

PUBLIC CONTRACTS APPEALS BOARD

Case No. 180

Advert No CT 232/2009 - CT 2628/2008

Tender for the Supply, Delivery, Installation and Commissioning of Medical Equipment for the Radiology and Operating Theatre Departments at the Gozo General Hospital – Lot 1

The closing date for this call for tenders which, was for a contracted estimated value of € 2,163,000, was 11.08.2009. Seven (7) different tenderers submitted their offers.

On 12.11.2009 *Messrs Charles de Giorgio Ltd* filed an objection against the decision by the Contracts Department after being informed by the latter that their tender ‘for Lot 1 was not successful as your offer was not administratively compliant.’

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 20.01.2010 to discuss this objection.

Present for the hearing were:

Charles de Giorgio Ltd.

Dr Antoine Cremona	Legal Representative
Dr Stefan Frendo	Legal Representative
Mr David Stellini	Managing Director
Mr Gunter Barthel	Siemens Area Manager
Mr John Sammut	Technician
Mr Adriano Spiteri	Technician
Mr John Mallia	Sales Manager Medical Equipment
Mr Austin Magro	Sales Consultant Siemens
Mr Ivan Laferla	Operations Manager

Triomed Ltd

Dr Damian Fiott	Legal Representative
Mr Brian Farrugia	
Mr Alex Vella	
Mr Ian Vella	
Mr Charles Cascun	

Ministry for Gozo

Dr Titiane Scicluna Cassar	Legal Representative
----------------------------	----------------------

Evaluation Board

Mr John Cremona	Chairman
Mr Nazzareno Grech	Secretary
Ing Chris Attard Montalto	Evaluator
Mr Rosario Attard	Evaluator
Dr Mark Borg	Evaluator
Mr Mario Caruana	Evaluator

Department of Contracts

Mr Francis Attard	Director General (Contracts)
-------------------	------------------------------

After a brief introduction about this case, the Chairman, Public Contracts Appeals Board (PCAB) invited the appellant's legal representatives to explain the motives which led to the objection.

The appellant's legal representatives asked the PCAB to consider the holding of the proceedings in English as one of their representatives was a foreigner. However, Dr Titiane Scicluna Cassar, the Ministry for Gozo's legal representative, said that once she had prepared her submissions in Maltese, she preferred if the proceedings were to be conducted in Maltese. Albeit, as a result, the PCAB decided to conduct the proceedings in Maltese, yet, it was also stated that, if and when the need arose, it would allow participants to communicate in English.

Dr Antoine Cremona, legal representative of Charles de Giorgio Ltd, started by stating that this was an appeal from a decision taken by the Department of Contracts on 11 November 2009 which could be dealt with on purely factual basis. These were facts that were exactly the same as those of other cases previously decided upon by the Public Contracts Appeals Board. At this point he made specific reference to two sentences in respect of appeals filed by:

- Messrs Selex Galileo/Galileo Avionica SpA regarding Advert No. CT 36/2009 – CT 2427/2008 - Procurement of a Fixed Wing Maritime Patrol Aircraft (MPA) (PCAB Case No. 158)

and

- Central Power Installations (CPI) Ltd regarding Advert No. CT2520/2007 - UM 1229 - Tender for the Supply and Installation of Electrical, Mechanical and Extra Low Voltage Services for the Extension of the Rector's Office at the Administration Building, University of Malta. (PCAB Case No. 140)

Dr Cremona said that they were appealing from the two reasons listed in the above mentioned letter which led to the exclusion of his client's bid, namely:

No documents regarding, and/or evidence of:

- *Financial and Economic Standing (Article 3.6.4)*
- *No Technical Training Proposal (Article 11.2)*

With regard to the first reason of exclusion, the appellant's lawyer quoted from page 9 of the tender document which stated that:

'It has to be emphasised that financial proposals are to be submitted ONLY in Package 3.'

Dr Cremona said that this was the same clause that was included in the tender regarding the above-mentioned Case No 158, this being a template used for ERDF tenders.

The appellant's lawyer explained that this was the reason why the Evaluation Board, on opening Package 2 of Charles de Giorgio Ltd's offer, did not find any proof of their financial and economic standing. He sustained that the Contracting Authority included this clause to ensure that no financial and economic data was included in Package 2, otherwise they would be excluded. Dr Cremona claimed that if his client had sought legal advice before submitting the tender he would have certainly advised not to insert any financial information in Package 2 because of the high risk of being excluded. It was stated that his client was being excluded because of complying with Instructions to Tenderers (ITT).

Dr Cremona maintained also that, under the *Three Package Procedure*, there has always been exclusion in case of submitting any financial information in Package 2. The appellant's lawyer said that a tenderer was not expected to interpret such a clause differently, in that they could not include any financial and economic information in Package 2. He said that the PCAB has consistently acknowledged that all financial information had to be included in Package 3.

At this point, the PCAB explained that the financial considerations in Case No 158 were related to the running costs and maintenance cost of the aircraft while in this case these were related to the financial information on the company. Dr Cremona's reply to this observation was that the word 'financial' could only be interpreted to refer to all financial and economic information that related to the entity submitting the bid and the tender itself.

Furthermore, Dr Cremona said that there were the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt. He argued that the ambiguity in this case was in the sense that tenderers were expected to insert financial information in Package No 2 (considering the fact that they were being excluded for not including such information in the said package) and, on the other hand, there was a clear provision in the tender whereby it was specifically stipulated that a tenderer was prohibited from submitting financial information in Package 2. He insisted that once it was the Contracting Authority itself that requested tenderers to submit such data in Package 3 his client, the appellant, should not be excluded for not finding this information in Package 2. Dr Cremona said that, at this point in time, they could not prove that such data had been included in Package 3 because this package had not yet been opened for evaluation.

In reply to a specific question by the PCAB, the appellant's lawyer said that his clients were stating that, once they were in doubt where to put such data, the safe option was to include it in Package 3. He reiterated that if, prior to doing so, they had sought his advice he would have gone for the secure option so that afterwards they would not be excluded for including such data in Package 2.

With regard to the second ground of exclusion, Dr Antoine Cremona claimed that there was no requirement for a *Technical Training Proposal* as indicated in the letter of exclusion because Article 11.2 (c) of the ITT requested:

'A technical training proposal for the proper and safe operation of the equipment and first hand maintenance interventions, where applicable.'

The appellant's lawyer sustained that Messrs Charles de Giorgio Ltd had to be excluded on what was requested of them in the said clause because there was no request for the technical training proposal but a technical training proposal that was qualified for the proper and safe operation of the equipment, who were the Radiographers. Dr Cremona said that, contrary to what was stated in the Department of Contracts' letter, his clients had given clear details of the training proposal of their bid as follows:

'Siemens Medical application specialists will be brought over to Gozo General Hospital to train the Diagnostic Radiographers in a clinical environment as follows:

- *5 days will be devoted to training on the Axiom Iconos R200 and Axiom Aristos MX 80 Kw. Training will be completed in 5 days.*
- *5 days will be devoted to training on the Acuson X300 Ultrasound system and the Mammomat Inspiration*
- *5 days will be devoted to training on the Somatom Sensation 64 CT*
- *3 days will be devoted to training on the Agfa CR 35 – X Digitizer.*
- *Drager Medical application specialists will provide 5 days technical training for the users in all the equipment being offered.*

Following these trainings participants would be able to use all the features of the systems offered. Training material will be given to each participant either in the form of printed notes or else in digital format during or after training.'

Dr Cremona said that, for the sake of the argument, he would have conceded that, for example, the training proposal of other bidders was a superior solution but, on the other hand, he could never accept the claim that his client did not submit any technical training proposal, which was the only reason given for exclusion on this particular issue.

At this point the lawyer quoted from page 89 of the ITT in the tender document wherein there was the following description of the training proposal for Lot 1 which was complementary to what was written under clause 11.2 (c):

“Bidders are to submit a training proposal indicating adequate training to all Diagnostic Radiographers working at the Gozo General Hospital...”

Dr Cremona also said that, according to the European Court of Justice, it was a legal obligation on the Contracting Authority to seek clarifications. He maintained that the Evaluation Board should have sought clarifications on their training proposal if they did not understand it exactly or if they felt that it was an inferior proposal to their requirement. He also questioned whether the clarification exercise was excluded from the evaluation process or whether any clarifications were sought from other bidders considering the fact that no clarifications were sought from the appellant.

Dr Titiane Scicluna Cassar, legal representative for the Ministry for Gozo, emphasised that the appellant Company was excluded on administrative non-compliance and not on technical non-compliance.

With regard to her colleague’s statement that their complaint, more than anything else, was factual and that the principal decisions in the cases quoted above were that any financial data had to be submitted in the Third Envelope, she contended that such an argument would defeat the scope of the Three Envelope Procedure. Dr Scicluna Cassar sustained that in the Tender Dossier it was clearly specified that all financial data had to be included in Package 2. Here, she quoted Article 11.2 (e) which stipulated that:

‘Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers’

She added that at the end of Clause 11.2 it was stated that:

‘All the above information is to be inserted in Package 2.’

while under Article 3.6.4 it was stipulated that:

‘Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for 2006, 2007, 2008 verified by a certified accountant.’

She claimed that the scope of opening this administrative requirement in Package 2 was that Evaluation Board would be in a position to evaluate the financial standing of the company. The Ministry for Gozo’s legal representative maintained that the requirement to include such data in Package 2 was clearly specified in the tender and therefore it could not be argued that they had doubt in which Package they had to submit such information and that if they had sought their advice they would have told them to include such information in Package 3. Furthermore, she pointed out that by their own submission, the appellants were admitting that such information was not included in Package 2.

With regard to what was stated in their letter of objection regarding the claim that their turnover was much more than that of Triomed Ltd, Dr Scicluna Cassar said that

Article 3.6.4 did not refer to turnover but to adequate liquid assets and access to credit facilities. She sustained that it was left to the discretion of the Evaluation Board to decide what was adequate.

As regards the appellant's argument that Triomed Ltd's 2008 audited accounts did not appear on the Malta Financial Services Authority's (MFSA) website, the Ministry for Gozo's legal representative pointed out that she was informed that the documents in respect of financial statements had to be submitted to MFSA till the end of September and, as the tender closed at an earlier date, such documents could have been submitted afterwards. However, she insisted that the most important thing was that Article 3.6.4 dealt with financial statements that had to be verified by a certified accountant and not audited. She maintained that, whilst those of Triomed Ltd were actually verified by a certified accountant, the other party did not even have any financial statements in the first and second envelope.

On this issue she concluded by stating that the fact that the Evaluation Board did not find such documents in Package 2, it was not in a position to know the financial standing of the appellant company and, therefore, it had no alternative but to consider such an offer as administratively not compliant.

With regard to the Training Proposal, Dr Scicluna Cassar emphasised that under Article 11.2 (c) bidders were requested to submit '*A technical training proposal for the proper and safe operation of the equipment and first hand maintenance interventions, where applicable.*'

The lawyer maintained that they were not contesting the appellants' training proposal, which was considered valid, but the fact that they did not include first hand maintenance interventions in their offer. She said that the appellant company submitted a training proposal for *Radiographers* who were the operators of the equipment but did not submit a training proposal for the technicians who were the persons responsible for the maintenance of the equipment. Dr Scicluna Cassar said that this was the other reason why their offer was considered not administratively compliant and therefore it was not a question of whether their training proposal was valid or not, or that they should have sought clarification.

At this point, the PCAB intervened to cross-examine Mr John Cremona, Chairman of the Evaluation Board, on the issue of the training proposals.

In his response to a PCAB's member's question, Mr Cremona declared that in their report they wrote that it (the appellant's offer) did "*not include technical first line training*".

When the PCAB's Chairman asked him to comment on the last paragraph 3.6.3 of page 3 of 3 of Messrs Charles de Giorgio Ltd's bid, which stated that the "*technicians have been trained by the manufacturers and have carried out service and maintenance on the current installed base, some of which is listed in item 3.6.2*", Mr Cremona (aided by other members of the Evaluation Board present for the hearing) took some time to find this document. At this point, Mr Cremona pointed out that in their report they commented about how tenders were being submitted because this was causing problems for the Evaluation Board to check documents. The Chairman

of the Evaluation Board said that, in the case of the appellant's offer, they had received a package of small spiral files without an index and he had to come over from Gozo to personally check whether the copy of the tenders that was kept at the Department of Contracts contained the financial statements because such documents were missing from the original offer. In actual fact it resulted that these were not found in the appellant's Package 2. Here, Dr Antoine Cremona intervened by stating that their copy was indexed.

When the document was eventually found, Mr Cremona was referred again to the above mentioned paragraph and was asked to explain what this implied. He replied that in the front page of the *Training Proposal* they did not indicate a training proposal for their technicians but for the Diagnostic Radiographers and, in the quoted paragraph, although they were indicating that their technicians were going to provide training, they did not indicate whom they would train. The Chairman of the Evaluation Board also said that they did not understand that this referred to the technicians that were going to be trained at the Gozo General Hospital but to the company's technicians. His attention was drawn, however, by the PCAB that this was an interpretation.

It was pointed out by the PCAB that once there was "where applicable", the Evaluation Board could not recommend that a tenderer should be disqualified for submitting a training proposal for Radiographers only or for not submitting a training proposal at all because this was not a mandatory requirement. It was also stated that the words "where applicable" were misleading.

With regard to the Chairman Evaluation Board's remark that Messrs Charles de Giorgio Ltd were excluded because they did not submit "*first line training*", Dr Cremona emphasised that, in the letter communicated to them, the appellants were not excluded because they did not submit "*first hand maintenance*" but because they did not submit a '*technical training proposal*', which was actually provided. He explained that they had provided the training proposal for Radiographers as required on page 89 of the tender dossier. He also submitted that, for the purpose of his client's bid, the training proposal for the technicians was not applicable because technical maintenance was going to be covered by a service agreement and operated remotely which meant that problems would be solved remotely. Dr Cremona said that the words "*where applicable*" were included purposely because they were giving bidders the chance to give a solution to the technical training.

Dr Scicluna Cassar sustained that bidders had to provide a training proposal both for the Radiographers and also for technicians and that both were applicable. She reiterated that this bid was excluded because it was administratively not compliant and this was mainly due to the fact that there were no financial statements. She said that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue.

Dr Cremona insisted that the two reasons given for exclusion were equivalent.

In reply to a specific question by Dr Stefan Frendo, another legal representative acting on behalf of the appellant Company, as to whether any clarifications were sought

from the other party, the Chairman of the Evaluation Board said these were sought on technical and not administrative issues.

During one of his interventions, Mr Cremona said that it was better for them to have as many tenderers as possible in the running because there would be more competition.

During these proceedings Mr John Sammut (Technician, Charles de Giorgio Ltd) took the witness stand and gave his testimony under oath.

The witness testified that in this package they offered a service agreement and remote diagnostics. He said that with this package they were demonstrating what they defined as important at first hand which meant that which the users could do. Mr Sammut explained that, with the service and equipment offered, no first hand maintenance was required because this would be covered by the services agreement as requested in the tender and also offered by remote diagnostics. They would only need to show the Radiographers how to grant them access to equipment to carry out the necessary checks.

On cross-examination by the PCAB regarding reliability and maintenance of equipment, the witness said that the most sophisticated equipment of this tender was the *CT Scan*. He went on to explain that they had supplied / installed a similar *CT Scan* at Boffa Hospital in November 2007 and it had never stopped since then. He also said that they had two fully trained engineers and the only delay he could envisage was the time they would take to cross over to Gozo.

The Chairman, PCAB was of the opinion that it had to deliberate on the element of what was implied by financial standing since this was not necessarily a commercial standing. He said that the standing was a snap shot of a company at that moment in time but not divulging, for example, prices because this was the commercial perspective of a bid. It was stated that if the MFSA's records were up to-date, anyone could have access to the financial standing of companies because these were public documents. He sustained that it was the price offer that delineated the commercial entity and corresponding sensitivity of any bid.

Dr Cremona clarified that under clause 3.6.4 it was not the audited accounts (in the public domain) that were requested but that '*access to credit facilities are adequate for this contract*'.

Continuing, the Chairman PCAB said that they had to deliberate also on whether the Evaluation Board had assessed the standing of the tenderers against supporting documentation and not solely on what was claimed by bidders. Another point to be considered was that no tenderer was free to arbitrarily decide not to submit something simply because it might have reservations on a particular clause.

At this point, Dr Cremona intervened by stating that their financial statements were actually submitted because these were in Package 3 as stipulated in Clause 10.1 (c). However, Dr Scicluna Cassar also intervened to say that they had no proof of this because Package 3 was still closed.

When the Chairman PCAB asked the parties to confirm where the required information under Clause 3.6.4 had to be submitted, Dr Cremona replied that the financial standing cannot be submitted in Package 2. Here, the PCAB quoted Clause 10.1 (c) of the ITT:

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

The PCAB claimed that the above were all related to the bid and not to the entities.

Here, Dr Cremona insisted that other financial arrangements included access to credit facilities while Dr Scicluna Cassar sustained that these referred to financial arrangement in respect of payments.

The PCAB's Chairman said that the PCAB needed to deliberate on this particular issue rigorously.

At this point, Dr Cremona referred to PCAB Case No. 140 wherein the appellants, Central Power Installations Ltd, were re-instated even though the audited accounts for 2004 were not submitted and not included in any of their packages.

The PCAB (Mr Triganza) said that they needed to check the said Case on its own merit in order to establish what led the same Board to arrive at that decision.

Dr Cremona maintained that irrespective of what the Evaluation Board stated:

1. no financial information had to be submitted in Package 2;
2. ambiguity in tenders should always militate in favour of bidders and not in favour of the Contracting Authority, so the benefit of doubt was always in favour of bidder; *and*
3. the provisions in the tender were clear in that financial proposals had to be submitted ONLY in Package 3

Here, the PCAB drew his attention that a 'financial proposal' was not a 'financial standing'.

However, Dr Cremona remarked that this clause was purposely included to ensure that the bidder would complete the contract successfully. He said that from the public information available which was submitted with their appeal they had reservations on the preferred bidder.

The PCAB's Chairman said that the PCAB agreed with the Chairman Evaluation Board that whilst, as in similar situations, whenever a Contracting Authority ended up with only one bidder, it was never 'healthy' in so far as competition is concerned, yet contracting authorities also needed to abide by the regulations.

Dr Scicluna Cassar insisted that it did not make sense to compare this case with other sentences because they had to take into consideration what was stipulated in this

particular tender, wherein it was specifically stated that the financial standing of the bidders had to be submitted in Package 2.

The PCAB said that its guidelines were the regulations and not the tender's specifications. There were fixed rules in the law that specified what was to be incorporated in Package 1, 2 and 3.

Dr Frendo intervened by making reference to Central Power Installations Ltd's appeal (PCAB Case No.140) which was decided in their favour. He said that the facts were as follows:

“He failed to submit the 2004 audited accounts and this must have happened through an oversight. Yet, there were only minor shortcomings committed by the appellants which should not have led to elimination. The omission committed was irrelevant in the light of these provisions and it, therefore, followed that appellant's bid was compliant and that the Adjudication Board did not act correctly when it rejected the latter's offer.”

Dr Frendo proceeded by saying that, whilst in that case the 2004 audited accounts were not submitted, in their case they were stating that the requested financial information was submitted in Package 3. He also argued that considering the fact that there were divergent views on what had to be included in Package 2 and in Package 3 there was no alternative other than to give the benefit of doubt in favour of re-inclusion of his client's bid. He questioned whether it was justified for one to exclude a bidder from the process simply because they played safe and included such information in Package 3 instead of Package 2. He also asked the PCAB to consider if other bidders were prejudiced once these were in Package 3. Dr Frendo concluded by stating that the purpose of the appeal was not to cancel the tender but, at least, to re-instate them in the process and adjudicate the offer on its own merits.

The PCAB's Chairman ensured that in their deliberation the Board members

- would analyse (i) what were the terms of Cases 140 and 158 and in which context such decisions were taken and (ii) the purpose why certain documentation and information was to be submitted at stage 1, 2 and 3, and
- would not allow deviations if these were going to wrongly impinge on the evaluation process

When Dr Scicluna Cassar requested a copy of these cases, the Chairman PCAB remarked that the decisions used to be uploaded on the Department of Contracts' website. However, proceeded the PCAB's Chairman, these were subsequently removed and therefore were no longer accessible online. Yet, he continued, that he wanted to draw the attention of all those present that the PCAB's decisions are included in a report which is laid annually on the Table of the House of Parliament.

At this point, Mr David Stellini, representing Charles de Giorgio Ltd, intervened by stating that they had similar equipment at Sir Paul Boffa Hospital and another two in private hospitals. He ascertained that they had submitted their accounts and was of the

opinion that the fact that such information was submitted in Packages 2 or 3 should not prejudice the case. Mr Stellini pointed out that they had a turnover of €14.6 million and this tender had a budget price of about €2.5 million.

In reply to a specific question by the PCAB as to whether in previous tenders they submitted such financial statements in Package 2 or whether there were instances when these were submitted in Package 3, Mr Stellini said that, with the exception of Mater Dei Hospital tender, there were no other tenders that requested bidders to submit such statements.

The Chairman PCAB said that their role was to ensure that the *modus operandi* was correct and fair with all bidders and, as a consequence, they wanted to clarify the financial standing of the only bidder recommended for the opening of the financial package, that is, Triomed Ltd.

He pointed out that in their reasoned letter of objection the appellants implied that the financial standing of the bidder in question was not strong enough to shoulder such financial burden. On cross examination by the PCAB on this issue, the Chairman of the Evaluation Board declared that they had already taken into consideration this aspect in their evaluation and that it was decided that the financial standing of the said company was acceptable. He said that they had evaluated the bids in accordance with the criteria requested by the tender and were satisfied that they had complied with the requirements of clause 3.6.4 already referred to at an earlier stage.

When asked by the PCAB to explain what was implied by the word “adequate”, Mr Cremona said that the fact that the tender did not specify an amount for turnover posed a huge problem for them. He declared that they arrived at their decision after analysing the financial statements covering the years requested in the tender and also a letter from their bank which confirmed that all necessary amounts would be available. He said that the tenderer submitted an agreement with the bank and the principal supplier’s Company overseas which could be signed once the contract was awarded. At this point his attention was drawn by the PCAB’s Chairman that the financial aspect had to be dealt with through the bank and not with the supplier’s principal company.

The Chairman Evaluation Board proceeded by furnishing the PCAB with the following documents:

1. a letter dated 11 August 2009 bearing the corporate details of Alliance Trust and signed by Mr Brian Farrugia, Director Interlink Corporate Services Ltd
2. a letter from Triomed Ltd to Bank of Valletta plc
3. a letter from Bank of Valletta plc to Philips Medical Systems BV
4. e-mails exchanged between Bank of Valletta plc, Triomed and Philips Medical Systems BV

The PCAB analysed these documents and noted that the document at 3 above was not endorsed by the Bank. After reading the contents of document no. 1, the Chairman PCAB asked Mr Cremona to state whether this provided them with comfort as regards the financial standing of the tenderer because this covered only the performance bond,

which was 10% of the contract value. Mr Cremona replied that this was considered acceptable in the absence of those who did not submit anything.

Dr Damian Fiott, the legal representative of Triomed Ltd, intervened by stating that this was only part of the evidence submitted by his client aimed at showing that it had the pertinent financial and economic standing. Dr Fiott contended that, apart from the requirements under Article 50 of LN 177/2005, they also submitted as evidence the right to gain access to credit facilities. Dr Fiott argued that the evidence submitted showing Philips Medical Systems BV's willingness to support their local representatives was not all the company's evidence as to whether it had the necessary financial standing for the execution of this tender but it was only part of the evidence showing that Triomed Ltd had the comfort from Philips Medical Systems BV, the principal Company, with the latter agreeing to be paid upon receipt of such proceeds by Triomed Ltd from the Government of Malta.

Mr Brian Farrugia, also representing Triomed Ltd, said that there were irrevocable instructions enclosed with that letter which showed that Philips Medical Systems BV gave unconditional credit facilities.

Dr Scicluna Cassar sustained that the financial statements showed that the company was profitable and that it had adequate financial standing for this tender. Mr Cremona added that the certified accounts submitted showed that the company was making profit and so they felt that the documents submitted were adequate to reach a decision. However, his attention was drawn by the Chairman PCAB that some time earlier it was stated that they had a problem in identifying what was "adequate".

The Chairman, PCAB placed emphasis on the fact that they were only interested in ascertaining that the *modus operandi* of the adjudication board was fair and that the benchmarking was carried out correctly. It was also stated that in view of the submissions made it had to be ascertained that those who adjudicated on the financial standing knew what they were saying.

At one stage Dr Frendo intervened to point out that there was no relationship between the Contracting Authority and the supplier who was guaranteeing credit facilities. He said that the Company with whom the contract would be entered into had a turnover of less than €500,000 for a contract of €2.5m. Dr Fiott interjected to reply that Philips Medical Systems BV were not unconnected with this contract because there was an undertaking with them in regard to credit facilities.

Dr Fiott concluded by stating that in the tender document there was a requirement that such evidence had to be included in Package No 2 in accordance with Article 50 of LN 177/2005 and this provision explained clearly what had to be included. In the definition there is evidence of liquidity and access to credit facilities and that was why they decided to include backup evidence of Philips Medical Systems BV because it was an essential requirement of the Legal Notice (LN).

With regard to access to credit facilities, Mr Farrugia, Triomed Ltd, explained that they included the 'comfort letter' of Philips Medical Systems BV (wherein they were granting unconditional credit terms) together with the correspondence exchanged

between Triomed, Philips Medical Systems BV and BOV. Furthermore, he said that BOV was unequivocally accepting the credit terms.

At this point the PCAB intervened to draw Mr Farrugia's attention to the fact that BOV was not accepting anything, as yet, considering the fact that such document was not signed. Mr Farrugia responded by stating that, as a lending officer, there was no bank that issued a sanction letter before a tender was concluded. The Chairman PCAB rebutted by questioning what comfort an adjudication panel would have if this were the case. However, Mr Farrugia insisted that the Bank was already showing its consent. The PCAB's Chairman said that the time line was important because, all things being equal, the consent was given at that moment in time and nothing was official.

On seeing that there were no further comments from the floor, the PCAB brought the public hearing to a close by stating that it was imperative for it to ascertain that at deliberation stage the adjudicating panel had treated all bidders equally.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 13.11.2009 and also through their verbal submissions presented during the public hearing held on the 20.01.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that the appellant Company made reference to two previous PCAB cases (Cases 140 and 158 respectively) which, in its legal representative's opinion, dealt with the same type of objection;
- having also taken note of the fact that the appeal concerned two reasons which led to the exclusion of the appellant's bid, namely, no documents regarding, and/or evidence of (a) '*Financial and Economic Standing*' (Article 3.6.4) and '*No Technical Training Proposal* (Article 11.2)';
- having heard the appellant's legal advisor claim that since the tender document stated that '*financial proposals are to be submitted ONLY in Package 3*' his client did not include any information of a financial nature in package 2;
- having also heard Dr Cremona state that there are the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt;
- having also noted that the appellant Company was claiming that there was no request for the technical training proposal but a technical training proposal that was qualified for the proper and safe operation of the equipment, who were the Radiographers and that they had given clear details of the training proposal of their bid;
- having considered Dr Frendo's claim as to whether it was justified for one to exclude a bidder from the process simply because they played safe and included such information in Package 3 instead of Package 2;

- having also taken note of points raised by appellant Company regarding the need for clarifications to be sought by the contracting authority;
- having taken into consideration the points raised by the contracting authority namely :-
 - a) the emphasis placed on the fact that the appellant Company was excluded on administrative non-compliance and not on technical non-compliance,
 - (b) the suggestion (as claimed by appellant Company) that any financial data had to be submitted in the ‘Third Envelope’ would defeat the scope of the Three Envelope Procedure and was totally untrue within the context of this same tender, stating that in the tender *dossier* it was clearly specified that all financial data had to be included in Package 2 (vide Clause 11.2 and Article 3.6.4 respectively),
 - (c) that the scope of opening this administrative requirement in Package 2 was that the Evaluation Board would be in a position to evaluate the financial standing of the company,
 - (d) that, whilst Triomed Ltd’s (the recommended tenderer) financial statements were actually verified by a certified accountant, the other party (the appellant Company) did not even have any financial statements in the first and second envelope,
 - (e) the fact that the Evaluation Board did not find such documents in Package 2, it was not in a position to know the financial standing of the appellant company and, therefore, it had no alternative but to consider such an offer as administratively not compliant,
 - (f) that the contracting authority was not contesting the appellants’ training proposal, which was considered valid, but the fact that that they did not include first hand maintenance interventions in their offer, claiming that, whilst the appellant company had submitted a training proposal for *Radiographers* (who were the operators of the equipment) yet they did not submit a training proposal for the technicians (who were the persons responsible for the maintenance of the equipment);
- having taken note of Mr Cremona’s statement wherein he claimed that in the front page of the *Training Proposal* the appellant Company did not indicate a training proposal for their technicians but for the Diagnostic Radiographers and, in the quoted paragraph, although they were indicating that their technicians were going to provide training, they did not indicate whom they (the appellant Company) would train;
- having deliberated on –
 - (a) the use of the term “where applicable”, which, the appellants’ legal advisor tried to justify with those present by stating that these words were purposely included because the contracting authority was giving bidders the chance to give a solution to the technical training, something that his clients were doing *and*
 - (b) the training proposal for the technicians, which, as suggested by appellants, was not applicable because technical maintenance was going to be covered by a service agreement and operated remotely which meant that problems would be solved remotely, a point corroborated by Mr Sammut’s testimony;
- having also deliberated on the fact as pointed out by the appellants, namely that they were not excluded because they did not submit “*first hand maintenance*” but because

they did not submit a ‘*technical training proposal*’, which, according to the same appellants was actually provided;

- having thoroughly considered the significance of Dr Scicluna Cassar’s concluding statement wherein, *inter alia*, she stated that the appellant Company’s bid was mainly rejected due to the fact that there were no financial statements and that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue;
- having taken full cognizance of the fact that by their own submission, the appellants were admitting that such information was not included in Package 2;
- having considered whether the Evaluation Board had assessed the standing of the tenderers against supporting documentation and not solely on what was claimed by bidders;
- having analysed the ancillary documentation referred to during the hearing relating to the recommended tenderer’s financial standing and Mr Cremona’s statement that the Evaluation Board maintained that these provided them with comfort even though this only covered the performance bond, which was 10% of the contract value, which was more when compared to all those others who did not submit anything;
- having considered the points raised by Dr Fiott and Mr Farrugia, particularly the fact that, according to them, the evidence submitted showing Philips Medical Systems BV’s willingness to support their local representatives was not all the company’s evidence as to whether it had the necessary financial standing for the execution of this tender;
- having duly analysed the implications of the argument brought to the fore by Dr Frendo wherein he stated that (a) there was no relationship between the Contracting Authority and the supplier who was guaranteeing credit facilities and (b) the Company with whom the contract would be entered into had a turnover of less than €500,000 for a contract of €2.5m,

reached the following conclusions, namely:

1. The PCAB maintains that conclusions reached by the same Board in previous PCAB cases (nos. 140 and 158) were taken out of context by appellant company in view of the fact that the areas of contention are totally unrelated to the objections made in this particular instance. As a consequence, this Board fails to understand the attempt made by the appellants to try to draw any similarity between the said cases and the present one.
2. The PCAB also feels that, whilst agreeing with the appellants’ legal advisor with regards to the fact that there were the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt, yet the PCAB fails to comprehend where one can find any traces of ambiguity in this particular instance.
3. The PCAB opines that, in view of the inclusion of the phrase “where applicable”, the Evaluation Board could not recommend that a tenderer should be disqualified for submitting a training proposal for Radiographers only or for not submitting a training proposal at all because this was not a mandatory requirement as implied by the phrase

“where applicable”. Furthermore, the fact that the contracting authority’s own legal advisor stated that the appellant Company’s bid was mainly rejected due to the fact that there were no financial statements and that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue, corroborated the futility of such ground for rejection.

4. Whilst not entirely agreeing with the analytical approach adopted by the Evaluation Board to ensure that the recommended tenderer’s financial standing is sufficient to sustain the financial responsibilities that the dimension of a tender such as this necessitates, yet, this Board would suggest a more thorough investigation in regard to ensure that the contracting authority is alleviated from potential future problems. It is also a fact, however, that, at this point, the PCAB has no sufficient ground to decide against the conclusions reached in regard by the Evaluation Board.
5. The PCAB cannot agree with the arguments brought forward by the appellant Company in so far as the interpretation of terms like “financial proposal” and “financial standing” are concerned. The PCAB holds the opinion that a “financial standing” (balance sheet, profit and loss, etc.) is a snap shot of a company at a particular moment in time (very often accessible to the general public via, for example, the MFSA’s website) but which falls short from presenting, for example, prices, payment terms and so forth (considered to contain commercially sensitive information not otherwise accessible to one and sundry).

The 3 package procedure distinguishes between these two scenarios. The opening of *package no. 2* enables an Evaluation Board to establish the financial solidity of a participating tenderer, regardless of the commercial nature of the bid. *Package no.3* is directly linked with the commercial application of the tenderer’s bid ‘per se’.

The PCAB is sceptic about the fact that the appellant Company is still oblivious of the fact that, whilst one is expected to include Company information such as balance sheets, profit and loss statements, etc. in Envelope 2, yet it is likewise expected to include details of a commercial nature in Envelope 3.

The PCAB contends that the interpretation of Section 10.1 (c) is unequivocal and any other interpretation given to such Clause is unacceptable. Moreover, these requirements are mandatory.

6. The PCAB argues that no tenderer is free to arbitrarily decide not to submit something simply because the same tenderer might have reservations on a particular clause.

As a consequence of the above, particularly, (5) and (6), this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

09 February 2010