

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 263

#### Adv No CT/161/2010

#### Service Tender for the Provision of Consultancy Services for Developing the Maltese Public Sector's Capacity to Implement Better Regulation

This call for tenders was published in the Government Gazette on 24<sup>th</sup> August 2010. The closing date for this call with a department estimate of €1,098,305 (excluding VAT) was 19<sup>th</sup> October 2010.

Four (4) tenderers submitted their offers.

PricewaterhouseCoopers Ltd filed an objection on 14<sup>th</sup> October 2010 against the decisions by the Contracts Department to disqualify its offer on being found administratively non-compliant and to recommend tender award to Frontier Economics Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Carmel Esposito and Mr. Joseph Croker as members convened a public hearing on Wednesday, 23<sup>rd</sup> February 2011 to discuss this objection.

Present for the hearing were:

#### **PricewaterhouseCoopers Ltd**

Dr Henri Mizzi	Legal Representative
Mr Steve Decesare	Legal Representative
Mr Lino Casapinta	Representative
Mr John Zarb	Representative
Ms Claudine Attard	Representative
Dr Chris Soler	Director for Legal Services at the University of Malta (Witness)

#### **Frontier Economics Ltd**

Judge Godwin Muscat Azzopardi	Legal Representative
Dr Ivan Vella	Legal Representative
Mr Adrian Said	Representative
Mr Matthew Castillo	Representative

#### **Management Efficiency Unit (Office of the Prime Minister)**

##### **Evaluation Committee**

Mr John Aquilina	Chairman
Dr Paul Debattista	Member

#### **Department of Contracts**

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant company was invited to explain the motives of its objection.

Dr Henri Mizzi, legal representative of Messrs PricewaterhouseCoopers Ltd, stated that, following the receipt of a letter dated 1<sup>st</sup> December 2010 from the Contracts Department, his client was informed that its offer was not successful as it was not administratively compliant and that the Evaluation Committee was recommending that the contract be awarded to Messrs Frontier Economics for the price of €869,730, exclusive of VAT.

At this point Dr Mizzi cited the reasons given in the evaluation report for his client's bid's non-compliance:

- *The bidder's offer satisfied the personnel requirements both as Key Consultants and Experts as specified in 6.1.2 (a).*
- *However, the bidder's offer does not comply with 10.1 which states that bidders should abide by the General Conditions of the Department of Contracts. In particular, Article 9.5 of the said General Conditions, which states that:*

*“Civil servants and other agents of the public service of the beneficiary country, regardless of their administrative situation, shall not be recruited in contracts in the beneficiary country”.*
- *For data protection purposes, the Evaluation Committee feels that the names of the individuals concerned should not be disclosed. The Evaluation Committee is referring to three individuals nominated by the bidder as Environment Experts, who according to the provided CVs, are currently all employed by the University of Malta.*
- *As a consequence of this situation, the Evaluation Committee notes that the Environmental Area is not covered by any Expert, as per requirements, and thereby is rendering the bidder's offer non compliant.*
- *Moreover, there are three Areas - Food Safety, Fisheries and Pharmaceuticals - wherein these Areas, one of the nominated experts (in each Area) is, according to the provided CVs, employed by the University of Malta.*
- *As a consequence of this situation, the Evaluation Committee notes that these three Areas are not covered by "replacement personnel", as per requirements, and thereby rendering the bidder's offer non compliant.*

Dr Mizzi then proceeded by making the following submissions with regard to the provisions of sub-clause 9.5 of the General Conditions, namely:

1. according to the CVs provided for the experts nominated by the appellant company some of the experts were employed with the University of Malta, a fact that his client was not contesting;

2. the University of Malta was an autonomous institution from the Government and that its lecturers were not civil servants or other agents of the public service for the purposes of sub-clause 9.5;
3. in order to fulfill its assigned role, i.e. to provide instruction and to carry out research, a university had to be self-regulating and autonomous, irrespective of how the institution was funded, so that outside influence in the running of the institution would be kept to a minimum and the University's independence preserved;
4. the Education Act (Chapter 327) guaranteed the autonomy of the University of Malta and empowered it to make regulations and bye-laws in order to provide for its own administration and for the administration of its activities;
5. the University of Malta was funded by the Government and, to a lesser extent, it received funds from other quarters, e.g. EU institutions, but that funding did not limit or interfere with the autonomy of the University;
6. the Government did not have a majority of members in the University's Council, which was the body responsible to make appointments to academic posts at the University of Malta whereas the recruitment and promotion of civil servants was managed by the Public Service Commission;
7. likewise, the University of Malta had its own internal disciplinary boards and its own Ombudsman and aggrieved university employees could take remedial action before the Industrial Tribunal and not before the Public Service Commission as was the case with public officers;
8. the Collective Agreement between academics and the University of Malta stipulated the manner in which university lecturers were appointed, promoted and remunerated and, moreover, the grades and salary scales were established by the Council with the endorsement of the Minister responsible for Education. University lecturers in fact did not feature in the list provided in the Third Schedule of the Public Administration Act which listed the grades to which public officers could be appointed;
9. referred to the Central Bank Act and to the Broadcasting Authority Act which precluded civil servants from sitting on their boards but, he claimed, one could find university lecturers sitting on their respective boards; and
10. by way of conclusion, the lecturers of the University of Malta could not be termed civil servants and neither other agents of the public service which was a very vague term with no specific technical boundaries

On his part, Dr Paul Debattista, a member of the Evaluation Committee, submitted the following comments, namely:

1. sub-clause 9.5 formed part of the *General Conditions for Service Contract* which the Department of Contracts included as standard requirements in calls for tenders and, as a consequence, those conditions were the realm of the Contracts Department;
2. sub-clause 9.5 of the General Conditions referred to the exclusion of ‘civil servants and other agents of the public service of the beneficiary country’ from being recruited as experts by bidders and since, during the evaluation process, the Evaluation Committee noted that some of the experts nominated by the appellant Company were, in fact, lecturers of the University of Malta, it sought the advice of the Department of Contracts;
3. the directions issued by the General Contracts Committee via email dated 4<sup>th</sup> November 2010 were that academic staff of the University of Malta were not excluded from the provisions of sub-clause 9.5, public officers could not be part of any contractor or expert, and that public sector employees were to be considered as civil servants and other agents of the public service;
4. once the appellant company had nominated lecturers from the University of Malta as experts and, given the instructions issued by the Contracts Department, the Evaluation Committee had no option but to disqualify the offer; and
5. the Contracts Department did not quote any legislation to back up its advice

When summoned to the witness stand, Mr Francis Attard, Director General (Contracts), under oath, gave the following evidence:

1. for the purposes of the Public Contracts Regulations, the University of Malta was considered as a public entity and was included in Schedules 1 and 2 of the same regulations and the University of Malta had to abide by those regulations;
2. therefore, University of Malta employees were precluded from participating in public tenders and the scope behind this stand was that if the Government required the expertise of University of Malta academic staff then Government would not have to contract such professional services but assign them to University of Malta experts;
3. although the University of Malta was quite different from any other public entity and did not qualify under the term ‘civil service’, still, for the purposes of public procurement, University of Malta employees were not allowed to participate, directly or indirectly, in public contracts;
4. agents of the public sector represented any government agency which was, directly or indirectly, controlled by government, even by way of funding;

5. although at page 32 'the public service' was referred to as 'government ministries and departments', the University of Malta was still a government agency as it was almost entirely funded by Government;
6. if a university lecturer participated in a public contract in one's personal capacity was one thing, whereas, the participation in a public contract of the company of a university lecturer was regarded as a different matter;
7. the employees of the University of Malta were considered as part of the public service or other agents of the public service and not the University of Malta as an institution; and
8. this stand was taken by government following discussions between various departments

Mr John Aquilina, Chairman of the Evaluation Committee, giving evidence under oath, provided the following explanations, namely:

1. the scope behind the issue of this tender was for a consultant to be engaged to advise Government on ten priority areas for the purpose of reducing the administrative burdens by up to 15% by 2012;
2. the priority areas included taxation, company law, statistics, financial services, fisheries, environment, employment relations and other areas but excluded the University of Malta among others;
3. the contractor was required to examine legislation and propose 100 measures that would contribute towards the reduction of administrative burdens to the benefit of the general public and the business community; and
4. albeit the contracting authority considered the public service to include ministries, departments and public entities, even regulatory bodies, yet Mr Aquilina stated that the contracting authority was objective driven and had nothing to do with the general conditions of the tender, such as sub-clause 9.5, which were included in the standard tender document by the Department of Contracts

The Chairman Public Contracts Review Board observed that, given that expertise was rather scarce in a small country like Malta, it was quite odd for a contracting authority to impose measures that would restrict the use of locally available resources with the consequence that one would have to contract foreign experts who could, possibly, not be well aware of local conditions.

At this stage Dr Chris Soler, Director of Legal Services of the University of Malta, was summoned to the witness stand who, under oath, gave the following evidence:

1. the University of Malta was autonomous with regard to the carrying out of its functions and also with regard to recruitment, promotion and the exercise of discipline and this independence was safeguarded by the Education Act and the collective agreements;
2. the government did not have effective control, i.e. it did not enjoy a majority, in the University Council which was the governing body of the University of Malta;
3. University lecturers, even in their personal capacity, were allowed and even encouraged to participate in other activities, even in rendering consultancy services, so much so that clause 29 (ii) of the 2009-2013 Collective Agreement provided as follows, namely
  - i. *“recognising that professional activities can bring benefit to and enhance the reputation of the University and the capacity of members, the University agrees that it may be beneficial that such academic members of staff engage in outside part-time professional services, paid or unpaid, provided that such activities do not conflict or interfere with the academic members' of staff obligations, duties and responsibilities to the University as defined in the Agreement”*;
4. the Minister of Education was a signatory to the collective agreement for the purpose of endorsing the salary structure of University of Malta staff since the University of Malta was practically funded in its entirety by the government;
5. the University of Malta definitely did not consider its lecturers as civil servants and that was so in the light of legal provisions to this effect and in view of what had been uniformly applied over the years in customary practice;
6. the University of Malta regulated itself through its Council and in such areas as recruitment, promotion and discipline the University of Malta did not fall within the responsibility of the Public Service Commission but had its own set-ups in accordance with the Education Act and the collective agreements, which norms have never been legally contested;
7. University lecturers were not precluded from engaging in consultancy services but university academic staff had an obligation to disclose any outside work which could cause a conflict of interest which was not of a negligible nature and, in fact, university lecturers did engage in consultancy services to the public service;
8. the University Consultancy Services Ltd was one of the subsidiaries of the University of Malta and its objective was to provide general consultancy services to the public and private sectors in general and it even participated in public tenders;

9. University employees were contracted by the University of Malta and not by the Government and a university employee could not be transferred to a ministry or department but could, perhaps, be seconded and, then again, that would take effect only with the concurrence of the University of Malta and the employee himself / herself;
10. the University of Malta was a public and not a private entity considering its public funding and that its objectives impacted on the general well-being, the public interest;  
  
and
11. the fact that the University of Malta did feature in Schedules 1 and 2 of the Public Contracts Regulations and the Public Procurement Regulations did not, in any way, impinge on its independence but it demonstrated that the University of Malta was not contrary to being subjected to scrutiny and controls by public regulators, even by the Contracts Department, all the more when it was financed out of public funds by way of subvention.

Dr Ivan Vella, legal representative of Frontier Economics Ltd, the recommended tenderer, remarked that the reason given for the appellant company's rejection stated that it did not abide by the General Conditions, in particular sub-article 9.5, which meant that the reason was not limited to that sub-article and he pointed out that sub-article 9.5 featured under Article 9 titled 'Conflict of Interest'.

Dr Debattista, under oath, confirmed that the sole reason for the disqualification of the appellant company was the violation of sub-article 9.5 since some of the nominated experts were University lecturers who, according to the Department of Contracts, were public service employees. He added that the Evaluation Committee did not go into the merits of whether there was any conflict of interest.

The Chairman Public Contracts Review Board remarked that the main concern to the Board was whether a University lecturer, in whatever capacity s/he acted, was a public servant or an agent of the public service, irrespective of whether the context was public procurement or otherwise.

Mr Lino Casapinta, partner of PricewaterhouseCoopers and who was very much involved in the compilation of the tender submission, under oath stated that:

1. the scope of the tender was to make a proposal to government towards the reduction in the administrative burden which would benefit the general public and the business sector;
2. in order to cover the ten priority areas indicated by Government his firm had to involve 30 consultants, of whom 22 were local and foreign PricewaterhouseCoopers personnel and another 8 consultants were from outside their organization;

3. the consultancy service proposed by his firm was made up of (i) key experts/consultants, who were all attached to PricewaterhouseCoopers and who were, ultimately, responsible to take decisions, and (ii) area/sectoral experts, of whom some were University lecturers;
  4. care was taken by the Company not to assign a University lecturer to a sector which could, potentially, create a conflict of interest;
  5. according to the tender document, the definition of 'public service' was limited to government ministries and departments and did not include all entities falling under the aegis of a ministry;
  6. the tender document imposed a certain limit/percentage with regard to sub-contracting - the involvement of personnel who did not form part of the tendering organization - and the bidders had to indicate that percentage and, in the case of PricewaterhouseCoopers' submission, it emerged that the input by 'subcontractors', including University lecturers, amounted to just 0.5% of the total contract;
  7. the University lecturers involved were going to be assigned work in food safety, fisheries, pharmaceuticals and the environment by way of identifying (a) the legislation regulating the particular sector, (b) the departments that dealt with the sector and (c) the stakeholders in the sector but, he reiterated, the decisions were taken by the key experts who were PricewaterhouseCoopers employees;
- and
8. his firm was well aware that University lecturers have participated in other public tenders

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' and also through their verbal submissions presented during the hearing held on 23<sup>rd</sup> February 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to (a) the issue as to why University lecturers / employees should be considered as "*Civil servants and other agents of the public service*", (b) the fact that the University of Malta regulated itself through its Council and in such areas as recruitment, promotion and discipline the University of Malta did not fall within the responsibility of the Public Service Commission but had its own set-ups in accordance with the Education Act and the collective agreements, which norms have never been legally contested, (c) the regulatory and administrative powers of the University's Council (d) the collective agreements governing the employment of

University of Malta's academic and other employees as distinct from similar agreement governing civil servants, (e) the fact that University lecturers, even in their personal capacity, were allowed and even encouraged to participate in other activities, even in rendering consultancy services -clause 29 (ii) of the 2009-2013 Collective Agreement, (f) the fact that the Minister of Education was a signatory to the collective agreement for the purpose of endorsing the salary structure of University of Malta staff since the University of Malta was practically funded in its entirety by the government, (g) the fact that University employees were contracted by the University of Malta and not by the Government and a University employee could not be transferred to a ministry or department but could, perhaps, be seconded and, then again, that would take effect only with the concurrence of the University of Malta and the employee himself / herself and (h) the fact that the University of Malta did feature in Schedules 1 and 2 of the Public Contracts Regulations and the Public Procurement Regulations did not, in any way, impinge on its independence but it demonstrated that the University of Malta was not contrary to being subjected to scrutiny and controls by public regulators, even by the Contracts Department, all the more when it was financed out of public funds by way of subvention;

- having considered the contracting authority's representative's reference to (a) the directions issued by the General Contracts Committee wherein there was stated that academic staff of the University of Malta were not excluded from the provisions of sub-clause 9.5 arguing that public sector employees were to be considered as civil servants and other agents of the public service, (b) the fact that once the appellant company had nominated lecturers from the University of Malta as experts and, given the instructions issued by the Contracts Department, the Evaluation Committee had no option but to disqualify the offer, (c) the fact that albeit the contracting authority considered the public service to include ministries, departments and public entities, even regulatory bodies, yet Mr Aquilina stated that the contracting authority was objective driven and had nothing to do with the general conditions of the tender, such as sub-clause 9.5, which were included in the standard tender document by the Department of Contracts and (d) the fact that the sole reason for the disqualification of the appellant company was the violation of sub-article 9.5 since some of the nominated experts were University lecturers who, according to the Department of Contracts, were public service employees;
- having examined the content of the evidence given by the Director General (Contracts), especially (a) his claim that for the purposes of the Public Contracts Regulations, the University of Malta was considered as a public entity and was included in Schedules 1 and 2 of the same regulations and the University of Malta had to abide by those regulations, (b) his argument that University of Malta employees were precluded from participating in public tenders, (c) his statement that although the University of Malta was quite different from any other public entity and did not qualify under the term 'civil service', still, for the purposes of public procurement, University of Malta employees were not allowed to participate, directly or indirectly, in public contracts, (d) the fact that agents of the public sector represented any government agency which was, directly or indirectly, controlled by government, even by way of funding, (e) the fact that

although at page 32 'the public service' was referred to as 'government ministries and departments', the University of Malta was still a government agency as it was almost entirely funded by Government, (f) the fact that if a university lecturer participated in a public contract in one's personal capacity was one thing, whereas, the participation in a public contract of the company of a university lecturer was regarded as a different matter and (g) his claim that this stand was taken by government following discussions between various departments,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the fact that the University of Malta regulates itself through its Council and in such areas as recruitment, promotion and discipline the University of Malta it does not fall within the responsibility of the Public Service Commission but has its own set-ups in accordance with the Education Act and the collective agreements as being enough to demonstrate that the said institution and its employees do not intrinsically form part of the public service.
2. The Public Contracts Review Board concurs with the argument raised by the appellant company's representatives wherein, inter alia, it was claimed that the sole reason why the Minister of Education was a signatory to the collective agreement was simply due to the need for such agreement to be formally endorsed since the University of Malta was practically funded in its entirety by central government.
3. The Public Contracts Review Board agrees with the appellant company's claim that the fact that the University of Malta did feature in Schedules 1 and 2 of the Public Contracts Regulations and the Public Procurement Regulations did not, in any way, impinge on its independence from mainstream public service.

In view of the above, this Board finds in favour of the appellant company and that, apart from the deposit paid by the appellants being reimbursed, this Board also recommends that the appellants' bid be reintegrated in the evaluation process.

Alfred R Triganza  
Chairman

Carmel Esposito  
Member

Joseph Croker  
Member

*7 March 2011*