

PUBLIC CONTRACTS REVIEW BOARD

Case No. 320 and Case No. 321

CT/2065/2011 Adv No CT/094/2011

Hire of Self-Drive Cars for Members of the Judiciary at the Courts of Justice Division – Lot 1

This call for tenders was published in the Government Gazette on the 29th March 2011. The closing date for this call with an estimated budget of € 843,624 was the 24th May 2011.

Four (4) tenderers submitted their offers.

Burmarrad Commercials Ltd and Fremond Ltd filed separate objections both on the 28th June 2011, against the decision of the Contracts Department to award the tender to Frank Borda Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 31st August 2011 to discuss this objection.

Present for the hearing were:

Burmarrad Commercials Ltd

Dr Josette Grech	Legal Representative
Mr Mario Gauci	Managing Director
Ms Sharon Camilleri	Representative

Fremond Ltd

Dr John Cremona	Legal Representative
Mr Anthony Meli	Representative

Frank Borda Ltd

Mr Darren de Domenico	Representative
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Michael Attard Ltd (Local Representative of Peugeot)

Dr Reuben Farrugia	Legal Representative
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Courts of Justice Division

Mr Kevin Mahoney	Director General
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Evaluation Board

Mr Raymond Scicluna	Chairman
Mr Lawrence Bilocca	Member
Mr Tonio Mercieca	Member
Mr Stephen Vassallo	Secretary

After the Chairman's brief introduction, the appellants were invited to explain the motives of their objections.

Case No. 320 - Burmarrad Commercials Ltd

Dr Josette Grech, legal representative of Burmarrad Commercials Ltd, stated that her client was objecting because the recommended offer was both administratively and technically not compliant.

A) Administrative Compliance

Tender Validity Period/Bid Bond

Dr Grech submitted that:

- i. the preferred bidder had presented its tender with a short validity date, namely it expired on the 21st October 2011 instead of on the 24th October 2011;
- ii. clause 19.1 stipulated that *“Any tenderer who quotes a shorter validity period will be rejected”*;
- iii. albeit clause 19.2, in exceptional circumstances, allowed the extension of the validity date of the tender, yet Dr Grech claimed that in this case that was not likely as the preferred tenderer had already approached her client offering to sell the tendered Skoda Octavia vehicles should the said tenderer decline the tender, something which he could do by opting to refuse to extend the validity date without even forfeiting the bid bond;
- iv. the preferred bidder had no intention to accept the award of the tender because the price quoted for the vehicles was one that could be offered by a car importer, such as Frank Borda Ltd, but, on the other hand, it had no experience in car leasing and maintenance workshops;
- v. clause 20 explained that the bond served as a guarantee so that the tenderer would not withdraw an offer up to the expiry date of the bid bond and, in this regard, no discretion was allowed to the Contracts Department or to the contracting authority except to permit a correction to an incorrect validity date or value within two working days, namely during adjudication and not after tender award;
- vi. in this case, the tender of Frank Borda Ltd should have been disqualified from the start, namely at the administrative compliance stage

Mr Raymond Scicluna, chairman of the evaluation board, reported that the evaluation board had brought to the attention of the Contracts Department the issue of the short validity period of the tender submitted by the preferred bidder, i.e. that it was dated 21st instead of 24th October 2011. He added that it was also noted that, in fact, 150 days after the closing date of the tender stipulated in Clause 19.1 should have read 21st

October 2011 and not 24th October 2011 as printed on the front page of the tender document. Mr Scicluna stated that on the 2nd June 2011 the General Contracts Committee replied that, in the circumstances, the tender form submitted by Frank Board Ltd was to be considered as valid.

B) Technical Compliance

(i) Saloon vs Hatchback

Dr Grech submitted that:

- a. the preferred bidder offered the Skoda Octavia which was not a 4-door saloon car but a 5-door hatchback type and, as a consequence, not in accordance with the Technical Specifications at Volume 3 point (f) ‘four door type saloon’;
- b. technically, the basic distinction between a 4-door and a 5-door was that a 4-door saloon has three compartments, namely, the engine compartment, the passenger seating and the luggage booth whereas a 5-door car was a hatchback consisting of two compartments, namely, the engine compartment and the passenger seating compartment which included the luggage booth;
- c. one could easily confirm that the Skoda Octavia was a 5-door hatchback effecting a search over the internet; and
- d. the construction of a 3 compartment car, namely, a 4-door saloon, provided more security to the passengers but was more costly and, therefore, it was not level playing field to allow tenderers to offer a 5-door car when the other tenderers were offering the more costly 4-door car as requested by the tender document.

Mr Raymond Scicluna, chairman of the evaluation board, explained that:

- i. in the first evaluation report the board had recommended the award to Burmarrad Commercials Ltd as the cheapest compliant tender as the offer by Frank Borda Ltd was found to be technically not compliant since the car offered was a 5-door instead of a 4-door saloon;
- ii. Burmarrad Commercials Ltd had furnished the evaluation board with a confirmation that the Toyota Avensis it offered had the speedometer and odometer in km and the evaluation board rested on that information conscious that the submission of false information in a tender submission meant serious consequences for the bidder;
- iii. subsequently, the Contracts Department had instructed the evaluation board as follows:

“the General Contracts Committee (GCC) feels that the case of doors should be considered as minimum specifications. Once a vehicle is

officially classified as a saloon it should continue to be considered for further evaluation”

- iv. the evaluation board consulted the log book issued by Transport Malta and it found that the Skoda Octavia was specified as ‘Octavia saloon’ and in view of the comment made by *General Contracts Committee* and the fact that the offer by Frank Borda Ltd was financially the most advantageous to the department, the evaluation board issued the second recommendation to award the tender to Frank Borda Ltd.

(ii) Odometer

Dr Grech stated that, by letter dated 2nd June 2011, the evaluation board had asked her client to confirm whether the tachometers and odometers were in km/h and km as requested in the tender document at Point (k) of Volume 3 ‘Technical Specifications’ (page 40). Dr Grech reported that her client had informed the evaluation board that both tachometers and odometers were in km/h and km and backed this up by a letter from the local representatives of Toyota. She added that the Toyota representative had also confirmed to her client that they would place a special order so that the cars would be supplied with meters in km to respect local legislation and taking into account the local use of speed cameras.

Dr Grech called on the Public Contracts Review Board to reject the recommended tender and to recommend award in favour of her client who, in the circumstances, submitted the cheapest compliant offer.

(iii) Alternative Offer

Dr Grech declared, that without prejudice to her client’s original offer, which she claimed was according to tender specifications, in line with sub-clause 17.5 that envisaged a discount without materially altering the bill of quantities /financial statement and in terms of sub-clause 27.4 that envisaged no reduction or alteration to tender price, her client was willing to, alternatively, offer the Peugeot 508 model instead of the Toyota Avensis at the same quoted price of € 19.40 daily for each vehicle.

Case No. 321 - Fremond Ltd

Dr John Cremona, legal representative of Fremond Ltd, stated that his client was objecting to the award of the tender to Frank Borda Ltd because it was not administratively and technically compliant.

A) Administrative Compliance

Tender Validity Period/Bid Bond

Dr Cremona submitted that:

- i. the bid bond submitted by Frank Borda Ltd had a short validity date since it

expired on the 21st October 2010 instead of on the 24th October 2010 when clause 19.1 stated that “Any tenderer who quotes a shorter validity period will be rejected”;

- ii. clause 20.1 of the tender document provided, among other things, that:

“Offers that are not accompanied with the mandatory Tender Guarantee (Bid Bond) by the Closing Date and Time of the tender will be automatically disqualified.

Tenderers will be requested to clarify/rectify, within two working days from notification, the tender guarantee submitted, only in the following two circumstances: either incorrect validity date, and/or incorrect value. Such rectification/s must be submitted within two (2) working days, and will be subject to a non-refundable administrative penalty of €50. Failure to comply shall result in the tender offer not being considered any further.”

- iii. In spite of the fact that the contracting authority could have requested the preferred bidder to rectify the bid bond after the closing date of the tender but before the notification of the award, yet, it appeared that Frank Borda Ltd did not rectify its bid bond.

Mr Raymond Scicluna, chairman of the evaluation board, reported that the evaluation board had brought to the attention of the Contracts Department the issue of the short validity period of the tender submitted by the preferred bidder, namely that it was dated 21st instead of 24th October 2011. He added that it was also noted that, in fact 150 days after the closing date of the tender, stipulated in Clause 19.1, should have read 21st October 2011 and not 24th October 2011 as printed on the front page of the tender document. Mr Scicluna stated that on the 2nd June 2011 the General Contracts Committee replied that, in the circumstances, the tender form submitted by Frank Board Ltd was to be considered as valid.

B) Technical Evaluation

(i) Saloon vs Hatchback

Dr Cremona submitted that:-

- a. as per Volume 3 ‘Technical Specifications’ point (f) of the tender document the contracting authority requested a 4-door type saloon;
- b. his client reckoned that the model that Frank Borda Ltd, as the agent/distributor of the Skoda automobiles in Malta, could offer was the Skoda Octavia which was a hatchback and, therefore, a 5 door car;

- c. a hatchback was a vehicle with a boot incorporating the rear window that opened vertically to access the storage area which was not separated from the passenger compartment;
- d. on the other hand a 4 door saloon (or sedan) vehicle had the boot separate from the passengers area;
- e. the Skoda Octavia was described by various car reviewers as a hatchback-type car ; and
- f. even the technical specifications issued by Skoda itself referred to it as a 5-door car and therefore a hatchback.

Mr Scicluna explained that:

- a. in the first evaluation report the board had recommended the award to Burmarrad Commercials Ltd as the cheapest compliant tender as the offer by Frank Borda Ltd was found technically non compliant since the car offered was a 5-door instead of a 4-door saloon;
- b. Burmarrad Commercials Ltd had furnished the evaluation board with a confirmation that the Toyota Avensis it offered had the speedometer and odometer in km and the evaluation board rested on that information conscious that the submission of false information in a tender submission meant serious consequences for the bidder;
- c. subsequently, the Contracts Department had instructed the evaluation board as follows:

“the General Contracts Committee (GCC) feels that the case of doors should be considered as minimum specifications. Once a vehicle is officially classified as a saloon it should continue to be considered for further evaluation”;

- d. the evaluation board consulted the log book issued by Transport Malta and it found that the Skoda Octavia was specified as ‘Octavia saloon’ and, in view of the comment made by GCC and the fact that the offer by Frank Borda Ltd was financially the most advantageous to the department, the evaluation board issued the second recommendation to award the tender to Frank Borda Ltd.

Dr Cremona insisted that one had to determine if a vehicle was as 4-door saloon or a 5-door hatchback not from the log book issued by Transport Malta but from the technical data compiled by the manufacturer itself, Skoda, and from comments made by car reviewers. He also noted that the preferred bidder offered 36 instead of the 39 cars requested.

C) Odometer - Toyota Avensis

Dr Cremona argued that:

- i. if Burmarrad Commercials Ltd tendered with the Toyota Avensis T2 2009 model, namely the same model that his client offered in Option B, then the tender submitted by Burmarrad Commercials Ltd should have been disqualified for the following reasons:
 - (a) Toyota Avensis T2 2009 models have their odometers in m/h and not in km/h which fact had been confirmed by the representative of Toyota in Malta (Michael Debono Limited) by email dated 23rd May 2011 and, therefore, the vehicle offered by Burmarrad Commercials was technically non compliant with point (k) of Volume 3 - Technical Specifications of the tender document which requested that “*the units of the Tachometers and Odometers have to be in km/h and km*”, and
 - (b) Burmarrad Commercials Ltd supplied incorrect information in its tender submission when it indicated the year of manufacture as 2011 instead of 2009 and that the odometer was in km.
- ii. whilst, by letter dated 22nd June 2011 sent by the Contracts Department the latter stated that his client’s Option A, where the Peugeot 508 model was offered, was technically compliant but not the cheapest, yet, in view of the above-mentioned explanations, the tender should be awarded to his client for Option A as the only technically and administratively compliant tender.

Dr Grech stated that the Chairman of the evaluation board had requested to inspect the Toyota Avensis which request was accepted but, for some reason, the inspection did not take place. She insisted that her client had furnished the letter dated 5th June 2011 from the local representative of Toyota which confirmed that the Toyota Avensis T2 4-door saloon had the speedometer and odometer displays in km/h and km respectively, namely, as per tender specifications.

Dr Cremona insisted that the letter from Michael Debono Ltd presented by Burmarrad Commercials Ltd referred to Toyota Avensis 5-door and not 4-door and, therefore, it was not in line with tender specifications adding that the date of the letter, the 5th of June 2011, was well after the closing date of the tender.

Dr Grech pointed out that this confirmation from the Toyota local representative dated 5th June 2011 was submitted to satisfy a query raised by the evaluation board on the 2nd June 2011 and she added that the document referred to a 5-door saloon and not hatchback as Dr Cremona seemed to imply. Dr Grech stressed that her client had indicated in the firm’s original tender submission that it would provide the cars with the odometer in km and the company was quite aware that, if it would fail at that, the tender conditions contemplated considerable penalties. Dr Grech drew the attention of the Public Contracts Review Board that the purpose of the appeal was to discuss the offer of the preferred bidder and not that of her client which the evaluation board had already found it compliant, so much so, that, at one stage, it was recommended for the award of this tender.

Dr Reuben Farrugia, representing Peugeot’s local agent, first remarked that Transport Malta only categorised cars as ‘saloon’ or ‘estate’ but, at a later stage, after making further enquiries, corrected himself in the sense that log books issued by Transport

Malta included other categories, such as, hatchbacks. Dr Farrugia was glad that both Fremond Ltd and Burmarrad Commercials Ltd were inclined to offer the Peugeot 508 model since it was a technically compliant vehicle. He added that it was not Transport Malta that decided on whether a car was a saloon or a hatchback but one had to rest on the technical literature which car manufacturers were obliged to draw up in accordance with EU legislation.

Mr Scicluna remarked that, whilst the tender document was, practically, the same one that was issued when the current contract was awarded, yet he conceded that he was not aware of any security considerations in opting for a 4-door saloon instead of a 5-door car although his predecessor might have been when he drafted this tender document.

Mr Mario Gauci, also representing Burmarrad Commercials Ltd, confirmed that his firm had tendered to provide a 4-door saloon with the tachometer and odometer displaying km and not miles and he also confirmed that this was going to be a special order. He added that, financially, it would be highly unreasonable for him to import 39 cars which would not be suitable to service this contract.

Mr Darren de Domenico, a representative of Frank Borda Ltd, had no comments of offer except to leave the matter in the hands of the Public Contracts Review Board for its decision.

The Chairman PCRB suspended the hearing for a few minutes to consult with Public his fellow Board members and on resuming informed those present that Public Contracts Review Board was going to proceed as follows:-

- i. the regulations allowed the Public Contracts Review Board to appoint experts to assist it in its work and it would therefore appoint an independent expert to advise on the appropriate classification of the Skoda Octavia model, namely if a 4-door saloon or a 5-door hatchback, and
- ii. to request the general sales manager of Michael Debono Ltd, Mr Massimo Panzavecchia, to confirm by affidavit which version was correct with regard to the tachometer and odometer of the Toyota Avensis model since the two certifications that he had issued seemed rather contradictory and, as far as possible, to back his statement by certificate/s from the manufacturer.

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 of 1st July 2011 and 28th June 2011 respectively and through the verbal submissions made during the hearing held on the 31st August 2011, had objected against the decision taken by the Nadur Local Council to award the tender to Mr Anthony Mercieca as the cheapest compliant tender;
- Case No. 320 - having noted the appellant (Burmarrad Commercials Ltd) firm's representatives' claims and observations regarding the fact that (a) the preferred

bidder had presented its tender with a short validity date, namely it expired on the 21st October 2011 instead of on the 24th October 2011 with major emphasis being placed on the fact that clause 19.1 stipulated that “Any tenderer who quotes a shorter validity period will be rejected”, (b) albeit clause 19.2, in exceptional circumstances, allowed the extension of the validity date of the tender, yet in this case that was not likely as the preferred tenderer had already approached the appellant offering to sell the tendered Skoda Octavia vehicles should the said tenderer decline the tender, something which one could do by opting to refuse to extend the validity date without even forfeiting the bid bond, (c) the preferred bidder had no intention to accept the award of the tender because the price quoted for the vehicles was one that could be offered by a car importer, such as Frank Borda Ltd, but, on the other hand, it had no experience in car leasing and maintenance workshops, (d) clause 20 explained that the bond served as a guarantee so that the tenderer would not withdraw an offer up to the expiry date of the bid bond and, in this regard, no discretion was allowed to the Contracts Department or to the contracting authority except to permit a correction to an incorrect validity date or value within two working days, namely during adjudication and not after tender award, (e) in this case, the tender of Frank Borda Ltd should have been disqualified from the start, namely at the administrative compliance stage, (f) the preferred bidder offered the Skoda Octavia which was not a 4-door saloon car but a 5-door hatchback type and, as a consequence, not in accordance with the Technical Specifications at Volume 3 *point (f)* ‘four door type saloon’, (g) technically, the basic distinction between a 4-door and a 5-door was that a 4-door saloon has three compartments, namely, the engine compartment, the passenger seating and the luggage booth whereas a 5-door car was a hatchback consisting of two compartments, namely, the engine compartment and the passenger seating compartment which included the luggage booth, (h) the construction of a 3 compartment car, namely, a 4-door saloon, provided more security to the passengers but was more costly and, therefore, it was not level playing field to allow tenderers to offer a 5-door car when the other tenderers were offering the more costly 4-door car as requested by the tender document, (i) following receipt of letter dated 2nd June 2011 and which was sent by the evaluation board Burmarrad Commercials Ltd confirmed – corroborated by a letter from the local representatives of Toyota - that both the ‘tachometers’ and ‘odometers’ were in km/h and km as requested in the tender document at *Point (k)* of Volume 3 ‘Technical Specifications’ (page 40), (j) the local Toyota representative had confirmed that, should the bid be successful, they would place a special order so that the cars would be supplied with meters in km to respect local legislation and taking into account the local use of speed cameras, (k) without prejudice to the appellant’s original offer, which the same appellant company claimed was according to tender specifications, in line with sub-clause 17.5 that envisaged a discount without materially altering the bill of quantities /financial statement and in terms of sub-clause 27.4 that envisaged no reduction or alteration to tender price, Burmarrad Commercials Ltd was willing to, alternatively, offer the Peugeot 508 model instead of the Toyota Avensis at the same quoted price of € 19.40 daily for each vehicle, (l) the Chairman of the evaluation board had requested to inspect the Toyota Avensis which request was accepted but, for some reason, the inspection did not take place, (m) the letter from Michael Debono Ltd presented by Burmarrad Commercials Ltd referred to Toyota Avensis 5-door and not 4-door and, therefore, it was not in line with tender

specifications adding that the date of the letter, the 5th of June 2011, was well after the closing date of the tender, (n) the confirmation from the Toyota local representative dated 5th June 2011 was submitted to satisfy a query raised by the evaluation board on the 2nd June 2011 adding that the document referred to a 5-door saloon and not hatchback as Fremond's legal representative (Case No. 321) seemed to imply, (o) the purpose of the appeal was for those present to discuss the offer of the preferred bidder and not that of Burmarrad Commercials Ltd which the evaluation board had already found it to be compliant, so much so, that, at one stage, it was recommended for the award of this tender and (p) financially, it would be highly unreasonable for the appellant company to import 39 cars which would not be suitable to service this contract;

- Case No. 320 - having considered the contracting authority's representatives' submissions, namely that (a) the evaluation board had brought to the attention of the Contracts Department the issue of the short validity period of the tender submitted by the preferred bidder, i.e. that it was dated 21st instead of 24th October 2011, adding that it was also noted that, in fact, 150 days after the closing date of the tender stipulated in Clause 19.1 should have read 21st October 2011 and not 24th October 2011 as printed on the front page of the tender document, (b) on the 2nd June 2011 the General Contracts Committee replied that, in the circumstances, the tender form submitted by Frank Borda Ltd was to be considered as valid, (c) in the first evaluation report the board had recommended the award to Burmarrad Commercials Ltd as the cheapest compliant tender as the offer by Frank Borda Ltd was found to be technically not compliant since the car offered was a 5-door instead of a 4-door saloon, (d) Burmarrad Commercials Ltd had furnished the evaluation board with a confirmation that the Toyota Avensis it offered had the speedometer and odometer in km and the evaluation board rested on that information conscious that the submission of false information in a tender submission meant serious consequences for the bidder, (e) the Contracts Department had advised the evaluation board that "*the General Contracts Committee (GCC) feels that the case of doors should be considered as minimum specifications. Once a vehicle is officially classified as a saloon it should continue to be considered for further evaluation*" and (f) the evaluation board consulted the log book issued by Transport Malta and it found that the Skoda Octavia was specified as 'Octavia saloon' and in view of the comment made by *General Contracts Committee* and the fact that the offer by Frank Borda Ltd was financially the most advantageous to the department, the evaluation board issued the second recommendation to award the tender to Frank Borda Ltd;
- Case No. 321 - having noted the appellant (Fremond Ltd) firm's representatives' claims and observations regarding the fact that (a) an objection to the award of the tender to Frank Borda Ltd was being filed because the recommended tenderer's bid was not administratively and technically compliant, (b) the preferred bidder had presented its tender with a short validity date, namely it expired on the 21st October 2011 instead of on the 24th October 2011 with major emphasis being placed on the fact that clause 19.1 stipulated that "*Any tenderer who quotes a shorter validity period will be rejected*", (c) in spite of the fact that the contracting authority could have requested the preferred bidder to rectify the bid bond after the closing date of the tender but before the notification of the award, yet, it appeared that Frank Borda Ltd did not rectify its bid bond, (d) albeit,

as per Volume 3 ‘Technical Specifications’ *point (f)* of the tender document the contracting authority requested a 4-door type saloon, yet the appellant company reckoned that the model that Frank Borda Ltd, as the agent/distributor of the Skoda automobiles in Malta, could offer was the Skoda Octavia which was a hatchback and, therefore, a 5 door car, (e) whilst a hatchback, like the Skoda Octavia – as delineated by the technical specifications issued by Skoda itself which referred to it as a 5-door car and, as a result, a hatchback - was a vehicle with a boot incorporating the rear window that opened vertically to access the storage area which was not separated from the passenger compartment, on the other hand a 4 door saloon (or sedan) vehicle had the boot separate from the passengers area, (f) if Burmarrad Commercials Ltd tendered with the Toyota Avensis T2 2009 model, namely the same model that Fremond Ltd offered in Option B, then the tender submitted by Burmarrad Commercials Ltd should have been disqualified due to the fact that the Toyota Avensis T2 2009 models have their odometers in m/h and not in km/h which fact had been confirmed by the representative of Toyota in Malta (Michael Debono Limited) by email dated 23rd May 2011 and, therefore, the vehicle offered by Burmarrad Commercials was technically non compliant with *point (k)* of Volume 3 - Technical Specifications of the tender document which requested that “*the units of the Tachometers and Odometers have to be in km/h and km*”, (g) Burmarrad Commercials Ltd supplied incorrect information in its tender submission when it indicated the year of manufacture as 2011 instead of 2009 and that the odometer was in km and (h) whilst, by letter dated 22nd June 2011 sent by the Contracts Department the latter stated that Fremond Ltd’s Option A, where the Peugeot 508 model was offered, was technically compliant but not the cheapest, yet, in view of the above-mentioned explanations, the tender should be awarded to the appellant company (Case No. 321) for Option A for it being the only, technically and administratively, compliant tender;

- Case No. 321 - having considered the contracting authority’s representatives’ submissions, namely that (a) the evaluation board had brought to the attention of the Contracts Department the issue of the short validity period of the tender submitted by the preferred bidder, i.e. that it was dated 21st instead of 24th October 2011, adding that it was also noted that, in fact, 150 days after the closing date of the tender stipulated in Clause 19.1 should have read 21st October 2011 and not 24th October 2011 as printed on the front page of the tender document, (b) on the 2nd June 2011 the General Contracts Committee replied that, in the circumstances, the tender form submitted by Frank Board Ltd was to be considered as valid, (c) in the first evaluation report the board had recommended the award to Burmarrad Commercials Ltd as the cheapest compliant tender as the offer by Frank Borda Ltd was found to be technically not compliant since the car offered was a 5-door instead of a 4-door saloon, (d) Burmarrad Commercials Ltd had furnished the evaluation board with a confirmation that the Toyota Avensis it offered had the speedometer and odometer in km and the evaluation board rested on that information conscious that the submission of false information in a tender submission meant serious consequences for the bidder, (e) the Contracts Department had advised the evaluation board that “*the General Contracts Committee (GCC) feels that the case of doors should be considered as minimum specifications. Once a vehicle is officially classified as a saloon it should continue to be considered for further evaluation*”, (f) the evaluation board consulted the log book issued by Transport

Malta and it found that the Skoda Octavia was specified as ‘Octavia saloon’ and in view of the comment made by *General Contracts Committee* and the fact that the offer by Frank Borda Ltd was financially the most advantageous to the department, the evaluation board issued the second recommendation to award the tender to Frank Borda Ltd and (g) whilst the tender document was, practically, the same one that was issued when the current contract was awarded, yet one had to concede that the contracting authority was not aware of any security considerations in opting for a 4-door saloon instead of a 5-door car although the previous drafters of the tender document might have been at the time;

- having also considered Peugeot’s local agent’s legal representative’s references to (a) Peugeot was glad that both Fremond Ltd and Burmarrad Commercials Ltd were inclined to offer the Peugeot 508 model since it was a technically complaint vehicle and (b) the fact that it was not Transport Malta that decided on whether a car was a saloon or a hatchback but one had to rest on the technical literature which car manufacturers were obliged to draw up in accordance with EU legislation,

reached the following conclusions:

1. The Public Contracts Review Board opines that there was no claim against the fact that the preferred bidder had presented its tender with a short validity date, namely it expired on the 21st October 2011 instead of on the 24th October 2011. This Board has deliberated upon this issue bearing in mind that clause 19.1 of the tender document stipulated that any “*tenderer who quotes a shorter validity period will be rejected*”. Undoubtedly, this particular fact cannot go unnoticed.
2. As was agreed during the hearing, this Board, following the usual formalities – proof of no conflict of interest and so forth - appointed a technical expert, Mr Philip Zammit (Motor Surveyor / Technical Expert), to advise the Board on the appropriate classification of the Skoda Octavia model, namely if it classifies as a 4-door saloon or a 5-door hatchback. During the hearing it was agreed that the findings of this expert would have been binding on all parties involved, including this Board. Following a thorough analysis of the Skoda Octavia models referred to in appendices ‘A’ and ‘B’ wherein these referred to a 4 door saloon and 5 door hatch model respectively, in a letter sent to this Board bearing the date of 24th September 2011, Mr Zammit concluded as follows, namely:

Quote

Sheet **No 1** shows a photo of the hatch door on all the Octavia models – i.e. except for the Octavia Estate and the Octavia Scout. These last two models are a Station Wagon 5 dr and a 4x4 5 dr.

On sheet **No 3** the Octavia Ambiente – ambition – model is highlighted in yellow at the 2 ltr turbo diesel engine version.

On sheets **Nos 4 & 5** the Octavia Elegance model with 2 ltr turbo Diesel engine are also marked with the yellow highlighter.

These sheets are full with all the different engine types and capacities that could be fitted on all Octavia models. It is to be noted that all relevant models with different engines are manufactured only as 5 dr hatch.

Unquote

As a result, this Board has no alternative but to conclude that the Octavia is not a four door saloon but a five door hatchback. This conclusion has a direct implication on the evaluation and adjudication process of this tender. This Board recognises that the construction of a 3 compartment car, namely, a 4-door saloon, may have provided more security to the passengers but was more costly and, therefore, it was not providing a level playing field in allowing tenderers to offer a 5-door car when the other tenderers were offering the more costly 4-door car as requested by the tender document.

3. In the first evaluation report the evaluation board had recommended the award to Burmarrad Commercials Ltd as the cheapest compliant tender as the offer by Frank Borda Ltd was found to be technically not compliant since the car offered was a 5-door instead of a 4-door saloon. This Board has deliberated further within the context of the advice given to the evaluation board by the General Contracts Committee wherein the latter had stated that it *“feels that the case of doors should be considered as minimum specifications. Once a vehicle is officially classified as a saloon it should continue to be considered for further evaluation”*. Needless to say that the technical opinion expressed by Mr Zammit has clarified the issue to one and sundry whereby now it is more evident that the car offered (Octavia) is a 5-door hatchback instead of a 4-door saloon (as requested by the tender document). This Board argues that the log book issued by Transport Malta wherein the Skoda Octavia is specified as ‘Octavia saloon’ needs to be amended to enable a more truthful representation of state of fact. As a matter of fact, on this particular issue, this Board agrees in principle with the argument raised by Dr Farrugia wherein he stated that it was not Transport Malta that decided on whether a car was a saloon or a hatchback but one had to rest on the technical literature which car manufacturers were obliged to draw up in accordance with EU legislation.
4. The Public Contracts Review Board also agrees with appellant’s claim (Case No. 320) that the purpose of the appeal was for those present to discuss the offer of the preferred bidder and not that of Burmarrad Commercials Ltd which the evaluation board had already found it to be compliant, so much so, that, at one stage, it was recommended for the award of this tender with the offer being regarded as the cheapest compliant tender as the offer by Frank Borda Ltd was found to be technically not compliant since the car offered was a 5-door instead of a 4-door saloon.
5. The Public Contracts Review Board also acknowledges the fact that, at this point, it is anything but permissible for anyone involved in the adjudication of this tender to accept a reduction or alteration to tender price originally submitted, as Burmarrad Commercials Ltd was willing to, alternatively, offer in respect of the Peugeot 508 model where instead of the Toyota Avensis it was inclined to offer the latter at the same quoted price of € 19.40 daily for each vehicle

6. In line with the request made by this Board during the hearing, the General Sales Manager of Michael Debono Ltd, Mr Massimo Panzavecchia, made the following sworn statement (affidavit) in the presence of Dr Louisa Vella Bardon B.A., LL.D on the 20th September 2011:

“I hereby confirm under oath that the information in Doc. “A”, namely that the cars can be supplied in Kilometres for both speedometer and odometer, is correct. Furthermore, I confirm that our initial information was as per Doc. “B” but subsequent data obtained from our principals confirmed the information in Doc. “A”.”

Also in line with request made by this Board at the conclusion of the hearing session on the 31st August 2011, a statement was made on the 20th September 2011 by the manufacturer (represented by Mr David Nolan) in the form of an email addressed to Mr Geoffrey Debono wherein it was stated:

“Following our conversations over the past few months and with specific regard to the possible supply of 40 new Toyota Avensis fitted with the speedometer and odometer in KPH as opposed to MPH I (am) pleased to confirm that this can be done. I trust that this information is of assistance however should you require any further information pls do not hesitate to contact me”

In view of the above this Board finds in favour of both appellant companies and, whilst recommending that the deposit paid by the said appellants should be reimbursed, also recommends that (a) the offer submitted by the preferred bidder be rejected in terms of Clause 19.1 and (b) both participating tenderers (appellants in respect of Case No. 320 and 321 respectively) should be reintegrated in the evaluation process and that the most administratively, technically and economically compliant offer be awarded this tender.

Alfred R Triganza
Chairman

Carmel J Esposito
Member

Joseph Croker
Member

30 September 2011