

PUBLIC CONTRACTS APPEALS BOARD

Case No. 222

Adv No CT/A/007/2010; CT/3015/2010

Tender for the Design, Supply, Delivery, Installation, Testing and Commissioning of a Complete Digital HD Virtual Television Studio and Editing Facilities at the MCAST Institute of Art and Design, Misrah l-Ghonoq, Mosta, Malta.

This call for tenders was published in the Government Gazette on 5 February 2010. The closing date for this call for offers was 18 March 2010.

The estimated budget for this tender was € 1,866,296 (excl. VAT).

Three (3) tenderer had originally submitted their offers.

Deemedia.tv Ltd & Somos Broadcast Media Zrt – Joint Venture filed an objection on the 15 June 2010 against decision taken by the Contracts Department that its tender was not compliant since the ‘documentation was deemed to be incomplete’ and the ‘technical capacity was not substantiated’.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 18 August 2010 to discuss this objection.

Deemedia.tv Ltd & Somos Broadcast Media Zrt – Joint Venture (The Joint Venture)

Dr Peter Fenech	Legal Representative
Mr Nick de Giorgio	Representative of Deemedia.tv Ltd
Mr Niklos Kenderessy	Representative of Somos Broadcast Media Zrt
Ms Agnes Lukacs	Interpreter

DAB Electronica Co. Ltd (DAB Ltd)

Mr Joseph Vella	Managing Director
Mr Alan Gatt	Technical Support Manager
Dr Steve Decesare	Legal Representative

Malta College of Art, Science and Technology (MCAST)

Dr Peter Borg Costanzi	Legal Representative
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Adjudicating Board

Architect Deborah Borg	Chairperson
Mr Paul Camilleri	Member
Mr Andrew Psaila	Member
Mr Stephen Vella	Member
Ms Crisania Gatt	Secretary

Department of Contracts

Mr Anthony Cachia	Director (Operations)
Mr Mario Borg	Assistant Director

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

It was agreed that, basically, the proceedings would be held in the Maltese language. Yet, it was also agreed that one was free to express certain technicalities in English for the benefit of Mr Niklos Kenderessy, a Hungarian national but who had a working knowledge of the English language.

Dr Peter Fenech, legal representative of the *Joint Venture*, complained from the start that the specifications of the tender in question were drawn up in such a way that they referred to the products of a particular brand/importer such that it restricted competition and, as a consequence, these did not guarantee MCAST the best value for money. Dr Fenech informed the PCAB that he would be tackling the case point by point as indicated in the letter of rejection and in his reasoned letter of objection dated 18th June 2010.

Blue Ray Disc and HDD Recorder

Dr Fenech stated that according to Contracts Department's letter of refusal dated the 9th June 2010 the technical literature with regard to the Blue Ray Disc and HDD Recorder had not been submitted. Dr Fenech rejected this allegation and insisted that his client had, in fact, submitted the relevant mandatory documentation in its original tender submission and that these items were even included in the list of contents.

The Chairman PCAB requested the adjudication board to go through the appellants' original tender submission to verify whether this technical documentation had been submitted or not.

Architect Deborah Borg, Chairperson of the adjudicating board, under oath, remarked that she was not a technical person but during the adjudication process she was assisted by two technical members, namely Mr Stephen Vella and Mr Paul Camilleri.

Mr Vella and Mr Camilleri, technical members of the adjudicating board went through the original documentation and under oath they confirmed that in fact the documentation with regard to the Blue Ray Disc and HDD Recorder was submitted as requested.

Lighting Grid

Dr Fenech explained that, with regard to the lighting grid, his client had requested information as per Question Nos. 1 to 3 in Clarification Letter No. 6 dated 16th March 2010 as to the condition of the ceiling and its maximum allowable load per square metre. Dr Fenech added that his client was informed that the studio's ceiling was an old metal trusses/corrugated sheeting roof structure and that no data was available as to the load allowable per square metre. Dr Fenech claimed that, in the absence of the requested information, his client could not submit specifications about the lighting grid as, otherwise, the proposed grid could have been a hazard in terms of health and

safety should the ceiling not be fit to support it. Dr Fenech remarked that his client had indicated that a solution would be provided once the site was inspected and that the solution that would be selected was covered in the global price quoted. Dr Fenech conceded that his client did not submit any drawings of the lighting grid.

Mr Vella remarked that the two other bidders had complied with the request for the design, supply, installation and commissioning of the lighting grid according to the information given in the tender document giving as an example the clarification and the drawing at the last page of the tender document. Mr Vella stated that the bidders were not constrained in any way to submit a particular lighting grid but they were left free to submit their own design and they were not even compelled to design a grid that had to be suspended from the ceiling (section 4.3.1 page 81). Mr Vella explained that there were various ways as to how one could put up a lighting grid, e.g. it could be wall mounted or one could erect metal columns to rest the grid thereon as was usually done on stages for open-air activities such as those held at the Floriana Granaries. Mr Vella stated that the adjudicating board could not evaluate this aspect of the tender submission in the absence of technical specifications. Mr Vella also referred to section 6.4 'System Drawings' at page 93 of the tender document which, *inter alia*, stipulated that:

“Bidders will be disqualified if diagrams do not have enough details to show an understanding of the whole system and/or due diligence on the part of the tenderers.”

Both Mr Vella and Ms Borg remarked that bidders had to take into account the data given regarding the state of ceiling and, in the circumstances, it was logical to avoid proposing a solution whereby the lighting grid had to be suspended from the ceiling and to provide viable alternatives.

Mr Vella stated that, in this regard, the adjudicating board did not have anything to clarify because no documentation had been submitted in the first place.

Mr Niklos Kenderessy, representing Somos Broadcast Media Zrt, remarked that, in the absence of technical data on the building, one could have proposed from four to five alternatives but the selection was dependent on the condition of the structure. He added that the joint venture did indicate that it would provide a functioning and a safe lighting grid covering the area indicated of 175 sq metres.

Mr Vella intervened to remark that the adjudication board had to assess on the designs and specifications provided in the tender submission and not on whatever the tenderer would decide to install after being awarded the tender. Ms Borg stated that (a) albeit the tender document did not provide for site visits, yet it was always possible for site visits to be acceded to on specific requests and (b) a clarification had to be sought for the purpose of explaining information already submitted and not for one to submit missing or fresh information.

Dr Peter Borg Costanzi, representing the Malta College of Art, Science and Technology (MCAST), the contracting authority, argued that tenderers were at liberty to come up with whatever design they reckoned was suitable to the existing building and, as Mr Kenderessy had already indicated, there were several alternative ways as

to how one could put up a lighting grid but, notwithstanding, the appellants opted to submit none of these solutions. He concluded that, in the absence of a submission in this regard, the adjudicating board could not exercise its evaluation function.

Dr Fenech insisted that the contracting authority should have sought a clarification on this matter prior to rejecting his client's offer especially since the information given in clarification letter no. 6 was not sufficiently clear.

Mr Joseph Vella, representing DAB Electronica Co. Ltd (DAB Ltd), an interested party, remarked that if a tenderer did not have any assurance that the ceiling could take the load then the tenderer had to propose alternatives to ceiling mounted lighting grids like the ones used for staging open air activities but, surely, the tenderer could not desist from making any submission with regard to the lighting grid.

Mr Vella informed the PCAB that the lighting grid was estimated to cost about €130,000.

Stage Boxes and Cabling

Dr Fenech remarked that his client considered it superfluous to submit documentation in respect of a stage box/wall box with connectors attached to it whose value did not exceed €10 each. The appellants' legal advisor stated that this was a standard item and what his client might have done was to provide an illustration of the wall box.

Dr Fenech claimed that the cables were standard industry cables and that the wiring was clearly indicated in the diagrams submitted by his client. Dr Fenech maintained that there were no variants to these cables and if the adjudicating board considered this information as essential then it could have easily asked his client for a clarification.

Mr Vella referred to page 77 of the tender document specifically to clauses:

'4.2.4 – Stage Boxes – Quality 6 – Stage boxes with minimum 8 inputs on 10 metre cable in a compact housing 15m;' and

'4.2.5 – Cabling – Appropriate cabling is to be supplied and installed to have the whole audio system work in a seamless manner and linked to the TV main studio.'

Dr Fenech argued that there were no technical details with regard to wall (stage) boxes because all that it consisted of was a plastic box with a couple of holes in it and that his client considered them as part of the cabling works in respect of which his client did make a submission.

Mr Anthony Pavia, a PCAB member, intervened to remark that tenderers had to provide the information requested in the tender document no matter how trivial it might appear to tenderers or else they had to explain in an exhaustive manner why that information could not be provided.

Mr Vella remarked that the appellants submitted no literature whereas the other bidders did submit literature relative to stage boxes and cabling.

Mr Joseph Vella remarked that it was true that there was a wide choice of junction boxes and cables yet he claimed that a connector without the proper contacts would produce distortions in the audio and he considered the quality of the cables as a very important aspect.

Technical Literature for the Virtual Studio Hardware and Software and the Camera Crane with Sensors

Mr Vella referred to the appellants' submission with regard to section '4.1.3 – Virtual Studio Hardware & Software' insisting that the hardware had to be supplied with the appropriate cabling for installation and commissioning purposes.

Dr Fenech claimed that, according to the tender document, all the installation was catered for under section 3 'General Utility Needs' (page 59) whereas section 4.1.3 (page 66) referred only to 'virtual studio hardware and software'.

Dr Fenech rebutted the allegation that the documentation was not comprehensive and that it did not include all the information requested to substantiate the characteristics requested. He insisted that all relevant literature was in fact included in the tender bid together with the proposed equipment which was top of the range equipment. Dr Fenech added that his client had also submitted two plans (*Mr Vella claimed that one was without a legend*) and about 3 to 4 pages of literature besides the list of equipment. Dr Fenech conceded that the language used in his client's submission could perhaps have been clearer but, again, he insisted that, in this case, the adjudicating board could have asked for a clarification.

Mr Vella quoted the requirements set out in section 4.1.3 (page 66) of the tender document with regard to virtual studio hardware and software and he added that all that the appellant joint venture submitted were six brochures which were insufficient. Mr Vella stated that this equipment was estimated to cost about €250,000.

Ms Borg stated that the adjudicating board first had to check the submission against the list of requirements and then it had to move on to check that the information submitted was in fact comprehensive enough for the adjudicating board to carry out a proper evaluation. She added that, in this particular case, it turned out that the information submitted was insufficient and that the guidelines she received on previous occasions, invariably, indicated that the contracting authority could not request additional or fresh information.

At this point the Chairman PCAB intervened and observed that there was a difference between (i) a non-submission and a submission of facts which could be slightly beefed up and (ii) a request asking for additional explanations to be made relating to information already submitted. He remarked that judging what was sufficient or not was rather subjective. The Chairman PCAB pointed out that the regulations did allow the adjudicating board to seek clarifications to help it understand better the tender submission and one should not keep back from doing so.

Technical Capacity Was Not Substantiated

Dr Fenech refused the claim that the technical capacity was not substantiated and argued that, in case of any doubt, the adjudicating board should have sought clarifications in accordance with regulations rather than to, hurriedly, disqualify his client's bid.

Dr Fenech quoted from his letter of objection dated 18th April 2010 which reflected the reasons given by the contracting authority, namely:

“The joint venture has not substantiated the technical capacity in relation to the delivery of similar supplies over the past three years. From the Memorandum and Articles of Association submitted, the Evaluation Committee noted that DeeMedia.tv Ltd does not have any experience in the delivery of similar supplies whilst Somos Broadcast Media ZRT has only been in operation for one year. In fact the tenderer was expected to submit a list of (at least 2) similar supplies delivered over the past three years (refer to clause 3.6.2 b of the. ITT). Deemedia.tv Ltd submitted a list of main productions; Somos Broadcast Media zrt did not submit a list but submitted two certificates of two projects which were certified during 2010.

Furthermore, in the offer it is stated that Deemedia.tv Ltd will give first level technical and service support. However, in accordance to the summary on technical and financial competence, the company does not have any related experience in terms of technicians. From information received in this offer, Deemedia.tv Ltd proposed a consultant who is not employed with the company, for technical support.”

Dr Fenech submitted that:

- a. the Memorandum and Articles of a *Limited Liability Company* did not substantiate the company's experience in the sector it operated but it rather indicated the type of activities it was going to undertake;
- b. to his client's knowledge, nobody in Malta had any experience with regard to virtual studios and that was precisely why Deemedia.tv Ltd, not having the technical capacity within its own resources, entered into a joint venture with Somos Broadcast Media. The consortium was made up of Somos Broadcast Media, to provide first level technical and service support, and Deemedia.tv Ltd, a locally registered company, having the advantage of knowing the local scene, with a strong financial base and with a very good reputation with regard to productions for local television; and
- c. with regard to the reservations regarding the technical experience and capabilities of Mr Bryan Schembri in the setting up of a project as that contemplated in this tender, his client had submitted in its bid the CV of Mr Schembri which clearly proved that he was one of Malta's most experienced technicians in the broadcasting industry and, specifically, in television broadcasting. It was common practice that, on being awarded a large contract, one would employ additional personnel to execute that contract and that, in

addition to the expertise of the foreign partner, Somos Broadcast Media.

Mr Vella stated that, contrary to what the appellants were saying, there were three virtual studios in Malta, among them, One Television and Smash TV. Mr Vella stressed that the contracting authority wanted to avoid being used as a guinea pig and it, therefore, wanted to ensure that the contract would be awarded to a consortium that had the expertise required to deliver what was requested. He added that the contracting authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy because the tender document stipulated that the tenderer had to provide the expertise.

The Chairman PCAB remarked that it was evident that the tender document did not specify that experts had to be in full employment with the tenderer and, even if they were, there was no guarantee that those experts would remain in employment with the tenderer throughout the contract period. The Chairman PCAB also noted that highly qualified personnel often offered their services on a consultancy basis.

Mr Vella remarked that one had to appreciate that Deemedia.tv Ltd did not have the technical knowhow whereas the foreign partner in the joint venture had only been established since the 10th March 2009, i.e. about one year prior to the closing date of this tender. He added that instead of submitting a list of at least 2 similar projects over the past 3 years in respect of both partners in the joint venture, only Somos Broadcast Media, the foreign partner, submitted two very similar, and at times identical, projects which were certified in 2010.

Ms Borg stated that, from the tender submission, it emerged that Deemedia.tv Ltd did not employ anyone who could provide technical support but that it was going to avail itself of the services of a consultant. Ms Borg remarked that, although it was not stipulated that the person providing technical support had to be a full-time employee with the tenderer, on the other hand, the fact that he was not employed with the bidder did not provide the adjudicating board with the peace of mind that the tenderer would in fact be in a position to provide first level support.

Mr Mr Niklos Kenderessy, obo of Somos Broadcast Media, explained that:

- (i) Somos Video/Group was one of the leaders in the broadcasting industry in Hungary and that during its ten years in operation it had undertaken various projects;
- (ii) at one point Somos Video had decided to embark on an expansion programme by setting up other companies, one of them Somos Broadcast Media, so as to have more capital to undertake larger projects; and
- (iii) the two projects undertaken by Somos Broadcasting Media, namely the upgrade to HD Studio at ATV, one of the top non-governmental commercial TV channels in Hungary (reference dated 1st February 2010) and the MCR upgrade, worth about €482,000, at TV2, another topnon-governmental commercial TV channels in Hungary (reference dated 10th March 2010) – were sent to Contracts Department and it was, therefore, unfair for the

adjudicating board to state that Somos Broadcasting Media did not have the necessary knowhow.

Dr Fenech remarked that the CVs of the technical directors included the projects that had been carried out.

The Chairman PCAB remarked that the fact that the two certificates were rather similar did not matter much but what mattered most was the track record of the tenderer. He opined that the adjudicating board should have sought clarifications on the documentation submitted.

Mr Vella pointed out that, in the event of award, the legal entity that would be a signatory to this contract was Somos Broadcast Media and not Somos Video or Somos Group. Mr Vella stated that the adjudicating board did some research on Somos Broadcasting Media and it transpired that it was set up on the February 2009, its trading profit was €20; the value of wages of employees was €1,393, whereas the number of employees was indicated as not applicable.

However, it was established that net profit before tax of Somos Broadcast Media was 5.3 million Hungarian Forints equivalent to about €19,000.

Dr Fenech conceded that this client could have been more explicit in making the connection between Somos Video Ztr, which had been established for a number of years, and Somos Broadcast Media Ztr, which was established in 2009. He added that one of the projects in progress was valued at €2.2mand that most of it had already been completed. Dr Fenech insisted that the adjudicating board should have sought a clarification in case it had any doubts.

Mr Nick de Giorgio, representing Deemedia.tv Ltd, remarked that as far as Deemedia.tv Ltd was concerned, although it might be lacking in terms of technical capability, which aspect was being addressed by the inclusion of a foreign partner expert in this line of business, it was the lead bidder and it had an undisputed sound financial base.

Financial and Economic standing of the Joint Venture were not substantiated

Ms Borg remarked that, whilst the tender document requested the submission of the audited accounts for the last three years, yet Deemedia.tv Ltd submitted the accounts for 2 years instead of 3 years while Somos Broadcast Media submitted the accounts in respect of one year.

Dr Fenech stated that it was true that Deemedia.tv Ltd had in fact submitted the accounts for the years 2006/2007 and 2007/2008, however, he pointed out that the accounts of one financial year were presented in comparison with those of the previous financial year and, as a result, in submitting the accounts for two financial years his client had, effectively, submitted the accounts for three consecutive financial years. Dr Fenech agreed that Somos Broadcast Media only submitted the accounts in respect of one year for the simple reason that the company had only been set up for one year while Somos Video/Group had been established for a number of years.

The Chairman PCAB agreed that once the set of accounts in respect of one year was presented in comparison with the accounts of the previous year then the contracting authority effectively had the company's accounts for the 3-year period requested.

Tender Specifications were clearly copied from particular specifications thereby preventing fair competition in a transparent fashion

Dr Fenech submitted that:

- a. most of the equipment specifications included in the tender documentation was clearly a 'cut and paste' job taken from the technical literature of products represented by a particular local company and a participating tenderer which had exclusive rights in Malta;
- b. with reference to page 64, which dealt with the 'Input/output connectors', the details matched the product supplied by one of the participating tenderers;
- c. the 'General Specifications' of the 'Compact HD Studio Lenses' at page 63 were also deemed too specific to suit a particular make;
- d. the contracting authority went into such details that the speakers had to be round edged; and
- e. when his client complained about this issue with the Contracts Department, the answer he got was that once we were in the EU one could get such products himself from various overseas sources. Nevertheless, continued Dr Fenech, the fact remained that one had to go through the local distributor

Mr Kenderessy remarked that, for example, with regard to the lens, the contracting authority went into a lot of detail so much so that the choice was limited to, possibly, one supplier when other lenses could have been just as good.

Mr de Giorgio remarked that his firm would have preferred for the appellant joint venture to be able to offer 'Sony' equipment but the tender specifications did not allow that and so they had to offer the particular items described in the tender *dossier*.

The Chairman PCAB pointed out that the contracting authority had to ensure that the specifications were not tailor-made for anyone in particular but that the specifications had to allow for as wide a competition as possible. The Chairman PCAB asked the adjudicating board to confirm whether or not the tender specifications were drawn up in a way as to permit open competition.

Mr Pavia drew the attention of the appellants that, in spite of their adverse remarks with regard to the tender specifications, yet they did in fact make a submission. Mr Pavia proceeded by saying that in spite of everything, it seems that it was still possible for the appellants to participate.

Mr Vella submitted that:

- (i) the specifications included in the tender *dossier* emerged from various sources, e.g. from literature available locally because the contracting authority had to

keep in view the local scenario because, as a teaching institution, the Malta College of Art, Science and Technology (MCAST) had to train students for the local market;

- (ii) the tender specifications were drawn up from literature of products pertaining to different suppliers. For example, in the case of computers, they required 'Mac' which, although it referred to a particular brand, one could procure 'Mac' computers in Malta from different suppliers and, as a result, he refused the allegation that the said items could be purchased only from one source;
- (iii) when it came to *software*, albeit one had to refer to particular types/names of *software*, yet, on the recommendation of the Contracts Department they included the phrase 'or equivalent';
- (iv) the other indicated tenderer did not import the whole lot of items requested in the tender and insisted that the specifications were 'open' so much so that the three participating tenderers did submit offers which were technically valid;
- (v) this tender was EU financed and that it was being issued for the second time. In the original tender the contracting authority had issued specifications to even fit the 'Sony' brand, considered to be the best, and in fact the two bidders did offer 'Sony' equipment. Yet, continued Mr Vella, in terms of price, they were well above the budget, in fact, one of the bids was 58% over the budget which was unacceptable. The contracting authority realised that it was useless to issue tenders with high specifications when that equipment was beyond its means and, as a consequence, they had to degrade the specifications with regard to various aspects so as to fit the budget; *and*
- (vi) prior to coming up with this set of specifications, the Malta College of Art, Science and Technology (MCAST) took into account the local scenario, attended fairs overseas and also considered the contracts it had with teaching institutions abroad, such as, *St John University New York* and *Adam Smith College*, with whom they operated an exchange of students.

The Chairman PCAB asked the adjudicating board (i) if the fact that the majority of the equipment fitted the specifications of the products imported by a particular firm constituted an advantage over the other competing firms and (ii) was the contracting authority conditioned by the financial constraint to the extent that it requested a particular kind of equipment.

Mr Vella replied that all tenderers had the opportunity to propose their own system and products because the tender conditions included the wording 'or equivalent' which term was introduced on the advice of the Contracts Department as stated earlier on. Mr Vella agreed that the tender specifications did reflect the budgetary constraint of the contracting authority but he disagreed that the specifications fitted only one particular brand because it was made quite clear that equivalents were acceptable. He added that the three participating tenderers submitted valid offers. Mr Vella explained that:

- (a) the computer component of the tender was valued at about €240,000 and although it had to be 'Mac' (Macintosh) it could definitely be acquired from more than one supplier;

- (b) with regard to film editing systems, which formed a good part of the contract, there were about 8 international firms that could offer the hardware and software and although the Malta College of Art, Science and Technology (MCAST) used two film editing software systems, among them *Premier*, the intention was to start teaching even on the software known as *Final Cut Pro*, and so make use of the three main products which had different suppliers;
- (c) the contracting authority opted for round edged speakers to avoid sharp edges as a measure of safety;
- (d) the allegation that the specifications of all or of the majority of the items fitted the products of only one supplier was unacceptable;
- (e) the appellant joint venture could have obtained the items on the Hungarian market; and
- (f) the contracting authority drew up the specifications from information and brochures obtained from local agents, like DAB Ltd, Forestals Ltd and iCentre, from fairs and teaching institutions overseas and from visits to the local TV studios like PBS, Smash and that known as 'Father Ġiġi', but they were not meant for any particular local firm so much so that bidder no. 3 from Spain submitted an offer according to the published specifications.

Mr Joseph Vella described as totally incorrect the allegation made by the appellants that all the specifications pertained to items supplied by his firm so much so that:

- (i) one of his sub-contractors in this tender was one of his main competitors, namely, *Forestals Ltd*, the agent for *Sony* in Malta, because part of the equipment had to be supplied by *Sony*;
- (ii) although his flagship was *Apple*, the contracting authority requested *Apple* with *Macintosh* and *Final Cut Pro* and he had to obtain that from one of his most fierce competitors and the same applied to *Adobe Director* and *Adobe Premier*;
- (iii) he had to source out other items, such as, the *Ikegami* camera which he got from a Greek dealer, for the lighting he had to rely on *Techno* as a sub-contractor; the same applied for the speakers. He went through all that, Mr Joseph Vella argued, because the contracting authority requested those items and he, therefore, had to provide them; and
- (iv) although he was critical about the type of crane requested by the contracting authority because it was too long, he included it in his submission and then he also offered an alternative

Dr Fenech claimed that, contrary to what Mr Joseph Vella said, with regard to the crane, no variant (alternative) solutions were allowed according to clause 20.5 (page 12) and, as a result, his tender ought to have been disqualified. Dr Fenech could not trace any reference in the tender document to the term 'or equivalent' and he submitted ten documents/brochures that he claimed demonstrated how the

specifications at, for example, pages 64 and 67 of the tender document matched the items of the *JVC* brand. Dr Fenech contended that that stifled competition.

Dr Borg Costanzi submitted the following;

- (a) the fact that the appellants managed to identify the sources/brochures from where the specifications in the tender document were extrapolated did not, in any way, mean that there was no level playing field. His client had gathered the technical information from various sources to, finally, come up with a set of specifications that fitted the required product within the budget available. On the contrary, that ought to have assisted the appellants to procure or to source out the products requested in the tender and, in fact, that was what the appellants did in their submission;
- (b) the missing information about the stage boxes and the cabling was important because there were many on the market which varied in type and quality;
- (c) the financial issue had been resolved with regard to Demedia tv however with regard to Somos Broadcast Media the appellants' submission did not explain or elaborate that this firm was born out of some larger company and that it had a whole set-up backing it;
- (d) the appellants' tender was not disqualified because of the financial shortcomings but because of technical deficiencies, such as, the non-submission of technical literature regarding the lighting grid, the stage boxes and cabling together with the lack of comprehensive information on the camera crane with sensors and virtual studio hardware and software which were all major items of the project; and
- (e) the adjudicating board could not have asked for a clarification in those instances where no submission was made.

Dr Steve Decesare, also representing DAB Ltd, pointed out that the contracting authority was concerned with the financial and technical resources of Somos Broadcast Media, which, ultimately, was going to be party to this contract, and that the technical expertise and financial resources attributed to Somos Group were of no relevance to this case since the latter was not going to be a signatory on the contract.

Dr Fenech argued that a contracting authority could not throw out an offer for a tender with an estimated value of €1.8m on mere trivialities because, after the clarifications given at the hearing, it turned out that the only two outstanding issues were the stage boxes and the lighting grid.

Dr Fenech conceded that his client did manage to submit an offer on the basis of the published specifications but he insisted that his client could have offered other items at a better price. As it happened, the tender specifications narrowed the choice of items and compelled his client to procure them from other suppliers at a higher price and, as a result, there was no level playing field.

Dr Fenech maintained that the link between Somos Video/Group and Somos Broadcast Media was evident and if the contracting authority had any doubts in that regard it should have sought a clarification.

Dr Fenech concluded that the issues raised by the adjudicating board could and should have been resolved through clarifications which were allowed by regulations and therefore his client's bid ought to be reinstated in the tendering process because the said joint venture has submitted a compliant offer.

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 June 2010 and also through their verbal submissions presented during the public hearing held on 18 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' representatives' submissions and arguments relating to the following issues, namely (1) Blue Ray Disc and HDD Recorder, (2) Lighting Grid, (3) Stage Boxes and Cabling, (4) Technical Literature for the Virtual Studio Hardware and Software and the Camera Crane with Sensors, (5) Technical Capacity Was Not Substantiated, (6) Financial and Economic standing of the Joint Venture were not substantiated, (7) Tender Specifications were clearly copied from particular specifications thereby preventing fair competition in a transparent fashion;
- having also taken particular note of the fact that (a) the documentation with regard to the Blue Ray Disc and HDD Recorder was submitted as requested, (b) whilst the appellant Joint Venture claimed that, in the absence of pertinent information, they could not submit specifications about the lighting grid as, otherwise, the proposed grid could have been a hazard in terms of health and safety should the ceiling not be fit to support it, the contracting authority argued that (i) two other bidders had complied with the request for the design, supply, installation and commissioning of the lighting grid according to the information given in the tender document giving as an example the clarification and the drawing at the last page of the tender document and (ii) the adjudicating board could not evaluate this aspect of the tender submission in the absence of technical specifications and that they had acted according to section 6.4 'System Drawings' at page 93 of the tender document which, *inter alia*, stipulated that "*Bidders will be disqualified if diagrams do not have enough details to show an understanding of the whole system and/or due diligence on the part of the tenderers*" and (iii) the adjudicating board did not have anything to clarify because no documentation had been submitted in the first place and the adjudication board had to assess on the designs and specifications provided in the tender submission and not on whatever the tenderer would decide to install after being awarded the tender (iv) tenderers were at liberty to come up with whatever design they reckoned was suitable to the existing building and that there were several alternative ways as to how one could put up a lighting grid but, notwithstanding, the appellants opted to submit none of these solutions, (c) the appellant Joint Venture's representative admission that it

considered it superfluous for one to submit documentation in respect of a stage box/wall box with connectors attached to it whose value did not exceed €10 each as this is a standard item albeit cables and wiring were clearly indicated in the diagrams as submitted by appellants and the contracting authority's claim that whilst it was true that there was a wide choice of junction boxes and cables yet it was equally true that a connector without the proper contacts would produce distortions in the audio thus rendering the quality of the cables as very important, hence the need for some kind of literature support, (d) whereas the contracting authority required that the Virtual Studio Hardware & Software had to be supplied with the appropriate cabling for installation and commissioning purposes and that all that the appellant joint venture submitted were six brochures which were insufficient, the appellants' representatives, whilst conceding that the language used in the appellants' submission could perhaps have been clearer, yet rebutted the allegation that the documentation submitted by the appellants was not comprehensive and that it did not include all the information requested to substantiate the characteristics requested especially when one considers that all relevant literature was included in the tender bid together with the proposed equipment which was top of the range equipment, (e) whereas, whilst the appellant joint venture refused the claim that the technical capacity was not substantiated arguing that, in case of any doubt, the adjudicating board should have sought clarifications in accordance with regulations rather than to, hurriedly, disqualify them, especially when (i) the Memorandum and Articles of a *Limited Liability Company* did not substantiate the company's experience in the sector it operated but it rather indicated the type of activities it was going to undertake and (ii) nobody in Malta had any experience with regard to virtual studios and that was precisely why Deemedia.tv Ltd, not having the technical capacity within its own resources, entered into a joint venture with Somos Broadcast Media, the contracting authority argued that contrary to what the appellants were saying, there were three virtual studios in Malta, among them, One Television and Smash TV and apart from the fact that the same Deemedia.tv Ltd did not have the technical knowhow, its foreign partner in the joint venture had only been established since the 10th March 2009, i.e. about one year prior to the closing date of this tender, (f) albeit the contracting authority was claiming that whilst the tender document requested the submission of the audited accounts for the last three years, yet Deemedia.tv Ltd submitted the accounts for 2 years instead of 3 years while Somos Broadcast Media submitted the accounts in respect of one year, it was established that (i) Deemedia.tv Ltd had in fact submitted the accounts for the years 2006/2007 and 2007/2008 but that the accounts of one financial year were presented in comparison with those of the previous financial year and (ii) Somos Broadcast Media only submitted the accounts in respect of one year for the simple reason that the company had only been set up for one year while Somos Video/Group had been established for a number of years, and (g) whereas the appellant joint venture (i) argued that most of the equipment specifications included in the tender documentation was clearly a 'cut and paste' job taken from the technical literature of products represented by a particular local company and a participating tenderer which had exclusive rights in Malta and (ii) insisted that in spite of the fact that it did manage to submit an offer on the basis of the published specifications yet the tender specifications narrowed the choice of items and compelled it to procure them from other suppliers at a higher price and, as a result, there was no level playing field, the contracting authority contended that the specifications included in

the tender *dossier* emerged from various sources and the fact that, for example, in the case of computers, albeit the Malta College of Art, Science and Technology (MCAST) required ‘Mac’ which, *per se*, referred to a particular brand, yet, one could procure ‘Mac’ computers in Malta from different suppliers and, as was the case with *software*, albeit one had to refer to particular types/names of *software*, yet, on the recommendation of the Contracts Department they included the phrase ‘or equivalent’;

- having considered DAB Electronica Co. Ltd’s (DAB Ltd) Managing Director’s intervention;
- having taken into consideration Ms Borg’s claim that the information submitted was insufficient and that the guidelines she received on previous occasions, invariably, indicated that the contracting authority could not request additional or fresh information;
- having taken cognizance of the fact that the contracting authority’s representatives claimed, *inter alia*, that (a) the authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy because the tender document stipulated that the tenderer had to provide the expertise and (b) although it was not stipulated that the person providing technical support had to be a full-time employee with the tenderer, on the other hand, the fact that he was not employed with the bidder did not provide the adjudicating board with the peace of mind that the tenderer would in fact be in a position to provide first level support;
- having considered Mr Kenderessy’s intervention, particularly his explanation in respect of the way the Somos Group is set up, the way it has evolved over time, the capitalisation programme and its vast experience in the media industry,

reached the following conclusions, namely:

1. The PCAB opines that it is a fact that, under normal circumstances, in the absence of pertinent explanations, tenderers have to provide the information requested in a tender document no matter how trivial it may appear to them.
2. The PCAB recognises the fact that, in spite of its adverse remarks with regard to the tender specifications, yet the appellant joint venture still proceeded with its participation thus demonstrating that it was possible for anyone to participate.
3. The PCAB feels that there is a strong difference between (i) a non-submission and a submission of facts which could be slightly beefed up and (ii) a request asking for additional explanations to be made relating to information already submitted. In this respect the PCAB feels that the adjudicating committee could have exercised its discretion more rather than, hastily, reneging on ensuring that all was clear enough. For example, the fact that two certificates were rather similar did not matter much but what mattered most was the track record of the tenderer. As a result, the PCAB feels that the adjudicating board should have sought further clarifications on the documentation submitted.

4. The PCAB disagrees with the adjudication board's stand relating to the scope behind the use of external consultants. This Board feels that that the tender document did not specify that experts had to be in full employment with the tenderer and, as a consequence, it cannot accept one of the arguments raised by one of the adjudication board's representatives, namely that the authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy.
5. The PCAB argues that with the claim made by the adjudication board relating to the fact that, according to its members, the appellant joint venture's submission did not substantiate its financial and economic standing as it was required to do, this Board feels that (a) once the set of audited accounts in respect of one year was presented in comparison with the accounts of the previous year then the contracting authority effectively had the company's accounts for the 3-year period requested and (b) no proper professional effort was made for the adjudication board to establish the intra-company relationship as far as the Somos Group is concerned.

The PCAB concludes that, in terms of what was submitted in writing and during the hearing, it feels that, prior to it proceeding with the adjudication process, in view of the fact that this Board feels that, in its opinion, in a few pivotal instances, the adjudication board either (i) simply refrained from clarifying areas which warranted such clarifications or (ii) with regards to a few specific issues, it did not conduct a proper thorough analysis of some of the content of the appellants' submission, this Board recommends that a more thorough analysis of the appellants' submission should be conducted to enable it to reach a more informed opinion.

As a consequence of (1) to (5) above this Board finds in favour of the appellant joint venture.

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 be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

13 September 2010

Addendum

Albeit Mr Anthony Pavia, one of the PCAB's members had already verbally agreed with the other members on the way the PCAB had to proceed with its decision relevant to this particular case, yet, unfortunately, Mr Pavia passed away on the 8th September 2010 whilst this decision was still being drafted.