

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 413

RC/01/2012

**Call for Tenders for the Provision of Authorised Officer Services – Reġjun Ċentrali**

This call for tenders was published in the Government Gazette on the 24<sup>th</sup> January 2012. The closing date for this call – which attracted no fewer than two (2) tenderers - with an estimated budget of € 120,000 p.a. (€ 600,000 over 5 years) was the 15<sup>th</sup> March 2012.

Messrs Synthesis Management Services Ltd filed an objection on the 19<sup>th</sup> April 2012 against the decision of the Reġjun Ċentrali to recommend tender award in favour of Toad Management Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmelo Esposito and Mr Paul Mifsud as members convened a public hearing on Wednesday 16<sup>th</sup> May, 2012 to discuss this objection.

Present for the hearing:

### **Synthesis Management Services Ltd**

Dr Kevin Camilleri Xuereb	Legal Representative
Mr Raphael Carabott	Representative
Mr Raymond Grima	Representative
Mr Charles Zammit	Representative
Mr Stephen Cassar	Representative

### **Toad Management Services Ltd**

Dr Alex Sciberras	Legal Representative
Mr David Soler	Representative
Mr Anthony Borg Caruana	Representative
Mr John Bonavia	Representative

### **Central Region**

Dr Keith Grech	Legal Representative
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### **Evaluation Board**

Mr Peter Bonello	Evaluator
Mr Samuel Herd	Executive Secretary



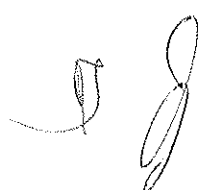
After the Chairman's brief introduction, wherein the Chairman Public Contracts Review Board informed those present that the issue as to whether the appeal should have been lodged in terms of Reg. 83 (4) or Reg. 21 (3) has been clarified and overcome such that the appellant company's case suffered no prejudice so much so that the appeal was accepted and the hearing appointed for today, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Kevin Camilleri Xuereb, legal representative of Synthesis Management Services Ltd, the appellant company, stated that by email dated 16<sup>th</sup> April 2012, the contracting authority had informed his client that its offer was not considered as the most financially advantageous one and that the tender was recommended for award to Toad Management Services Ltd.

### **A) Draft Tender Document**

Dr Camilleri Xuereb submitted that:-

- i. one of his client's contentions was that the recommended tenderer could have been in possession of the tender document prior to the issue of the call for tenders thus giving the company an edge over his client;
  - ii. this claim was substantiated by an email sent on the 9<sup>th</sup> November 2011 by Ms Cynthia Misokova of the OPM to all regions whereby she furnished them with the draft tender document for the provision of authorised officer services and requested the regions to give their feedback on the document;
  - iii. Mr Samuel Herd, executive secretary of the Central Region, sent emails on the 14<sup>th</sup> and 22<sup>nd</sup> November 2011 to Mr David Soler, a representative of Toad Management Services Ltd, the recommended tenderer, with the subject being this draft tender document and, in the latter email, Mr Herd requested Mr Soler to print the tender document by the following day;
  - iv. a copy of these emails were posted to his client by unknown person/s, according to information furnished by his client;
  - v. considering that the tender was issued on the 24<sup>th</sup> January 2012 one had to question why the draft tender document was in the possession of the recommended tenderer as early as November 2011 and if there could have been an 'indirect' input in the drafting of the tender document by the recommended tenderer that could have put the said company at an advantage *vis-a-vis* its competitors;
- and
- vi. this tender document was common for all regions and the same issue might arise in adjudication of other tenders for this same service.



Dr Keith Grech, legal representative of Central Region, remarked that:-

- a. Synthesis Management Services Ltd with Reg. No. C 55191 was incorporated and registered on 1<sup>st</sup> February 2012;
- b. therefore, any reference to something that had taken place in November 2011, when the appellant company was not even registered, could not have led to any damages to the appellant firm;
- c. that fact also led one to question whether the appellant firm possessed the 3 year experience required in the tender document;
- d. in November 2011 members of Toad Management Services Ltd were rendering a service to the Central Region;
- e. this tender had been issued on a previous occasion and Toad Management Services Ltd had participated and, in fact, it was the current provider of this service to Central Region;

and

- f. the tender document which Mr Herd referred to Mr Soler was a draft and not the published tender document.

Dr Camilleri Xuereb remarked that (i) way back in October 2011 Mr David Soler, of Toad Management Services Ltd, had informed Mr Raphael Carabott, then a Toad Management Services Ltd employee (now an employee of Synthesis), in writing that he could no longer trust him, and (b) the tender document sent to Mr Herd by Ms Misokova contained a number of amendments to the version published in connection with the previous call for tenders.

Mr Samuel Herd, executive secretary of the Central Region, under oath, gave the following evidence:-

- a. in November 2011 he had his office at the Msida Local Council whereas the office of the Tribunal was at San Gwann and since he did not have a functioning printer he sent the draft tender document to the Tribunal's office to be printed out so that he would start working on it;
- b. in the email he sent to Mr David Soler (soled001@onvol.net) all that he requested was to have draft tender document printed out;
- c. the other printer in the Msida office block belonged to the Msida Local Council but he was not attached to that council and he did not have a printer at home;
- d. albeit the draft tender was considered a confidential document at that stage, yet it did not occur to him to print it out at a stationer's so that it would remain for his eyes only but, instinctively, he sent it to Mr Soler's private office at San Gwann where he performed the duties of authorised officer for the Central Region;

- e. he had worked with Mr Soler for about 6 weeks until his office was set up at the Msida Local Council;
  - f. Ms Misokova had sent the draft tender document to several other persons, including himself, as evidenced from the email addresses;
  - g. the tender document published in 2012 was an amended version of the draft tender document;
- and
- h. he could not tell if the published tender document was basically the same as that issued 5 years previously and he was not aware of the contents of the latter document.

At this point Mr Soler, representing Toad Management Services Ltd, under oath, confirmed that soled001@onvol.net was the email address he used in the performance of his duties.

#### **B) Allocation of Points for Technical Evaluation**

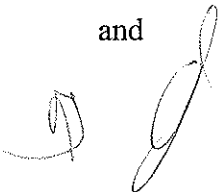
Dr Camilleri Xuereb submitted that:-

- i. one could not fail to note that each of the five evaluators allocated identical points in respect of each criterion that featured in the Technical Evaluation Grid as if none of the evaluators had a differing opinion on the various criteria under examination;
  - ii. one also noted that the points allocated by two of the evaluators, Mr Joe Camilleri and Dr Malcolm Mifsud, were evidently corrected at some stage;
- and
- iii. one had also to keep in view that the award criterion was not price but based on a Most Economically Advantageous Tender (MEAT) principle.

The Chairman Public Contracts Review Board pointed out that:-

- a. the purpose of evaluating a tender on a Most Economically Advantageous Tender basis was to have a number of evaluators, in this case 5 evaluators, examining the technical aspects of each bid independently from one another and then the points allocated by each evaluator would be aggregated to arrive at the final mark;
- b. the fact that all five evaluators awarded the same number of points to both tenderers on all the different criteria that featured in the Technical Evaluation Grid led to the evident conclusion that points were allocated by each evaluator after having been agreed to by all five evaluators;

and



- c. the way the technical evaluation was carried out defeated the scope of resorting to the Most Economically Advantageous Tender procedure and tainted the technical evaluation process.

Dr Grech submitted that once both bids were found to be technically of the same standing then the contracting authority had to decide on the award of the tender on the basis of price and in that regard it turned out that the recommended tenderer was about €5,000 cheaper (€42,000 vs €46,973).

### **C) Clarification Sought From Toad Management Services Ltd**

Dr Camilleri Xuereb remarked that:-

- a. the contracting authority sought a clarification from the recommended tenderer to confirm whether the administrative staff mentioned in the tender submission would be utilised for the Authorised Officer Services and whether the Central Region would incur any expenses for their services;
- b. no clarification was requested from his client;
- c. according to clause 12.3 at page 13 of the tender document 'Matrix for Points Scoring' under 'Work Plan', "*a weak answer which did not provide sufficient information in the core aspect of the question and/or lacked clarity*" merited 6 to 9 marks whereas "*an average answer which has either left one or more non-core aspects unexplained or needed to provide additional information to provide clarity in response*" merited 10 to 19 points;

and

- d. given that the recommended tenderer was asked for a clarification then the maximum points that should have been allocated under 'Work Plan' were 19 points and not 38 points which denoted an answer which exceeded the requirement.

Mr Herd confirmed that the estimated value of the tender was €120,000 per annum for 5 years, i.e. a total of €600,000, whereas the recommended offer was €42,000 per annum for 5 years, i.e. a total of €210,000.

Dr Alex Sciberras, legal advisor of Toad Management Services Ltd, the recommended tenderer, provided the following explanations:-

- i. up to the time that this tender was issued members of the appellant firm were employees of Toad Management Services Ltd with ample access to commercially sensitive information;
- ii. there was evidence that the directors of Synthesis Management Services Ltd, e.g. Mr Raphael Carabott and Mr Raymond Grima, had been planning for months to set up a new company to perform authorised officer services and they hung on to Toad Management Services Ltd to obtain commercially sensitive information;

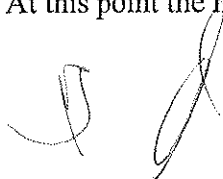
- iii. prior to the reform undertaken with regard to the local councils system, the authorised officer and the executive secretary of the local council were one and the same person and, during the ensuing transition period, the executive secretaries and the (new) authorised officers worked side by side to ensure a smooth handover;
  - iv. the adjudicating boards in such cases were appointed by the Department of Contracts;
  - v. one ought to exhibit the tender document published in connection with the previous call for tenders some 5 years previous, draft tender document which was the subject of the email exchanged between Mr Herd and Mr Soler and the tender document published in 2012 so that it would be confirmed that the main changes concerned the job description of the executive secretary and of the authorised officer along with the award criteria (clause 12.2 'Award Criteria');
  - vi. the appellant company could not present contracts executed by his client, the recommended tenderer, as evidence of his experience;
- and
- vii. the firm has been awarded the tender otherwise it would have lodged an appeal challenging the appellant company's eligibility on the grounds of experience.

Dr Grech was informed that a particular person, who was appointed by government, was advising the evaluation board members as to how to allocate the number of points at technical evaluation stage and the way this was being carried out was giving rise to appeals.

The Chairman Public Contracts Review Board remarked that from the evidence given at the hearing the Board could not overlook the fact that the procedure followed during this tendering process was defective in such a way that it could lead to the tendering procedure being declared null. Nevertheless, in order to enable all interest parties more time to elucidate the Board further, the Chairman allowed the following timeframes to the parties concerned to make written submissions to the Public Contracts Review Board, which would in turn be circulated among the interested parties:

- a) the recommended tenderer - *Toad Management Services Ltd* - up to noon of the 23<sup>rd</sup> May 2012 (*Week No.1*)
  - b) the appellant company - *Synthesis Management Services Ltd* - a week after that date, namely up to noon of the 30<sup>th</sup> May 2012 (*Week No.2*)
- and
- c) the contracting authority - *Central Region* - a further week, namely up to noon of the 6<sup>th</sup> June 2012 (*Week No.3*)

At this point the hearing was brought to a close.



This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 19<sup>th</sup> April 2012 and also through their verbal submissions presented during the hearing held on the 16<sup>th</sup> May, 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 16<sup>th</sup> April 2012, the contracting authority had informed the appellant company that its offer was not considered as the most financially advantageous one and that the tender was recommended for award to Toad Management Services Ltd, (b) with regard to the draft tender document (1) one of the appellant company's contentions was that the recommended tenderer could have been in possession of the tender document prior to the issue of the call for tenders thus giving the company an edge over the appellant, (2) this claim was substantiated by an email sent on the 9<sup>th</sup> November 2011 by Ms Cynthia Misokova of the OPM to all regions whereby she furnished them with the draft tender document for the provision of authorised officer services and requested the regions to give their feedback on the document, (3) Mr Samuel Herd, executive secretary of the Central Region, sent emails on the 14<sup>th</sup> and 22<sup>nd</sup> November 2011 to Mr David Soler, a representative of Toad Management Services Ltd, the recommended tenderer, with the subject being this draft tender document and, in the latter email, Mr Herd requested Mr Soler to print the tender document by the following day, (4) according to the appellant company's representative, a copy of these emails were posted to the appellant company by unknown person/s, (5) considering that the tender was issued on the 24<sup>th</sup> January 2012 one had to question why the draft tender document was in the possession of the recommended tenderer as early as November 2011 and if there could have been an 'indirect' input in the drafting of the tender document by the recommended tenderer that could have put the said company at an advantage *vis-a-vis* its competitors, (6) this tender document was common for all regions and the same issue might arise in adjudication of other tenders for this same service, (c) way back in October 2011 Mr David Soler, of Toad Management Services Ltd, had informed Mr Raphael Carabott, then a Toad Management Services Ltd employee (now an employee of Synthesis), in writing that he could no longer trust him, (d) the tender document sent to Mr Herd by Ms Misokova contained a number of amendments to the version published in connection with the previous call for tenders, (e) with regard to the 'Allocation of Points for Technical Evaluation' (1) one could not fail to note that each of the five evaluators allocated identical points in respect of each criterion that featured in the Technical Evaluation Grid as if none of the evaluators had a differing opinion on the various criteria under examination, (2) one also noted that the points allocated by two of the evaluators, Mr Joe Camilleri and Dr Malcolm Mifsud, were evidently corrected at some stage, (3) one had also to keep in view that the award criterion was not price but based on a 'Most Economically Advantageous Tender' (MEAT) principle and (f) with regard to the 'Clarification Sought From Toad Management Services Ltd' (1) the contracting authority sought a clarification from the recommended tenderer to confirm whether the administrative staff mentioned in the tender submission would be utilised for the Authorised Officer Services and whether the Central Region would incur any expenses for their services, (2) no clarification was requested from the appellant company, (3) according to clause 12.3 at page 13 of the tender document 'Matrix for Points Scoring' under 'Work Plan', "a

*weak answer which did not provide sufficient information in the core aspect of the question and/or lacked clarity*” merited 6 to 9 marks whereas “an average answer which has either left one or more non-core aspects unexplained or needed to provide additional information to provide clarity in response” merited 10 to 19 points, (4) given that the recommended tenderer was asked for a clarification then the maximum points that should have been allocated under ‘Work Plan’ were 19 points and not 38 points which denoted an answer which exceeded the requirement;

- having considered the contracting authority’s representatives’ reference to the fact that (a) Synthesis Management Services Ltd with Reg. No. C 55191 was incorporated and registered on 1<sup>st</sup> February 2012, (b) therefore, any reference to something that had taken place in November 2011, when the appellant company was not even registered, could not have led to any damages to the appellant firm, (c) that fact also led one to question whether the appellant firm possessed the 3 year experience required in the tender document, (d) in November 2011 members of Toad Management Services Ltd were rendering a service to the Central Region, (e) this tender had been issued on a previous occasion and Toad Management Services Ltd had participated and, in fact, it was the current provider of this service to Central Region, (f) the tender document which Mr Herd referred to Mr Soler was a draft and not the published tender document, (g) according to Mr Herd (1) in November 2011 he had his office at the Msida Local Council whereas the office of the Tribunal was at San Gwann and since he did not have a functioning printer he sent the draft tender document to the Tribunal’s office to be printed out so that he would start working on it, (2) in the email he sent to Mr David Soler (soled001@onvol.net) all that he requested was to have draft tender document printed out, (3) the other printer in the Msida office block belonged to the Msida Local Council but he was not attached to that council and he did not have a printer at home, (4) albeit the draft tender was considered a confidential document at that stage, yet it did not occur to him to print it out at a stationer’s so that it would remain for his eyes only but, instinctively, he sent it to Mr Soler’s private office at San Gwann where he performed the duties of authorised officer for the Central Region, (5) he had worked with Mr Soler for about 6 weeks until his office was set up at the Msida Local Council, (6) Ms Misokova had sent the draft tender document to several other persons, including himself, as evidenced from the email addresses, (7) the tender document published in 2012 was an amended version of the draft tender document, (8) he could not tell if the published tender document was basically the same as that issued 5 years previously and he was not aware of the contents of the latter document, (h) once both bids were found to be technically of the same standing then the contracting authority had to decide on the award of the tender on the basis of price and in that regard it turned out that the recommended tenderer was about €5,000 cheaper (€42,000 vs €46,973) and (i) the estimated value of the tender was €120,000 per annum for 5 years, i.e. a total of €600,000, whereas the recommended offer was €42,000 per annum for 5 years, i.e. a total of €210,000;
- having considered the recommended tenderer’s representatives’ reference to the fact that (a) Mr Soler, representing Toad Management Services Ltd, under oath, confirmed that soled001@onvol.net was the email address he used in the performance of his duties, (b) up to the time that this tender was issued members of the appellant firm were employees of Toad Management Services Ltd with ample access to commercially sensitive information, (c) there was evidence that the directors of Synthesis Management Services Ltd, e.g. Mr Raphael Carabott and Mr



Raymond Grima, had been planning for months to set up a new company to perform authorised officer services and they hung on to Toad Management Services Ltd to obtain commercially sensitive information, (d) prior to the reform undertaken with regard to the local councils system, the authorised officer and the executive secretary of the local council were one and the same person and, during the ensuing transition period, the executive secretaries and the (new) authorised officers worked side by side to ensure a smooth handover, (e) the adjudicating boards in such cases were appointed by the Department of Contracts, (f) one ought to exhibit the tender document published in connection with the previous call for tenders some 5 years previous, draft tender document which was the subject of the email exchanged between Mr Herd and Mr Soler and the tender document published in 2012 so that it would be confirmed that the main changes concerned the job description of the executive secretary and of the authorised officer along with the award criteria (clause 12.2 'Award Criteria), (g) the appellant company could not present contracts executed by the recommended tenderer as evidence of his experience and (h) the firm has been awarded the tender otherwise it would have lodged an appeal challenging the appellant company's eligibility on the grounds of experience;

- having considered the written submissions made to the Public Contracts Review Board by

(a) the recommended tenderer - *Toad Management Services Ltd*, particularly, wherein the said tenderer

1. objected to the Public Contracts Review Board because they alleged that they were not given enough chance to prove their case  
and
2. demanded the abstention of the present Board and that the case be heard again by a different Review Board

Furthermore, without prejudice, the recommended tenderer's submission proceeded by placing emphasis on the following, namely:

3. that even if the appellant company's representatives were misinformed by the contracting authority, they should have been knowledgeable enough to file a proper objection. It was thus further argued that misinformation by the contracting authority does not render the tendering process null.
4. that the appellant company filed the objection under Rule 21, while it should have been filed under Rule 84 which renders the objection null.
5. that the deposit made by the appellant company should have been according to Regulation 84 and the amount actually deposited (400 euro) does not cover the necessary amount, again rendering the appeal null.
6. that the appellant company should have produced evidence that the sending of the email in question caused it prejudice or given advantage to others. The recommended tenderer argued that the appellant company failed to prove this.

7. that the appellant company was constituted on the 1<sup>st</sup> February 2012 and thus could not have suffered prejudice by an email sent when the company was not yet set up.
8. no evidence of collusion was produced, but only the naivety of the Executive Secretary was produced.
9. the appellant company should have used Rule 85(1) and filed a pre-contractual complaint and not let the process finish to file an appeal.
10. the Public Contracts Review Board should discard the production of the email in question as this is the private property of the receiver, Mr. David Soler.
11. that the appellant company was incorrect in stating that Toad Management Services Ltd should have had their points deducted because of the clarification sought from them, as this clarification only dealt with price issues.
12. that the appellant company should not have qualified as tenderers because, being set up on the 1<sup>st</sup> February 2012, they should have been disqualified under Clause 12 because they lack the required experience and management of similar contracts of 50,000 euro per annum.
13. complain that the Public Contracts Review Board did not hear members of the adjudication board giving explanations regarding points awarded and that the same Board cannot substitute its discretion for that of the adjudicating authority

(b) the appellant company - *Synthesis Management Services Ltd*, particularly, wherein by way of reply to those filed by the recommended tenderer, *inter alia* stated that during the hearing of the 16<sup>th</sup> May 2012, everyone present had equal opportunities to put forward their views, and, as a result, there was nothing objectionable in the way the proceedings were conducted.

Furthermore, the appellant company's submission proceeded by placing emphasis on the following, namely:

1. that Toad Management Services Ltd was put in an advantageous position and no proof was produced that Synthesis Management Services Ltd's directors received the same information.
2. that the document sent with the email was, in fact, the tender document as otherwise, Mr Herd testifying under oath would have denied it.
3. that, once it emerged during the hearing that the tender document had been sent via email by a member of the adjudication board to David Soler, who later submitted a bid, it follows that there was no need of further evidence, either by Toad Management Services Ltd or the contracting authority. As a consequence, Toad Management Services Ltd's claim that the proceedings breached their right to a fair hearing is to be rejected, so much so that they were allowed to file written submissions and
4. that any objections to the Board's decision should have been raised up there and then, but both Toad Management Services Ltd and the contracting authority remained silent, thus acquiescing to the Board's observation.

5. that the appellant company need not produce any proof of having suffered damages by the sending of the email, the possession of the draft contract by Toad Management Services Ltd clearly breached both the principle of equality and that of transparency. Even if Toad Management Services Ltd did not gain any advantage from the event, the process was still vitiated and the principle that justice must not only be done, but also seen to be done, should prevail.
6. the email sent by Mr Herd is relevant and thus admissible as evidence and does not breach David Soler's right to privacy.
7. that the Public Contracts Review Board did in fact ask the adjudication board members present, but no member offered any explanation, not even Mr Herd while testifying, offered any explanation for the points given.

(c) the contracting authority - *Central Region*, particularly, the submissions relating to the fact that

1. since the appellant company filed the appeal under the wrong *Rule* this rendered this appeal as null

and

2. it claimed that the Public Contracts Review Board has expressed its views before concluding the hearing on the validity of the appeal and thus this Board should not take cognizance of the case.

Furthermore, the contracting authority's submission proceeded by placing emphasis on the following, namely:

3. the fact that the contracting authority did not indicate the appropriate remedy in its letters to the appellant company dated 12<sup>th</sup> April and 16<sup>th</sup> April, does not render the tender null.
4. that the email of the 22<sup>nd</sup> November by Samuel Herd to David Soler did not vitiate the tendering process, because of the circumstances leading to it, as explained by the said witness.
5. that the appellant company's allegations of collusion and favouritism in favour of Toad Management Services Ltd are contradicted by facts and the adjudication board did not discriminate against any one of the bidders, so much so they were awarded the same points.
6. that the clarification requested from Toad Management Services Ltd was not related to the technical evaluation and thus carried no loss of points.
7. that the appellant company has not brought any evidence that Toad Management Services Ltd had in its possession the tender documents prior to the date when it was published.
8. the appellant company's claim that they appealed under Regulation 84 on the 12<sup>th</sup> April is unfounded as this letter was addressed to the Director of Local Councils and cannot be deemed as an appeal.



9. finally, the contracting authority requests the rejection by the Public Contracts Review Board of any new pleas raised in the appellant company's note of submission,

reached the following conclusions, namely:

1. On receipt of the first letter by the contracting authority, the appellant company filed an appeal on the 17th April 2012 under Rule 84 together with a deposit of Euro 1200. On receipt of the second letter from the contracting authority, the same appellant company filed another objection, this time as directed by the second misleading letter, under Rule 21, accompanied by a deposit of Euro 400.

As the contracting authority informed the Public Contracts Review Board that the value of the tender was under Euro 120,000, the Public Contracts Review Board deemed the latest objection as being the most appropriate and decided to hear this objection. It was for this reason that Euro1200 deposited with the first objection were refunded.

The Public Contracts Review Board opines that it goes against all principles of justice, as the contracting authority seems to be doing when asking for the nullity of the objection filed under Rule 84, for one to first misdirect someone and then for the same authority to ask action to be taken against such person or entity for acting on one's misguided advice.

2. The Public Contracts Review Board agrees with the appellant company that the fact that the recommended tenderer was in possession of the tender document (regardless of whether this was in draft format or the final version including a number of amendments to the version published in connection with the previous call for tenders), prior to the issue of the call for tenders, would have given the company an edge over the appellant company. This Board cannot but question why a draft copy of the tender document under review - which was issued on the 24<sup>th</sup> January 2012 - was in the possession of the recommended tenderer as early as November 2011.
3. This Board acknowledges that all could have been carried out with the best of intentions such as the fact that, according to Mr Herd (a) in November 2011 he had his office at the Msida Local Council whereas the office of the Tribunal was at San Gwann and since he did not have a functioning printer he sent the draft tender document to the Tribunal's office to be printed out so that he would start working on it, (b) albeit the draft tender was considered a confidential document, yet, at that stage, it did not occur to him to print it out at a stationer's so that it would remain for his eyes only but, instinctively, he sent it to Mr Soler's private office at San Gwann where he performed the duties of an authorised officer for the Central Region and (c) in the email he sent to Mr David Soler at soled001@onvol.net all that he requested was to have the draft tender document printed out, yet, this Board argues that, even if Toad Management Services Ltd did not gain any advantage from the event, the process was still vitiated and the principle that justice must not only be done, but also seen to be done, should prevail. This Board finds it difficult to accept that the process possessed such transparency and this despite of the fact that it could have well been through naiveté, yet, regardless, this Board considers the process to be vitiated.



4. The Public Contracts Review Board feels that the purpose of evaluating a tender on a *Most Economically Advantageous Tender* basis was to have a number of evaluators, in this case 5 evaluators, examining the technical aspects of each bid independently from one another and then the points allocated by each evaluator would be aggregated to arrive at the final mark. As a result, the fact that all five evaluators awarded the same number of points to both tenderers on all the different criteria that featured in the 'Technical Evaluation Grid' led to the evident conclusion that points were allocated by each evaluator after having been agreed to by all five evaluators. This Board contends that the way the technical evaluation was carried out defeated the scope of the contracting authority resorting to the *Most Economically Advantageous Tender* procedure and, in the Board's opinion, as a consequence, tainted the technical evaluation process.
5. The Public Contracts Review Board considers the fact that, with regard to the allegations made both by Toad Management Services Ltd and the contracting authority, the Public Contracts Review Board had already expressed itself on the matter during the hearing and should thus abstain, this Board insists that it has always been its 'modus operandi' to point out clearly most or all of its' members' possible apprehensions during open sessions. Undoubtedly, this operational policy has never been challenged to date as all present had acknowledged that certain observations made during the hearing solely served to give the chance to everyone to rebut them as well as elucidate further those present, including this Board members, in order to facilitate the deliberation process which would take place following the hearing. One cannot but observe that any objections to this 'modus operandi' should have been raised up, there and then, during the hearing, but both Toad Management Services Ltd and the contracting authority remained silent, thus acquiescing to the Board's observations.

Furthermore, this Board cannot see the point in it requesting all parties to provide it with written submissions to allow more input from the latter with a view to enable this Board to become more informed thus conducting a better deliberation process and then, as a result, whilst availing of this preferential opportunity considering that this Board only allows written submissions to be filed after the hearing, yet the same authors of these written submissions end up stating that their clients' position was prejudiced due to observations made during the hearing which observations could have been both verbally, during the hearing, as well as, in the written submissions, subsequent to the hearing, duly contested by all parties involved. This Board considers its operational process as a vivid example of a democratic *iter* at its peak. Also, no party's request was declined for evidence to be provided. This Board remains surprised by the claim made by the recommended tenderer's legal advisor wherein, *inter alia*, it was stated that the Public Contracts Review Board did not hear members of the adjudication board giving explanations regarding points awarded and that the same Board cannot substitute its discretion for that of the adjudicating authority. In the first instance, verbal and written submissions are considered more than enough for any interested party to make its case. Secondly, with regard to its discretionary powers, this Board argues that it has not only the right but the obligation to conduct proper analysis of the 'modus operandi' adopted by evaluation boards including the reasoning supporting all of the decisions taken. As a result, this Board does neither agree (a) with the claim made that it was manifestly in breach of the principles of natural justice and the right to a fair hearing, nor (b) with the request made by both the recommended tenderer's and contracting authority's respective representatives to abstain and seek for a fresh hearing to be reappointed by a differently composed body.

6. This Board contends that albeit a participating tenderer has the opportunity to file a pre-contractual complaint yet the same legal provisions do not preclude any party from letting the process finish for it to file an appeal.
7. The Public Contracts Review Board opines that is not fair for the contracting authority to raise up at the submission of written pleas' stage the matter of eligibility of the appellant as, after all, the same appellant company was found to be fully compliant at the adjudication stage. If, in fact the appellant company were ineligible, this would further prove the loose way matters in the adjudication process were conducted.
8. The Public Contracts Review Board also opines that the contracting authority, as well as the evaluation board, could have administered, deliberated and decided upon this particular tender in a more cautious, transparent and effective manner.

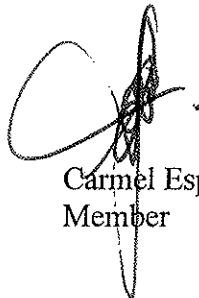
In view of the above, this Board accedes to the appellant company's request in its objection and recommends that this tender be cancelled and reissued.

The Public Contracts Review Board also recommends that the evaluation board to be appointed by the contracting authority to evaluate the tenders submitted in the fresh call will consist of new members in no way connected with the tender under review.

This Board also recommends that the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed as, all things being equal, it became evident that the appellant company was not properly notified by the contracting authority as to the real reasons for it not being favourably considered.



Alfred R Triganza  
Chairman



Carmel Esposito  
Member



Paul Mifsud  
Member

8<sup>th</sup> October 2012