discarded on the basis that they were filed outside the period stipulated by the regulations

As a consequence of (1) to (6) above:

The Public Contract Appeals Board finds the filing of both appeals not to be admissible.

In view of the new evidence heard during the meeting and consequent on the above decision the Board recommends that the Department of Contracts should review the validity or otherwise of the appeal lodged by EMCS Consortium (case reference No.148).

Anthony Pavia
Acting Chairman
14 October, 2009

Edwin Muscat
Member

Carmelo Esposito
Member