

PUBLIC CONTRACTS REVIEW BOARD

Case No. 334

MCC/272/2010 - Tender for the Provision and Management of Catering Services at the Mediterranean Conference Centre

This tender was published on the 16th August 2011 with a closing date of the 5th September 2011. Following the successful compliance with the Administrative Criteria, the tender will be adjudicated to that bidder offering the highest financial consideration not below €400,000 per annum.

Objection filed by Island Caterers Ltd against the decision of the Mediterranean Conference Centre to adjudicate the tender submission made by Corinthia Palace Hotel Company Ltd (CPHCL) administratively compliant, when it should have been disqualified.

The Public Contracts Review Board composed of Mr Joseph Croker as Acting Chairman, Mr Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Monday, 17th October 2011 to discuss this objection.

Present for the hearing were:

Island Caterers Ltd (ICL)

Dr Adrian Delia	Legal Representative
Mr Winston J. Zahra	Managing Director
Mr Kenneth Abela	Representative
Mr Raphael Cauchi	Representative
Mr Claudio Bondin	Representative
Dr Veronica Galea Debono	Legal Representative
Dr Matthew Pulis	Legal Representative

Corinthia Palace Hotel Company Ltd (CPHCL)

Dr J. J. Vella	Legal Representative
Dr K Briffa	Legal Representative
Mr J Fenech	Representative
Mr S Bajada	Representative
Mr J Borg	Representative

Mediterranean Conference Centre (MCC)

Dr Peter Fenech	Chairman MCC
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Evaluation Board

Major Alfred Cassar Reynaud	Chairman
Dr Chris Balzan	Member
Mr Anthony Cachia	Member
Ms Anita Portelli	Secretary

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

Dr Adrian Delia, obo ICL, the appellant, stated that by letter dated 15th September 2011, ICL had requested the disqualification CPHCL from the tendering process for the following reasons:-

- i. the tendering process was governed by the tender document, the Public Procurement Regulations and previous PCAB/PCRB decisions;
- ii. his client was not objecting because CPHCL was not entitled to do business on its own or to enter into joint ventures;
- iii. reference was made to the following provisions of the tender document:-

Clause 4: The Operator will not be permitted to assign its rights and obligations under the catering agreement by any title whatsoever, in whole or in part, to any third party nor shall it associate in any way, any other person with it in the operation of the catering services in terms of the catering agreement. Should the Operator be a company, the share transfer or increase in shareholding of the company without the authorisation of the MCC will bring about the immediate termination of the contract.

Clause 5: The Operator will be prohibited from using the MCC or any part thereof, for any reason other than for the purpose of putting the catering agreement into effect. The Operator will also be prohibited from operating its business in partnership with third parties or ventures.

- iv. reference was also made to the letter of reply by CPHCL dated 10th October 2011, particularly to the extract of the minutes of the Board Meeting of CaterMax Ltd held on the 12th November 2010 with regard to the MCC Tender which read as follows:-

The Board was advised that the long awaited tender for the provision of catering services at the MCC has now been formally announced and issued. The operating term of this contract will be limited to 5 years commencing from October 2011.

Mr D'Alessandro noted the importance for CaterMax to be awarded this contract, as apart from the business that is expected to be generated from this venue, expected to be in the region of €1.2 million per annum, whoever wins this tender will automatically gain access to other supplementary business that is generated over and above the base business produced at the MCC. Moreover, the caterer that wins this contract will gain visibility and will automatically control a segment of business where there is limited competition.

In view of a limitation in the tender document demanding tenderers to have a minimum 5 years experience in the catering field, CaterMax's participation and its chances to compete on a level playing field have been restricted if not severed.

For this reason it was agreed that:

CPHCL will, if it so wishes, submit an offer independent from that of CaterMax Limited. This bid will be made on the Company's own accord in line with Recital C of the Shareholders' Agreement dated 2 August 2010;

Dr Joseph J. Vella will be commissioned to make representations to the Board of MCC demanding a confirmation that CaterMax's tender submission will be considered, irrespective of the fact that it does not have a direct five year experience in the field. Dr Vella will make reference to CaterMax's Shareholders' and managements' experience in the event catering industry, which by any measure exceeds the minimum five year experience limitation.

Dr Vella will also seek clarifications from MCC on what weighting will be given to the four parameters that have been identified as forming part of the financial bid within the tender process. These latter financial parameters together account for 50% of the overall bid points.

- v. CPHCL might argue that those minutes referred to its first tender submission and not to the second tender submission which was the subject of this appeal;
- vi. the original tender had been cancelled and reissued, however, tenderers who had participated in the first call for tenders were given the option to either retain the tender submission presented in the first process or else present a fresh tender submission. His client in fact had participated in the second call for tenders with his original tender submission presented in connection with the first process;
- vii. from the minutes of the Board Meeting of Catermax Ltd it resulted that Catermax Ltd wished to secure this contract but it lacked the five years experience since it had been set up only one year prior to the issue of the tender and therefore, it was decided that CPHCL should participate in this tendering process because it had 40-year experience in this sector;
- viii. in its letter of reply dated 10th October 2011, CPHCL had indicated that as a matter of fact the Shareholders' Agreement, by virtue of which CaterMax Limited was set up, clearly stated that:

The business activity of the Company (namely CaterMax Limited) comprises the operation of catering event service activities as well as conference catering, and any ancillary business that the shareholders consider appropriate (the

"Business") in Malta. The Parties also wish to explore the possibility of bringing their outside catering capacities together for event catering and venue catering management contracts. The Parties acknowledge that this shall not operate so as to limit the ability of CPHL (Corinthia Palace Holdings Limited) or CG (CaterGroup Limited) from pursuing these activities independently where they believe that the event would be better served by one party.

- ix. his client was not objecting to CPHCL's contractual right to submit a tender but what his client was objecting to was that CPHCL was misrepresenting facts by discarding the event whereby it had surrendered the catering business to CaterMax Ltd so much so that the personnel identified by CPHCL were in fact attached to CaterMax Ltd, not to mention also CPHCL's own line of defence;
- x. the submission of a few invoices was insufficient to demonstrate that CPHCL was still involved in the catering business after the setting up of CaterMax Ltd and it would later on be demonstrated that outside catering events for 50 or more persons were to be carried out by CaterMax Ltd; and
- xi. the fact was that at the closing date of the tender, CaterMax Ltd had the capability to undertake this contract but not the experience whereas CPHCL had the experience but not the capability and therefore, if CPHCL were to be awarded this contract it would have to assign it to CaterMax Ltd, something which the tender conditions prohibited.

Dr Peter Fenech, chairman MCC, explained that:-

- a. an independent adjudicating board had been appointed by MCC to evaluate the tender submissions;
- b. the adjudicating board had found CPHCL and ICL compliant;
- c. clauses 4, 5 and 21 had been included in this tender document for the past 10 years or so;
- d. the provisions of the tender document were intended to ensure that the catering services offered at MCC would be up to a five-star conference centre; and
- e. clause 4 was meant to prohibit the assignment of the contract, even through share transfer, clause 5 dealt with joint venture or sub-letting and clause 21 dealt with administrative documentation whereby the tenderer had to demonstrate his experience and to propose the staff compliment and submit the CVs of senior staff.

Major Alfred Cassar Reynaud, chairman of the adjudicating board (second), remarked that:-

- a. CPHCL participated in the second call for tenders;

- b. at one point of the evaluation process, someone had drawn the attention of the adjudicating board that a complaint had been received with regard to the eligibility of CPHCL and the adjudicating board then felt that it should refer to the advice dated 2nd May 2011 given by Attorney General himself to the board that adjudicated the tenders submitted in the first tender process regarding the interpretation of clauses 4 and 5 of the tender document. The issues MCC raised with the Attorney General (AG) were the following:-
(copy of the AG's advice was handed out to the interested parties at the hearing)

The MCC has issued a tender for the concession of its catering facilities. The tender document provides that:

“The Operator will not be permitted to assign its rights and obligations under the catering agreement by any title whatsoever, in whole or in part, to any third party nor shall it associate in any way, any other person with it in the operation of the catering services in terms of the catering agreement. Should the Operator be a company, the share transfer or increase in shareholding of the company without the authorisation of the MCC will bring about the immediate termination of the contract.

The Operator will be prohibited from using the MCC or any part thereof, for any reason other than for the purpose of putting the catering agreement into effect. The Operator will also be prohibited from operating its business in partnership with third parties or ventures”.

We would be very grateful if you could provide us with your interpretation as to whether the said clauses would preclude a tenderer from entering into any arrangements with third parties for the use of its facilities or for the use of the services of its employees.

The advice of the AG read as follows:-

In my understanding it is important in these cases to distinguish situations of partnership in business from other contractual relationships which only consist of commitments to supply goods or services to the tenderer.

It is natural that any tenderer making a bid for the operation of a catering or other business activity would have thought out and costed the various elements involved in putting that operation together including the supply chain of the goods and services and of any expertise which may have to be contracted out. In doing so the tenderer might have also considered it beneficial to enter into elaborate long term agreements with suppliers in order to ensure a steady supply of goods and services at a competitive price. In this scenario the tenderer still assumes all the business risk of the venture and the only risk taken on by his suppliers is their own risk of not getting paid in the event that they have given goods or services on credit to the tenderer and he becomes illiquid.

A situation of partnership or association in, the running of the business, as contemplated in the quoted clauses of the tender document differs from the above scenario in that the third party actually gets directly involved in the running of the business and assumes the business risk in whole or in part. I understand the clauses as being aimed at prohibiting the unauthorised transfer of the business in whole or in part and not as clauses in any way concerned with regulating the supply chain of the proposed operation.

I therefore advise that the quoted clauses do not preclude a tenderer from entering into contractual arrangements with third parties for the use of their facilities by the tenderer or for the use by the tenderer of the services of the third parties' employees or business expertise. (Dr Peter Grech – AG)

- c. according to that advice, the adjudicating board considered that the tender conditions did not exclude a tenderer from using the services of third parties and therefore CPHCL was eligible to participate in the tendering process;
- d. CPHCL and ICL were the two main local catering service providers and both were considered eligible to run the five-star service requested by MCC; and
- e. the adjudicating board carried its evaluation not on public pronouncements but on the tender documentation submitted and in the case of CPHCL it was declared that all employees operating at the MCC would be personnel of the Corinthia Group.

Dr Joseph Vella, obo CPHCL, made the following submissions:-

- i. the objection raised by ICL was untimely because it was envisaging a scenario where if his client were to be awarded the contract he would not be allowed to assign the contract or to enter into a joint venture with a third party, however, the process had not reached that stage yet;
- ii. the tendering process was at the stage where the bidders were being evaluated administratively as to whether they were eligible to participate in line with the conditions laid down;
- iii. there was no doubt that CPHCL, given its 40-year experience in the catering sector, was capable of undertaking this contract;
- iv. CPHCL's association with Vassallo Group had nothing to do with this tendering process and, for the same reason, he was not going to go through the similar association between Island Group and Buttigieg Holdings (another catering firm);
- v. as already indicated earlier on at the hearing, in the setting up of CaterMax Ltd, CPHCL had retained the right to undertake catering contracts on its own whenever it was

considered expedient to do so and the press statement made on the occasion of the launch of CaterMax Ltd did not in any way contradict that;

- vi. the appellant's claim that CPHCL was misrepresenting the facts was repelled because the crux of the matter was that in the CaterMax Ltd shareholders agreement CPHCL had retained the right to operate independently in the catering business and proof had been given of this activity with the presentation of invoices; and
- vii. the evaluation had to be carried out only on the basis of his client's (second) tender submission and not on public statements or on the tender submissions in connection with the first call for tenders which had been cancelled.

Dr Delia expressed the following views:-

- a. the tenderer was CPHCL and not Corinthia Group;
- b. reiterated that CPHCL had every right to take part in the tendering process but it should have been disqualified at administrative evaluation stage;
- c. the press statement launching CaterMax Ltd, stated, among other things, that:

Last year, the Vassallo Group set up Catergroup, which includes Cateressence, Catermeals and now CaterMax - the joint-venture with the Corinthia Group. CaterMax will now take over and consolidate all the outside catering business of the two groups of companies, already making CaterMax the strongest catering player on the market.

- d. CPHCL would have been eligible to participate in this tender but prior to handing over its catering business to CaterMax Ltd; and
- e. evidently the adjudicating board was not differentiating between CPHCL, Corinthia Group, CaterMax Ltd and so forth.

Major Alfred Cassar Reynaud, under oath, gave the following evidence-

- i. confirmed that the bidding company was CPHCL;
- ii. confirmed that the AG's advice was sought by the chairperson of the adjudicating board set up in connection with the first call for tenders;
- iii. at one stage of the evaluating process that he was conducting, the board was informed that the Chairman MCC had received a complaint from ICL regarding the ineligibility of CPHCL, which apparently was similar to the complaint raised during the first tendering process and so the adjudicating board referred to the AG's advice that had been obtained in that instance;

- iv. his board had considered the complaint in the light of the AG's advice and the tender submission of CPHCL and it found that CPHCL was eligible;
- v. CPHCL indicated in its submission that all employees were Corinthia employees;
- vi. to Dr Delia's reference to document dated 1st September 2011 issued by CaterEssence Ltd to "To Whom It May Concern" wherein it was stated that should CPHCL be awarded the MCC contract Mr Edward D'Alessandro, an employee of CaterEssence Ltd, would be seconded to CPHCL to render his services at MCC, he stated that according to the tender submission Mr D'Alessandro was an employee of Corinthia Event Catering Ltd; and
- vii. the profiles indicated that Mr Andrea Lattughi, operations manager, was an employee of Corinthia Event Catering, and Ms Rowena Spiteri, sales executive, as an employee of Corinthia Event Catering.

Mr Christian Borg, a representative of the Employment and Training Corporation (ETC), under oath:-

- i. presented the ETC lists of employees as on 5/9/11 with regard to CaterEssence Ltd, CaterMax Ltd, Cater Group Ltd (no registered employees), and Corinthia Palace Holding Ltd (no registered employees);
- ii. confirmed that:

Mr Edward D'Alessandro was employed by CaterEssence Ltd
 Mr Andrea Lattughi was employed by CaterMax Ltd
 Mr Jose de Silva was employed by CaterMax Ltd, and
 Ms Rowena Spiteri was employed by CaterMax Ltd

Dr Vella asked if Mr Borg could provide the same information with regard to companies within the Island Group for the sake of parity of arms whereupon Dr Delia rebutted that it was his client who had lodged the appeal however his client would raise no objection if the request put forward by Dr Vella were to be entertained by the ETC. Dr Delia went on to present two documents showing how Island Caterers Ltd and CaterMax Ltd were structured.

Dr Peter Fenech, chairman MCC, under oath, gave the following evidence:-

- a. during the first independent adjudication exercise, he was informed that the board required legal advice whereupon he personally contacted the AG, Dr Peter Fenech, to assist in the matter, however, he was never aware of the issue and he did not see the AG's advice;
- b. during the second tendering process he had directed that reference could be made to the first tender process since, not to duplicate paperwork and effort, bidders were given the option to participate in the second call for tenders with their same tender submission presented in the first call for tenders;

- c. during the adjudication of the second tendering process he, as chairman MCC, received a written complaint from ICL questioning the eligibility of one of the bidders and he replied to ICL in the sense that the evaluation was still in course and if ICL would feel aggrieved by the eventual decision then it could have recourse to appeal – at the same time he had informed the adjudicating board secretary, Ms Anita Portelli, that he had received ICL’s complaint;
- d. the composition of the second adjudicating board was entirely different from that of the first process that had been cancelled;
- e. earlier on he had given the scope behind the inclusion of clauses 4, 5 and 21 in the tender document, however, it was not his role to give an opinion on or to interpret the advice of the AG, that was role was assigned to the adjudicating board; and
- f. the wording of clauses 4 and 5 was meant to prevent the contractor from assigning the contract, or part thereof, and to enable the MCC to retain control over the contractor even in the event of share transfer, which was subject to MCC clearance.

The Acting Chairman PCRB informed those present at the hearing that the PCRB only summoned witnesses which it retained necessary to clarify matters on its behalf but the PCRB did not summon witnesses on behalf of third parties.

Mr Gerald Borg, managing director of various industrial operations/companies of CPHCL, under oath, gave the following evidence:-

- i. he had been employed by CPHCL for over 14 years and he was present at the meeting of the Board of Directors of CaterMax Ltd held on 12th November 2010 since he was one of the directors;
- ii. in spite of what the press statement indicated, CPHCL used to and still was acting as an outside caterer as clearly stated in CPHCL’s reply to the letter of objection and, particularly, as per CaterMax Ltd shareholders’ agreement;
- iii. catering personnel, among them Mr Andrea Lattughi, Mr Jose de Silva and Ms Rowena Spiteri, were employed with CaterMax Ltd however these employees could take up more than one job at the same time;
- iv. conceded that at the time of tendering for this contract CPHCL did not actually have the bulk of the personnel to carry out this contract however there was an agreement in writing that the required personnel, including those already named, would be seconded with CPHCL for the duration of the contract, i.e. 5 years, and the arrangement was agreed to by the employees concerned; and
- v. the legal advice they had was that CaterMax Ltd was not eligible to bid for this tender and therefore the decision was taken that CPHCL should submit the bid.

Dr Delia, obo ICL, concluded that:-

- i. the relationship between CPHCL and CaterMax Ltd was quite clear;
- ii. what mattered were the facts and the circumstances at the closing date of the tender and it emerged that at that time the bidder, CPHCL, did have the five year experience but it did not have the personnel, not even the key persons, to execute this contract and therefore it lacked the required capacity;
- iii. moreover, the decision to let CPHCL tender for this contract because CaterMax Ltd lacked the required experience was not in itself illegal but the contractual agreement entered into by CPHCL and CaterMax Ltd was in breach of clauses 4, 5 and 21 of the tender document; and
- iv. the adjudicating board had failed to go into these issues but rested on the advice of the AG which was incorrect because the AG was not furnished with all the details surrounding the case.

Dr Vella, obo CPHCL, remarked that:-

- a. it was not contested that CaterMax Ltd was interested in this tender so much so that it had submitted a bid in the first call which was eventually cancelled however in the subsequent call the bidder was CPHCL;
- b. he found comfort in the advice given by the AG, the highest ranking government legal adviser, because his advice was founded on what MCC, the client, was requesting in the tender document;
- c. on the other hand, the appellant found no comfort in the AG's conclusion, reached after giving cogent reasons, which read as follows:

I therefore advise that the quoted clauses do not preclude a tenderer from entering into contractual arrangements with third parties for the use of their facilities by the tenderer or for the use by the tenderer of the services of the third parties' employees or business expertise.

- d. that meant that his client could use the facilities, e.g. a kitchen, and even the personnel of third parties and his client recognised that CaterMax Ltd was a third party, even though it worked closely with CPHCL;
- e. the advice of the AG was reinforced by Clause 11 of the tender document which stated, among other things, that: *The Operator **shall** at all times maintain a staff compliment, which the Board considers adequate and suitable for the efficient and expeditious operation of the catering services to be provided.* (emphasis added by Dr Vella);

- f. the wording of clause 11 did not refer to the closing date of the tender but it referred to the future and therefore his client (i) had the required experience, (ii) according to the AG's advice, he could make arrangements with third parties to execute the contract – his client had written agreement/s in that regard – and (iii) on observing clause 11 whereby, upon being awarded the tender he would have in place adequate and suitable staff, then his client would be in line with the provisions of the tender document, which was all that mattered;
- g. the adjudicating board acted correctly in finding his client compliant because his tender submission provided the peace of mind that he was capable of executing the tender; and
- h. reiterated that what mattered was not the public statement but the shareholders agreement that in certain circumstances individual shareholders could independently undertake catering contracts.

Dr Fenech remarked that the MCC would respect the recommendations and conclusions reached by the independent board which had been set up for the very purpose of adjudicating this tender.

At this point the hearing was brought to an end.

The Board,

- having taken cognizance of the objection filed by Island Catering Limited to the effect that the company CPHCL should have been adjudicated as being administratively non-compliant by the Adjudicating Board since though it had the required experience did not have the capacity to carry out the contract and was precluded in terms of clauses 4 and 5 of the call for tender from making use of the services of third parties and their facilities including personnel to carry out the contract;
- having also noted the arguments brought forward by CPHCL that the mentioned clauses did not in actual fact prohibit the company which would be awarded the tender from entering into contractual agreements with third parties to use their catering facilities, including personnel;
- having also noted that the fact that CPHCL did have the necessary expertise to carry out the contract in a satisfactory manner was not disputed, not even by the appellant;
- having noted that CPHCL had reached an agreement with CaterMax Limited whereby the latter would allow the use of its key personnel to work for the former in the event that CPHCL is awarded the contract;
- having also noted that CPHCL produced documents to show that it is still involved in providing catering services;

- having also noted that the parties making up CaterMax Limited could also act independently in their own right without any impediment;

came to the conclusion that:

- the objections raised by appellants based on Clauses 4 and 5 in the call for tender are unjustified since there is nothing to indicate that CPHCL, if successful with the tender submission, will be carrying out the catering services in partnership with a third party;
- condition 21 requires documentation of the proposed management, senior staff and chefs who will be engaged on the contract if the tender is awarded to a tenderer; it does not imply that the staff should already be in the firm's employment at the time of the bid;
- CPHCL demonstrated the fact that it had the necessary experience and would have the necessary personnel to carry out its commitments should it be awarded the contract;
- both companies have the competence to give a five star catering service as required by the MCC.

In view of the above, this Board finds against the appellant and confirms the decision of the adjudication board to conclude that both tenderers i.e. ICL and CPHCL, are administratively compliant and eligible to continue with their participation in the tendering process. The deposit paid by the appellant should not be refunded.

Joseph Croker
A/Chairman

Edwin Muscat
Member

Carmelo Esposito
Member

25 November 2011