

PUBLIC CONTRACTS APPEALS BOARD

Case No. 167 / Case No. 168

Advert. No. CT/A/007/2009; CT/2426/2008

Service Tender for the provision of Tutoring Services and Hiring of Computer Labs

This call for tenders with an estimated contracted value of € 494,775 (excluding VAT) was published in the Government Gazette on 30.03.2009. The closing date for this call for offers was 12.05.2009.

Three (3) different tenderers submitted their offers.

On 14.08.2009 *Messrs DHM Consortium Ltd* and *The Computer Training Course Ltd (TCTC)*, separately, filed an objection against the decision arrived at by the Department of Contracts to award this tender to *Messrs Allied Consultants Ltd*.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel J Esposito, respectively, acting as members convened two public hearings on 16.10.2009 and 26.10.2009 to discuss this objection.

Present for the first hearing (dated 16.10.2009) were:

DHM Consortium Ltd (DHM Ltd)

Dr John Bonello	Legal Representative
Mr Evan Camilleri	Director, Holistic Technologies Ltd
Mr Melvyn Cutajar	ECDL Manager, Holistic Technologies Ltd
Mr Robert Mifsud	Director Malta Institute of Computer Science
Mr Roland Scerri	Deputy CEO Datatrak Group

The Computer Training Course Ltd (TCTC)

Dr George Hyzler	Legal Representative
Ms R Galea	Training Manager

Allied Consultants Ltd

Dr Antoine Naudi	Legal Representative
Ms Christine Caruana	Representative
Mr Anthony Mule' Stagno	Representative
Mr Joseph Mercieca	Representative

Ministry of Education, Culture, Youth and Sport (Education Department)

Dr Stephen Zammit	Legal Representative
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Evaluation Committee:

Mr Franco Costa	Member
Mr Emmanuel Zammit	Member
Mr Dennis Zammit	Member
Mr Josef Gauci	Secretary

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellants were invited to explain the motives of their objections.

Dr John Bonello, legal representative of DHM Consortium Ltd (hereinafter referred to as DHM Ltd), explained that his client lodged an objection for the purpose of rebutting reasons quoted by the Department of Contracts for considering its bid as non-compliant, namely that:

- (i) one of the computer labs was not equipped with an air conditioner (a/c)
and
- (ii) the six laboratories proposed were equipped with less than 14 computers per lab

Dr Bonello added that, in his objection, his client also claimed that the recommended tenderer, Allied Consultants Ltd, was not an ECDL Test Centre and hence could not provide the mandatory technical services outlined in Part A Section 3 (ii) of the tender document with the consequence that it would have to subcontract more than 50% of the value of the contract which, in turn, would breach Part A Section 3 (d) of the tender document.

With regard to the missing air conditioner, Dr Bonello maintained that, in fact, the laboratory in question was equipped with an a/c but the members of the adjudicating committee who inspected the premises did not see it because it was installed behind a thick curtain and to corroborate his point he produced photographs which he claimed showed that, in fact, the air conditioner was in place.

Dr Bonello then referred to the number of computers in each laboratory as proposed by his client and quoted from Clarification No. 2 dated 22nd April 2009 bullet 4:

A maximum of 13 participants should be placed in each computer lab; sessions with less participants are to be left to the contractor's discretion.

Dr Bonello remarked that although each computer laboratory had to accommodate a maximum of 13 participants, it was left up to the contractor to provide laboratory for fewer participants with the extra expense being borne by the contractor. He contended that, in virtue of this clarification, his client could have offered laboratories that accommodated less than 13 participants and so that was not a valid reason for exclusion.

Dr Bonello stated that the recommended tenderer was not registered as an ECDL Test Centre on the ECDL webpage and, as a result, Allied Consultants Ltd could not provide the core services requested in this tender, i.e. the provision of training and the ECDL certification, with the consequence that it would have to subcontract these services which, he alleged, definitely constituted more than 50% of the contract value and, therefore, was not in line with the conditions of the tender. Dr Bonello claimed that since Allied Consultants Ltd was not registered as an ECDL Centre it should not have been recommended for the award of this tender.

Dr Bonello concluded his opening remarks by stating that, in view of these explanations, his client's offer should be considered as compliant with the tender specifications and that Allied Consultants Ltd should not be recommended for the award of this tender since it was not registered as an ECDL Test Centre.

Dr George Hyzler, legal representative of *The Computer Training Course Ltd* (TCTC Ltd), explained that instead of offering 5 laboratories as indicated in the tender document, his client offered 18 of these laboratories. Dr Hyzler conceded that although not each and every one of the 18 laboratories proposed met the conditions set out in the tender document, e.g. with regard to the number of computers in each laboratory, this proposal provided more laboratories scattered around each of the five specified areas, providing better accessibility to participants with the latter standing to gain by being placed in smaller groups as the tutor could give them more personal attention.

Mr Franco Costa, member of the adjudication board, referred to page 49 Section 1.8 under 'Specific objectives' 'Overview' of the tender document which, among other things, stated that:

"Each computer lab will host 13 attendees"

and to page 50 1.8 under 'Specific objectives' 1. 'Computer Labs' which stated that:

"Each lab must be equipped as follows:

1. *15 PCs including the tutor's PC"*

Mr Costa explained that the 15 computers in each laboratory were required to be used by the participants (13), the tutor (1) and another one to serve as standby.

Dr Hyzler argued that the reason for the disqualification should have been that the tenderer did not meet the minimum requirements set out in the tender. He contended that the fact that during the site visits the adjudication board found a few laboratories that were not up to the standards requested did not mean that his client did not have 5 laboratories out of the 17 laboratories proposed - because 1 laboratory was later on withdrawn - up to standard or that it did not meet the overall requirements. Dr Hyzler remarked that the adjudication board did not inspect all the laboratories offered by his client and maintained that his client had more laboratories compliant than the 5 laboratories requested in the tender. Dr Hyzler added that a tenderer should have been penalised if the laboratories were not up to standard by the commencement date of the courses and not for having found shortcomings months before the course starting date. Dr Hyzler stated that his clients had their own training centres which were available round the clock whereas those who were going to locate their centres in schools could make use of them only after school hours. Dr Hyzler conceded that the tender document specified that the courses were to be held after working hours but he maintained that, if the need arose, his client was in a position to hold courses even during school hours and that was an added value.

Dr Hyzler remarked that

- a. PCs were mobile items and that TCTC Ltd possessed hundreds of PCs which it could make available at any time
- b. his client's offer was, by far, cheaper than that of the recommended tenderer
- c. his client had 17 years experience in this line of business whereas the recommended tenderer had no experience and did not even possess the ECDL Test Centre certificate.

Mr Dennis Zammit, member of the adjudication board, intervening instead of the chairperson of the Adjudication Board, who on the date of the hearing was unavoidably absent as she was abroad, remarked that the courses were meant for parents and teachers to attend at the same time and that was one of the main reasons why the Department had succeeded in securing EU funding for this project.

On his part, Mr Franco Costa, another member of the adjudication board, explained that site inspections were carried out randomly and that the venue and date/time were agreed to by the bidders. He also explained that the Education Department, the contracting authority, had (i) divided Malta into four areas with Gozo being the fifth area, (ii) requested 15 classes per week in each area and (iii) specified that the lesson had to take place between 17.30 hrs and 20.30 hrs on weekdays and from 09.00 hrs to 12.00 hrs on Saturdays.

Mr Costa also referred to section 1.14 under 'Logistics and Timing' at page 54 of the tender document which stated that:

The contractor is to provide at least 15 classes per week in each one of the areas and 6 classes per week in area 5. Each class is to accommodate at least 13 participants.

At that stage the PCAB requested further explanation as to the workings involved and, as a result, the following calculations were made:

a) $15 (3 \text{ labs} \times 5 \text{ days}) \text{ classes} \times 13 \text{ participants} = 195 \text{ participants per week for each area (as per tender conditions)}$

b) DHM Ltd (Annex 5):
Fgura - Centre at Holistic Technologies:-

Lab 1 = 15 computers with 13 participants (less 1 for the tutor & 1 standby);
Lab 2 = 12 computers for 10 participants (less 1 for tutor & 1 standby) or at most 11 participants (less 1 for tutor only);

Lab = 11 computers for 9 participants (less 1 for tutor & 1 standby) or at most 10 (less 1 for tutor only)

According to the contracting officials, that worked out at:

- i) 32 participants (13+10+9) x 6 (incl. Saturday) classes = 192 participants per week per area according to adjudication board as against 39 participants (13 x 3 labs) x 5 classes (excl. Saturday) = 195 participants per week per area requested in the tender document;
- ii) 34 participants (13+11+10) x 6 classes = 204 participants per week per area according to DHM Ltd which made no allowance for the extra/contingent computer in each class as indicated in one of the documents.

Mr Costa pointed out that para. 8 of the letter of objection submitted by DHM Ltd clearly demonstrated that this firm interpreted correctly that in each class 1 computer was earmarked for the tutor and another one was required as standby or whatever, such that it had indicated that a laboratory with 15 PCs accommodated 13 participants and that a laboratory with 12 PCs accommodated 10 participants.

Mr Costa informed those present that the Department had targeted this course for 1,700 participants but in fact 2,083 persons had applied for these courses.

At this stage Mr Zammit stressed that the participants/tutor ratio as laid down in Annex II section 1.8 (2) 'Provision of ECDL tutors and invigilators' stood at 13:1 and, as a result, one could not have a laboratory that accommodated more than 13 participants in order to compensate for another laboratory that accommodated less than 13 participants because the 13:1 student/teacher ratio in each class had to be respected.

At this stage Dr Bonello pointed out that, in its letter of the 7th August 2009, the Contracts Department stated that DHM Ltd proposed computer laboratories with less than 14 PCs (not with less than 15 PCs) per laboratory and so he contended that even the Contracts Department was not including the extra/contingent PC in the equation.

Following this, the Chairman PCAB intervened to state that any adjudication board is expected to carry out its evaluation according to specifications laid down in the apposite tender document and not according to what is stated elsewhere.

Dr Stephen Zammit, legal representative of the contracting authority, remarked that once DHM Ltd did not provide for 13 participants in each class/laboratory then its submission was not compliant with the tender conditions. He added that the clarification did not alter the participants/tutor ratio but made it clear that the contractor could provide more than 3 laboratories in an area with a lower participants/tutor ratio – which event would be to the advantage of participants - so long as the number of participants per area was satisfied and any that any resulting additional cost would be borne by the contractor.

Dr Bonello insisted that, in his view, his client had satisfied the requirements of the tender document in the sense that he provided computers for 34 participants which, when multiplied by 6 classes per week, worked out at 204 as against the required 195. At the same time, Dr Bonello conceded that except in the case of laboratory 1, these workings did not take into account the extra computer that the adjudication board was insisting upon.

At this point the issue of the missing air conditioner was discussed.

Mr Costa remarked that the photos he took during the site inspection demonstrated that one of the laboratories did not have the required air conditioner. On hearing Dr Bonello's explanation that the air conditioner was, in fact, installed and, on realising that, when the photo was taken, the air conditioner was not visible as its view was obstructed by a thick curtain, the adjudicating board accepted the explanation given by the appellant Company and decided not insist on this issue.

Dr Hyzler explained that there were five designated areas and each had to have at least one centre and each centre had one or more laboratories/classes. He claimed that in his offer his client proposed 18 centres.

Mr Costa reported that, during the random inspections at the centres proposed by TCTC Ltd, the adjudication board noted certain shortcomings, such as, no air conditioning equipment was installed and that certain centres, such as the one in Gozo, were going to be housed in a different place than that identified in the tender submission. Mr Costa remarked that, after the closing date of the tender, TCTC Ltd had informed the adjudication board that action was either (i) already being taken, or (ii) that it will soon be attended to in order for certain shortcomings to be rectified.

He added that on seeking the advice of the Contracts Department as to whether the modifications effected after the closing date of tender were to be taken into account for evaluation purposes, the adjudication board was advised that the developments that occurred after the closing date of the tender should not be taken into consideration as that would amount to a change in the offer which was deemed illegal.

The Chairman PCAB noted that the tenderer had only to be up to standard in five centres, each with at least 1 laboratory having 15 PCs, and with at least one centre in each of the five designated areas, when TCTC Ltd submitted 17 such centres. Dr Hyzler submitted that TCTC Ltd's technical manager was abroad and so he was not in a position to provide the technical data on his client's tender submission, however, he insisted that the adjudication board should indicate to him and to the PCAB that out of the 17 centres proposed by his client it did not find at least 5 centres which were compliant with minimum requirements.

Mr Costa stated that the adjudication board randomly visited 7 centres of those proposed by TCTC Ltd, namely those located at Senglea, Msida, Mtarfa, Mosta, Rabat, Naxxar and Victoria (Gonzo). Mr Costa added that, in effect, each centre had only one laboratory

whereas the appellant's Training Manager present for the hearing, Ms R Galea intervened to state that the Paola Centre in Area 1 had 2 laboratories, the B'Kara Centre had 2 classes, the Naxxar Centre had 4 classes and the Gozo Centre in Area 5 had two classes.

Mr Costa remarked that the adjudication board had gathered evidence that showed that the centres in Area 3 were not up to standard for the following reasons, viz:

- a. the Mtarfa Centre was not equipped with an air conditioner
- b. the monitors at the Mosta Centre were out of order;
- c. the Rabat Centre did not have the required number of computers and
- d. the room was inadequate

Mr Costa concluded that Area 3 did not meet the tender specifications and that these shortcomings were even listed in the letter of objection submitted by TCTC Ltd.

Replying to a question by the PCAB, Mr Costa replied that it was the intention of the contracting authority to award this tender to one contractor.

Dr Hyzler conceded that there were shortcomings with regard to certain centres proposed by his client and that action was being taken to rectify them as evidenced in the emails that his client exchanged with the adjudicating board. He argued that once computers and projectors were mobile items one tended to make use of them in different places as and when required and so it was normal practice to set up this kind of equipment within a relatively short time. Dr Hyzler contended that the important thing was that the classes would be properly set up and in good order prior to the start of lessons and not months before that date. At that stage, Mr Costa quoted from the tender submission of TCTC Ltd (pg 41): *each centre is equipped with 15 PCs including the tutor's and multi-media projector. Training premises are equipped with an air conditioner in good working order.* Mr Costa declared that there were other tenderers who had everything in place at the time of the site inspection. Following these comments, Dr Hyzler reiterated his stand on this line of thought.

Mr Costa then proceeded by referring to the issue relating to ECDL Certification. He explained that the fact that Allied Consultants Ltd, the recommended tenderer, is the local representative of Henley Business School was evidence enough that it has the necessary experience in the organisation of courses considered to be the main service requested in this tender.

Mr Costa stated that the tender document laid down that the premises where the exams would be held along with the computer laboratories had to be ECDL accredited testing centres, which certification was issued by the governing body of the ECDL and that the recommended tenderer's hired laboratories also had to be accredited ECDL testing centres. Mr Costa stated that on receipt of these objections, the adjudication board sought the advice of ECDL (Malta) and at that stage he quoted from the email he sent on the 25th August 2009 to Mr Albert Vella, ECDL (Malta)'s Project Manager:

As part of the ESF project, we are in the process of ensuring that a particular contractor is eligible to perform a number of activities related to ECDL.

This contractor, which is not yet recognised by ECDL Malta, is proposing to hire recognised ECDL testing centres and coordinate ECDL courses and exams recognised by ECDL Malta). In view of such facts, do you find any objections to the operability of the said contractor? Does the contractor have the possibility to get recognition by your institution prior commencement of his services?

Mr Costa then read out the reply dated 4th September 2009 sent by ECDL (Malta) which, *inter alia*, stated:

With reference to your query kindly note that ECDL Malta certifies tests centres to ensure that they have the capability of organising and performing ECDL tests as required by the ECDL Foundation standards. As long as the contractor coordinates testing and certification in any of the ECDL Malta approved test centres on your behalf then we would have no objection on the matter.

“Kindly note that irrespective of the approach taken, the respective test centre managers in the test centres are ultimately responsible for the proper administration of the ECDL qualification at their centre”

The Chairman PCAB observed that, whereas in the case of the other tenderers the adjudicating board saw to it that the premises and the equipment were all in place, it appeared that by August 2009 the adjudication board had not verified whether the recommended tenderer was ECDL certified when the closing date of the tender was the 12th May 2009. Mr Costa stated that the contractor did not have to be an ECDL test centre and that the adjudicating board had visited the centres that Allied Consultants Ltd proposed to hire in connection with this tender and they were ECDL centres.

Mr Robert Mifsud, representing DHM Ltd, interjected to remark that one of the centres proposed by the recommended tenderer was in fact one of his sub-centres because the ECDL system allowed a centre to have sub-centres where tests could be carried out in the name of that centre. Mr Mifsud argued that according to what was stated in the email by ECDL (Malta) he, Mr Mifsud, would ultimately be responsible for one of the centres proposed by Allied Consultants Ltd. Mr Mifsud declared that he had not granted his authorisation to the recommended tenderer to propose his sub-centre in his tender submission and had no intention of doing so in the future either.

Mr Costa explained that the experience requested in the tender document was not related as such to ECDL courses but rather to course coordination in which sector Allied Consultants Ltd had the necessary experience. He added that tutors with experience were required to teach ECDL courses.

At this point Mr Costa’s attention was drawn to the fact that he had asked Mr Albert Vella (ECDL Manager in Malta): *Does the recommended contractor have the possibility*

to get recognition by your institution prior commencement of his service?, which, *per se*, implied that the recommended tenderer was still in the course of getting the ECDL recognition. On hearing this both appellants queried how was it that their offers were disqualified because an air conditioner was not in place at the time of the site inspection and the recommended tenderer was not disqualified for not having the ECDL recognition at the closing date of the tender!

Mr Costa remarked that it was not the case that the recommended tenderer was going to sub-contract all the services because he submitted, like all the tenderers, the list of tutors that were to be deployed on this course. Mr Costa explained that the contractor would have to purchase the exams online from overseas, the candidate would be assessed by the supplier of the exams and then the certificate would be issued on the skill cards that the Education Department purchased from ECDL (Malta). Mr Costa stated that the recommended tenderer had made a declaration that he would be issuing the certification. Dr Hyzler insisted that, according to Mr Vella, ECDL (Malta) Manager, the test centre manager was responsible for ECDL certification and pointed out that Allied Consultants Ltd was not a certified test centre manager. Mr Costa conceded that, as things stood, Allied Consultants Ltd was not the test centre manager and that, following the email sent by ECDL (Malta), the adjudicating board did not check whether the recommended tenderer was the test centre manager in respect of the centres proposed in its tender submission.

The PCAB regarded the certification as a very important part of the whole process. Mr Robert Mifsud contended that the adjudication board had to verify that the recommended tenderer was either a certified test manager or else had an agreement with a certified test manager.

Dr Bonello remarked that once the recommended tenderer could not issue the certification the said tenderer would have to subcontract that service and that led to the other issue that the contractor could not subcontract more than 50% of the contract value. At that stage, members of the adjudication board stated that according to the tender submission of the recommended tenderer the element of subcontracting was calculated at 46.6% of the contract value.

Dr Antoine Naudi, representing Allied Consultants Ltd, the recommended tenderer and an interested party in this hearing, took the floor. He commenced his intervention by stating that the same company's director could not be present for the hearing as he was overseas on business affairs.

Dr Naudi explained that (a) the tender document referred also to the hiring of computer laboratories and (b) the same tender document did not require the contractor to be an accredited ECDL centre but that the contractor had to provide an accredited test centre and he claimed that that was exactly what his client had declared.

The recommended tenderer's legal representative stated that, according to the adjudicating board, the hiring (subcontracting) of the test centres did not exceed 50% of the contract value.

With regard to experience Dr Naudi referred to section 3 (f) (1) (pg 7) which required “*a list of all works carried out for the past three years accompanied by certificates of satisfactory execution for the most important works.*” Dr Naudi pointed out that that did not refer to (works in connection with) ECDL but it was just being assumed that it did.

Dr Naudi placed emphasis on the fact that the tender document laid down that

- a. the contractor had to provide 15 computers in each laboratory and
- b. every laboratory had to accommodate 13 participants

He pointed out that it has emerged that DHM Ltd, one of the two appellant Companies, did not provide 15 PCs per laboratory and, as a consequence, that should lead to disqualification for failing to comply with a mandatory requirement. Dr Naudi added that, whereas the two appellants were claiming that the contractor had to be ECDL accredited, Annex II 1.8 1. ‘Computers’ (pg 50) stated that: *The centre must be: (2) a CSM ECDL Accredited tutoring/testing centre.* Dr Naudi argued that it was the centre that had to be accredited and not the contractor and that it was the accredited centre which issued the certificate.

Dr Naudi remarked that there were two previous PCAB rulings whereby contracts were awarded to tenderers who did not have in place the substantive – not the formal – tender requisites on the closing date of tender but were in place on the tender award date. Dr Naudi submitted that his client could be in a position to obtain the accredited test centres by the tender award date. Following this claim, the Chairman PCAB intervened and remarked that the installation of an air conditioner unit was an action entirely within the control of the tenderer, whereas to secure the services of 15 certified test centres by the tender award date did not depend solely on the tenderer, so much so, that others had to make their certified test centres available to him.

Dr Naudi remarked that his client should not be penalised because the adjudication board did not seek certain verifications following the receipt of the email from ECDL (Malta) because had the adjudication board done that, the picture would be much clearer to all parties concerned.

The PCAB observed that it appeared that the contracting authority was after a contractor who was not necessarily an expert in the subject matter but who could coordinate the course and provide the premises and the tutors.

At this point the PCAB decided to seek apposite clarification as to

- a. who was going to be responsible to ensure that the course was properly carried out;

- b. who was going to issue the certification in the light that the recommended tenderer was not a certified ECDL test centre manager; and
- c. whether the adjudication board was satisfied that the recommended tenderer was in a position to deliver the service requested in the tender.

Mr Costa said that Allied Consultants Ltd was going to subcontract certain aspects of the service requested. Mr Costa confirmed that every ECDL test centre had a test centre manager which prompted Dr Naudi to argue that once the test centre was there and that each test centre had to have a test manager then the certificate could be issued.

At this point it was acknowledged that the tender document made no reference to the test centre manager and Dr Naudi expressed his desire to establish whether the test centre manager in each test centre was obliged to issue the ECDL certificate. The Chairman PCAB intervened and quoted the email sent by ECDL (Malta) to the contracting authority's office wherein it was stated that "*... irrespective of the approach taken, the respective test centre managers in the test centres are ultimately responsible for the proper administration of the ECDL qualification at their centre.*" Following this, DHM Ltd's representative said that he would not allow the recommended tenderer to operate in that manner from his sub-centre. Dr Naudi retorted that if Mr Mifsud would stand by what he had just said his client was not be precluded from contracting the services of another test centre.

Dr Naudi requested that ECDL (Malta) should be asked to give evidence before the PCAB to confirm or otherwise that the test centre manager at each and every accredited test centre proposed in his client's tender submission could certify the ECDL courses carried out by Allied Consultants Ltd.

Mr Costa informed those present that the exams had to be purchased from overseas and that the certification/stamp was part of the exam itself. He estimated that each exam would cost €4. Dr Naudi stated that the tutors were employed by his client, even if on a part-time basis, and that, according to the tender conditions, the responsibility for the proper execution of the contract, even for services rendered by sub-contractors, ultimately rested with the contractor.

At this juncture, Mr Robert Mifsud gave the following account with regard to the methodology adopted in so far as ECDL courses/certifications are concerned. He said that:

- a. one had to be accredited by ECDL (Malta) and that required premises and personnel, including the test centre manager and invigilators;
- b. a test centre could also have sub-centres which, however, still fell under the responsibility of the test centre manager;
- c. a test centre manager could not certify a candidate who did not take the exam at his test centre; and
- d. audits were carried out on these test centres

Mr Mifsud remarked that Allied Consultants Ltd never requested him to use one of his sub-centres in which case he, Mr Mifsud, would have to provide the computer laboratory and the invigilators. Mr Mifsud could not vouch if there were similar cases with regard to other test centres proposed by the recommended tenderer.

Mr Costa remarked that if Allied Consultants Ltd had reached an agreement to make use of the services of the accredited centre or sub-centre belonging to Mr Mifsud's firm, then that would have been considered an accredited test centre as requested in the tender document.

Dr Hyzler remarked that Mr Vella of ECDL (Malta) had indicated in his email that “... *As long as the contractor coordinates testing and certification in any of the ECDL Malta approved test centres on your behalf then we would have no objection on the matter.*” Dr Hyzler interpreted that to mean that the contractor, in this case it would be Allied Consultants Ltd, was going to do the testing and certification on your behalf, or rather, the contracting authority, namely, the Education Department, and all this, emphasised Dr Hyzler, when the contractor was not authorised to test and certify. Mr Costa intervened and stated that he interpreted ‘on your behalf’ as including ‘on any other accredited centre’s behalf’. Dr Hyzler pointed out that Mr Mifsud had just said that he would not allow his competitor to use his laboratory let alone certify the tests carried out by such an entity!

The Chairman PCAB expressed the view that, apparently, the tender document focused more on the ancillaries, i.e. the equipment, classes and premises rather than the content of the process as a whole and he expressed doubt as to whether the contracting authority had at that stage all the assurances that the recommended tenderer could deliver the requested service.

Dr Naudi, while sharing the concern raised by the Chairman PCAB, insisted that Mr Vella of ECDL (Malta) ought to explain the contents of his email especially with regard to certification because it could be the case that the manager of the test centre was obliged to sign the certificate.

Reacting to Dr Bonello's remark that tutors of the recommended tenderer were going to be self-employed, Dr Naudi stated that his client had declared that he was going to engage the tutors on a part-time basis and that, in this case, it did not matter if the tutors were employees or self-employed.

At this stage both appellants expressed doubts with regard to the workings of the adjudication board that established the value of subcontracted services at 46.6% of the contract value claiming that there could have been hidden costs/elements that might well have increased the resulting percentage above the 50% limit. Dr Hyzler stated that, in this case, the recommended tenderer had to sub-contract all the test centres with the test centre managers and the invigilators and he reckoned that the 50% limit allowed to subcontracting must have been exceeded. Dr Hyzler exclaimed that it appeared that the recommended tenderer was not aware of what the tender was all about, so much so, that

the respective legal counsel instead of reacting to the statements made by the appellants kept asking questions as to how the ECDL certification system worked.

Dr Naudi kept on insisting on the need to establish whether the accredited test centre mentioned in the tender document was obliged to produce the final certification. He reminded those present that the tender document did not stipulate that the contractor had to be ECDL certified but it was the test centre that had to be ECDL certified.

The Chairman PCAB observed that, according to the adjudication board, the tender specifications were designed to yield the desired results, i.e. organising a course that would lead to ECDL certification. He added that one had to look also into whether the recommended tenderer had proposed other test centres in respect of which he had not entered into an agreement with the respective owners as in the case of the sub-centre owned by Mr Robert Mifsud of DHM Ltd.

Dr Naudi made the following statement:

Jien, Dr Antoine Naudi għan-nom ta' Allied Consultants Ltd, in vista tal-email datata l-4 ta' Settembru 2009 mibgħuta mis-Sur Albert Vella tal-ECDL (Malta) Ltd li għiet a konoxxenza tiegħi llum, nitlob li jiġi mħarrek is-Sur Vella quddiem dan il-Kumitat sabiex jixhed dwar din l-email u dwar x'ifisser il-kliem 'accredited test centre' u 'test centre manager'.

The Chairman PCAB informed those present that the PCAB had accepted the request made by Dr Naudi on behalf of Allied Consultants Ltd and that a meeting would soon be set for the purpose and for each party to make winding up remarks.

At this point the public hearing was brought to a close.

Present for the second hearing (dated 26.10.2009), always convened by the Public Contracts Appeals Board (PCAB), still made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel J Esposito, respectively, acting as members were:

DHM Consortium Ltd (DHM Ltd)

Dr John Bonello	Legal Representative
Mr Simon Bonanno	Holistic Technologies Ltd
Mr Evan Camilleri	Director, Holistic Technologies Ltd
Mr Melvyn Cutajar	ECDL Manager, Holistic Technologies Ltd
Mr Robert Mifsud	Director Malta Institute of Computer Science
Mr Roland Scerri	Deputy CEO Datatrak Group

The Computer Training Course Ltd (TCTC)

Dr George Hyzler	Legal Representative
Mr Raymond Mula	Representative
Ms R. Galea	Training Manager

Allied Consultants Ltd

Dr Antoine Naudi	Legal Representative
Ms Emmanuel Said	Representative
Mr Lorenzo Mule' Stagno	Representative

Ministry of Education, Culture, Youth and Sport (Education Department)

Dr Stephen Zammit	Legal Representative
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Evaluation Committee:

Mr Franco Costa	Member
Mr Emmanuel Zammit	Member
Mr Dennis Zammit	Member
Mr Josef Gauci	Secretary

Department of Contracts

Mr Anthony Cachia	Director (Operations)
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Witness

Mr Albert Vella	Managing Director ECDL (Malta)
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The Chairman PCAB informed those present that the hearing was being held at the request of the legal representative of Allied Consultants Ltd, the recommended tenderer, so that Mr Albert Vella, Managing Director of ECDL (Malta), would explain the contents of his email dated the 4th September sent to the adjudication board and for winding up statements.

Mr Albert Vella, Managing Director ECDL (Malta), under oath started by giving the following brief overview of the ECDL certification process:

- a. ECDL (Malta) was a member of the ECDL Foundation based in Ireland and a sub-licensee of the Computer Society of Malta charged with the ECDL programme in Malta and Gozo;
- b. ECDL (Malta) had to conform to certain established standards because the ECDL certification was a globally recognised qualification;
- c. a candidate had to purchase a skill card which consisted of an A4 paper with the particulars of the candidate and seven sections for the seven ECDL modules where, eventually, each of these sections would be signed by the test centre manager once the candidate was successful in that module;
- d. the skill card belonged to the candidate and the candidate could sit for his tests at more than one test centre;
- e. the duties of the test centre manager included, among other things, the listing of the candidate's data on the skill card, supervising the ECDL certified invigilators, ensuring the security of exam papers and informing ECDL (Malta) with the successful candidates for the issue of the certificate;
- f. an accredited centre did not refer solely to the physical building but it referred to the whole process which, in modern terminology, was referred to as a "people process technology", incorporating the staff, the building and the equipment;
- g. an accredited centre was a centre where ECDL tests were carried out and attached to each centre there was a test centre manager who was responsible for that centre and for issuing certification to the successful candidates; *and*
- h. although in most cases a test centre manager was responsible for one centre, there were instances that a test centre had a number of other (sub) centres with a case in point being that of public schools where a private test centre would inform/request ECDL (Malta) that it was going to run tests in a particular school in which case ECDL (Malta) would check that the school had what was required in terms of computers, internet access and so forth, however, what took place in that school as far as ECDL certification was concerned remained the responsibility of the test Centre Manager of that private test centre.

To questions put forward by Dr Antoine Naudi, representing Allied Consultants Ltd, Mr Vella replied that:

- an ECDL certified invigilator could also act as a marker, i.e. he could sign the skill card if so delegated by the test centre manager but the latter would ultimately be responsible for the invigilator's actions. This flexibility was conceded in view of the number of ECDL candidates involved;
- ECDL (Malta) carried out routine audits in test centres with sample checks performed on tests undertaken at that centre;
- the test centre manager did not have to be present during the exam because it was the invigilator/s who had to supervise the exam; *and*
- the ECDL course was quite flexible in the sense that a candidate did not have to undertake the ECDL exams at the same centre where he attended for tutorials

In reaction to questions by Dr Bonello, Mr Vella gave the following evidence:

- the invigilators, whether performing duties in centres or sub-centres/external testing locations, had to report to the respective test centre manager. In the case of the Education Department there were about 9 test centres and each of these centres then reported to the Director of Education who was, ultimately, the ECDL certified test Centre Manager;
- the coordination process of ECDL certification involved various aspects, such as:
 - the provision of a certified test centre which had a certified test centre manager
 - the provision of a number of certified invigilators depending on the volume of work
 - prior to the exam, the test centre would request ECDL (Malta) to issue a skill card for each candidate which would have a distinct number and on which the test centre manager had to insert the particulars of the candidate,
 - the test centre manager had to forward a spreadsheet showing the particulars of the candidates against each skill card number which ECDL (Malta) would then register with the ECDL Foundation for international recognition purposes,
 - the assignment to candidates of automated online tests or of manual tests on printed paper,
 - the assignment of invigilators and, in the case of manual testing, markers, *and*

- if a candidate obtained a borderline mark the paper would have to be marked again by another marker and then work out the final average mark - an invigilator could act as a marker but in respect of papers of the candidates who did not sit for the exam under their supervision.

The following was other evidence given by Mr Albert Vella:

- There were instances where, besides the test centre manager, a test centre had also a centre administrator who would undertake the day-to-day running of the centre especially with regard to paperwork and data handling. In this case Mr Vella considered the Education Department as the test centre manager and, therefore, responsible for the data, candidate certification and so forth whereas the coordinator was the one who drew up the timetables and who organised things but, surely, not the one who issued certification. At that stage, Dr Hyzler, representing one of the appellant companies, TCTC Ltd, drew the attention of the PCAB that Mr Vella was not aware of all the details of the tender document and, as a result, some of the things that he was saying amounted to guesswork.
- ECDL (Malta) did not go into the tutoring itself but it was only concerned with the certification process. The registering of candidates against the respective skill cards had to take place before the exam and the test centre manager was always responsible for the work he delegated to others, e.g. invigilators and administrators but the test centre manager was not responsible for the training.
- He confirmed that the accredited test centres were only those displayed on the ECDL website and that, to his knowledge, Allied Consultants Ltd was not registered as a test centre or as a test centre manager.
- It was not acceptable to ECDL (Malta) if, in this case, the coordinator was not going to act under the direction of the Education Department as the test centre manager.

Dr Hyzler remarked that the services requested in this tender did not involve the hiring of a “garage” because besides the premises it involved a process. He added that Allied Consultants Ltd was not a body certified by ECDL (Malta).

Dr Naudi observed that it appeared that with regard to the coordination of tutoring services there was no need for the services of a test centre manager whereas the latter was required when tests were held and to sign the certification. Mr Vella remarked that one had to separate the training from the certification because ECDL (Malta) would find no objection if Allied Consultants Ltd were to provide the tutors and to coordinate the training lessons since ECDL (Malta) was not concerned with tutoring but with the certification process.

When Dr Hyzler asked if the invigilators could be contracted by someone who was not a test centre manager or had no connection with a test centre, Mr Vella said that an invigilator had to be certified by ECDL and had to be attached to a test centre and in case

an invigilator moved from one test centre to another ECDL (Malta) had to be informed and, therefore, it followed that it was not possible for just anyone to hire the services of invigilators.

The Chairman PCAB read out the five points listed in page 49 of the tender document under section 1.8 'Specific Objectives', namely:

- Hire of computer labs
- Provision of ECDL tutors and invigilators
- ECDL automated exams and mock tests
- Course coordination
- USB pen drive with ECDL approved course work for each participant

In reacting to observations made by the Chairman PCAB, Mr Vella said that with regard to point 2 ECDL (Malta) was only concerned with the invigilators and had nothing to do with the tutors whereas Mr Costa confirmed that, under point 3, the contracting authority was also requesting certification.

The Chairman PCAB asked the contracting authority whether it had contemplated the eventuality that the contractor would hire these services, including the test centres. Mr Costa replied that the contracting authority requested the test centre to be ECDL accredited and not the contractor. Mr Costa explained that the course was spread over 80 hrs 15 min of which 75 hours involved tutoring and 5hrs 15 min involved testing. Mr Costa clarified that the mock tests formed part of the 75 hours.

Reacting to questions by Dr Hyzler, Mr Vella explained that mock tests were available only to accredited centres and that usually the training and the tests were carried out in test centres and hence a certified test centre would carry out mock tests during the training that took place at the centre.

Mr Vella stated that the Education Department did not contact ECDL (Malta) with regard to this tender prior to the email sent on the 25th August 2009, which statement was confirmed by Mr Costa who added that the tender document was drawn up in consultation with an officer of the Education Department who was well versed with ECDL procedures and who was recognised by ECDL (Malta). The Chairman PCAB observed that, eventually, Mr Costa sought the clarifications from ECDL (Malta), the governing body, and not from the Department's officer mentioned by Mr Costa. The PCAB Chairman remarked that, perhaps, this would have been better had it been the case in the first place!

Dr Naudi asked whether the mock tests and the tests themselves could be carried out, not by the recommended tenderer who, admittedly was not ECDL recognised and who was to act as coordinator, but by the ECDL certified test centres, which included the test centre manager and the invigilators attached to them, that his client would be hiring for the purpose. Mr Vella remarked that albeit what Dr Naudi was proposing was rather unorthodox and outside the norm, yet, he added that such a proposal appeared to be

workable and in which case the hired test centres would be responsible for the certification.

Dr Bonello asked Mr Vella to consider the whole exercise of teaching and examining 1,700 candidates and to offer his opinion as to what portion or percentage would he allocate to tutoring and to certification, i.e. mock tests, actual test and the issue of the certificate. Mr Vella estimated that 35% would go towards administration and 65% towards the delivery of content and that it did not matter if the candidates were housewives or young students.

At this point when asked to confirm whether it stood by its workings with regard to the percentage allocated to sub-contracting, the adjudicating board replied in the affirmative.

At that stage the costings of the adjudicating board were circulated among all the parties concerned and present at the hearing.

Mr Costa remarked that the adjudicating board included the hiring of laboratories under sub-contracting in its workings when it was emerging that that item did not amount to sub-contracting but should have been classified under tutoring since it was deemed a supply. Dr Hyzler claimed that the adjudicating board was requesting the exclusion of the cost of laboratories' hiring from sub-contracting so as to ensure that if any adjustments were going to be made, the sub-contracting element would still not exceed the 50% limit. Mr Costa said that by including the hiring of laboratories under sub-contracting the adjudicating board had taken a worst case scenario which still rendered sub-contracting costs below the mark of 50% of the total cost of contract. Mr Costa declared that the adjudicating board had erroneously put laboratory hiring under sub-contracting. The Chairman PCAB remarked that that depended on whether the coordinating body had its own laboratories or not. Mr Anthony Pavia, a PCAB member, remarked that, in his view, anything that the coordinator could not supply out of his own resources but had to resort to other suppliers amounted to sub-contracting. Mr Costa confirmed that the recommended tenderer did not have his own computer laboratories but he insisted that the hiring of laboratories was considered a supply.

Following an examination of the costings drawn up by the adjudicating board the following comments were made:

- Mr Richard Mifsud remarked that once it had been established that the recommended tenderer was going to hire the computer laboratories, which meant hiring the physical place along with the services of the test centre manager, invigilators and so on, it therefore followed that the sub-contracting element would surely exceed the 50% limit. He stated that invigilation services had to be added to the hiring of laboratories, the ECDL tests and the mock tests under sub-contracting
- Mr Costa explained that the adjudicating board drew up its workings from the figures presented by the recommended tenderer and took a worst case scenario by

including the hiring of the computer laboratories under sub-contracting which should have been classified as a supply as was the case with the engagement of tutors. The Chairman PCAB expressed the view that engaging tutors was one thing and hiring of computer laboratories was another. On his part, Mr Vella commented that it was acceptable for one to hire a test centre or a computer laboratory so long as it was hired on a long term basis to enable ECDL (Malta) to subject that centre/laboratory to its periodical audits

- Dr Hyzler reiterated his stance that, in this instance, one was not hiring a garage, which certainly did not qualify as sub-contracting, but one was hiring services which included the premises, personnel, equipment and technology. He contended that, more than anything else, this was a question of control over and responsibility for the services and stressed that, in this case, the recommended tenderer had no control because it was not ECDL certified
- Dr Naudi pointed out that rather than resorting to assumptions one had to be factual by referring to the tender document where the heading itself read: *Service Tender for the Provision of Tutoring Services and Hiring of Computer Labs*. He then referred also to ‘Services’ at page 23 under Article 1 ‘Definitions and conventions’ which was termed as “*activities to be performed by the Contractor under the contract such as technical assistance, studies, training and designs.*”

Dr Naudi then quoted para. 4.1 at page 24 of the tender document under ‘Article 4 Sub-contracting’ which stated that “*any agreement by which the Contractor entrusts performance of a part of the services to a third party is considered to be a sub-contract.*” Dr Naudi stressed that he was not making assumptions but he was quoting from the tender document and he declared that his client could not be blamed in case there was something incorrect in the tender specifications. Dr Naudi concluded that his client had satisfied the tender conditions and reminded those present that Mr Vella had indicated that although the proposal made by Allied Consultants Ltd was not the norm, still it was workable.

Dr Hyzler remarked that according to the email sent by Mr Vella ECDL (Malta) would have had no objection if the coordination and the testing were to be carried out on ‘your behalf’, which Dr Hyzler interpreted as ‘on behalf of the Education Department’, which meant that the responsibility for the tests would rest with the Education Department. He added the Education Department could not be assigned the responsibility in connection with the testing because, being the contracting authority, the Education Department had to supervise the execution of the contract and therefore had to remain detached from the process.

In his concluding remarks Dr Hyzler stated that he had insisted from the very beginning that, essentially, this was a service contract which services had to be delivered primarily by the contractor, so much so, that the limit allowed for sub-contracting was put at 50% of the value of the contract. He added that a computer laboratory included the test centre manager, the invigilators, the tests, the mock tests and so on. Dr Hyzler held the view

that, apparently, the recommended tenderer and, presumably, even the contracting authority, interpreted the tender in such a way that one could resort to the hiring of a number of services which together would satisfy the requirements of the tender. He opined that such an approach was not permissible under ECDL rules. Dr Hyzler disagreed with the workings of the adjudicating board and insisted that (i) the hiring of laboratories amounted to sub-contracting as that represented the provision of a service, (ii) the coordination fee was rather on the high side and that it included services that were going to be sub-contracted by the recommended tenderer and (iii) according to the figures given by Allied Consultants Ltd and to the evidence given during the hearing the sub-contracting elements should have been as follows:

- Hiring of laboratories: €158, 895
- Invigilators: €10,395
- ECDL automated tests: €47,600
- ECDL mock tests: €23,800
- 35% of the coordination fee: €30,975
- Total of: €271,665 or, approximately, 55% of the value of contract.

Dr Hyzler remarked that the adjudicating board recommended for award the tenderer who quoted the highest price and the only one who had no experience with regard to ECDL courses/certification while, at the same time, it eliminated all the other tenderers on rather petty shortcomings. Dr Hyzler calculated that with the price quoted by his client – and perhaps it was the same case with DHM Ltd - the contracting authority could satisfy the actual demand for this course, i.e. 2,300 instead of 1,700, and still remained within the department's budget.

Dr Bonello agreed with what Dr Hyzler had submitted and added that:

- a. if the adjudicating board had to correct the way it worked out the sub-contracting element of the contract it should have been done at an earlier stage
- b. although the title of the tender referred to tutoring services and hiring of laboratories it emerged from the tender document that the test centres had to be ECDL certified to render the core services requested in the tender and it also emerged from the hearing that the recommended tenderer was not in a position to provide the test centres but had to resort to hiring them – Dr Bonello even claimed that the recommended tenderer had included in his submission a sub-centre that belonged to his client *and*
- c. the definitions of 'services' and 'sub-contracting' in the tender document were quite wide ranging. Dr Bonello declared that Allied Consultants Ltd should not have been recommended for award

Dr Bonello then referred to the reasons given for the disqualification of his client, namely, that:

- one of the laboratories was not equipped with an air conditioner, which issue had been satisfactorily settled during the hearing, *and*
- the number of computers per laboratory did not satisfy requirements, which allegation was dealt with at the first hearing where he had demonstrated that, in fact, his client was compliant with the tender conditions even in that respect. Dr Bonello concluded that the tender should have been awarded to his client since he quoted the cheapest price - €90,000 cheaper than that of the recommended tenderer - and conformed with the 'Selection Criteria' laid down at page 7 para (f) of the tender conditions.

The Chairman PCAB said that, rather than quoting percentages which were not scientifically proved, one had to deliberate on what constituted sub-contracting. He also recalled the point aired during the hearing that it could be the case that the successful bidder did satisfy the tender specifications but that the tender document itself was not drawn up as it should have been.

Dr Hyzler commented that, first of all, both appellants had objected against their disqualification from the tendering process and, secondly, both appellants were contending that Allied Consultants Ltd should have been disqualified and not recommended for award for the reasons explained earlier on. Given that his client had submitted more centres than required in the tender, Dr Hyzler insisted that prior to eliminating his client on the basis that certain test centres were not compliant, the adjudicating board should have visited all the test centres to verify whether or not TCTC Ltd had met the minimum standards.

Dr Antoine Naudi insisted on the following points:

- the adjudicating board had concluded that his client's offer was according to specifications having considered the following:
 - DHM Ltd was not compliant because it did not provide the 15 computers per laboratory requested while TCTC Ltd, in certain cases, did not provide adequate premises;
 - the tender document made no mention to the test centre manager but it requested the provision of accredited test centres;
 - once his client submitted test centres which were accredited by ECDL then each one of them had attached to it the test centre manager who would issue the certification;
 - the PCAB had to discard the allegation made by DHM Ltd that one of the test centres quoted by his client in his tender submission was a sub-centre of DHM Ltd because DHM Ltd did not produce any proof to substantiate that allegation;

- if it occurred to the contracting authority that although the tender document did not mention the test centre manager, the services of the test manager were still required, the contracting authority had no right to disqualify his client but prior to the start of the service the contracting authority should have sought a clarification from the recommended tenderer as to whether it would be providing the test centre manager and if that would be at an additional cost;
- his client had satisfied the tender definitions with regard to ‘sub-contracting’ and ‘services’ and, although the adjudicating board had included the hiring of laboratories under sub-contracting, which he claimed did not qualify as sub-contracting, to take a worst case scenario, the total value of sub-contracting was still below the 50% limit;
- with regard to invigilators and tutors he referred to section 1.8 (2) at page 51 of the tender document where under ‘Invigilators’ it was stated that “*CSM Qualified Invigilators will perform another 5 ¼ hrs invigilating time during the ECDL exams (ECDL tutors may act as invigilators provided that they are CSM qualified Invigilators and are not asked to invigilate their own ECDL class)...*”
- no proof had been produced that the test centres submitted by his client were not going to issue the required certification;
- it might have been better had the awarded tenderer been ECDL certified but the tender conditions did not stipulate that and hence his client could not be disqualified on those grounds;
- the price quoted by his client for the hiring of the test centres included the test centre managers; *and*
- the PCAB had to deliberate on the basis of the tender document and he invited the PCAB to confirm the award of the tender to his client because its offer was compliant. On the other hand, if, and only if, his client would be disqualified then that had to be the result of shortcomings in the way the tender document was drawn up and not the result of shortcomings on the part of his client.

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

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 13.08.2009 (Messrs *DHM Consortium Ltd*) and 24.08.2009 (Messrs *The Computer Training Course Ltd (TCTC)*), had objected to the decision taken by the General Contracts Committee;
- having taken note of the arguments raised and verbal submissions presented by all parties concerned during the two public hearings held on the 16.10.2009 and

26.10.2009 respectively, namely the two appellants (*Messrs DHM Consortium Ltd* and *The Computer Training Course Ltd (TCTC)* respectively), the recommended tenderer (*Messrs Allied Consultants Ltd*) the contracting authority (*Ministry of Education, Culture, Youth and Sport (Education Department)*) and the facts as presented by a key witness in the second hearing, namely, Mr Albert Vella (Managing Director *ECDL (Malta)*);

reached the following conclusions, namely:

1. The PCAB does not agree with the line of reasoning embarked upon by the adjudicating board in so far as the distinction made between sub-contracting and the hiring of services, with the PCAB arguing that, in its view, anything that the coordinator (in this case the recommended tenderer) would not be able to supply out of its own resources would have to resort to other suppliers to be able to provide such services and this, in the PCAB's opinion, is tantamount to sub-contracting;
2. The PCAB finds it hard to understand why, when the tender document stated that no site visits were contemplated, the adjudicating board, on its own initiative, decided to carry out such visits months before the actual training was programmed to begin, but, at the same time, did not deem it necessary to verify whether all the centres offered by Allied Consultants Ltd were really available to enable the latter to offer the service;
3. The PCAB feels that the clarification which allowed the contractors discretion as to the number of students to be trained in each class, while not explicit, it is clear rendered nonsensical any insistence on a rigid number of 15 computers in each class
4. Although the title of the tender referred to tutoring services and hiring of laboratories, from evidence given and other issues that transpired during the hearing, it emerged that the test centres had to be ECDL certified to enable the rendering of the core services requested in the tender. Having seen section 4.1 of the tender documents which states "*that any agreement by which the contractor entrusts performance of a part of the services to a third party is considered to be a sub-contract*", the PCAB feels that, since the recommended tenderer is not ECDL certified, the amount of sub-contracting and ancillary operational costs which it would need to engage itself in, should force the said tenderer to go beyond the level of allowable sub-contracting ($\leq 50\%$ of the contract value) calculated by the evaluating committee thus rendering the submission of the awarded tenderer in breach of tender specifications;
5. The PCAB opines that this tender could have been evaluated better by the contracting authority's representatives and, had proper liaison with ECDL (Malta) taken place prior to the drafting of the tender specifications, the message to all potential participating tenderers would have been clearer and in line with standard procedures normally allowed by the managing entity for such courses in Malta, namely ECDL (Malta). During the hearing it became evidently clear that such communication was lacking and this was attributable to operational *lacunae* demonstrated by the contracting authority throughout the entire procedure. As a result of such lack of communication (demonstrated by the contracting authority) which would have enabled a clearer way forward and more appropriate and pertinent

specifications included in the tender document, participating tenderers could have possibly been misled that they have what it takes to run such courses according to the formally recognised managing authority's - ECDL (Malta) – standards. Needless to say that such clearer specifications could have prompted potential participants to desist from pursuing with their tender submission;

6. The PCAB feels that the real *raison d'être* of the tender was not properly grasped by the adjudicating board in a way that the PCAB retains it to be inconceivable as to how one is expected to believe that a contracting authority would be more interested in whether there is air-conditioning facilities, accessibility, fifteen rather than thirteen computers per laboratory or vice-versa and so forth and then be, concurrently, totally oblivious as to whether, *inter alia*, the bidder (a) was in a position to enable a student to obtain the apposite certification not giving due consideration as to whether a tenderer was officially recognised by the locally recognised managing authority of such courses, namely ECDL (Malta) and (b) had obtained formal approval from test sub/centres prior to proceeding with including them as part of their bid – as it transpired in the case relating to the one which is attested to one of the appellants themselves;
7. The PCAB, whilst fully cognisant that, at closing date of tender, not all premises offered by tenderers may have been in accordance with specifications (e.g. air-conditioning, etc.), yet maintains that, considering that there was still ample time for the opening of the course and certain maintenance could have easily been carried out in time, it fails to agree with the way the adjudicating board deliberated on similar issues. Yet, on the same lines, the PCAB cannot agree with the awarded tenderer's argument that, likewise, one had to consider giving due time for it to become officially recognised by ECDL (Malta) and this in view of the fact that such a decision is not completely within the tenderer's control whilst installing an air-conditioner or buying a couple of computers on time is.

As a consequence of (1) to (7) above:

- a. in the case (Ref. Case No. 167) of the appeal lodged by Messrs *DHM Consortium Ltd* the PCAB decides that, all things being equal, considering that out of the two reasons given for the appellant Company being disqualified:
 - the one relating to an air-conditioner not being installed in one of the computer laboratories turned out to be a gross mistake on the part of the adjudicating board when, as it transpired during the hearing, this was there but its presence was hindered by a thick curtain which through a mere question could have saved a couple of faces from turning red whilst,
 - as regards the second reason given for such disqualification, namely the fact that the appellant Company's offer proposed 6 computer laboratories with less than 14 PCs per laboratory when in the clarification meeting held on 15.04.2009 at the eLearning Centre (Floriana) it was, *inter alia*, decided that "sessions with less participants are to be left to the contractor's discretion", the PCAB cannot comprehend why the adjudicating board remained inflexible as regards the amount of computers available in a laboratory, whilst, concurrently leaving it entirely in the contractor's discretion to decide on the extent of sessions with less

than the intended participation level. The PCAB feels that it cannot agree with a decision which disqualifies a tenderer on such a trivial issue when, generally speaking, the tender document as submitted by the appellant Company was in compliance with the tender specifications

As a consequence, the PCAB finds in favour of the appellant Company.

- b. in the case (Ref. Case No. 168) of the appeal lodged by Messrs *The Computer Training Course Ltd (TCTC)* the PCAB finds in favour of appellant Company considering it is clear that by the time that the training is programmed to start, overall the company has sufficient resources to provide the basic requirements listed in the tender specifications as they have bound themselves to do by their offer.

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

Finally, the PCAB would like to recommend the following:

- Considering the evidence given by Mr Vella, it could well be that the tender as submitted by the awarded tenderer is untenable and this albeit it may have been, *prima facie*, in line with tender specifications. Yet, in view of the same evidence, the PCAB opines that the tender specifications were erroneously drafted giving the impression that this tender boiled down to a co-ordinating function when it definitely required a formal ECDL recognition to enable a student to, eventually, obtain the ultimate certificate. The PCAB feels that, when deliberating, the contracting authority's priority should have been given more to the ultimate certification rather than most of the clichés (which are undeniably important in their own right) that the adjudicating board was focused on throughout its adjudicating process;
- Adjudicating boards should, preferably, consist of a mix of persons with a dose of experience being resorted to. Furthermore, during the two hearings the PCAB felt that too much reliance was made on individualism to the detriment of professionalism and overall team-work. Indeed, the metrics used to classify what is pivotal or not were inconsistently availed of by the adjudicating board with the result that this particular tendering process ended up not being up to the standard required.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

16 November 2009