

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 351**

#### **CT/2065/2011 DSS/42/2088 Adv No CT094/2011**

#### **Tender for the Hire of Self-Drive Cars for Members of the Judiciary at the Courts of Justice**

This call for tenders was published in the Government Gazette on 29<sup>th</sup> March 2011. The closing date for offers was 24<sup>th</sup> May 2011.

The estimated value of this tender was €843,624.

Four (4) tenderers had originally submitted their offers.

Messrs Fremond Ltd filed an objection on 28<sup>th</sup> October 2011 against the decisions taken by the Ministry of Justice and Home Affairs (Courts of Justice Department) that its offer was not the cheapest compliant one and to award the tender to Burmarrad Commercials Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Edwin Muscat and Mr Carmel Esposito as members convened a meeting on Tuesday 6<sup>th</sup> December 2011 to discuss this objection

Present for the hearing were:

#### **Fremond Ltd**

Dr John Cremona	Legal Representative
Mr Anthony (Tony) Meli	Representative
Dr Reuben Farrugia	Representative of Michael Attard Ltd (Agents for Peugeot)

#### **Burmarrad Commercials Ltd**

Dr Josette Grech	Legal Representative
Mr Mario Gauci	Representative
Ms Sharon Camilleri	Representative
Mr Geoffrey Debono	Managing Director -Michael Debono Ltd (Agents for Toyota)
Mr Michael Mallia	Representative of Michael Debono Ltd

#### **Courts of Justice Dept. – Ministry of Justice and Home Affairs**

#### **Adujdicating Board**

Mr Raymond Scicluna	Chairman
Mr Lawrence Bilocca	Member
Mr Peter Micallef	Member

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

Dr John Cremona, legal advisor of Fremond Ltd, the appellant company, made the following submissions:

- i. by letter dated 19<sup>th</sup> October 2011 his client was informed by the contracting authority that the company's bid was not successful because it was not the cheapest compliant tender and that the contract was being recommended for award to Burmarrad Commercials Ltd;
- ii. Volume 3 'Technical Specifications' of the tender document indicated, among other things, that "*All cars to be provided shall be: (k) the units of the tachometers and odometers have to be in Km/h – Km*";
- iii. both his client – one of his company's two options - and the recommended tenderer had offered the same Toyota model, i.e. Avensis T2;
- iv. prior to the closing date of the tender, namely the 24<sup>th</sup> May 2011, his client had obtained information from Mr Massimo Panzavecchia, General Sales Manager of Michael Debono Ltd, the local agent for Toyota, indicating that the odometer of this car model was in miles and, as a consequence, his client declared this feature in the company's tender submission with regard to the option offering the Toyota Avensis T2 model;
- v. for the same model, the recommended tenderer had indicated in the tender submission that the odometer was in km and, during the first hearing held by the Public Contracts Review Board on this case (no. 321), it had transpired that the recommended tenderer was backing the firm's declaration by letter dated 5<sup>th</sup> June 2011 - closing date of tender 24<sup>th</sup> May 2011 - from the same Mr Panzavecchia confirming that the odometer was in km;
- vi. faced with these two conflicting declarations from the same source, the Public Contracts Review Board had sought a confirmation from Mr Panzavecchia as to which version was the correct one and, on 20<sup>th</sup> September 2011 Mr Panzavecchia confirmed under oath that:-
  - a. the information given to Fremond Ltd on 23<sup>rd</sup> May 2011 that the odometer of Avensis T2 was in miles was correct at the time of writing, and
  - b. the information given to Burmarrad Commercials Ltd on 5<sup>th</sup> June 2011 was correct since new data had been communicated by his principals that confirmed that Avensis T2 could be supplied with an odometer in km;
- vii. referred to Reg. 4. of the Public Procurement Regulations which stated that:

*“(1) Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic*

*operators are treated equally and transparently in all calls for tenders whatever their estimated value”*

- viii. therefore, the legal argument was that, by the closing date of the tender, the Toyota Avensis T2 model was supplied with the odometer in miles and, for the sake of transparency and non discrimination, the adjudicating board should have evaluated the recommended tenderer’s submission on the documented information available at the closing date of the tender and, according to that data, the recommended tenderer should have been disqualified as technically non compliant;
- ix. the adjudicating board should not have evaluated the recommended tenderer’s bid in the light of the communication dated 5<sup>th</sup> June 2011 because that was made available after the closing date of the tender;
- x. his client was not questioning whether the recommended tenderer could have, eventually, supplied the vehicles with the odometer in km or not; and
- xi. another issue was that Burmarrad Commercials Ltd indicated the date of production of the vehicles as 2011 whereas his client maintained that the production date was 2009.

Mr Raymond Scicluna, chairman of the adjudicating board, explained that:-

- a. the evaluation board was empowered to seek clarifications during the evaluation process and, in fact, given the conflicting declarations by the appellant company and by the recommended tenderer with regard to the same car model, it had sought a clarification, through the Department of Contracts, from both bidders and Burmarrad Commercials Ltd confirmed it would provide the vehicles with the odometer in km whereas the appellant company confirmed its original submission that the vehicles’ odometer would be in miles;
- b. the clarification was sought from the appellant company and from the recommended tenderer because they were the bidders and they had to confirm and substantiate their original declarations; and
- c. the tender document provided for substantial penalties in the case that bidder provided false declarations or incorrect information.

The Chairman, Public Contracts Review Board, intervened to remark that, in the first place, a contracting authority should endeavour to avoid coming to a situation where it would have to impose sanctions.

Dr Josette Grech, legal representative of Burmarrad Commercials Ltd, the recommended tenderer, submitted that:-

- i. one had to focus on the point at issue which was that the tender specifications requested in very clear terms – “shall” - that the odometer had to be in km;

- ii. her client had clearly indicated in the firm's original tender submission and throughout the tendering process that it would supply the cars with the odometer in km as per mandatory tender specifications;
  - iii. on the other hand, the appellant company had indicated in its tender submission that it would supply the cars with the odometer in miles in breach of mandatory tender specifications;
  - iv. the tender conditions did not oblige her client to provide the Avensis T2 from the local Toyota representative and, in fact, her client had made enquiries to obtain these cars from Ireland and the company was informed that it could;
  - v. her client was aware that the company could get these cars directly from overseas suppliers and the letter dated 5<sup>th</sup> June 2011 from Michael Debono Ltd simply confirmed that her client could even obtain this type of car with the odometer in km through the local Toyota representative, which, in itself, proved that Toyota Avensis 2T could, in fact, be supplied with the odometer in km;
  - vi. with regard to the year of production her client had indicated the year 2011;
- and
- vii. the fact remained that what her client had declared in the company's original tender submission was correct from the very beginning and that was further confirmed during the evaluation process.

Mr Tony Meli, also on behalf of the appellant company, stated that the specifications he had obtained from the local Toyota representative at tendering stage were that the Avensis T2 was supplied with the odometer in miles. He claimed that the local Toyota representatives, namely Mr Panzavecchia and Mr Geoffrey Debono, had informed him that one could not import in Malta forty new Toyota Avensis cars except through their agency.

The Chairman, Public Contracts Review Board, remarked that, in the case of the appellant company, it did not appear to make sense for the latter to offer the Avensis T2 model since the one it offered was, manifestly, not technically compliant and it would have been better had the firm offered another compliant model. He observed that in a globalised world and once Malta was an EU Member State, one might not, after all, have to rely on the local representative to obtain this supply.

*At this point Dr Reuben Farrugia, a representative of Michael Attard Ltd - local agents of Peugeot – asked permission to intervene. The Public Contracts Review Board stated that they cannot oblige due to the fact that Dr Farrugia's client had not formally registered to intervene as an interested party. Dr Grech, representing the recommended tenderer, objected claiming that the issue concerned a Toyota model and not a Peugeot model. As a result, Dr Farrugia was granted permission by the appellant company to associate himself with the company's legal representative.*

Dr Farrugia explained that, with regard to certain sectors, the EU had provided more than one model of operation and, in the case of the car sector, the EU provided two different types of agreements to deal with ‘exclusivity’, namely one where a manufacturer was allowed to intervene in the local market and another where the agent was to, exclusively, cover a certain territory ensuring that the customers of that area were adequately serviced. Dr Farrugia asked Mr Debono whether the arrangement Michael Debono Ltd had under EU rules with the manufacturer was that of exclusive rights over the Maltese territory, and, if so, whether an agent in Ireland could buy 40 new Toyota cars from the manufacturer not for use in Ireland but for re-export to Malta without the Maltese agent being involved or if Michael Debono Ltd would tolerate such a deal to take place.

Mr Geoffrey Debono, Managing Director of Michael Debono Ltd, under oath, gave the following evidence:-

- a. it was correct to state that only Michael Debono Ltd was authorised to import Toyota models in Malta but that did not preclude a person from purchasing a Toyota car in an EU member state and get it over to Malta, in fact, that was something that took place all over Europe;
- b. 40 cars were substantial for the local market but for the UK market it was a relatively small number;
- c. it was not desirable for the local agent that individuals bought new cars from overseas and brought them over to Malta but under EU regulations the local agent cannot stop such practice from happening;
- d. as a local agent he could technically register 40 new cars in Malta and then export them; and
- e. one could register a car as new up to six months from the date of purchase and having less than 6,000km

Dr Farrugia made the following observations:-

- i. Mr Debono was correct that he could not simply import 40 new cars for re-export because to do that he would have to first register them in Malta and then re-export them – such procedure would fall under what is known as ‘grey imports’;
- ii. the recommended tenderer could not import 40 new Toyota cars without the consent/intervention of Michael Debono Ltd;
- iii. in his original tender submission the recommended tenderer did not produce evidence from local or overseas sources that, in fact, he could supply this Toyota model with the odometer in km; and
- iv. it was the clarification sought by the contracting authority that provided the recommended tenderer with the opportunity to present written evidence from

the local importer but, then again, that was dated after the closing date of the tender.

Mr Debono remarked that:-

- a. his firm did not get any commission in the case of a person who purchased a new car in another country and then imported it in Malta;
  - b. different countries had different regulations, e.g. in the UK one could register a vehicle and then deregister it whereas in Malta the situation was a bit different since we have a substantial first registration tax;
  - c. he would supply the 2009 Avensis model but the year of production would be 2011. He explained that, in the automobile industry, it did not pay to have a new model every year but a model was retained for an average of 6 years and, usually, after 3 years minor changes were effected to that model and, therefore, a 2009 model could have a 2010 and 2011 as year of production;
- and
- d. prior to the closing date of the tender Michael Debono Ltd was not in a position to supply the model Avensis T2 with the odometer in km but, on enquiring further with the manufacturer, it later transpired that this model could, in fact, be supplied with the odometer in km.

Mr Mario Gauci, Managing Director of Burmarrad Commercials Ltd, made the following remarks:-

- a. apart from trading in used vehicles and being agents for certain automobile manufacturers, he also managed a firm dealing with renting and leasing and the company could, therefore, import the new cars not for reselling purposes but to conduct its business of renting and leasing;
- b. he had consistently declared that his company would supply the vehicles as per tender specifications and in its answer to the clarification the company had also invited the contracting authority to physically inspect the car offered but this invitation was not taken up – Mr Raymond Scicluna, chairman of the adjudicating board, confirmed this.

Mr Lawrence Bilocca, a member of the adjudicating board, remarked that the adjudicating board was aware that Toyota Corporation sold cars worldwide and that meant that it manufactured its products to suit the demands of different markets, namely left-hand and right-hand drive and with the display monitors in miles or km.

The Chairman, Public Contracts Review Board, expressed the view that it was not amiss for the adjudicating board to seek a confirmation from tenderers but it could have also sought comfort from an independent source.

Dr Cremona stated that (i) apart from the Toyota option, his client had submitted another option offering a Peugeot model which the adjudicating board had already

evaluated and found it to be fully compliant and (ii) the recommended tenderer's indication 'year of production 2011' was incorrect as Mr Debono had stated that it was 2009.

Dr Josette Grech concluded that:

- i. she could not agree more with Dr Cremona that what mattered was the state of affairs at the closing date of the tender, namely that her client submitted a compliant tender whereas the appellant company did not with regard to the Toyota model option not to mention that he had quoted a much higher price;
- ii. although the adjudicating board had acted correctly all the way, the clarification sought by the adjudicating board and the manner how it did that were not contention points raised in the appellant company's letter of objection;
- iii. in her client's case the clarification did not add anything to the firm's original submission but it was merely confirming what it had already declared in the first place – irrespective of whether the supply was going to be made through overseas suppliers or through the local agent. She added that her client went further to invite the contracting authority to physically inspect the model on his company's premises;
- iv. things were different in the case of the appellant company because its submission was technically in breach of specifications and remained so even after the clarification;
- v. one should not expect her client to enter into a formal agreement with third parties for the supply of 40 new cars prior to being awarded the tender even though her client was himself the owner of a company which imported vehicles;
- vi. even the Public Contracts Review Board had asked Mr Panzavecchia to confirm whether the Avensis T2 was available with an odometer in km, which confirmation was given under oath on the 20<sup>th</sup> September 2011 and, in itself, that meant that, contrary to what the appellant company was implying, her client did not make any misleading or false declarations;
- vii. the EU provided for parallel trading whereby a person was free to purchase a product in an EU Member State for use in another EU Member State;
- viii. the commercial arrangements between Michael Debono Ltd and Toyota Corporation were irrelevant as the former was not a party in her client's tender submission;
- ix. her client was not, in any way, questioning the adjudicating board's action to get comfort by seeking a clarification so much so that her client did provide the comfort required by submitting the certificate issued by Michael Debono Ltd; and

- x. the technical specifications at Volume 3 stated that the model offered was not to be older than 3 years in production and that offered by her client indicated 2011.

Dr Farrugia contended that the adjudicating board should have evaluated the offers on the strength of the original tender submissions and at that stage it had at its disposal the certificate provided by the appellant company which was issued by the local agent for Toyota and hence it was more reliable and credible than the mere declaration submitted by the recommended tenderer. He concluded that, on the strength of that written evidence, the recommended tenderer should have been disqualified.

The Chairman, Public Contracts Review Board remarked that an important issue to be deliberated upon by the Board was whether, at the closing date of the tender, the recommended tenderer could have provided these vehicles without using the services of the local Toyota representative.

Mr Gauci maintained that, although his firm could import the vehicles through the local Toyota representative, the recommended tendering company was not obliged to act in that manner.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 28<sup>th</sup> October 2011 and through the verbal submissions made during the hearing held on the 6<sup>th</sup> December 2011, had objected against the decisions taken by the Ministry of Justice and Home Affairs (Courts of Justice Department) that its offer was not the cheapest compliant one and to award the tender to Burmarrad Commercials Ltd.;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 19<sup>th</sup> October 2011 the appellant company was informed by the contracting authority that its bid was not successful because it was not the cheapest compliant tender and that the contract was being recommended for award to Burmarrad Commercials Ltd, (b) Volume 3 'Technical Specifications' of the tender document indicated, among other things, that "*All cars to be provided shall be: (k) the units of the tachometers and odometers have to be in Km/h – Km*", (c) both the appellant – one of the company's two options - and the recommended tenderer had offered the same Toyota model, i.e. Avensis T2; (d) prior to the closing date of the tender, namely the 24<sup>th</sup> May 2011, the appellant company had obtained information from Mr Massimo Panzavecchia, General Sales Manager of Michael Debono Ltd, the local agent for Toyota, indicating that the odometer of this car model was in miles and, as a consequence, the appellant company declared this feature in the its tender submission with regard to the option offering the Toyota Avensis T2 model, (e) for the same model, the recommended tenderer had indicated in the tender submission that the odometer was in km and, during the first hearing held by the Public Contracts Review Board on this case (no. 321), it had transpired that the recommended tenderer was backing the firm's declaration by letter dated 5<sup>th</sup> June 2011 - closing

date of tender 24<sup>th</sup> May 2011 - from the same Mr Panzavecchia confirming that the odometer was in km, (f) faced with these two conflicting declarations from the same source, the Public Contracts Review Board had sought a confirmation from Mr Panzavecchia as to which version was the correct one and, on 20<sup>th</sup> September 2011 Mr Panzavecchia confirmed under oath that (1) the information given to Fremond Ltd on 23<sup>rd</sup> May 2011 that the odometer of Avensis T2 was in miles was correct at the time of writing, and (2) the information given to Burmarrad Commercials Ltd on 5<sup>th</sup> June 2011 was correct since new data had been communicated by his principals that confirmed that Avensis T2 could be supplied with an odometer in km, (g) the legal argument was that, by the closing date of the tender, the Toyota Avensis T2 model was supplied with the odometer in miles and, for the sake of transparency and non discrimination, the adjudicating board should have evaluated the recommended tenderer's submission on the documented information available at the closing date of the tender and, according to that data, the recommended tenderer should have been disqualified as technically non compliant, (h) the adjudicating board should not have evaluated the recommended tenderer's bid in the light of the communication dated 5<sup>th</sup> June 2011 because that was made available after the closing date of the tender, (i) the appellant company was not questioning whether the recommended tenderer could have, eventually, supplied the vehicles with the odometer in km or not, (j) Burmarrad Commercials Ltd indicated the date of production of the vehicles as 2011 whereas the appellant company maintained that the production date was 2009, (k) the specifications Mr Meli had obtained from the local Toyota representative at tendering stage were that the Avensis T2 was supplied with the odometer in miles, (l) the local Toyota representatives, namely Mr Panzavecchia and Mr Geoffrey Debono, had informed the appellant company's representatives that one could not import in Malta forty new Toyota Avensis cars except through their agency, (m) with regard to certain sectors, the EU had provided more than one model of operation and, in the case of the car sector, the EU provided two different types of agreements to deal with 'exclusivity', namely one where a manufacturer was allowed to intervene in the local market and another where the agent was to, exclusively, cover a certain territory ensuring that the customers of that area were adequately serviced, (n) Mr Debono was correct that he could not simply import 40 new cars for re-export because to do that he would have to first register them in Malta and then re-export them – such procedure would fall under what is known as 'grey imports', (o) the recommended tenderer could not import 40 new Toyota cars without the consent/intervention of Michael Debono Ltd, (p) in his original tender submission the recommended tenderer did not produce evidence from local or overseas sources that, in fact, he could supply this Toyota model with the odometer in km, (q) it was the clarification sought by the contracting authority that provided the recommended tenderer with the opportunity to present written evidence from the local importer but, then again, that was dated after the closing date of the tender, (r) apart from the Toyota option, his client had submitted another option offering a Peugeot model which the adjudicating board had already evaluated and found it to be fully compliant and (s) the adjudicating board should have evaluated the offers on the strength of the original tender submissions and at that stage it had at its disposal the certificate provided by the appellant company which was issued by the local agent for Toyota and hence it was more reliable and credible than the mere declaration submitted by the recommended tenderer;

- having considered the contracting authority’s representative’s submissions, namely that (a) the evaluation board was empowered to seek clarifications during the evaluation process and, in fact, given the conflicting declarations by the appellant company and by the recommended tenderer with regard to the same car model, it had sought a clarification, through the Department of Contracts, from both bidders and Burmarrad Commercials Ltd confirmed it would provide the vehicles with the odometer in km whereas the appellant company confirmed its original submission that the vehicles’ odometer would be in miles, (b) the clarification was sought from the appellant company and from the recommended tenderer because they were the bidders and they had to confirm and substantiate their original declarations, (c) the tender document provided for substantial penalties in the case that bidder provided false declarations or incorrect information and (d) the adjudicating board was aware that Toyota Corporation sold cars worldwide and that meant that it manufactured its products to suit the demands of different markets, namely left-hand and right-hand drive and with the display monitors in miles or km;
- having also reflected on the claims and interventions made by representatives of the recommended tenderer, especially those relating to the (a) fact that one had to focus on the point at issue which was that the tender specifications requested in very clear terms – “shall” - that the odometer had to be in km, (b) fact that the recommended tenderer had clearly indicated in the firm’s original tender submission and throughout the tendering process that it would supply the cars with the odometer in km as per mandatory tender specifications, (c) fact that the appellant company had indicated in its tender submission that it would supply the cars with the odometer in miles in breach of mandatory tender specifications, (d) the fact that the tender conditions did not oblige participating tenderers to provide the Avensis T2 from the local Toyota representative and, in fact, the recommended tenderer had made enquiries to obtain these cars from Ireland and it was informed that it could, (e) fact that the recommended tenderer was aware that the company could get these cars directly from overseas suppliers and the letter dated 5<sup>th</sup> June 2011 from Michael Debono Ltd simply confirmed that one could even obtain this type of car with the odometer in km through the local Toyota representative, which, in itself, proved that Toyota Avensis 2T could, in fact, be supplied with the odometer in km, (f) fact that with regard to the year of production her client had indicated the year 2011, (g) fact that what the recommended tendere had declared in the company’s original tender submission was correct from the very beginning and that was further confirmed during the evaluation process, (h) fact that, apart from trading in used vehicles and being agents for certain automobile manufacturers, the recommended tendering company’s managing director also managed a firm dealing with renting and leasing and the company could, therefore, import the new cars not for reselling purposes but to conduct its business of renting and leasing, (i) fact that Mr Gauci had consistently declared that his company would supply the vehicles as per tender specifications and in its answer to the clarification the company had also invited the contracting authority to physically inspect the car offered but this invitation was not taken up – Mr Raymond Scicluna, chairman of the adjudicating board, confirmed this, (j) fact that what mattered was the state of affairs at the closing date of the tender, namely that her client submitted a compliant tender

whereas the appellant company did not with regard to the Toyota model option not to mention that he had quoted a much higher price, (k) fact that although the adjudicating board had acted correctly all the way, the clarification sought by the adjudicating board and the manner how it did that were not contention points raised in the appellant company's letter of objection, (l) fact that in the recommended tenderer's case the clarification did not add anything to the firm's original submission but it was merely confirming what it had already declared in the first place – irrespective of whether the supply was going to be made through overseas suppliers or through the local agent, (m) fact that in the case of the appellant company its submission was technically in breach of specifications and remained so even after the clarification, (n) fact that one should not expect the recommended tenderer to enter into a formal agreement with third parties for the supply of 40 new cars prior to being awarded the tender even though the said tendering company's owner was himself the owner of a company which imported vehicles, (o) fact that even the Public Contracts Review Board had asked Mr Panzavecchia to confirm whether the Avensis T2 was available with an odometer in km, which confirmation was given under oath on the 20<sup>th</sup> September 2011 and, in itself, that meant that, contrary to what the appellant company was implying, the recommended tenderer did not make any misleading or false declarations, (p) fact that the EU provided for parallel trading whereby a person was free to purchase a product in an EU Member State for use in another EU Member State, (q) fact that the commercial arrangements between Michael Debono Ltd and Toyota Corporation were irrelevant as the former was not a party in her client's tender submission, (r) the technical specifications at Volume 3 stated that the model offered was not to be older than 3 years in production and that offered by the recommended tenderer indicated 2011 and (s) fact that although the recommended tendering company could import the vehicles through the local Toyota representative, the same company was not obliged to act in that manner;

- having also duly considered all the other submissions made during the hearing including Mr Debono's, particularly the ones including the fact that (a) albeit it was correct to state that only Michael Debono Ltd was authorised to import Toyota models in Malta but that did not preclude a person from purchasing a Toyota car in an EU member state and get it over to Malta, in fact, that was something that took place all over Europe, (b) 40 cars were substantial for the local market but for the UK market it was a relatively small number, (c) it was not desirable for the local agent that individuals bought new cars from overseas and brought them over to Malta but under EU regulations the local agent cannot stop such practice from happening, (d) as a local agent he could technically register 40 new cars in Malta and then export them, (e) one could register a car as new up to six months from the date of purchase and having less than 6,000km, (f) his firm did not get any commission in the case of a person who purchased a new car in another country and then imported it in Malta, (g) the local agent would supply the 2009 Avensis model but the year of production would be 2011, (h) in the automobile industry, it did not pay to have a new model every year but a model was retained for an average of 6 years and, usually, after 3 years minor changes were effected to that model and, therefore, a 2009 model could have a 2010 and 2011 as year of production and (i) prior to the closing date of the tender Michael Debono Ltd was not in a position to supply the model Avensis T2 with the

odometer in km but, on enquiring further with the manufacturer, it later transpired that this model could, in fact, be supplied with the odometer in km,

reached the following conclusions:

1. The Public Contracts Review Board contends that an evaluation committee is expected to base its recommendations on the premise that what it evaluates is thoroughly analysed and not by, primarily, resting on the fact that some kind of declaration is generally enough to cover its legal right for possible recourse in the future should a recommended tenderer end up not delivering what is expected of him or her.
2. The Public Contracts Review Board opines that it was not amiss for the adjudicating board to seek a confirmation from tenderers but it could have also sought comfort from an independent source.
3. The Public Contracts Review Board feels that one important issue to be considered was whether, at the closing date of the tender, the recommended tenderer could have provided these vehicles without using the services of the local Toyota representative. This Board feels that whilst, under normal circumstances, the fact that the recommended tenderer's position has remained vague as to whether the company will be importing the vehicles in question through Toyota's local agent, could have raised a few eyebrows, yet this Board notices that the recommended tenderer had invited the contracting authority to pay him a site visit in order to view a prototype of the vehicle the same tenderer was offering. Undoubtedly, this provided enough evidence that the vehicle being offered was available.
4. The Public Contracts Review Board notes that the availability of the vehicle as well as the declaration made in the submission by the recommended tenderer are in full compliance with tender specifications' requirements.
5. Taking full cognisance of the above this Board concludes that the delivery *modus operandi* is, at this stage, to be considered irrelevant,

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

29<sup>th</sup> December 2011