

PUBLIC CONTRACTS APPEALS BOARD

Case No. 202

Ref: 322/CSD//09

Restricted Invitation to Tender for a Concession Contract for the Provision of Scheduled Bus Services in Malta

This call for tenders was published in the Government Gazette on 14.07.2009. The closing date for this call for offers was 17.02.2010.

Four (4) different tenderers submitted their offers.

On 15.04.2010 *Messrs* Nex Continental Holdings SLU filed an objection after its bid had been adjudicated non-compliant due to various shortcomings listed in letter dated 12.04.2010.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 26.05.2010 to discuss this objection.

NEX Continental Holdings SLU (NEX Holdings)

Dr. John Bonello	Legal Adviser
Dr. James Muscat Azzopardi	Legal Adviser
Dr Ged McEwan	Legal advisor, National Express Group
Sra Maria Perez Prieto	Legal Adviser
Sr. Rafael Gonzalez	Urban Division General Manager
Sr. Carlos Huesa	Development Division General Manager
Mr Juan Jose Cobo	Representative

Transdev Plus Consortium

Mr Leo Grech	Representative
Mr Anthony Mamo	Representative
Mr Glen Warren	Representative
Prof. Ian Refalo	Legal Adviser
Dr. Roderick Zammit Pace	Legal Adviser

Arriva Malta Consortium

Dr George Hyzler	Legal Adviser
Mr Silvan Fenech	Representative of Tumas Group
Ms Elena Cattaneo	Representative of Arriva

Transport Malta

Dr Adrian Delia	Legal Adviser
Dr John L. Gauci	Legal Adviser
Dr Nicolette Spiteri Bailey	Legal Adviser
Mr Mark Portelli	Chairman Transport Malta

Core Evaluation Committee

Dr Stanley Portelli	Chairperson
Mr David Sutton	Evaluator

Mr Dennis Attard
Mr Konrad Pule
Dr Anita Fenech

Evaluator
Evaluator
Secretary

After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Ged McEwan, Legal advisor, National Express Group and NEX Holdings, stated, *inter alia* that the purpose of the appeal was not because they maintained that their bid was the most advantageous but that they were convinced that, on the basis of the letter of rejection they received from Transport Malta, their bid should not have been disqualified but that their bid should be allowed to continue participating in this tendering process.

Dr James Muscat Azzopardi, also representing NEX Holdings, contended that the issues raised by Transport Malta in its letter dated 12th April 2010 were incorrect both in fact and at law. Dr Muscat Azzopardi after explaining that, in the course of tender evaluation, the Adjudicating Board had requested a number of clarifications, fifteen (15) in all, as per letter dated 23rd March 2010 which his client had answered he proceeded by posing the question as to why the contracting authority, Transport Malta, decided to issue its letter of disqualification instead of asking for further clarifications on those same reasons for disqualification in terms of section 4.6.4 (page 32) of the tender document which stated that:

“The Adjudicating Board shall have the right to seek clarifications from Tenderers on points of a technical nature to enable a proper evaluation of any Tender.”

Job Description

Dr Muscat Azzopardi then referred to the first reason for disqualification which, quoted verbatim, read as follows:

“you have failed to satisfy the requirements of the ITT as you have failed to provide a detailed job description of top management which had to be provided in terms of Annex 2 and which had to indicate the relevant qualifications and expertise.”

Dr Muscat Azzopardi claimed that his client had submitted the information requested, however, if that information was not as detailed as the contracting authority wanted it to be then it could have asked for more details as it was entitled to do. He argued that if the contracting authority considered this issue as of fundamental importance to the tender process then why did it not seek a clarification thereon, as it did on fifteen (15) other issues as per letter dated 23rd March 2010. Also, on the other hand, if it did not consider this shortcoming as fundamental to the process then this deficiency should not have led to disqualification. Dr Muscat Azzopardi asked the PCAB to look at this matter from the point of view that it was to the advantage of Transport Malta to have as many bidders as possible since more competition would produce better service quality and prices. At this point Dr Muscat Azzopardi referred to clause 4.6.8 which stated that:

“.....In exceptional circumstances, the Adjudicating Board reserves the right to accept Tenders which are not fully compliant with this Invitation to Tender

but only where the deficiencies do not affect materially the requirements of this Invitation to Tender and the contents of the Tender.”

Dr Muscat Azzopardi did not consider that lack of detail in the job description of top management should lead to tender rejection when the invitation to tender was a very complex one requesting the provision of buses. He then explained that he really meant the provision of transport services.

Dr Adrian Delia, legal representative of Transport Malta, by way of introduction submitted the following:

- The appellant appeared to have admitted that this invitation to tenders was not for the provision of management but for the provision of buses/transport, however, the problem with Malta’s public transport was not the lack of buses but the problem was the mismanagement of the transport system and thus the management aspect of this tender was crucial.
- Clarifications were in fact sought from the appellant Company as had already been pointed out by the same appellant Company. He added that clarifications were meant to explain better what had already been submitted but clarifications were certainly not meant to request information that should have been submitted in the first place as a mandatory requirement.
- With regard to management, the tender document requested, as follows, at page 122:

(2) Operational Strategy – This shall include, inter alia:

A high level plan of staff complement required and a detailed job description of the persons who will be responsible for the top management on the Project, indicating the required level of relevant qualifications and expertise, and a clear indication of the resources dedicated to network planning and auditing.

Dr Nicolette Spiteri Bailey, also a legal representative of the contracting authority, explained that, contrary to what the appellants seemed to imply, Transport Malta was keen to have as wide a competition as possible and that efforts were made in that direction and that was demonstrated by (i) the number of clarifications sought from the appellants and (ii) the opportunity given to the appellants at envelope one stage to correct the bank guarantee which had erroneously been issued in the name of NEXT Continental Holdings instead of NEX Continental Holdings, something which could have led to outright disqualification of the appellants from the outset.

Dr Spiteri Bailey contended that this invitation to tender did not involve only the purchase of buses but it involved the provision of a public transport system in a holistic manner. She added that Government was, in fact, granting a concession whereby the contractor would derive his revenue from the sale of tickets and from compensation paid on certain services which were not considered commercially

feasible. She continued that Annex 2 to the tender document included all the essential and mandatory requirements and that this annex should not be considered as secondary in importance to the tender document itself. Dr Spiteri Bailey remarked that the appellant Company's bid was deficient both in administrative and in technical aspects and that, on seeking clarifications, the contracting authority was further convinced that the appellants, either did not fully understand the tender document, or else it could not provide the standard of service requested. She added that the evaluation process involved the setting up of four separate committees, each specialized in a specific area, which reported to the core evaluation board and she confirmed that all the decisions were taken unanimously, i.e. with no dissenting opinions.

Dr Spiteri Bailey stressed that the tender *dossier* specifically requested qualifications and expertise and that there were directives in force which dealt with the recognition of qualifications across borders. She added that, over the ten-year period, managers could change but the contractor would be obliged to provide replacements with the qualifications and expertise laid down in the contract.

Dr Muscat Azzopardi referred the PCAB to pages 69 and 70 (of his client's submission with regard to General Management).

The Chairman PCAB opined that the contracting authority needed to know the competencies of the top management within the foreseeable future – 10 years – who would be operating this service and thus the request for qualifications and expertise and not simply the title/nomenclature of the post as was indicated by the appellant Company at page 70 of its submissions.

Dr Muscat Azzopardi remarked that it could not be said that his client did not submit information. However, he conceded that the submission did not contain that level of detail, which, he argued, the contracting authority could have (i) either asked for in a clarification for the sake of not eliminating competition on such details or (ii) penalized his client by awarding him fewer points as per award criteria at page 31.

Dr John Bonello, also representing the appellant Company, agreed with Dr Spiteri Bailey that this was a 'restricted invitation to tender' and not a normal call for tenders and submitted that the adjudicating board should have applied throughout the evaluation process the provisions of clause 4.6.4 quoted earlier on at the hearing.

Dr Delia remarked that the appellants did not provide evidence of the qualifications and expertise of managers and did not even indicate if they were going to be, say, engineers or lawyers or architects.

Dr Muscat Azzopardi maintained that his client was an international operator of transport systems and that his client did appreciate the important role of management in the running of such public transport services. Dr Muscat Azzopardi did not contest the argument that the contracting authority required more details with regard to management but he insisted that it could not be said that his client did make a submission with regard to management.

The Chairman PCAB remarked that clarifications were to be sought for the purpose of throwing more light on information already submitted and not to obtain information which was requested but not submitted because that could amount to a form of negotiation.

Dr Spiteri Bailey explained that there were various stages and that a tender had to be found administratively and technically compliant to be allowed to move on to the weighting stage as explained in the evaluation criteria at page 31 which provided for, among other things, the following:

“4.6.1 – The Authority shall have the right to reject any or all Tenders which are not compliant with the procedural or substantive requirements of this Invitation to Tender on the recommendation of the Adjudication Board. Any tender which is so disqualified shall be discarded once the Tender Procedure is completed.

4.6.3 - An evaluation of Tenders will be made to ensure that the tendering procedural requirements and/ or the mandatory specifications included in the Invitation to Tender are satisfied. Tender submissions which meet the minimum requirements, hereunder ‘Compliant Bids’, will then be weighted in accordance with the award criteria set forth hereunder”

Dr Spiteri Bailey also referred to clause 4.6.8. which read as follows:

“4.6.8 - The Authority shall have the power to disqualify any Tenderer who, in its opinion, based on the information it holds, will not be able to comply with its Tender submissions In exceptional circumstances, the Adjudicating Board reserves the right to accept Tenders which are not fully compliant with this Invitation to Tender but only where the deficiencies do not affect materially the requirements of this Invitation to Tender and the contents of the Tender .”

Dr Spiteri Bailey explained that an exceptional circumstance was, for example, when only one tenderer submitted a bid, in which case one could have accepted the bid even if not fully compliant but still the deficiencies should not affect materially the requirements which, she claimed, was not the case with the appellant Company. Dr Spiteri Bailey referred to the appellants’ letter of objection where, inter alia, it was stated that *“...it is impractical to specify particular academic requirements at this early state...”*.

Dr Bonello intervened and insisted that if the contracting authority considered the lack of detail with regard to the job description of top management as a fundamental issue such that it amounted to disqualification then it should have been included in the list of clarifications which it sought from his client on 23rd March 2010, otherwise, he argued, what was the use of seeking the other clarifications.

Technical Grounds

At that stage it was decided that certain issues listed in the letter of objection – referred in (i) to (iii) hereunder could be grouped and tackled together because they were interrelated.

i) “The Peak Vehicle Requirement (PVR) submitted following a request for clarification fall between 27 (or 8.7%) and 38 (or 11.7%) buses short from that considered to be required for the provision of the Services by the Authority, based on the network requirements. It is therefore clear that the proposed bus fleet is insufficient to comply with the requirement of the ITT.”

ii) “The Bus fleet submitted in the Tender demonstrates that you failed to thoroughly analyse the bus routes and the maximum waiting time as mandatorily required by clause 2.6.1.1 of the ITT”

iii) “The submission with respect to the Bus Fleet also indicates that you have failed to distinguish between the difference between the Maximum Waiting Time requirement and the scheduling requirement.”

Dr Spiteri Bailey explained that the contracting authority did not specify the number of buses required but instead gave the bidders certain information, such as the number of routes and bus stops and the maximum waiting time for a passenger to board the bus, and on the basis of that information and on the analysis carried out by the bidders themselves then they had to arrive at the number of buses required. Dr Spiteri Bailey remarked that Transport Malta experts had arrived at 300 buses which was not disclosed to the bidders but was meant to serve as a benchmark. She stated that ‘the maximum waiting time’ was the most important output level.

Mr Juan Jose Cobo, NEX Holdings technical representative, with Dr Muscat Azzopardi acting as interpreter, submitted that the appellants had brought over to Malta a number of experts to undertake the necessary studies on the ground and according to their calculations 288 buses would be required. He added that the number of buses was arrived at by using the formula given by the contracting authority and by adding 10% thereon which, through experience, was considered more than sufficient to local conditions including the maximum waiting times indicated. He explained that the average speed of 17 km/hr was considered as very conservative.

Dr Spiteri Bailey remarked that, although the number of buses had not been disclosed by the contracting authority, the tender document made various references in relation to this requirement particularly clause 2.2.2 (page 17) which stated that:

“The Operator shall ensure that a passenger does not wait at any particular Bus Stop for a time which is longer than the Maximum Waiting Time described for each Bus Stop in Item A1 of the Data Room before he can board the Bus which he is waiting for. The Operator shall moreover coordinate the times at which Buses pass by a particular Bus Stop in order to reduce the waiting time, as much as possible, for persons who need to make an interchange between different Bus Routes. The Operator shall

endeavour to coordinate the times at which Buses leave and/or arrive at a particular destination from which the public can utilise scheduled means of transport other than by road, with the transport organiser or coordinator of such other means of transport. For this purpose, the Operator shall endeavour to plan the Buses' arrival at, and departure from, such destinations in such a way that the waiting time for the use of such other means of transport is minimised. The Operator shall consult with operators and/or coordinators of such other means of transport, including inter alia, the operator of the Malta International Airport for the purpose of scheduled flights, operators and/or coordinators of international and national passenger ferry services and the operator of any sea plane services as well as any operator of vertical connections and any other operator or coordinator providing different scheduled means of transport other than by road.”

Dr Spiteri Bailey remarked that the evaluation board did not discard the appellant Company's offer because Mr Cobo quoted 288 buses instead of the 300 buses worked out by Transport Malta but because when asked for a clarification - as per document which read that “*in terms of clause 2.6.1.1*” of Part Two of the ITT, “*Tenderers are required to analyse the Bus Routes and the Maximum Waiting Time applicable to each Bus Stop with a view to establishing an appropriate mix of Bus type or types to render the Scheduled Bus Service* - the appellant Company did not present in its reply the analysis undertaken with regard to, for example, traffic congestion or to tourist seasonality. As a result, Dr Spiteri Bailey argued, in the absence of such analysis as to how the number of buses was arrived at, the contracting authority did not have the comfort that the number of buses proposed by the appellants was in fact adequate. On being specifically asked by the PCAB, Dr Spiteri Bailey stated that the successful tenderers had presented from the outset the number of buses required, which were well below the 10% variation indicated by the appellants, along with detailed workings that backed their proposal. Dr Spiteri Bailey remarked that the adjudicating board even noticed that (i) the summer route extensions (e.g. Mgarr-Gnejna), (ii) a particular route (ML 73) and (iii) the return trip on another route were not included in the spreadsheet submitted by the appellants and that only one bus was proposed for Mgarr Gozo which was by far insufficient in relation to the maximum waiting time requested.

Dr Muscat Azzopardi argued that such workings were to accompany the economic aspect of the submission in envelope 3. The Chairman PCAB disagreed because this aspect concerned customer satisfaction with regard to the proposed service and that it was apart from the economic aspect that affected the operator. Dr Muscat Azzopardi insisted that (a) the clarification was answered, (b) the formula used was adequately explained with the result having been topped up by 10%, (c) the spreadsheet submitted did take into account various aspects, e.g. peak and off peak waiting times, and (d) a team of about 10 officers came over to Malta to work on these calculations. Dr Muscat Azzopardi expressed the view that the fact that their experts calculated that 288 buses would be required against the benchmark of 300 buses was quite reasonable indeed.

Dr Bonello reminded those present that the appeal should be limited to the points raised in the letter of rejection dated 12 April 2010.

Dr Delia argued that the fact that the adjudicating board did request clarifications demonstrated that there was no intention to reject any tenders at the first opportunity that occurred but, on the other hand, one had to appreciate that the replies given by the appellant Company to the clarifications requested by the contracting authority did not provide the comfort needed but these replies rather convinced the contracting authority that the appellants either did not understand properly what was being requested or else could not deliver the level of service requested. Dr Delia went on to stress that a 10% variation in the number of buses could have severe consequences on the quality of the service.

iv) “The Statement in the Tender that operations conducted abroad will be implanted into Malta and the failure to indicate that these need to be adapted to the local context and explain how this will be done.”

v) “The branding and marketing campaign is insufficiently detailed, and once again relies heavily on transplanting marketing campaign from other transport operations to Malta rather than looking at the specific issues relating to the existing and potential customers and tailoring the approach.”

vi) “The operational Strategy gives a fairly standardized description of bus operations and no specific local applications was made in the context of the processes proposed.”

Mr Cobo, through Dr Muscat Azzopardi acting as his interpreter, stated that what had been submitted in this tender was not general in nature but it was based on experience gained from overseas operations but adapted to the conditions prevailing in Malta. He added that what had been submitted conform to ISO 9001 and ISO14001 and to the geophysical conditions in Palma de Majorca and Marrakesh (Morocco), which were similar to those in Malta.

Dr Spiteri Bailey remarked that although it had been stated both in the letter of objection and at the hearing that this submission was tailor-made for Malta, the appellants failed to demonstrate this assertion.

Dr Delia declared that no evidence had been made available by the appellant Company that demonstrated that it had arrived at its calculations on conditions prevailing in Malta. Dr Delia said that the appellants did submit material with regard to branding and marketing, however, it invariably referred to other countries, e.g. one of the billboards referred to ‘Bristol Road’, and no attempt was made to adapt same to the local context.

Dr Muscat Azzopardi claimed that the experience gained by his client in various countries should be taken as a plus and not as a handicap because what his client did was to use his experience in the Maltese context. Dr Delia remarked that the contracting authority had nothing against the overseas operations of the appellants but it was necessary for the said appellants to demonstrate how it was going to utilise that experience in its proposed operations in Malta.

Dr Spiteri Bailey remarked that in terms of marketing campaign the contracting authority requested an outline of the branding and marketing strategy distinguishing between the strategy for the launch and the initial period of the services and the on-going marketing strategy including the relative budget. Dr Spiteri Bailey remarked that the submission presented by the appellants demonstrated that the Company was not aware of the local realities with regard to public transport.

Dr Delia again pointed out that the appellant Company did make a submission in this respect but it failed to indicate which sections of the population it would be targeting and how the product was going to look. The contracting authority's legal representative added that one of the main thrusts behind this exercise was to encourage more people to use public transport and that aspect was missing from the appellants' submission.

Dr Muscat Azzopardi denied the claims made by the contracting authority and referred to the following quotes from his clients' submission (pages 55 to 66):

"Page 56 – The primary target audience for the promotional campaign is permanent residents of Malta, though we recognize that in the peak tourist season there is heavy use of the bus network by tourists. The peak tourist season will be over by the anticipated commencement date so it is not anticipated that a great deal of focus on the tourist market will be required until the 2011 peak season begins.

Page 57 – NEXCON will advertise extensively in both the English language and Maltese language daily newspapers in the two month period prior to the commencement date."

The Chairman PCAB remarked that what the PCAB had to deliberate upon was whether a poor submission constituted a non-submission.

Dr Delia referred to clause 4.6.8. which stated, *inter alia*, that the "Authority shall have the power to disqualify any Tenderer who, in its opinion, based on the information it holds, will not be able to comply with its Tender submissions" and, as a result, he claimed, the contracting authority was obliged to discard the appellants' submission. Moreover, he remarked that no marks were allotted specifically to 'branding' and 'marketing' but that 25 marks were given to 'Overall Quality of the Tender submission'. However, proceeded Dr Delia, to qualify for those points the submission had to satisfy the procedural and mandatory specifications as per clause 4.6.3.

Dr Muscat Azzopardi argued that the contracting authority had two options, namely:

- (i) to decide that the submission was not compliant and hence disqualify it, or
- (ii) the submission was there but could be improved upon through a clarification and hence the bid should be kept in the process.

Dr Muscat Azzopardi referred to the last part of clause 4.6.3. which stated that "The points allotted to (i) the Public Service Compensation, (ii) the Concession

Fee, (iii) the concession Guarantee, (iv) the Parking Fee and (v) Cost of Eligible Modifications shall be allotted on a relative grading system, with the best offers getting full points and the worst offers getting nil points.” Dr Muscat Azzopardi interpreted this to mean that with regard to the two remaining bids, the worse bid was not going to be awarded any points while the better bid was going to be awarded all the 315 points available and, as a consequence, it was in the best interest of the contracting authority to have as wide a competition as possible.

Dr Delia declared that the bidders were aware of the tender conditions and specifications from the very start.

vii) “The Tender does not contain an executive summary in line with the requirements of part B Annex 2 and fails to adapt the operations described in the specific requirements of the ITT and the Maltese public transport system. Moreover, the Tender lacks any significant description with respect to training and recruitment which will have to be conducted within short periods of time, which is a high risk particular to Malta and the lack of any mitigating plans.”

Dr Bonello remarked that Part B of Annex 2 (page 122) provided as follows:-

“(1) Executive summary

Tenderers must submit an executive summary of their overall understanding of the Project and its goals as well as a high-level explanation of the Tenderer's proposal to achieve such goals. This should include, inter alia:

- A stakeholders' interest analysis;*
- Tenderer's vision of the Technical and Operational requirements which are important for the successful execution of the Project, in particular its objectives and expected results, thus demonstrating the degree of understanding of the Project;*
- An opinion on the key issues related to the achievement of the Contract objectives and expected results;*
- An explanation of the risks and assumptions affecting the execution of the Contract.”*

Dr Bonello refused the ‘non-submission’ claim made by the contracting authority contending that pages 1 to 26 of Book 2 of his client’s submission dealt specifically with this matter.

Dr Spiteri Bailey intervened to remark that the first bullet requested a ‘stakeholders' interest analysis’ whereas the appellant presented a ‘business interest analysis’ which were two different things. She added that the contracting authority had issued the *Request for Clarifications No. 2* dated 9.11.2009 no. 2.66 which gave the following further explanation, viz:

“Tenderers are expected to provide their analysis of the identity, needs and likely interests of segments of the community and other market sectors that hold a stake in the success of the services. This is considered relevant to be able to assess the understanding of the Tenderers of the identity and needs of

the customer base which is presumed to be the first step to be able to develop and refine a product that meets those needs.”

Dr Spiteri Bailey declared that what the appellants submitted was a ‘business interest analysis’ which dealt solely with the reasons why the appellants wished to operate the transport system of Malta, with Transport Malta’s legal advisor arguing against the impression the appellants gave that the only stakeholder contemplated within the context of this tender was the operator when, as is widely known, there are various other ‘stakeholders’.

Dr Muscat Azzopardi stated that if it was a question of a misinterpretation a clarification should have been requested. On the other hand Dr Delia stated that this point had already been clarified as stated earlier on by Dr Spiteri Bailey and that clarification formed part of the tender dossier.

Dr Muscat Azzopardi remarked that once his client had made a submission in respect of one stakeholder and the contracting authority requested the inclusion of more stakeholders then there was justification for a request for a clarification or for a penalty when allotting points. Dr Muscat Azzopardi could not understand why the shortcomings mentioned by Transport Malta in its letter of rejection dated 12 April 2010 were not included in the list of clarifications requested by Transport Malta on the 23 March 2010.

The Chairman PCAB opined that a bidder should not expect the contracting authority to keep on seeking clarifications on end on the same issue and one had to always keep in mind that it was, ultimately, up to the bidder to submit a complete and compliant tender right from the very start.

viii) “In page 26 it is stated that “Any wrong data in this information should be checked and compared at the start of the operations in order to offset the harmful effect this might have on the service. Indicating that you are not prepared to take the risk inherent in certain parts of the Project”

Dr Muscat Azzopardi interpreted this statement to mean that any erroneous data submitted by his client would be rectified by his client so that the service would not be negatively affected.

Dr Delia remarked that the tender document did not request this kind of statement or declaration but the appellant Company chose to submit it out of one’s own free will. Dr Delia said that the statement did not indicate that the bidder would shoulder the risk or who was going to carry out the proposed checking. Dr Delia noted that in the ‘letter of objection’ the appellants had added the words ‘without any risk or cost to the Authority’.

Mr Mark Portelli, Chairman, Transport Malta, remarked that the appellants included this statement under 1 (d) ‘Risk Assessment’ at para. (f) of page 26 of their bid (Book 2) and hence the bidder was considering this as a risk and that he was passing on this risk onto the contracting authority whereas all risks were to be taken by the operator.

Dr Muscat Azzopardi refused the argument put forward by the contracting authority and insisted on his interpretation that his client was going to assume all the risks and that the service would not be adversely affected.

Dr Spiteri Bailey remarked that the conditions of the tender and of the 'Expression of Interest' (EOI) were clear that the operator was to take all the risks but the inclusion on the part of the appellants of this sentence that was interpreted as a 'condition' shifted the risk onto the contracting authority.

ix) "Failure to provide any detail on how the operations control centre, a very important element of the Project, would be staffed and managed also indicates that you have not given sufficient weighting to this requirement."

Dr Spiteri Bailey referred to the sixth bullet at page 123 which referred to a 'Detailed description of Operations Control Centre.' She added that these centres were of utmost importance because, through it, the operator would, effectively, control the entire public transport system. Dr Spiteri Bailey remarked that, besides the physical side of the operations control centre, the contracting authority was interested in how this centre was going to be manned, a requirement laid down on page 122 discussed earlier on at the hearing under 'job description'.

The Chairman PCAB observed that the details of the operations control centre – document 2.k of the appellants' submission, page 151 onwards – seemed to deal more with equipment rather than personnel.

Dr Muscat Azzopardi referred to pages 75 to 79 of his client's submission where details had been given even with regards to staff and added that if the contracting authority required more information then it could have asked for it.

x) The Gantt Chart provided is insufficiently detailed, and does not specify key and important milestones, including the preparation of the time-tables, the adaption of the IT system, which according to the submission, must occur after the network and time-tables are available, and also the design and planning of the marketing campaign"

Dr Muscat Azzopardi maintained that part of the clarifications submitted by his client on the 24th March 2010 included a more detailed Gantt chart.

The Chairman PCAB, after the Board had examined the document submitted by the appellant Company, noted that it did not represent a proper Gantt chart but was simply a spreadsheet.

Dr Spiteri Bailey remarked that the contracting authority had granted a maximum preparation period of 130 days and the appellant Company was proposing a preparation period of 170 days. She added that the contracting authority expected the appellants to submit a Gantt chart that laid down how the various stages were going to unfold together with appropriate explanations. Dr Spiteri Bailey stated that no explanations were submitted by the appellants and the Gantt chart made available

would not enable the contracting authority to properly monitor progress and to enable the contracting authority to intervene in good time.

xi) “No information was submitted with respect to the places where the buses will be stabled.”

Mr Cobo explained that the buses would be placed in the locations which would be provided by the Authority and that these places could not be determined at the time the tender was submitted because the Authority was in the course of adjudicating another tender for the provision of these places where the buses will be stabled. He added that, both in the tender document and in the clarification, it was indicated that the ‘park and ride’ and the ‘bus terminus’ would have specific areas where the buses would be stabled.

Dr Spiteri Bailey stated that, according to the appellant Company, the buses were going to be stabled in the garages provided by the contracting authority whereas the garages that were to be provided by the contracting authority were meant only for maintenance purposes and, in fact, they could not accommodate more than 19 buses.

At this point Dr Spiteri Bailey referred to clause IX.3 at page 103 of the tender dossier which stated that:

“The Park and Ride Sites shall also be used by the Operator in order to park its Buses therein; provided that between during day time hours the Operator shall not use more than 20% of the Park and Ride Sites for the purposes of parking Buses. The Park and Ride Sites shall also be used by the Operator in order to clean the Buses when these are not on duty; provided that this is done in a manner so as not to disturb or annoy person using the Park and Ride Sites and provided further the Operator shall before so doing obtain any permits which are required in terms of law.”

Dr Spiteri Bailey also referred to clause VII.12 (page 93) which laid down that the *“Operator shall ensure that Buses are garaged or parked off street at all times while not on duty.”*

Dr Muscat Azzopardi argued that his clients had committed themselves to the tender conditions and so they had to provide premises where to garage the buses. Notwithstanding, in practical terms, one could not expect that at tendering stage his client had to enter into rent or purchase agreements for the provision of these garages, i.e. prior to being awarded the tender. Dr Muscat Azzopardi stated that tenderers were not requested to indicate the garages where they were going to garage the buses but they were asked to commit themselves to garage the buses when off duty and his clients provided the requested guarantee/undertaking when they endorsed the tender document/submission.

Dr Spiteri Bailey stated that tenderers were obliged to demonstrate to the contracting authority their capability to meet the tender conditions and referred to page 17 of the tender document clause 2.2.1.1 under ‘Methodology’ which stated that

“Tenderers shall, in their Technical Offer (Envelope B), provide a detailed description of how they intend to fulfil the requirements of the Contract in order to demonstrate that they have (i) a clear understanding of the requirements of the Contract and (ii) the capacity and capability of carrying out the obligations included therein. As a minimum, Tenderers shall submit the information required in Annex 2. The information submitted in pursuance of this provision shall become an integral part of the Contract and shall be binding on the successful Tenderer”

Dr Delia referred to the ‘letter of objection’ where, with regard to garaging, the appellant Company stated that ‘the Authority itself will be seeking an alternative site for the Malta garage’ and that the ‘facilities would be provided by the Authority’.

Dr Muscat Azzopardi explained that the facilities referred to in the previous paragraph were those that were not to be provided by the operator.

In concluding, Dr Adrian Delia, on behalf of the contracting authority, submitted the following:

- the PCAB had to take into account the letter dated 12 April 2010 which listed the reasons for the disqualification of the appellants’ bid. The PCAB has been called to consider whether the adjudicating board had taken its decisions reasonably and within the context of its competencies or if it went beyond that. The adjudicating board was vested with the responsibility to take the decisions;
- the mandatory requirements with regard to job description of top management, by way of qualifications and expertise and not by simply indicating the title of the posts, had not been submitted. This deficiency by itself should lead to tender disqualification;
- this invitation to tenders concerned the granting of a ten-year concession by government to a third party to provide and operate the public transport system and, as a consequence, the contracting authority issued specific conditions with a view to ensuring that the operator would deliver the service up to the required standard;
- with regard to clarifications, one had to make a clear distinction between those made prior to the closing date of tender, which formed part of the tender document itself, and those requested during evaluation stage, which were regulated by the pertinent legislation and by previous decisions taken by the PCAB. The adjudicating board was obliged to seek clarifications to enable it to understand something which had been submitted but the adjudicating board would not be correct to ask for missing mandatory information. Throughout the hearing the appellants kept on insisting that (i) either further clarifications should have been sought by the adjudicating board during evaluation stage on each and every reason given for disqualification - notwithstanding the 15 clarifications sought from the appellant on the 23 March 2010 - or (ii) the

listed shortcomings should have led to the deduction of points but not to disqualification;

- it would have amounted to abusive behaviour on the part of the adjudicating board had it used clarifications to reinforce and to alter the original weak tender submission made by the appellant Company. Moreover, the adjudicating board was bound to act according to the provisions of clause 4.6.3 (page 31) whereby bids, prior to being awarded any points, had first to be found administratively and technically compliant;
- the appellants did not produce any evidence on any one of the 11 reasons for disqualification that demonstrated that the adjudicating board had taken an erroneous decision but all along the appellants' argument was that, if the contracting authority found the submission lacking in detail, then it should have asked for more information;
- the appellant Company failed to convince the contracting authority that it was able to provide the level of service requested in Malta and, in certain instances, even during the hearing, the appellants showed that they had not fully understood the tender conditions and specifications when claiming, for instance, that garaging facilities had to be provided by government when it was not the case; and
- the adjudicating board had to decide on the information made available, even after asking for a number of clarifications, and that it had carried out a thorough and correct evaluation process as demonstrated by the documentation at the disposal of the PCAB.

On his part, Dr James Muscat Azzopardi, representing the appellant Company, made the following concluding remarks:

- he discarded the allegation that his client had submitted a very poor and non-compliant bid because, had it been so, the adjudicating board would have rejected it outright from the beginning;
- the adjudicating board did not reject his clients' bid from the start but retained it and at the same time requested more information. Dr Muscat Azzopardi queried once again as to whether, once the adjudicating board had felt the need to request 15 clarifications on the 23 March 2010, why did it not seek similar clarifications on the other points raised in the letter of rejection dated 12 April 2010;
- he conceded that perhaps there were instances where his clients could have substantiated their tender submission with more details from the very beginning. However, he invited the PCAB to consider the three options that were available to the adjudicating board, namely, (i) to ask for clarifications, (ii) to judge the 'Overall Quality of the Tender submission' of his client as poor due to lack of detail and consequently deduct 25 points, or part thereof, out of the total of 500 points or (iii) to disqualify the bid. He stated that if the PCAB considered that the shortcomings mentioned by the adjudicating board

did not justify disqualification then his clients' bid should be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 15.04.2010 and also through their verbal submissions presented during the public hearing held on 26.05.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of Nex Holdings' legal representatives'
 - claim that contended that the issues raised by Transport Malta in its letter dated 12th April 2010 were incorrect both in fact and at law;
 - reference to the fact that the Adjudicating Board had requested a number of clarifications, fifteen (15) in all, as per letter dated 23rd March 2010 which the appellant Company had answered;
 - contention that Transport Malta decided to issue its letter of disqualification instead of asking for further clarifications on those same reasons for disqualification;
 - claim that albeit the appellants had submitted the information requested as regards the detailed job description of top management, yet it was reasonable to expect that, had the information not been as detailed as the contracting authority wanted it to be then it could have asked for more details as it was entitled to do;
 - insistence that one would not consider that lack of detail in the job description of top management should have led to tender rejection when the invitation to tender was a very complex one requesting the provision of transport services;
 - remark that whilst it could not be said that the appellants did not submit the necessary information as regards the qualifications and expertise, yet they were conceding that the submission did not contain that level of detail that the contracting authority could have (1) either asked for in a clarification for the sake of not eliminating competition on such details or (2) penalized his client by awarding him fewer points as per award criteria at page 31;
 - claim that issues referred to by Dr Spiteri Bailey - see 3 (j) – relating to workings were meant to accompany the economic aspect of the submission in envelope 3;
 - insistence on the fact that (1) the various clarifications were answered, (2) the formula used was adequately explained with the result having been topped up by 10%, (3) the spreadsheet submitted did take into account various aspects, e.g. peak and off peak waiting times, and (4) a team of about 10 officers came over to Malta to work on these calculations;
 - statement that the experience gained by his client in various countries should be taken as a plus and not as a handicap because what his client did was to use his experience in the Maltese context;

- claim that, contrary to what the contracting authority was stating, the appellants had stated that the “*primary target audience for the promotional campaign is permanent residents of Malta*” though the Company recognizes that in “*in the peak tourist season there is heavy use of the bus network by tourists*”;
 - argument that with regards to the lack of detail submitted with regards to the ‘stakeholders’ interest analysis it was a question of a misinterpretation and that, in the circumstance, a clarification should have been requested;
 - claim that the contracting authority had erroneously interpreted the appellants’ tender submission (page 26) to mean that the said appellant Company was “*not prepared to take the risk inherent in certain parts of the Project*” when what was really meant was that any erroneous data submitted by his client would be rectified by his client so that the service would not be negatively affected;
 - reference to the presumed insufficient detailed Gantt Chart wherein it was argued that the clarifications submitted by the appellants on the 24th March 2010 included a more detailed Gantt Chart;
 - statement wherein it was claimed that tenderers were not requested to indicate the garages where they were going to garage the buses but they were asked to commit themselves to garage the buses when off duty and his clients provided the requested guarantee/undertaking when they endorsed the tender document/submission
- having also taken note of Dr Delia’s
 - remark about the fact that clarifications were meant to explain better what had already been submitted but clarifications were certainly not meant to request information that should have been submitted in the first place as a mandatory requirement;
 - reference to ‘Operational Strategy’ about which he stressed that information provided should, *inter alia*, include “*A high level plan of staff complement required and a detailed job description of the persons who will be responsible for the top management on the Project, indicating the required level of relevant qualifications and expertise, and a clear indication of the resources dedicated to network planning and auditing*”;
 - comment relating to the fact that the appellants did not provide evidence of the qualifications and expertise of managers and did not even indicate if they were going to be, say, engineers or lawyers or architects;
 - remark that a 10% variation in the number of buses *vis a vis* the internal benchmark set by the Transport Authority could have severe consequences on the quality of the service;
 - reference to the fact that no evidence had been made available by the appellant Company that demonstrated that it had arrived at its calculations on conditions prevailing in Malta;
 - reference to the fact that albeit the appellants did submit material with regard to branding and marketing, however, it invariably referred to other countries, e.g. one of the billboards referred to ‘Bristol Road’, and no attempt was made to adapt same to the local context;

- reference to the fact that the appellant Company did make a submission with respect to the ‘marketing campaign’ but it failed to indicate which sections of the population it would be targeting and how the product was going to look;
 - remark that the tender document did not request any kind of statement or declaration with regard to possible erroneous data. However, once given, it was also a fact that the statement did not indicate that the bidder would shoulder the risk or who was going to carry out the proposed checking;
 - reference to the ‘letter of objection’ where , with regard to garaging, the appellant Company stated that ‘the Authority itself will be seeking an alternative site for the Malta garage’ and that the ‘facilities would be provided by the Authority’
- having also considered the points raised by Dr Spiteri Bailey, particular those relating to the fact that
 - Transport Malta had sought to maintain a wide competitive base as possible, amply demonstrated by (1) the number of clarifications sought from the appellants and (2) the opportunity given to the appellants at envelope one stage to correct the bank guarantee;
 - this invitation to tender did not involve only the purchase of buses but it involved the provision of a public transport system in a holistic manner;
 - as she claimed, the appellant Company’s bid was deficient both in administrative and in technical aspects and that, on seeking clarifications, the contracting authority was further convinced that the appellants, either did not fully understand the tender document, or else it could not provide the standard of service requested;
 - the tender *dossier*, specifically requested qualifications and expertise and that, according to the EU directives in force, which dealt with the recognition of qualifications across borders;
 - there are exceptional circumstances when one may accept a bid even if not fully compliant but still the deficiencies should not affect materially the requirements, claiming that, nonetheless, this was not the case with the appellant Company;
 - the contracting authority did not specify the number of buses required but instead gave the bidders certain information, such as the number of routes and bus stops and the maximum waiting time for a passenger to board the bus, and on the basis of that information and on the analysis carried out by the bidders themselves then they had to arrive at the number of buses required;
 - ‘the maximum waiting time’ was the most important output level;
 - although the number of buses had not been disclosed, the tender document made various references in relation to this requirement particularly clause 2.2.2 (page 17);
 - the evaluation board did not discard the appellant Company’s offer because Mr Cobo quoted 288 buses instead of the 300 buses worked out by Transport Malta but because when asked for a clarification - as per document which read that “*in terms of clause 2.6.1.1*” of Part Two of the ITT, “*Tenderers are required to analyse the Bus Routes and the*

Maximum Waiting Time applicable to each Bus Stop with a view to establishing an appropriate mix of Bus type or types to render the Scheduled Bus Service - the appellant Company did not present in its reply the analysis undertaken with regard to, for example, traffic congestion or to tourist seasonality;

- the adjudicating board even noticed that (1) the summer route extensions (e.g. Mgarr-Gnejna), (2) a particular route (ML 73) and (3) the return trip on another route were not included in the spreadsheet submitted by the appellants and that only one bus was proposed for Mgarr Gozo which was, by far, insufficient in relation to the maximum waiting time requested;
- the contracting authority did not have the comfort that the number of buses proposed by the appellants was in fact adequate;
- with regards to the marketing campaign, the contracting authority requested an outline of the branding and marketing strategy distinguishing between the strategy for the launch and the initial period of the services and the on-going marketing strategy including the relative budget;
- in the authority's opinion, the submission presented by the appellants demonstrated that the Company was not aware of the local realities with regard to public transport;
- the first bullet referred to in Part B of Annex 2 (page 122) referred to "a stakeholders' interest analysis" whereas the appellant Company presented a 'business interest analysis' which were two different things, elaborating further that the Request for Clarifications No. 2 dated 09.11.2009 no. 2.66 provided additional explanation in regard, namely, "*Tenderers are expected to provide their analysis of the identity, needs and likely interests of segments of the community and other market sectors that hold a stake in the success of the services*";
- the conditions of the tender and of the 'Expression of Interest (EOI)' were clear that the operator was to take all the risks but the inclusion on the part of the appellants of this 'condition' seemed to shift the risk onto the contracting authority;
- the 'Operations Control Centre' was of utmost importance and, besides the physical side of the operations control centre, the contracting authority was interested in how this centre was going to be manned, a requirement laid down on page 122 under 'job description'. However, it seemed that the appellants' submission dealt more with equipment rather than personnel;
- the contracting authority expected the appellants to submit a Gantt chart that laid down how the various stages were going to unfold together with appropriate explanations and that, however, no explanations were submitted by the appellants and the Gantt chart made available would not enable the contracting authority to properly monitor progress and to enable the contracting authority to intervene in good time;
- according to the appellant Company, the buses were going to be stabled in the garages provided by the contracting authority whereas the garages that were to be provided by the contracting authority were meant only for maintenance purposes and, in fact, they could not

accommodate more than 19 buses, as specifically referred to (and, more evidently, highlighted) in (1) clause IX.3 at page 103 of the tender dossier wherein it was stated that “*between during day time hours the Operator shall not use more than 20% of the Park and Ride Sites for the purposes of parking Buses.*” and (2) VII.12 (page 93) which laid down that the “*Operator shall ensure that Buses are garaged or parked off street at all times while not on duty.*”

- having also taken cognizance of Dr Bonello’s intervention wherein, *inter alia*, he
 - insisted that if the contracting authority considered the lack of detail with regard to the job description of top management as a fundamental issue such that it amounted to disqualification then it should have been included in the list of clarifications which it sought from his client on 23rd March 2010, otherwise, he argued, what was the use of seeking the other clarifications;
 - refused the ‘non submission’ claim made by the contracting authority with regards to the ‘Executive Summary’ contending that pages 1 to 26 of Book 2 of the appellants’ submission dealt, specifically, with this matter

- having duly considered Mr Cobe’s statements, particularly, those in connection with the fact that
 - the appellants had brought over to Malta a number of experts to undertake the necessary studies on the ground and, according to their calculations, 288 buses would be required;
 - 10% was added to the number of buses arrived at by the Company’s experts, calculated and based on the formula given by the contracting authority;
 - Nexus Holdings considered the average speed of 17 km / hr as very conservative;
 - what had been submitted by the appellants in this tender was not general in nature but it was based on experience gained from overseas operations but adapted to the conditions prevailing in Malta;
 - the buses would be placed in the locations which would be provided by the Authority and that these places could not be determined at the time the tender was submitted because the Authority was in the course of adjudicating another tender for the provision of these places where the buses will be stabled;
 - in the appellants’ opinion, both in the tender document and in the clarification, it was indicated that the ‘park and ride’ and the ‘bus terminus’ would have specific areas where the buses would be stabled

reached the following conclusions, namely:

1. The PCAB generally agrees with the evaluation board’s assessment and opines that the appellant Company’s bid (a) was deficient both in administrative and in technical aspects and (b) amply demonstrated that the said tenderer did not fully understand the tender document

2. The PCAB agrees with the arguments brought about by the contracting authority's legal representatives, namely, the ones referring to the fact that (a) the tender *dossier* specifically requested qualifications and expertise and that there were directives in force which dealt with the recognition of qualifications across borders and (b) the contracting authority needed to know the competencies of the top management who would be operating this service within the foreseeable future – 10 years - and thus the request for qualifications and expertise and not, simply, the title/nomenclature of the post as was indicated by the appellant Company at page 70 of its submissions. Furthermore, contrary to what the appellants' legal representatives tried to argue, in this particular instance, the evaluation board was absolutely right in not trying to get more information as there was nothing further to be clarified as the issue was a question of outright 'non submission' of requested mandatory details
3. The PCAB also feels that, whilst, under specific circumstances, clarifications should be sought by evaluation boards, yet, clarifications were to be sought for the purpose of throwing more light on information already submitted and not to obtain information which was requested but not submitted because that could amount to a form of negotiation. Needless to say, argues the PCAB, the onus for a properly detailed submission rests with the tenderer as, the evaluation board's remit should never go beyond what it is supposed to be doing, namely to evaluate in an objective and transparent manner the details provided by tenderers, and not to ensure that submissions, as originally submitted by bidders and which lack mandatory information, should be given a second chance to do what was expected of them in the first place
4. The PCAB feels that the appellant Company's stand on the need for the evaluation board to seek continuous clarifications goes to demonstrate how just the evaluation board was in its overall assessment of the appellants' bid which, taking everything in perspective, left very much to be desired in content and substance. It is the opinion of the PCAB that, in this instance, it was not a question of giving less points but a question of the evaluation board resorting to its prerogative not to accept a bid for various deficiencies ranging from (i) a very poorly designed marketing campaign for such an important economic sector – especially considering the reform and the need to attract new target audiences, (ii) lack of necessary details as regards professional accreditation and experience in the field, (iii) lack of knowledge of local operational requirements, (iv) totally unprofessional presentation of Gantt Chart details (even as revised following clarification) and so forth, (v) total amateurish way as to how one should interpret stakeholders' interest, regardless of proper knowledge of the English language ... despite a considerable amount of clarifications already formally allowed and discussed with pertinent authorities;
5. Whilst recognising that the garaging (stabling) of buses could have been better detailed in the specifications, yet the misunderstanding of the spirit of the tender's requirements, as so evidently demonstrated by the appellant Company - that 'the Authority itself will be seeking an alternative site for the Malta garage' and that the 'facilities would be provided by the Authority'- leaves

any evaluation board with little leverage, especially when one recognises the fact that the said specifications were clear enough as to what the contracting authority was really after. Once again, no evaluation board is expected to seek clarification(s) in similar circumstances – a tenderer either submits or not

6. Finally, the PCAB recognises that most of the problems with the appellant Company's submission emanated due to linguistic issues. However, the PCAB argues that the need for linguistic dexterity does not fall within the competence of the contracting authorities or evaluation boards but it is simply an issue that has to be shouldered by the tenderer '*per se*'.

As a consequence of (1) to (6) above 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 said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

11 June 2010