



Report on the Working of the
General Contracts Committee and the
Public Contracts Appeals Board
During 2004

Department of Contracts

Ministry of Finance

This report is submitted in terms of Clause 13 of Part One of the Public Contracts Regulations, 2005.

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Introduction

In terms of Clause 13 of Part One of the Public Contracts Regulations, 2005 an annual report which gives an account of the proceedings of the General Contracts Committee and of the Public Contracts Appeals Board has to be submitted to the Minister of Finance for onward transmission to the House of Representatives.

General Contracts Committee

The composition of the General Contracts Committee during 2004 was as follows:

Mr Joseph V Spiteri – Director General, Chairman ex-officio (up to 6 September 2004)

Mr Edwin Zarb – Director General, Chairman ex-officio (from 7 September 2004)

Mr Joseph Borg Grech B.Arch. BE & A, A & CE

Mr Robert Carabott

Mr Sebastian Debono B.A., L.P., Dip.Ed.Guid.

Mr Carmel J Delicata C.P.A.A., F.C.I.B., F.I.A., F.I.C.I.S.

Mr Carmel Gatt A.C.I.B.

Mr Joseph Mizzi B.Eng., A & CE

Mrs Edwige Xuereb

Mr Joseph Zammit L.P.

Technical Adviser (not a voting member): Mr Maurice E. Galea B.Eng., A&CE

During the year the General Contracts Committee held meetings twice a week on Tuesdays and Thursdays for a total number of one hundred and one sittings.

The General Contracts Committee is appointed by the Prime Minister and its members are primarily responsible for providing advice to the Director General (Contracts) on all matters pertaining to public calls for tenders and the award of the relevant contracts. Additional duties include the opening of the tenders received at the Department of Contracts. Schedules of tenders received and prices quoted are published on the Department of Contracts' notice-board on the same day that the tenders are due for submission.

The Public Contracts Regulations, 2003 that came into effect on the 1 January 2004, provide that in tenders having an estimated value between Lm 5,000 and Lm 20,000 and are issued by a Local Council or by a Contracting Authority listed in Schedule 2, an aggrieved bidder shall have a right to make a complaint

to the General Contracts Committee. During 2004, the General Contracts Committee heard three such complaints and the text of the final decisions is published in Part 1.

Public Contracts Appeals Board

The Public Contracts Appeals Board was appointed by the Prime Minister for a period of two years with effect from the 27 January 2003. The Public Contracts Appeals Board is constituted as follows:-

Chairman: Mr Alfred R. Triganza B.A. Hons (Accty)., F.I.A., C.P.A.,
Dip.M(UK)., M.C.I.M.(UK)., MIM
Members: Mr Anthony Pavia D.P.A.
Mr Edwin Muscat
Mr Maurice Caruana M.Q.R. (substitute member)

During 2004 the Public Contracts Appeals Board heard eleven objections in terms of Regulations 102, 103 and 104 of the Public Contracts Regulations, 2003. The text of the final decisions is published in Part 2 of this publication.

PART 1

Complaints decided by the General Contracts Committee

Case No. 1
W.D. Advert 14/2004
Tender for Below Ground Containers at Paceville
Objection by S.R. Services

Meeting of the General Contracts Committee

29 April 2004

The following officials were present during the meeting in order to assist the General Contracts Committee:- Perit J. Zerafa Boffa, Ing. A. Attard and Mr F. Bonello.

In their adjudication report of the 26th March 2004 the Works Division Board had recommended award of this contract to what they considered to be the third cheapest bidder namely T.2 Greenskips Services Ltd (Option No. 1) at a cost of Lm 15,817.90.

During the meeting it was established that the fixed capital cost (Item 1) as quoted by SR Services, the complaining firm, was cheaper than the price of the same item quoted by Greenskip Services Ltd. Perit Zerafa Boffa and Ing. A. Attard, who made up the adjudication board, indicated that the contract was recommended for Greenskip Services on the basis of an apparently lower cost quoted by Greenskip Services for both items 1 and 2 taken together. However, further examination of tender No. 2 showed that the tenderer concerned failed to quote as requested for item 2, with the result that the adjudication board had to take it upon itself to establish a "total" cost. The General Contracts Committee agreed that in doing so the board had assumed a duty which it could not assume, since the responsibility for proper completion of the tender rested with the tenderer himself. In this case Greenskip Services Ltd had failed to quote the total cost for Item 2 as expressed in the schedule of rates and instead quoted a rate of Lm 17.70 per service per container without indicating the total cost per month, thus leaving the final cost of their tender practically unknown since such total cost would eventually be determined in accordance with the total number of instances that the bins were cleaned. On the other hand S.R. Services quoted a rate of Lm 470 per month for the servicing and emptying of the bins. This is the amount which would be due to S.R. Services every month for the service, if they are awarded the contract, for the total annual cost of Lm 5,640.

The adjudicating board agreed with the opinion of the General Contracts Committee about the interpretation of this aspect of the two tenderers.

In view of the above the General Contracts Committee decided that Greenskip Services Ltd had failed to tender correctly and have rendered a like with like comparison impossible. On the other hand the Contracts Committee agreed that S.R. Services had tendered correctly and clearly and consequently their complaint was upheld.

The General Contracts Committee recommended that the Works Division should award the contract to S.R. Services and that their Lm 100 deposit should be refunded.

Case No. 2

W.D. Advert No. 43/2004, WD 459/99/4

Period Contract for the Supply and Delivery of Oak Timber to the MSD Works Division

Meeting of the General Contracts Committee

27th July 2004

Mr Guido Pace, representing Defranco Ent. Ltd., attended this sitting. The Chairman informed Mr Pace about the objection raised against award of this contract in his company's favour. The reasons forming the basis of the objection were explained to Mr Pace.

According to Mr Pace some mistake had been committed on his part during the computation of the rates submitted for this tender. After depositing his tender he had realised that the rates quoted in his same tender forms were on the low side. Notwithstanding this, his company was ready to fulfil its commitments to the full if awarded this tender. Request by the MSD for timber as specified in the tender document will be fully honoured at the submitted rates. Acting on the Chairman's request, Mr Pace accepted to confirm this commitment in writing.

As a completion of the objection procedure the Committee agreed that representative/s of Cortis Timber Ltd. are to be called before the Committee to be informed of the developments reported upon above and to give their respective comments.

Meeting of the General Contracts Committee

3rd August 2004

Further to the decision of the 27th July 2004 Mr Joe Cortis on behalf of Cortis Timber Ltd attended this sitting. The Chairman informed him that despite admitting that the submitted price was on low side Mr Pace (for Defranco Ltd) had repeatedly confirmed that the contract would be honoured 100% as submitted if award was issued in favour of Defranco Ltd's favour. Mr Cortis stated that he had documents issued by American Sawmills that proved that the requested timber could not commercially be offered at the prices submitted by Defranco Ltd. The Chairman informed Mr Cortis that notwithstanding the prices quoted in the mentioned documents, the offer by Defranco Ltd could not be rejected once there was a written commitment that the contract would be fully honoured if awarded as recommended. Although repeating that he was

sure that the contract could not be honoured at the accepted prices, Mr Cortis seemed to accept the argument that in view of the confirmation given by Defranco, his assertions provided no sound basis for the Committee to reject his competitor's tender.

The Committee concluded by agreeing that the contract is to be awarded to Defranco Ltd and that the deposit of Lm 100 submitted by Cortis Timber Ltd in support of the objection is to be forfeited to Government.

**Case No. 3
(Malta Enterprise) – Proposal for the SIAL International Food Fair in
Paris, France**

Meeting of the General Contracts Committee

31st August 2004

Zaffarese Exhibitions & Events Ltd objected to the decision by Malta Enterprise to disqualify their tender for the construction of stands at the SIAL Food Exhibition in Paris.

Clause 2 of the Instructions to Tenderers in the tender documents read as follows:

The tenderer shall submit two designs in respect of each stand; one is to be standard and the other including additional features and design. The tenderer is therefore required to give two separate quotes in respect of each stand.

Malta Enterprise disqualified Messrs Zaffarese's tender on the basis that his tender had five options when the tender documents clearly stipulated that only two options had to be submitted. On his part Mr Zaffarese stated that Malta Enterprise had not enforced this condition in previous tenders.

The General Contracts Committee after hearing the submissions made by all the parties came to the following conclusion:

1. The tender by Zaffarese Exhibitions & Events Ltd was in breach of Clause 2 of the Instructions to Tenderers in the tender documents in that five options were submitted instead of the two requested.
2. The fact that Mr. Zaffarese had breached this condition in the past did not entitle him to ignore this condition with impunity. Tender conditions are there to be respected. In fact, the other two tenderers who responded to this call for tenders both submitted two options as stipulated in the tender documents.
3. Allowing Zaffarese Exhibition & Events Ltd to submit five options instead of two would constitute an unfair advantage on the other tenderers.

In view of the above, the General Contracts Committee decided that Malta Enterprise was justified in disqualifying the tender submitted by Zaffarese Exhibitions and Events Ltd and the latter's objection was rejected and the deposit forfeited.

PART 2

Complaints decided by the Public Contracts Appeals Board

Case No. 8

CT2063/2004, EU Accession Celebrations

Tender for the design, organisation and management of a quality national event on the eve of May 1, 2004

Public hearing at the Department of Contracts, Floriana on Thursday, 19 February 2004 to consider the objection raised by **Production & Event Services of International Trading Company Ltd. (PRES of ITC Ltd)** against the decision to award the tender entitled '**Tender for the design, organisation and management of a quality national event on the eve of May 1, 2004**' (Ref. CT2063/04 – EU ACCESSION CELEBRATIONS) to the **Welcomeurope Consortium**

Present

Public Contracts Appeals Board

- Mr Alfred Triganza Chairman
- Mr Anthony Pavia Member
- Mr Edwin Muscat Member

Production & Event Services of ITC Ltd

- Mr Mario Camilleri
- Prof. Ian Refalo LL.D.
- Dr Malcolm Mifsud LL.D
- Ms Catherine Guillaumier
- Mr Angelo Attard – Technical Adviser

Welcomeurope Consortium Ltd

- Mr Lou Bondi`
- Dr Anthony Cremona LL.D
- Dr Stefan Frendo LL.D
- Dr Robert Attard LL.D
- Mr Anton Attard

Adjudication Board

- Mr Vincent Cassar - Chairman
- Mr Carmel Galea – Member (Ministry of Foreign Affairs)
- Mr Tonio Briguglio – Member (Ministry of Finance and Economic Affairs)
- Mr Mario Attard (Malta Tourism Authority)

Witnesses:

- The above-mentioned members of the adjudication board as well as
- Mr Joseph V Spiteri – Director General (Contracts)
- Mr Andrew Psaila – Chief Executive PBS
- Mr Mario Camilleri (PRES of ITC Ltd)
- Mr Angelo Attard – (PRES of ITC Ltd)
- Mr Lou Bondi` – (Welcomeurope)

Apologies of Absence

Mr V. Cassar - Chairman of the Adjudication Board informed the Appeals Board that Dr Paul V. Mifsud, another Member was indisposed. There was general agreement not to call Dr P. Mifsud in order to give evidence by telephone conference as it was considered unnecessary.

Following the Chairman's introduction during which it was agreed that all members of the Adjudication Board were being allowed to remain seated in the Hall whilst its members would be summoned as witnesses, Prof. Refalo was asked by the Board to initiate proceedings by giving a general overview relating to the points raised in his objection letter.

Prof Ian Refalo started by claiming that a number of documents needed to be exhibited as these were considered indispensable for the objecting firm to substantiate its objections. In this respect he requested that the following documents be made available by the Public Contracts Appeals Board (PCAB):

- Adjudication Board's report
- Minutes of meeting dated 26 January 2004 regarding PRES of ITC Ltd
- Minutes of meeting regarding the presentation of Welcomeurope
- Letter from Welcomeurope relating to TV coverage/transmission by European Broadcasting Union (EBU)
- Welcomeurope's detailed list of equipment
- Certificate of insurance cover by Welcomeurope

The PCAB suspended the sitting for a few minutes to deliberate on the matter. When the meeting was reconvened the Board stated that its role was to hear the objections so as to establish whether they were justified or not. The PCAB informed those present that it was giving a ruling which substantially was reiterating its policy so far adopted in all the public hearings presided by this Board since it was constituted, namely, that it would find no objection for the

exhibition of all documentation relevant to the objections formally raised in the complainant's letter (once these would be deemed necessary by the Board) and only after specific mention taking place during the proceedings. However, it was also made clear that this Board would not permit fishing expeditions thus allowing anyone to gain access to documents not related to the formal objections raised.

Dr Malcolm Mifsud stated that his clients submitted their objection on the basis of the following:

- the offer of Welcomeurope Consortium should have been disqualified and considered null and void since they did not submit their offer in accordance with the tender conditions which required that the proposals be submitted for the three components separately and also because the adjudication board had the option to award the tender in whole or in part.
- in their submission Welcomeurope Consortium gave incorrect and misleading information with regard to the 'laser canons' which according to Messrs. Productions and Event Services, they did not exist.
- if a like for like comparison were to be made the offer submitted by his client would be more advantageous.

Furthermore, Dr Mifsud stated that ITC gave various options including others beyond what was required. It also gave a detailed itemised list with relative costs. He contended that in deciding the award of the tender in question the Adjudication Board did not consider (a) the different options given or (b) the possibility of awarding the tender to more than one respondent.

With regards to the TV transmission the complainants lawyer stated that it was not true that the EBU was transmitting the event from Malta in view of the involvement of Welcomeurope. He insisted that the Adjudication Board should not have taken into consideration the EBU transmission since this was broadcasting all the grand spectacles produced by the ten acceding countries to a network covering the entire twenty-five member states anyhow.

Dr Stefan Frendo, representing Welcomeurope, categorically denied that his client did not submit the offer according to tender conditions. He said that according to para 5.1.1 Form of Proposal of Tender Documents there was no indication that the amount in words should have been included individually. Also he made reference to para 2.2 of the Tender Documents which stated that '*Proposals will be received for the three components as detailed at para 1.5 above, **individually** or **collectively** subject to the condition at para 4.11 below.*' He argued that, if Welcomeurope's proposals were to be considered as null and

void because of it submitting a collective offer, his clients would have had grounds to object because they would have been misled.

Dr Frendo stated that Welcomeurope took a commercial risk when they submitted a whole amount for their proposal because even the conditions stipulated that tender could be awarded in whole or in part. He clarified that his client had submitted one submission collectively but under three separate categories.

With regard to 'price', he remarked that there was no obligation to select the cheapest price but the most favourable offer.

As far as the laser canons were concerned Dr Frendo said that they never indicated that they had laser canons. At this stage Mr Lou Bondi` intervened saying that in line with their presentation/submission to the Adjudication Board, Mr Gert Hof (international artistic producer) would make use of a huge amount of Ireos space cannon lights of 7 kW as well as big YAK lasers in his Show. Mr Bondi` claimed that respondents were not required to state type of canons to be used.

Dr Anthony Cremona, another lawyer representing Welcomeurope, stated that the tender did not require an itemised list. Tenderers were requested to provide a spectacle based on a world-renowned artist. The definition of the 'space cannon' mentioned in ITC's objection was incorrect. He said that ITC wanted to condition the artist when they mentioned the use of a particular type of equipment. He added that it was completely not admissible, procedurally, on the part of PRES to propose an adjustment in the number of lasers to be used by their competitor.

With regard to what had been stated by ITC in their motivated letter of objection regarding the international TV coverage, Mr Lou Bondi` stated that EBU would not be transmitting from the 25 European Union countries but only from the 10 acceding ones. He said that in a letter dated 16 January 2004, signed by Mr Stephan Reichenberger (CEO of Schwanstein Entertainments), who was commissioned by the EBU to produce "Welcome to Europe", it was confirmed that on the eve of 1st May 2004, EBU would not only connect with Malta at peak time but also that this particular show would transmit live for a duration of five times more than the time allowed being granted to the other acceding countries and this solely due to the artist whose services were being exclusively utilised by Messrs Welcomeurope.

At this stage the Board started hearing evidence given under oath.

Mr Vincent Cassar, the Chairman of the Adjudication Board, was the first to take the stand. Mr Cassar gave details of the procedure followed by the Adjudication Board throughout the phases leading to the award of this tender. He said that on 28 December 2003 the Ministry for Youth and the Arts issued a call for the submission of proposals for the tender in question. The tender requested that proposals should be made for three components, namely, the ‘grand spectacle’ (package 1) , ‘audio visual’ programme (package 2) and the management of *ad hoc* sales and catering concessions in specific localities around the Grand Harbour (package 3).

Three offers were found in the tender box, namely,

- Synergix
- Welcomeurope
- PRES of ITC

(Tenderers No 1, 2 and 3 respectively). These were opened in front of members of the general public and a schedule of the bids was drawn up and published on the Ministry’s notice board.

He said that Tenderer No 1 submitted an offer for Package 1 only, Tenderer No 2 offered one collective price for the three packages made up of two options and Tenderer No 3 submitted an offer for the three packages and included separate prices for each package consisting of two options each.

During the opening of the tenders Mr Camilleri (PRES of ITC) remarked that once Welcomeurope did not submit their individual prices for the three packages, their tender should not be considered for evaluation. However, when a representative of Welcomeurope was asked to identify the prices for each package separately, he insisted that the consortium was submitting one price for the three items collectively. The matter was discussed by the Adjudication Board and it considered that their offer was in accordance with the conditions specified in para 2.2 and 4.11 of the Tender Documents. Thus, it was decided to evaluate only Tender Nos. 2 and 3 since the tender price submitted by Synergix was high taking into consideration only Package number 1.

Subsequently, the Adjudication Board requested Welcomeurope and PRES of ITC to make formal detailed presentations of their offer. These were held on 23 and 26 January 2004 respectively. Mr Cassar said that during the presentations each member took notes individually. According to the Chairman of the Adjudication Board both tenderers delivered acceptable presentations.

Mr Cassar stated that the Board members went through the offers and found that both were according to the Tender conditions. However, it transpired that there was a difference in prices between both tenderers. The prices of the first option, which was considered as the basic offer, of both tenderers were low and those of the second option were higher.

When Prof Refalo asked Mr Cassar about questions that were asked (during the PRES presentation) to Mr Robbie Williams, he replied that the Board wanted to establish the difference in prices between PRES's two options (Lm 319,969 as against Lm 797,303). As far as he was aware, the reason given by Robbie Williams was that Option A represented a programme for local consumption only while Option B represented a programme of international standard that could be televised overseas.

With regard to the discussion mentioned by Prof Refalo in connection with the variation in prices, Mr Vincent Cassar stated that throughout and after Messrs Production and Events Services' presentation he was always of the opinion that the parties present were discussing the difference in prices between Options 1 and 2 of PRES' submission in respect of package 1 regarding the grand spectacle. As a matter of fact this issue was dealt with thoroughly during the presentation. However, Prof Refalo pointed out that at that time Mr Robbie Williams was referring to the 'audio visual' package because he had transcripts of what was said. Following an intervention by this Board Mr Carmel Galea, Mr Cassar requested not to answer Prof Refalo's question, since Mr Galea was in a better position to answer the question.

Mr Cassar stated that the Adjudication Board wanted to establish a price to meet the basic minimum requirement since both tenders were according to tender conditions. With regard to Welcomeurope's offer he said that they accepted Option 2 and not Option 1 because the spectacle in option 2 reached the required standard. On the other hand, if they considered PRES's Option 1, which was more expensive than the higher Option of Welcomeurope, they would not have reached a satisfactory standard.

When Prof Refalo asked Mr Cassar if the Board had enquired whether Welcomeurope's submissions conformed with the tender requirements or whether they commented about the way they tendered, he replied to remarks that were passed by representatives of Welcomeurope. Subsequently, Prof Refalo requested a complete copy of the Adjudication Board's report. At the PCAB's request Mr Cassar formally exhibited a copy of page 5 of the Adjudication Board's report which was relevant to the matter in question. Mr Cassar argued that other parts of the report might contain commercial and other information of a confidential nature. He confirmed that Welcomeurope's offer was in accordance with the conditions specified in para 2.2 and 4.11 of the Tender Documents.

During Mr Cassar's evidence it was also established that when they were comparing both submissions, there were enough elements to evaluate them collectively rather than individually. However, he did not think that, if the need arose, it would have been impossible to evaluate the three packages separately. However once the offers were both submitted according to tender conditions, there was no need to evaluate the packages individually. He added, that the Adjudication Board recommended Option 2, which was Lm 20,000 more expensive than Option A due to the fact that the light show projection produced by international artist Ross Ashton was considered an essential element. He emphasised that the Board was briefed to concentrate on events of high standard which could be televised across Europe, attracting both local and foreign viewers aiming the spectacle to reach a climax at the stroke of midnight on the 1st May 2004. Following the visual submission of the two presentations the Board was of the opinion that Welcomeurope's show was of a higher standard than the one presented by PRES of ITC. He said that although the latter submitted a fully itemised and costed schedule, Welcomeurope's submission apart from the fact that it met the basic requirements of the tender documents, resulted in it being the cheapest and better option acceptable.

When the Chairman of the Adjudication Board was asked to give reasons as to why they did not evaluate each package individually, Mr Cassar replied that according to the tender documents, the Board, although had this option, was not obliged to accept part proposals from different submissions and prospective Respondents. They evaluated every submission from a holistic approach and on its own merits in accordance with para 4.6 of the tender document (page 8). The Board was of the opinion that the tender should not be split because they wanted a coordinated spectacle. Mr Cassar reiterated that even though certain items from PRES's more expensive offer were to be removed, the result would have been still inferior to Welcomeurope's recommended offer but yet more expensive.

The procedure continued to be discussed in detail between Mr Cassar and Prof Refalo as the latter along with Dr Mifsud, was contending that the offer submitted by Welcomeurope was a conditional bid.

Mr Cassar rebutted such claim stating that the Board he presided over was not conditioned in any way while deliberating on the award of the tender.

At this stage Dr Mifsud continued to persist in requesting that the submission presented by Welcomeurope be made available to them. Mr Bondi` insisted that this contained commercial information of a highly confidential nature and as a consequence he was strongly objecting to such request being acceded to by this Board. The PCAB reiterated its position against allowing parties access to documentation relating to matters falling beyond the scope of the formal objections submitted.

Messrs Production and Event Services Ltd's lawyer proceeded with raising issues pertaining to certain technical aspects of this tender placing particular emphasis on the use of lasers by Messrs Welcomeurope.

Mr Cassar was asked to confirm whether the laser's specifications were thoroughly considered by his Board. In his reply the Chairman of the Adjudication Board stated that the Board was satisfied with the *light show* being offered as well as the creativity of the artist.

Prof Refalo intervened by asking Mr Cassar to quantify the number of lasers and canons to be utilised by Welcomeurope. Furthermore, Dr Mifsud insisted with Mr Cassar for the latter to confirm to those present whether they could make rightful comparisons between the presentations submitted to them.

Mr Cassar reiterated that the Board evaluated the presentations holistically and their objective was solely to award the tender to the offer, which apart from meeting specification requirements, would have provided its target audiences with the best value for money option.

Dr Mifsud continued to contend that the Board could not establish how Welcomeurope's tender worked out to be cheaper than the one submitted by PRES once it seemed clear to him that technical aspects were not thoroughly entered into.

With regard to the Dr Malcolm Mifsud's enquiry about the transmission of the events by international TV Stations, Mr Cassar replied that according to tender conditions they were going to give importance to those respondents who had overseas TV coverage. Also, he knew before the tender was issued that the European Broadcasting Union (EBU) was interested to cover the events in Europe and that they were going to be broadcasted live from two venues – Berlin and Warsaw. He said that every acceding country was requested to transmit for 6 minutes – 3 minutes recorded which were to be utilised for promotional purposes and 3 minutes taken up by live transmission. Each country was required to send an artist to either Berlin or Warsaw to give a live show. He said that Vittorio Panchetti, who is a former member of the EBU, informed the Adjudication Board that if PRES won the tender, he would start talks with EBU to cover Malta's spectacle.

In reply to Dr Frendo's question, Mr Cassar stated that the procedure used in evaluating the tender was normal. Respondents could have submitted collective or separate prices since according to tender documents at para 2.2 tenderers were requested to submit their proposals for the three components either

individually or collectively. He emphasised that they were looking after an artistic presentation which was of an international standard. Apart from this, the price element was also taken into consideration. He said that in this respect, Welcomeurope's offer was superior. With regard to live overseas TV coverage the tender conditions specified that such respondents would be favourably considered. Also he said that their intention was that Malta took advantage of the spectacle.

When Mr Lou Bondi` made reference to a particular element (slide projections on St Angelo) which the Board decided upon, despite the fact that such an offer would be more expensive, Mr Cassar answered that both submissions had that element included. With regard to TV coverage Mr Cassar said that both respondents guaranteed that the spectacle would be televised live.

With reference to Mr Camilleri's comment relating to the letter dated 16 January 2004 sent by Mr Reichenberger, Mr Cassar declared that this letter was submitted with Welcomeurope's tender documents and that the Minister for Youth and the Arts did not receive that letter personally.

Before Mr Cassar finished his testimony, he tabled a letter dated 15 February 2004 from YADA dancers containing a declaration that the latter no longer formed part of the Productions & Event Services consortium.

Mr Tonio Briguglio, another Board member, was asked by Prof Refalo about the difference in price of Option 1 and Option 2. Mr Briguglio testified that the question was asked about the whole package/product and not solely on the 'Audio Visual' package. He insisted that, although the reply was given by Mr Robbie Williams, the question was asked in general and not directly to him.

When Dr Frendo asked Mr Briguglio about the reply given by Mr Robbie Williams, he stated that the difference in price was due to the fact that Option 1 catered for local consumption while Option 2 catered also for a wider international audience.

Another Board member, Mr Carmel Galea, corroborated the version previously given by Mr Briguglio confirming that the issue in question was raised at the end of the presentation and not during the 'audio visual' as was stated by Prof Refalo.

However, Mr Galea continued that, irrespective of the above, Mr Robbie Williams' reply had no effect whatsoever on his final decision because at that point he was already decided.

In reply to Dr Malcolm Mifsud's question, Mr Galea declared that, provided that the whole package met the required standard, he always considered to evaluate each tender holistically and not individually. He was convinced that Welcomeurope's Option 2 was the cheapest and the best offer.

Mr Andrew Psaila, Chief Executive Officer Public Broadcasting Services (PBS), took the witness stand and was duly cross-examined by, firstly, Mr Lou Bondi followed by Mr Mario Camilleri.

Mr Psaila confirmed that they had contacts with the Live Events Department of the EBU and that it was agreed that the Grand Finale of the EU Expansion Celebrations event be televised live from Malta. He said that the programme will be coordinated by the EBU, with the German and Polish TV Stations being responsible to produce it. The EBU, arbitrarily, decided to specifically include Malta because of the Malta Light Monument artistically produced by Mr Gert Hof.

He stated that the PBS was a member of the European Broadcasting Union, which is an association of national broadcasters and that it always had rights to transmit such national events.

As Mr Joseph Spiteri (DG Contracts) was indisposed, all interested parties agreed to take his testimony by way of telephone conferencing following the witness's full disposition to collaborate.

In reply to Prof Refalo's questions, Mr Spiteri said that when the Contracts Committee received the Adjudication Board's report, it agreed with its recommendations. He said that the Minister of Finance and Economic Affairs convalidated the issue of this Departmental tender in terms of Regulation 4 (4) of the Public Service (Procurement) Regulations 1996.

He said that despite the fact that Welcomeurope's submission did not contain detailed pricing, the Adjudication Board informed them that their offer was considered complete. Their offer was accepted because it was the cheapest acceptable and met all tender basic requirements, including live transmission of the spectacle at midnight which included the Light Monument. He was not sure whether Welcomeurope offered lasers or searchlights/space canons.

With regard to PRES of ITC's offer, his impressions were that their offer was much more expensive than Welcomeurope's and that it met the required international standards as well as transmitting at midnight on 01st May 2004.

Mr Camilleri asked Mr Spiteri to recall about when he protested with the Contracts Committee regarding the award of the said tender, the reply given

was that their show did not qualify because of Mr Robbie Williams statement and that PRES had 4 lasers while Welcomeurop had 100. Mr Spiteri replied by stating that the Committee accepted the cheapest acceptable offer irrespective of the number of lasers. Mr Spiteri added that he was not a technical person and that he did not distinguish space canons and lasers. For him the crucial element was the light monument by Mr Gert Hof and the midnight transmission of the grand finale.

In reply to Dr Stefan Frendo's question regarding the Board's decision and the evaluation procedures, Mr Spiteri confirmed that this was taken unanimously and the process of evaluation was not done haphazardly.

When Mr Lou Bondi` made reference to the meeting he had with Mr Camilleri after the award of the tender, Mr Spiteri stated that any tenderer who felt aggrieved by the decision had a right to enquire why one's offer was not accepted. He added that it was the prerogative of the bidder concerned to decide as to whether he should submit an appeal or not.

Mr Mario Camilleri, the person responsible for various Departments at ITC as well as for the Production and Events Services Ltd, then took the stand giving a detailed procedural analysis of the preparations and subsequent composition of the tender documents. He took into consideration each and every item in the tender document to ensure that they submitted their offer according to the tender conditions.

During his cross-examination by Dr Malcolm Mifsud, he testified that when the tenders were opened, Synergix protested about the fact that Welcomeurope included one price for the three packages collectively. He drew the Adjudication Board's attention to consider whether, in view of these circumstances, they could stop procedures since it would have been difficult to allocate prices among them. The matter was referred to Welcomeurope but nothing changed because the latter convinced the Board that their submission was in accordance with the tender conditions. From the Schedule of Tenders it resulted that apart from a column for each component another column with the heading '3 No Items Together' was included and the reason given was that para 2.2 of the tender documents requested that the proposals for the three components could be given individually or collectively.

Then he gave an account of their presentation and information about the persons (including Mr Adrian Bell - light designer) who were involved in the grand spectacle. He said that Mr Galea should not have asked Mr Robbie Williams about difference in prices of audio visual's options A and B for the simple reason that he was not an expert on the matter. He declared that Mr Robbie Williams, contrary to what was stated earlier by the Adjudication Board

members, was referring to the 'audio visual' programme only and not on the whole package when he said that Options A and B were for local and foreign consumption respectively.

As far as the TV coverage is concerned, Mr Camilleri stated that they had sought international television operators to transmit between 30 minutes to an hour of the event. He added that Oasi TV, which covered the whole of Europe and North Africa, was interested in transmitting the grand spectacle. He said that they discussed the uplink with Mr Andrew Psaila, CEO-PBS so that they could provide the necessary facilities to other TV companies.

With regard to prices, Mr Camilleri stated that the Adjudication Board did not consider the different options included in their submission. He contended that should both submissions be compared like with like (exclusive of lasers), PRES's offer would have been more advantageous.

PRES's representative went on to remark that concerning the issue of lasers/canons information given was misleading because Mr Gert Hof only used space canons in his shows, whilst their artistic designer, Mr Robbie Williams, was internationally renowned for light shows.

When Dr Anthony Cremona asked Mr Camilleri to confirm whether he had any kind of contact with Mr Lou Bondi` following the award of the tender to Welcomeurope, Mr Camilleri replied in the affirmative (following a heated cross debate with Mr Bondi`) that a couple of meetings and telephone conversations took place.

Dr Stefan Frendo then insisted with, Mr Camilleri for the latter to state what was the reason behind his meeting with the Minister for Youth and the Arts, the Hon Mr Jesmond Mugliett. He said that he requested this meeting to protest about the fact that, once Welcomeurope did not submit separate prices and itemised lists for the three components, their offer should have been disqualified. Mr Camilleri confirmed that Minister Mugliett did not personally intervene in the matter.

During his testimony Mr Camilleri also declared that he did not have access to Welcomeurope's tender. He was convinced that the tender was lost not on concept but on the 100 lasers.

As regards documentation available relating to international TV coverage, Mr Camilleri said that during their presentation there were Mr Vittorio Panchetti

who was one of the owners of OASI and Adrian Bell who was affiliated to Channel 4. At this stage Mr. Camilleri tabled a document indicating that OASI TV were interested in transmitting the event.

Mr Camilleri's evidence was followed by the one given by Mr Angelo Attard - Project Manager and Technical Advisor but also responsible for health & safety, security, fire and quality management (ITC).

When requested to comment about the tender by Dr Malcolm Mifsud, Mr Attard stated that the event had to be of the highest standard and quality. He declared that the question regarding the difference in prices of Option 1 and 2 was asked directly to Mr Robbie Williams during the 'audio visual' presentation.

In reply to Mr Anton Attard's request to explain the distinction between Oasi TV and EBU network, Mr Angelo Attard stated that the former transmitted via satellite without national stations while the latter was a network of European stations.

On taking the witness stand Mr Mario Attard, another member of the Adjudication Board, was first cross-examined by Prof Ian Refalo. Mr Attard said that the question asked to Mr Robbie Williams was asked soon after PRES carried out their presentation because the Board could not distinguish the difference between the two options as far as quality and standard of the show was concerned. He confirmed that he understood that the figures mentioned by Mr Robbie Williams were in respect of the Audio Visual and not concerning the Grand Spectacle. However, Mr. Williams' comments were of concern to the Board. Mr. Attard said that Option 1 was known as the 'basic offer', while Option 2 included a number of extras. He stated that the basic offers of the two respondents were comparable. On the other hand, Option 2 of Welcomeurope was cheaper and of higher quality. He confirmed that the grand spectacle offered by PRES, as far as the basic offer was concerned, met the tender requirements. Prof Refalo clarified that according to the tender conditions it was the grand spectacle which had to be of an international standard and not the audio visual.

When he was cross-examined by Dr Malcolm Mifsud, Mr Attard confirmed that he was present when the tenders were opened. With regard to Welcomeurope's offer he said that in view of the fact that they submitted one price for the whole package, they could not analyse the three components separately but collectively. However, he acknowledged that it was difficult to distinguish the prices of Grand Spectacle from those of the Audio Visual. He opined that Welcomeurope's submission was not conditional because a number

of alternatives were available and that the tender conditions allowed them to evaluate every submission in whole or separately.

When Dr Frenco asked Mr Attard to state whether the way Welcomeurope's submission was presented had created any difficulties during the evaluation process, the reply given was in the negative. He said that Welcomeurope's submission was unanimously accepted because of the quality of the presentation, the TV coverage, the high standard of the grand spectacle and the price factor.

Mr Attard was followed by Welcomeurope's representative, Mr Lou Bondi`, who took the stand.

When Dr Frenco asked Mr Bondi` to comment on Welcomeurope's offer, Mr Bondi` said that this was submitted in accordance with the tender conditions and objectives, with particular emphasis on the artistic show. In this respect they contracted two world-renowned artists namely Messrs Gert Hof and Ross Ashton respectively. The former did the millennium shows in China, Hungary and Germany and was commissioned for the show regarding the launching of the EURO. The latter, who was the designer of the Queen's Jubilee celebrations, would be helping with the projections. He said that although the amount budgeted for these celebrations was considered low when compared to the Lm 1 million spent on the millennium celebrations, the tender required respondents to present artists of an international standard.

He said that when they submitted one price for the three components collectively, they took a commercial risk. They also took into consideration the economies of scale. However, they still submitted their offer within the parameters of the tender conditions. He contended that they would not have been interested in providing one of the components or part thereof, since otherwise they would not have been competitive taking into account the fact that the show had to be of high quality within a restricted budget.

When Dr Robert Attard asked Mr Lou Bondi` to comment about the EBU transmission he stated that Mr Roger Waters was expected to premier part of his new opera during Malta's EU accession celebrations. He agreed to feature 15 minutes of his opera *Ca Ira* in the grand manifestation to be held at the Grand Harbour.

Dr Anthony Cremona then asked Mr Bondi` to elaborate on the EBU issue, Mr Bondi` said that the EBU agreed to allocate 15 minutes to Malta's celebrations, as against the three minutes given to the other nine acceding countries. Thus, Malta's manifestations would be broadcast in the most important grand finale show at midnight. He alleged that the other competitor did not have assurance by EBU as regards TV coverage.

With regard to contacts with Mr Mario Camilleri, Mr Bondi` denied that he ever requested any lasers. He said that he never received any proposal to integrate with his consortium.

Finally, Mr Bondi` was requested by Prof Refalo to give the names of the members of NnG, which was a member of the Welcomeurope Consortium, with Prof Refalo alleging that the father of Mr Gianni Zammit of NnG was a member of the Contracts Committee which was responsible for awarding the tender in question. However, following a phone conversation which Dr Frendo had with someone at the other end of the line who was verifying the validity of Prof Refalo's claim there and then, assurance was given to those present that the person specifically mentioned by PRES's lawyer, namely Mr Zammit had desisted from participating in any way during the whole process leading to the award of this tender.

The Chairman declared that the Appeals Board would investigate the matter. This board has subsequently received a sworn statement (dated 23rd February 2004) by Mr Joseph Zammit L.P. stating that he “did not in any way participate in the discussion leading to the recommendation for the award of this contract to the *WELCOMEUROPE* consortium, nor did” he “in any way whatsoever try to influence the Committee to award the contract to the mentioned consortium.”

FINAL SUBMISSIONS

Following the summoning of all witnesses to the stand this Board requested the respective legal representatives to commence their oral submissions.

PRES's legal representative, Prof Ian Refalo commenced his intervention by persevering with his claim that in not being allowed by the Appeals Board to view the documentation requested by him, his client was placed at a disadvantage.

Prof Refalo stated, however, that notwithstanding this Board's ruling to this effect during the day's proceedings his client had managed to demonstrate that Welcomeurope's offer was not submitted in accordance with the tender conditions. Such conditions Prof Refalo argued, specifically required that respondents submit a price for each of the three components separately. The way the tender was presented by Welcomeurope did not permit the Adjudication Board to evaluate each package individually. Apart from this, the interested parties concerned could not compare the prices of each package individually when the schedule of tenders was published. He contended that Welcomeurope's tender should have been disqualified as it lacked a fundamental element of the tender conditions.

It was also argued that the fact that Welcomeurope had refrained from submitting in itemised format as duly requested in the tender specifications was *sui generis* a direct breach of tender conditions. Furthermore, Prof Refalo insisted that the Adjudication Board did not understand Mr Robbie Williams comments which were partly based on issues relating to the Grand Spectacle and partly relating to Audio-Visual matters.

In addressing those present Dr Mifsud strongly urged the Appeals Board to consider his client's claim which contends that the way the other party had presented the offer to the Adjudication Board was substantively misleading.

In his concluding submission and acting on behalf of Messrs Welcomeurope, Dr Cremona remarked that his client had managed to annul every objection raised by PRES amply demonstrating in the process that the award as given by the Adjudication Board was just in all aspects. It was also evident that the said Board had not acted in a negligent manner or frivolously as the members in question had ample experience and would have definitely deliberated upon the issue in a responsible and professional manner.

Moreover, his client did also manage to corroborate with documentary evidence the validity and extent of his offer doing away with any doubt which PRES would have tried to cast during the day's proceedings.

The fact that the tender was presented collectively instead of individually was not incorrect, since this was not a stipulated condition. This was simply a commercial risk taken by Welcomeurope Consortium.

At this stage the hearing came to a close.

Having considered all the above, this Board came to the conclusion that:

1. PRES's submission regarding the invalidity of Welcomeurope's tender has not been proven to this Board's satisfaction. Clause 2.2 of the Tender Document clearly states that " proposals will be received for the three components ... individually or collectively ... "
2. the Adjudication Board decided to award the tender to Welcomeurope on the grounds of value for money as well as the quality of the spectacle as formally presented by the two parties in question and this Board finds no reason to cast any doubt on their evaluation method.

3. with regards to comments made by Mr Robbie Williams as referred to in the Adjudication Board's report, this Board feels that although the context of the comments may have been misunderstood by one or more members of the Adjudication Board, this Board considers that such an issue could not have had a marked bearing on the final decision of the Adjudication Board which was taken unanimously.
4. the specifications of the Tender Document did not provide for the supply of any particular number of lasers, space canons or any light equipment but provided for a holistic approach (as stated in Clause 4.6 of the Tender Document) based on a high standard spectacle. This Board therefore considers that the question of whether any number of lasers or any other light equipment were to be used is irrelevant.
5. this Board has already established that the quantity of lasers is irrelevant and that the award of the tender was correctly made on the basis of a holistic approach, it feels that the objection raised by PRES regarding pricing based on the number of lasers cannot be entertained.

On the basis of the above this Board agrees that the objections raised by PRES cannot be entertained and that the award to Welcomeurope was made correctly.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 27th February 2004

Case No. 14

CT 2501/2002, Advert No. CT 290/2002, GPS 04.067.T02BB

Supply of Factor VIII inhibitor by-passing activity complex

This call for tenders, published in the Government Gazette on the 27th September 2002, was issued by the Contracts Department following a formal request received by the latter from the Government Pharmaceutical Services (GPS).

The global estimated value of the contract in question covering a period of three years was Lm 122,258.16.

The closing date for this call for offers was 14th November 2002.

The Government Pharmaceutical Services appointed an Adjudication Board consisting of Messrs.

- a. M. Dowling (Chairperson)
- b. D. Zerafa (Pharmacist)
- c. B. Briscoe (Senior Pharmacy Technician)

to analyse the two offers received.

Following the adjudication by the Adjudication Board of the contract, Messrs. Charles de Giorgio Ltd filed a Notice of Objection on 05th May 2003 against the said award to Messrs. Drugsales Limited.

The Public Contracts Appeals Board made up of Mr. Alfred Triganza (Chairman), Mr. Edwin Muscat and Mr. Maurice Caruana, respectively, as members, convened a public hearing on 19th November 2003.

Present for the hearing were:

- a. Mr David Stellini (Messrs Charles de Giorgio Ltd / Novo Nordisk)
- b. Mr George Smith (Messrs Charles de Giorgio Ltd / Novo Nordisk)
- c. Mr Alfred Gera de Petri (Messrs Drugsales Limited)
- d. Mr Dens Knadsen (Novo Nordisk)
- e. Mr Monolis Karmalis (Novo Nordisk)
- f. Dr Isaac Odeyemi (Novo Nordisk)
- g. Mr Axel Schoppmann (*Baxter Biosciences*)
- h. Ms Anna Debattista (Director GPS)
- i. Dr D P Busuttill (Consultant Haemologist)
- j. Mr Joseph Meli (Contracts Department)

Mr David Stellini, representing Messrs. Charles De Giorgio Ltd, started by stating that initially there was a proposal to award the tender to Novo Nordisk. Subsequently, on the basis of the price which was calculated on the cost per bottle/vial, a different decision was taken and the tender was proposed to be awarded to their competitor, Baxter Biosciences Austria. As a result, an appeal was lodged aimed at proving that the product being offered by his principals was in fact substantially cheaper than that offered by Baxter. He argued that, in order to conduct a scientific and evidence-based evaluation, the two products should not have been calculated on direct acquisition cost per vial but on the total cost of treatment of a bleeding episode, that is, price per patient per kg per year.

Mr Gera de Petri, representing Messrs. Drugsales Ltd, stated that he was in a position to prove that the appellant's product was more expensive. He also claimed that Novo Nordisk were completely out of specifications because they offered a different product from that requested in the tender.

In reply to this statement, Mr David Stellini stated that their product gave the same or better results. He and Dr Dens Knadsen insisted that they launched their objection on the basis of the price since in the GPS's report it was never mentioned that they were out of specifications. They declared that if the latter was the case they would not have lodged the appeal or come to the public hearing. Mr Stellini said that they offered an alternative product that was recombinant factor VII (rFVII).

Dr Busuttil, a Consultant Haemologist, stated that the tender was specifically issued for Factor VIII inhibitor bypassing activity. In the medical lexicon this was synonymous with an activated plasma derived prothrombin complex (aPCC) of which two were available on the market. He said that although rFVII was used in patients with inhibitors, it did not belong to that family of agents and therefore on technical grounds it did not meet the specifications of the advert.

Dr Dens Knadsen, representing Novo Nordisk, said that NovoSeven, which was produced by Novo Nordisk, was not a plasma-derived product but a recombinant product manufactured by gene technology. He contended that the Health Department asked for a bypassing product, which treated haemophilia patients who developed inhibitor to Factor VIII. NovoSeven was used to treat patients from severe bleedings who were unresponsive to the normal Factor VIII. He stated that most of the Western World decided to use NovoSeven as first line treatment because it did not carry the risk of transferring of complex diseases which were always a concern for plasma-derived products. He said that NovoSeven worked more rapidly than any other product and so people with haemophilia could relatively go on with their normal lives.

Dr Dens Kandren declared that Novo Nordisk avoided the use of plasma-derived products and that in the EU NovoSeven was considered as a bypassing product.

Mr Monolis Karamalis, who frequently served as a health economist in many different countries, stated that, according to guidelines in other countries, NovoSeven was specifically recommended as a first line treatment for haemophilia patients with inhibitors (antibodies). He argued that, for this reason, the Maltese people should not be denied from getting the same best treatment.

Mr Axel Schoppmann, Baxter Biosciences' representative, confirmed that their FEIBA product was deduced from human plasma and that NovoSeven was a recombinant product. He said that it was not true that recombinant products were never exposed to human plasma or animal viruses. To prove his point he said that, according to product information leaflets, NovoSeven contained bovine components recalling in the process bovine related diseases which ensued some time ago. He said that his company produced and strongly advocated the use of common Factor VIII because of its excellent efficacy and safety features. He said that, in Malta, plasma Factor VIII was the major supply for haemophilia A and plasma Factor IX for haemophilia B.

With regard to what was stated by Mr Karamalis, Mr Axel Schoppmann claimed that international treatment guidelines and recommendations for the treatment of inhibitor patients preferred Feiba. He said that an anti-inhibitor coagulation complex was used to treat bleeds in people with haemophilia who would have developed inhibitors to factor VIII or IX. He said that data available demonstrated that there was no scientifically proven comparative analysis between the two products. The literature from published papers demonstrated that FEIBA was highly effective, needed fewer infusions and involved short periods of hospitalisation (product consumption and duration of treatment were less with FEIBA than FVIIa). FEIBA's efficacy made this product a cost effective treatment for patients with inhibitors to FVIII.

Mr Isaac A O Odeyemi Ph.D., a Health Economics Consultant and an international expert in Haemophilia, made a presentation on the Therapeutic and Pharmaco-Economic Equivalence of rFVIIa (NovoSeven – recombinant factor VIIa) and aPCC (FEIBA) which were two of the most widely-used treatments available on the market. This presentation was made to demonstrate that the product offered by Novo Nordisk (Messrs. Charles de Giorgio Ltd.) was cheaper. He based his presentation on a study carried out by himself and Julian F Guest, the aim of which was to estimate the economic impact of using rFVIIa when compared to aPCC (FEIBA) to manage a minor (ie mild to moderate) bleeding episode at a haemophilia treatment centre among haemophilia patients with inhibitors in the UK. The comparison between the

two products was based on the total cost of treatment of a bleeding episode, that is, price per patient per kg per year.

According to Dr Odeyemi the results and conclusion reached following this study showed that:

- the cost of treatment was significantly lower with rFVIIa (NovoSeven), in hospital [rFVIIa - £11,794 vs aPCC - £20,467], but comparable at home [rFVIIa - £12,944 vs aPCC - £14,645] but still 12% cheaper;
- rFVIIa stopped the bleed twice as fast as aPCC (FEIBA) – [time to resolve a bleeding episode took 32 hours as compared to 60 hours];
- as regards clinical efficacy, patients receiving 2.3 doses of rFVIIa (90 µg/kg body weight) would resolve 92% of bleeds whilst 3 doses of aPCC (75 units/kg body weight) would only resolve 79% of bleeds;
- empirical evidence suggested rFVIIa 1 µg/kg was equivalent to APCC 1.6 (1.2-1.9) IU/kg and 56 vials rFVIIa (1,2mg) equals 216 vials aPCC (500 IU).

Mr Stellini stated that on the basis of the formulae referred in the penultimate point, the therapeutic equivalence mentioned in the latter point and also taking into account the prices that were actually quoted in the tender (1 vial of rFVIIa and aPCC cost DKK 4,620 and US\$ 378.53 respectively), then the estimated cost, based on the overall cost of treatment, would amount to:

- (a) 56 vials rFVIIa X DKK 4,620 = DKK 258,720 @ 17.955 = Lm 14,409 *whilst*
- (b) 216 vials aPCC X US\$ 378.53 = US\$ 81,763 @ 2.4063 = Lm 33,978.

This revealed that rFVIIa was 57% cheaper.

Mr Monolis Karamalis from Novo Nordisk, stated that from a costing efficacy point of view their treatment worked twice as much as the other product and at a very significant lower cost.

Mr Alex Schoppman replied that Novo Nordisk's cost comparison study by Odeyemi and Guest was invalid because these were based on assumptions and biased in favour of NovoSeven. The outcome of this study was heavily impacted by the selection of references and by wrong or incomplete picking of data from those references. Also he said that, in this study, a *worst-case scenario* for Feiba was compared against a *best-case scenario* for NovoSeven. He argued that the 2.3 doses were not the final dose to be given

to patients since probably an additional infusion had to be given to all patients after efficacy evaluations, which was ignored for the cost evaluation. In the Hilgartner study 52% of the patients bleedings were controlled with one infusion but three doses were entered in above cost calculations. He said that a European home care study showed only a 79% success rate when compared to 92% as claimed in the Odeyemi / Guest study report. Mr. Schoppman showed that patients needed more a half-life product. He said that Dr Odeyemi did not consider the complete data from the publication since the cost estimations of Hospital Treatment amounted to rFVIIa - £11,794 vs aPCC - £20,467. He stated that it depended from where data was extracted because this could give different conclusions/results. The Rhonda L Bohn report declared that initial treatment with Feiba was cheaper than with aPCC [US\$23,000 per episode (300IU/kg) as against US\$34,400 per episode (360ug/kg)]. He said that as far as efficacy rate was concerned, the Hilgartner report findings demonstrate that FEIBA had 93% overall efficacy.

Mr Schoppman stated that all the arguments presented by witnesses / representatives from Novo Nordisk as well as cost assessments and pertinent comparisons made were based on actual clinical data rather than assumptions or on dosing recommendations written on official product inserts. He said that according to inserts 1000 U of Feiba corresponded to 1.2mg of NovoSeven. Treatment costs depended on the number of doses, duration of treatment and success rate, not on the price per vial. With regard to Feiba he said that the large majority of joint bleeds was covered with one infusion, the remainder being covered with 2 or 3 infusions and thus their product was equal or favourable to NovoSeven in this respect. He said that the maximum daily cost for treating severe bleeds with Feiba and NovoSeven was US\$160 and US\$658 respectively. He claimed that Feiba was cheaper than NovoSeven because of the longer half-life and resulting longer infusion intervals based on similarity in efficacy. Various papers in the literature otherwise favouring NovoSeven explicitly pointed out the huge cost impact this product was bringing about for anti-inhibitor treatment. There was no head-to-head comparison allowing a direct comparison of the two products in the same patients.

Ms Anna Debattista stated that the specifications for this product were based on the specific request by Dr Busuttil, who asked for an *'anti-inhibitor coagulant complex vapour heated, freeze dried, sterile human plasma fraction with factor VIII inhibitor by-passing activity, 500 IU ampoules, powder for injection.'*

With regard to the change in the recommendation of tender, from Charles de Giorgio Ltd, acting on behalf of Novo Nordisk, to Drugsales Limited, representing the interests of Baxter Biosciences (Austria), Ms Debattista said that it was the Adjudication Board's official report of the 9 April 2003 which

recommended the acceptance of Drugsales' offer that was binding and not the one mentioned by Mr Stellini because this was crossed out. However, Mr Stellini claimed that he had viewed the report in which the award of contract had originally recommended Novo Nordisk's bid. When his attention was drawn to the fact that it was not normal practice for people to be allowed to view such files, Mr Stellini changed his version and stated that in actual fact the official concerned had read out what was written in the file.

In view of the seriousness of the matter, the Board decided to call Mr Joseph Meli (Contracts Department) to enlighten all present about the proper procedure and to verify whether Mr Stellini was allowed to view the whole file.

Mr Meli declared that in principle they did not disclose any information from files to anyone except when there was mutual agreement among interested parties. Moreover, he confirmed that, in general, the practice was that an official was not allowed to read out anything from file to anyone. He contended that it would be highly unusual for recommendations relating to the award of tenders to be read out to any person or for actual viewing of documentation to be permitted.

Ms Debattista reiterated that the Adjudication's Board's report of the 9th April 2003, which recommended the award of contract to Messrs Drugsales Limited, had deemed the latter's offer to be the cheapest. Subsequently, Messrs Charles de Giorgio Ltd lodged a complaint in which they maintained that their offer was cheaper. She admitted that this was quite a complicated and technical tender and so they had to be very careful as to how the basis of the cheapest offer was to be worked out. She decided to refer the matter to Dr Busuttill to explain how the offers were evaluated. The procedure followed by the Health Department in the award of contracts was that they first established which was the cheapest bid and then determined whether they were according to specifications.

Ms Debattista claimed that, after the appeal, when they analysed and worked again the schedule of prices, it resulted that after taking into account the number of vials required per bleeding episode, Drugsales' product was found to be more expensive. However, Novo Nordisk's product was not according to specifications because they offered a recombinant factor VII and not Factor VIII inhibitor by-passing activity complex.

Dr Busuttill stated that there was no consensus regarding the optimal treatment of acute bleeding in patients with inhibitors. The general trend for adults treated in UK hospitals was to use aPCCs first line and to resort to rVII in patients not responding in first line treatment.

He said that both products were found to be effective in up to 90% of all haemorrhages in non-randomised studies. He stated that no direct head-to-head comparisons had ever been made between the two products. A cost effectiveness analysis was also planned and so it was premature to state whether one product was more cost effective than the other.

Dr Busuttill concluded by saying that this tender was issued for one particular haemophiliac patient with inhibitors who needed home treatment. For various medical reasons pertinent to the individualised care of this patient, it was advisable to use the agent with the longest half-life.

In its consideration of the evidence given as well as issues and arguments brought to the fore during the public hearing besides relevant documentation made available to this Board, the latter noted particular matters as well as reaching the following conclusions, viz:

- Complainant based the appeal on cost assumptions and not on compliance with specifications;
- When recommending the award of the tender to Drugsales Limited., neither the Adjudication Board nor the General Contracts Committee made any reference to the aspect of compliance with the specifications. This emerges clearly from the text of the (a) adjudication report dated 09th April 2003 and (b) the file minute registering the respective decision of the General Contracts Committee.
- During the public hearing proceedings, Messrs Charles De Giorgio Ltd had no indication that compliance with specifications was also a determining factor, the reason being that the evaluation criteria and sequence applied by the Adjudication Board were such that the primary consideration was given to lowest price and the second concern was compliance with the specifications. The Adjudication Board proceeded by first calculating the total cost of each offer and, on the basis of their assumed dosage requirements / projection, which they later found to be incorrect, concluded that Drugsales' bid was the cheapest. The Adjudication Board then checked whether this offer was compliant with specifications and on confirming that it was proceeded with recommending the award to Drugsales Limited.
- Had the Adjudication Board given more priority consideration to the compliance aspect, they would have immediately noticed that Messrs De Giorgio's bid was not compliant and therefore not eligible for further consideration. The Adjudicating Board would then have been left with only one bid to examine and, in such a situation, the price issue would be irrelevant once the compliance of the product was confirmed. The adjudicating process was flawed as a result of the procedure adopted. The

present method of adjudicating bids, as applied by the Government Pharmaceutical Services, calls for serious review to ensure more thoroughness and also the application of proper *prioritisation criteria* in the evaluation of offers.

- As a general rule, it is extremely important that both the report of the adjudicating body as well as the final recommendation to award any tender, should include clear and unequivocal statements regarding the extent of compliance of the bid under consideration.
- From evidence given by Dr Busuttil and Ms Debattista it transpired that the product to be procured through the tender under consideration was patient-specific (i.e., required for one particular patient).

It resulted also that the product sought through this tendering procedure may be supplied by only two known suppliers. It therefore appears that, in this particular case, recourse to “selective tendering” would have been more appropriate than “open tendering”.

- The product offered by Messrs Drugsales Limited was fully compliant with the published specifications and, being the only other offer for consideration, merited the award of the tender not on price considerations but rather on compliance merits.

Following further deliberation of the issues mentioned, this Board finds in favour of the Adjudication Board’s decision confirming award of tender to Messrs Drugsales.

Furthermore, the Board strongly recommends that the present method of adjudicating bids, as applied by the Government Pharmaceutical Services, be seriously reviewed to ensure more thoroughness and also the application of proper *prioritisation criteria* in the evaluation of offers.

Alfred Triganza
Chairman

Edwin Muscat
Member

Maurice Caruana
Member

Date: 29th March 2004

Case No. 15

CT 2362/2002, CT/WSC/T/27/2002

Tender for the supply, installation and commissioning of Multi-Terminal Hand recognitionsystem

The Public Contracts Appeals Board, constituted of Mr. A. Triganza, who chaired the proceedings, and Messrs. A. Pavia and E. Muscat (Board Members), met to consider the appeal on the 3rd December 2003, the 28th January 2004 and 12th May 2004.

The call for offers, with an estimated value of Lm 45,000 was published in the Government Gazette between 21st June 2002 and 19th July 2002 with the closing date being finally extended to the 20th August 2002.

Tenders were received from seven companies, two of which included an alternative offer.

Following the necessary adjustments in prices, corrected as explained in Section 1.15 of the Adjudication Report “to adjust for some discrepancies within the tenders”, the cheapest offer ended up being the one submitted by Messrs. AIS (Option 1) for a global price of Lm 8,728.50. The other offers included the ones submitted by:

Messrs. J. Grima & Co. Ltd. (Lm 8,811.76); AIS (Option 2) (Lm 9,476.00); Databyte Computer Services Ltd (Lm 12,073.45); Dakar Systems (Lm 13,850.30); Megabyte Ltd (Lm 21,929.00); Alberta F&S (Option 2) (Lm 22,550.00) and Alberta F&S (Option 1) (Lm 26,575.00).

The Adjudication Panel was made up of Mr Antoine Galea (Financial Controller) who acted as Chairman whilst Ing. Antoine Psaila and Mr Anthony Camilleri were the other members.

According to the adjudication report dated 26th June 2003 the cheapest overall offer was that submitted by tenderer Messrs. Advanced Industrial Systems Limited, an offer which was however, not considered by the Adjudication Board to be up to the required specification in that it failed to meet paragraph 6.13 (*Method of Adjudication*) of the tender specifications. As a consequence, the Board decided not to consider further this offer.

According to the Adjudication Board, the first tender that was compliant to specifications was the one submitted by Messrs. Dakar Systems Ltd, originally the fifth cheapest.

Following the publication of such recommendations Messrs. Advanced Industrial Systems Limited filed an objection with the Director of Contracts on 28th July 2003.

The following persons attended all or at least any one of the public hearing sessions:

Water Services Corporation

Ing. Anthony Rizzo – Chief Executive
Dr Nicolette Cassar (Legal Representative)
Mr Antoine Galea (Chairman – Adjudication Board)
Ing. Antoine Psaila (Member – Adjudication Board)
Mr Anthony Camilleri CPO (Member – Adjudication Board)

Advanced Industrial System Ltd

Ing. Mario Schembri (Managing Director)
Mr Kevin Schembri
Ms Odette Schembri

Dakar Software Systems

Mr David Schranz (Managing Director)
Mr Reuben Vella
Mr Godfrey Farrugia

Other Witness:

Prof. Robert Ghirlando (Ex-Enemalta Chairman)
Ing. R. Azzopardi (Enemalta)
Mr David Schranz (Dakar Software Systems)
Mr Tarcisio Mifsud (Financial Controller, Enemalta)
Mr France Muscat (IT Manager, Malta Shipyards)
Mr Victor Mifsud (Project and Systems Manager, Malta Shipyards)
Mr Martin Bajada (Technical & Information Technology Forensic Consultant)

Ing. Mario Schembri, representing AIS Ltd, gave an overview of the tender. He said that this project consisted of three main deliverables, namely:

- i. **Hand Reader Terminals (clocks)**
Only five terminals were requested in the original tender documents. Eventually, this quantity is expected to increase to fifty (maximum).
- ii. **A Time and Hand Reader Software.**
The system had to have the ability: –
 - (a) to collect information from these hand reader terminals *and*
 - (b) to work out the number of hours worked;

iii. **A Time and Attendance Software**

This had to be seamlessly integrated with the Hand Reader Terminals as well as the existing Payroll and HR Software.

He said that their major objection was based on the Adjudication Board's report as far as their offer was concerned. He alleged that its comments and conclusions contained various inaccuracies.

Mr Schembri said that in the '*Major qualifications*', the Board did not mention the strongholds of AIS. He stated that it was the only company in Malta that was officially recognised as the 'Authorised Reseller' for these hand reader terminals and the only Certified Repair Centre in the Mediterranean. Also, he said that AIS had been installing these type of systems since 1994, and that at present they had about 100 different installations and over 20,000 employees who every morning clocked on their hand reader terminals.

With regard to '*Experience*', wherein it was stated that '*AIS Ltd. carried out a number of hand reader installations. Details of references were not provided*', he said that it was not true that references were not provided. He exhibited a list of all their clients who used Hand Recognition System installed by AIS including two particular references, namely Enemalta Corporation and the Malta Drydocks (MDD).

As far as '*Notes and comments*', listed hereunder were concerned, Mr. Schembri said that:

- Re Point 1:** the tender document did not specify that terms of payments were required. They set payment terms in the absence of any.
- Re Point 2:** contrary to what was stated in the report, training course details were given in the bills of quantities wherein it was indicated that they were offering 10 sessions of 2 hours each.
- Re Point 3:** the number of 6 hour battery backup against Item 1 was a type written mistake. In fact in para. 5.8 of AIS's official offer relating to **Power Supply** (page 14) it was stated that '*the readers will be backed by an 8 hour battery backup supply*'.
- Re Point 4:** in their proposal they included the price for 12-month maintenance and support service under **Service Contract** which amounted to Lm 1,275 for 150 hours of maintenance service.
- Re Point 5:** it was not AIS which indicated that the HR software was not installed but the tender documents since on page 8 item 5.10 – **Software Interfacing** it was stated that '*It is our (WSC)*

intention to replace existing leave management software with the Dakar Human Resources software'. Following this they requested to carry out a site visit and WSC had the payroll software installed which they did not find any difficulty to integrate with. It was confirmed that if the HR software was of the same structure as the payroll, they would not find any problems to integrate with it.

Re Point 6: they had a dictionary that had the ability to integrate with their system.

Re Point 7: when the system was being installed, Enemalta engaged Ms Anna Darmanin (Personnel Manager). One of her tasks was to help the contractor integrate the system. However, she had to resign as Enemalta Management boycotted and completely isolated her. Notwithstanding this, the system was installed and was still being used by the employees who were punching on their system. Then, Mr. Schembri quoted from Ing. R. Azzopardi's letter dated 8 August 2003, in which he confirmed that *'the time and attendance system has also been integrated with other modules, and data is exported into third party databases used for our Human Resources information systems'*. He added that every year Enemalta renewed the maintenance contracts. As a result, he did not understand how it was stated that *'Enemalta had bitter experience mainly on the interfacing of the system offered by AIS with Enemalta payroll and HR software, which are of DAKAR Systems.'*

Re Point 8: although paragraph 6.13 of the tender specifications requested that *'References of successfully completed similar projects in Malta (minimum 2) must include availability of such companies for site visits by WSC personnel at any time during the adjudication stage'*, AIS did not have the opportunity to present their system at the Malta Drydocks which had a similar system integrated with DAKAR software payroll and the human resources system. It was also pointed out that the system used at the Westin Dragonara is another system which they integrated with DAKAR software. Apart from this, their system was integrated with various other companies that provided payroll and human resources systems, such as Malta International Airport and Tumas Group.

As regards the warranty clause, in the report it was stated that AIS did not give them the three-year warranty period as requested. Mr Schembri stated that they offered twelve-month warranty and gave them an extended warranty.

In her intervention on behalf of the Water Services Corporation (WSC), Dr Nicolette Cassar insisted that WSC wanted a system which integrated with their system as specified in page 1 **Item 2.0 Scope of Works** - point no 3 - which stated that the tenderer was expected to *'carry out any programming and configuration of hand reader software to integrate with the existing Payroll and HR software.'* She said that WSC wanted references to determine how it was capable to integrate its system in other companies. She confirmed that AIS submitted two references as requested, namely Enemalta and MDD. However, she claimed that, although the system was working, when they held meetings with Enemalta to enquire about their experience with AIS, it resulted that it was not integrated. She said that although Enemalta insisted for an integrated system, such integration never materialised. With regard to the period of guarantee, she said that such warranty was not according to specs because AIS offered only one year guarantee with an extension for 3 years and at a price.

Then, Mr Schembri quoted from Ing. R. Azzopardi's letter dated 8 August 2003, *'As part of the same project, Advanced Industrial System Ltd. supplied Enemalta Corporation with a Time and Attendance Database Management System, which processes the data, collected from the Hand Recognition terminals into various Time and Attendance Reports. The Time and Attendance System has also been integrated with other modules, and data is exported into third party databases used for our Human Resources Information systems.'*

Mr Rizzo confirmed that this was what they required but he said that facts were completely different. The main issue was the linking and integration. Mr Rizzo said that when they visited Enemalta, which had many systems similar to WSC, they categorically told them that their system was not integrated.

During Prof. Robert Ghirlando's (ex Chairman, Enemalta Corporation) testimony he declared that they had problems with the integration of the hand recognition system provided by AIS. Also, he said that at first they had support services problems but afterwards things improved. They had spent a lot of money and so this justified the pressure put on AIS to implement the system. It cost about Lm 70,000. He said that Enemalta had a Dakar System and the problem was that technically the integration could not be done because the information on the database of the palm reader system could not be transferred to DAKAR System.

During Profs Ghirlando's testimony, Mr Schembri reiterated that they had problems because the organisation did not accept the system, there was resistance to change and because of internal management and administrative problems. He insisted that although MDD had the Dakar System, it worked. Also, he said that the DAKAR System was more expensive.

On the other hand Mr Rizzo remarked that once the first reference failed they did not feel the need to go to MDD. He said that when an Enemalta employee punched, the system did not provide a hardcopy receipt, which was still being done manually. He insisted that WSC wanted a complete and seamless integration with their existing payroll and human resources information system.

Ing. Ray Azzopardi, Assistant Human Resources Manager (Enemalta), confirmed the contents of the letter dated 8 August 2003. When asked to declare whether Enemalta's system was integrated, the reply given was in the negative. He said that the system was a stand-alone one. Records of vacation leave, sick leave and so forth were kept on a different program and that the software thereof was made in-house. When asked by Dr Nicolette Cassar to explain why he said that the system was '*integrated with other modules*', he replied that it was not software-integrated.

Ing Ray Azzopardi declared that the server was overloaded and was slow to retrieve data.

Mr Rizzo quoted from Minutes of Meeting held at Enemalta Corporation on 7 March 2003 which confirmed that the integration with payroll and human resources was not carried out and that the database was slow.

Mr David Schranz, Managing Director, *Dakar Software Systems*, stated that there was not even one site where they had installed a system which was not integrated with theirs. They specialised on a whole, complete and integrated software solution, that is, from employees' punching till the issue of payslip. AIS was not capable to issue a payslip. He said that they created an employee only once in payroll/human resources and that no export, import or intermediate files were required. They offered a one-stop-shop system. There was not even a single installation in Malta with a DAKAR System which had a seamless integration with their product and which did not need their intervention for integration. This was due to the fact that their data was completely encrypted for security purposes.

Mr Schembri requested that they should be given access to DAKAR databases so that they could build their system therein and use such databases since they had the software and hardware to meet WSC needs.

He also said that MDD system, which had a Dakar System, was more similar to WSC system since it used the same software that was being offered to WSC. He said that the most advanced system they had was at MDD, which was the same system they were recommending to WSC. MDD had remote sites within the same organisation namely, Manoel Island and Malta Shipbuilding.

The administration office of the MDD was remotely connected with the punching stations. Mr Schembri added that it was being given the impression that AIS was not capable of integrating the systems. He invited WSC to go to MDD because they had a seamless integration system which had similar software.

During the second hearing session, Mr. Rizzo reiterated that AIS' system did not satisfy WSC's needs as it did not meet specifications. The Time and Attendance System offered by AIS did not satisfy the tender conditions since it could not be integrated seamlessly with the existing Payroll and Human Resources Software. They wanted a system which could be updated automatically without any human intervention. He said that when they inspected Enemalta's system, which was one of the references provided by AIS itself, it resulted that it was not integrated seamlessly.

Mr Rizzo drew the Appeals Board's attention to the fact that following the first session, he received a telephone call from Mr Schembri during which conversation the latter asked him if it was possible to arrange something or to reconsider the position. However, Mr Rizzo reminded him that in view of the appeal he could not consider anything and that the matter should be discussed before the Board. Mr Schembri clarified that, in view of the fact both companies (AIS and WSC) worked together and the fact that they commissioned a system which was critical to them, they did not want that such an issue would jeopardise their good working relationship.

Then, Mr Rizzo said that AIS offered a Hand Recognition System using the Handkey II hand reader which was an Access Control Reader and not a Time & Attendance Terminal. He tabled two brochures to prove his point. Also, he claimed that the former system did not support internet. These statements were categorically denied by Mr Schembri who stressed that the specifications of both systems were identical and that both supported internet. He explained that one system was marketed and not designed for security and access control application and the other for time and attendance purposes. He said that in Malta the Handkey II was used as Time and Attendance.

Mr Tarcisio Mifsud (Enemalta Corporation) admitted that, from his experience, such contracts never met expectations. He said that the hand readers and Time and Attendance (T & A) software were purchased from AIS while the Payroll software was procured from Dakar. Mr Mifsud said that when they bought the T & A software, it was believed that their wages software would turn out to be compatible with this system. He added that the system still required extensive manual intervention.

With regard to the HR System, Mr Mifsud said that he was not in a position to comment. At this point, Mr M Schembri intervened and claimed that

Enemalta's HR System was developed in-house, the T & A system was integrated with the HR System and that the major problem was the integration of the HR System with the Wages System.

During his cross-examination, Mr Mifsud confirmed that AIS' system was not seamlessly integrated since it required manual intervention. He said that every morning, when workers punched, the HR had to send a person to check who was present or absent. However, he declared that he could not tell whose fault it was that the system did not work. All he knew was that they started with a contract that was supposed to cost so much and then, due to the need of additional software and programmes, Enemalta ended by spending much more. He said that, as far as he was aware, it was thought that such a system would cater for the whole Corporation and not for one user only.

Mr Mifsud contended that there was manual intervention due to the system and not due to resistance to change or because of internal management/administrative problems between the Wages Department and the Human Resources. However, Mr Schembri emphasised that anything Enemalta requested for integration was delivered successfully.

At this point Ing. Rizzo made reference to the minutes of meeting held on 7 March 2003 wherein it was indicated that the Time and Attendance was not integrated with the Payroll and Human Resources and that they had to enter data manually in the payroll software and HR software. Thus, he could not understand how the supplier was stating that the system at Enemalta was integrated. Nonetheless, Ing Schembri insisted that the integration of the system was accomplished as far as Enemalta requested it to be. He added that the information collected by the hand readers was used by the HR and T&A and that they were integrated. He said that irrespective of what was stated about Enemalta's system, the case at Malta Drydocks was completely different.

Both Mr Victor Mifsud and Mr Francis Muscat (Malta Shipyards) confirmed that their system was supplied, installed and commissioned by AIS Ltd. It was stated that 32 Hand Recognition terminals were installed at 8 different sites, namely Cospicua Drydocks for the industrial grades (2) and at the principal gates (2), Malta Shipbuilding (2), Manoel Island Yacht Yard (1) and Ricasoli Tank Cleaning Farm (1). The shipyards depended on automated Time and Attendance Systems based on Hand Recognition Technology to manage the attendance of their workforce. Mr Mifsud stated that after the merger of the Malta Drydocks and the Malta Shipbuilding, the systems at both yards were easily integrated without any problems.

Then they gave technical information of how integration among the systems was carried out. The Time and Attendance system transferred data collected from the Hand Recognition terminals to the Dakar payroll system. The Time

and Attendance was also integrated with Human Resources system which used Visual Personnel Software. This software was widely used in Europe and was relatively cheap. Leave information which was kept on the Human Resources system, was exported to the Time and Attendance database every evening. It was confirmed that AIS system could be interfaced with other different software applications and that when they had to change requirements, it was flexible enough to meet their needs.

Mr V Mifsud declared that the Time and Attendance system distributed information automatically to all departments/centres electronically by e-mail. Since the introduction of the Automated Time and Attendance system they were in a position to develop Management Reports for decision-making.

In reply to a specific question regarding seamless integration, Mr Mifsud stated that for them it was seamless because although the Time & Attendance, Human Resources and Payroll had three different and separate databases (AIS, Visual Personnel and Dakar respectively), data flew smoothly from one system to another automatically. They were satisfied with the system because only by exception human intervention was needed.

When Mr Mifsud was asked about the function of the Handkey II reader, he replied that the Access Control Reader and the Time & Attendance Terminal had the same function.

In his concluding submission, Ing Schembri said that the system at Enemalta was installed as required, that is, T&A system was integrated with the HR system automatically while manual intervention was required for the Payroll. From Mr Tarcisio Mifsud's testimony, it was established that it was not AIS's fault that they did not manage to interface the T&A with HR and payroll software. On the other hand the IT and the Project & Systems Managers at the Malta Shipyards were more than happy with AIS system. In fact, it was confirmed that the T & A system was integrated seamlessly with the HR and Payroll. The process from punching till the issue of payslip was all done automatically. The reporting system helped in the financial operation and management decisions. He declared that AIS specialised in system integration because the systems they offered could be interfaced with a number of software applications, were flexible and could be changed to meet requirements.

He said that another point that had to be taken into consideration was the significant difference between the prices of the two offers, namely Dakar at Lm 13,850 and AIS (inclusive of the three year warranty) at Lm 7,500.

With regard to the brochures exhibited about the hand readers, Ing Schembri said that they were different for marketing purposes only. He contended that the Handkey II had two functions, namely, Time and Attendance Terminal and Access Control Reader.

Ing. Schembri concluded by stating that, once their offer met WSC requirements and specifications and was significantly cheaper, the Appeals Board should reconsider the decision taken by the Contracts Committee and award the contract to AIS Ltd.

Dr N. Cassar, representing WSC, in her final submission, mentioned the references provided by AIS Ltd. She said that they required two references so that one would corroborate with the other. She said that they could not understand why they included Enemalta as one of their references taking into account the fact that despite repeated attempts they did not succeed to implement the interfacing with their HR and payroll software. She added that when WSC inspected Enemalta's system in operation it was found that their system was not integrated seamlessly and that extensive manual intervention was necessary. Thus, it resulted that one of the references provided by AIS itself was completely contrary to what WSC required. WSC's engineers were convinced that, in view of the specifications included in the tender submission, the system offered by AIS would not reach the concept of seamless integration. She added that it was the bitter experience with Enemalta that lead WSC not to consider the award of contract to AIS.

As regards the warranty clause, Dr N Cassar said that relative cost should have been included in the lump sum.

After hearing the final submissions, the Appeals Board ruled that in view of the outcome of these proceedings, it intended to appoint an independent IT Expert to analyse the tender documents prepared by the WSC and the tender documentation by AIS Ltd in order to establish and confirm whether (a) AIS Ltd's offer was compliant with the tender's specifications and (b) the system offered by AIS Ltd could be integrated seamlessly with the payroll and Human Resources software modules. The IT Expert's technical report would subsequently be referred to the parties concern for their comments.

Following receipt of credentials of a couple of experts, the Public Contracts Appeals Board on the 26th March 2004 formally appointed Mr Martin Bajada, FIAP (Technical & Information Technology Forensic Consultant) to write this report ensuring that the latter will be given access to all relevant documentation.

Mr Bajada submitted his findings to the PCAB and the latter forwarded a copy to all parties concerned giving these a week to view and formally comment on Mr Bajada's report.

Following receipt by this Board of the comments made in connection with the submission of Mr Bajada's report, it was decided to reconvene the hearing once again in order to give everyone the opportunity to ask all pertinent questions and raise any comment deemed apposite to the hearing procedure. Such

hearing took place on May 12, 2004 where this time Mr Bajada joined the proceedings and gave evidence under oath apart from making himself available for cross-examination by interested parties.

The Chairman, Public Contracts Appeals Board opened the meeting by stating that in accordance with the terms agreed upon by the parties concerned during the public hearing session of 28th January 2004, appointed an independent person to draw up a report with the following terms of reference:

- (i) To analyse the tender documents prepared by the Water Services Corporation (WSC):
- (ii) To analyse the tender documentation submitted by Advanced Industrial Systems Ltd (AIS Ltd) in conjunction with the said tender document prepared by WSC; and
- (iii) To establish and confirm whether (a) AIS Ltd's offer was compliant with the tender's specifications and (b) the system offered by AIS Ltd could be integrated seamlessly with the Payroll and Human Resources software modules.

The Chairman informed those present that this Board decided to appoint Mr Martin Bajada because from the CV submitted and Declaration made (dated 16th February 2004), he was considered to be competent enough to do the job.

A copy of Mr Bajada's report was forwarded to the parties concerned for their comments. WSC and AIS submitted their comments on 28th and 29th April 2004 respectively. The Board found it necessary to call another public hearing because AIS alleged that Mr Bajada went beyond his terms of reference. Nevertheless, it was at this stage that the Chairman PCAB emphasised the fact that this Board would only abide by its terms of reference and that any comments made beyond the Board's terms of reference would definitely not have conditioned its decision. He said that the Board called this meeting so that, for fairness sake, if such comments were made, they could be rebutted and/or confronted by the parties concerned.

Mr Bajada took the stand and commenced by saying that he first read the tender document and marked a number of documents related to this tender. Then he was given copies of all the documentation requested and analysed them. He felt that throughout these documents the WSC repeatedly highlighted the need to have a seamless integration and in subsequent communication they even gave a wider definition of this clause.

Mr Bajada said that he did not find any deficiencies in Dakar or AIS systems. His terms of reference were to analyse all the documentation and to give an opinion. He said that he had 10 years experience in similar court cases.

With regard to WSC's tender document, Mr Bajada stated that they made it clear from the outset that they wanted a seamless integration system and that any intervention had to be automatic without any other means or process for integration. WSC requested that all necessary information had to flow constantly through the Payroll and Human Resources System by using one seamless integration system.

As regards the AIS's tender document, Mr Bajada said that the issue regarding the import and export of data and functioning of the system had been raised in all the correspondence exchanged between AIS and WSC and also during a meeting held between WSC and AIS. In actual fact, the WSC had specifically asked AIS as to whether the integration could be carried out by manual data entry and file export method, to which AIS replied in the affirmative. In other correspondence AIS stated that the integration could only be accomplished by means of import and export of ASCII files. This meant that the import was not going to be seamless since it required manual intervention.

With regard to the third point, Mr Bajada said that he was of the opinion that, for the purpose of seamless integration, AIS's offer was not compliant to tender conditions which specified that the hand reader system had to be integrated with the Payroll and Human Resources Systems. He made it clear that during his analysis he did not go into the merit as to whether AIS' or Dakar's system was good or not.

Mr. Schembri argued that with regard to what was allegedly stated by Mr Bajada, namely that their system could not be integrated seamlessly with the software system available at WSC, he reiterated that his Company could do such similar seamless integration as a fallback situation. He proceeded by stating that on page 15 of their tender document it was specifically indicated that they could do the seamless integration. He added that in the previous session, it was established that Malta Drydocks' system was integrated seamlessly. He said that although all systems were theoretically open, they could not gain access to those systems where, for commercial reasons, databases were protected by passwords. So what they were stating was that, in the prevailing circumstances, they could do it by other means. However, provided that the system was accessible and not protected by password/s, the need to resort to the import and export of files was irrelevant. In their proposal it was indicated that their system could write directly in the Payroll and Human Resources databases, which was similar to the systems introduced in other places. He said that once these places did not have the problem of password protection, their system could be integrated seamlessly.

When Mr Bajada made reference to Section 5.10 Software Interfacing wherein it was stated that "*text files will then be imported by your existing Payroll system*" which meant that they were passing the system, Mr Schembri rebutted this argument by quoting from the same section wherein it was stated that:

“ if your HRIS uses an open database, a data transfer module already developed by AIS can read the HIRS tables directly and write the relevant data into TimeIT database.”

With regard to the number of documents and minutes of meeting mentioned by Mr Bajada, Mr Schembri contended that they did not have a copy thereof and so they could not state in which context the questions were asked and answered. He reiterated that Mr Bajada was not allowed to analyse such internal documentation since according to his terms of reference he should have analysed only the WSC tender documents/specifications and AIS' offer. However, the Chairman PCAB stated that it was important for the Board to determine whether any clarifications to the original tender document were requested, since then, if this was the case, they would be considered as forming part of the tender document. Mr Schembri immediately declared that this was not the case. On the other hand Mr Bajada said that this Board had given him access to all files and relevant documents. He added that the meeting was held specifically to discuss the seamless integration of a contract between WSC and AIS. Mr Schembri intervened by stated that the meeting was held after the submission of their offer and before the award of contract. It was confirmed that nothing was changed from the tender document. Mr Bajada stated that it was evident that further clarification was requested because the person who analysed AIS tender document felt that there was not enough information. More correspondence was required particularly on the seamless integration and more than one meeting was held apart from the sight visit. He declared that he based his conclusion on all documentation examined, including a diskette containing information on database by DAKAR which was submitted after the closure of tendering process. Mr Schembri intervened and stated that following this they confirmed that they could integrate the system seamlessly. However, Mr Bajada insisted that this could not be done unless import is done *via* ASCII files. Mr Schembri replied by quoting from page 11 of the Mr Bajada's report wherein AIS stated that:

“Alternatively our system can also read and write directly from the Payroll and Human Resources database, provided these are not encrypted, open and support ODBC connectivity.”

Mr Bajada insisted that during the meeting AIS confirmed that they could not do it seamlessly.

Mr Schembri replied by stating that the emphasis was being made on that point to disqualify them and the other point which qualified them was not being mentioned. Mr Bajada replied that in his report he made reference to all points mentioned in the documents. He declared that his interpretation was simple, that is, AIS' system was seamless provided that it was *“not encrypted, open and support ODBC connectivity.”* In the minutes of meeting held between AIS and WSC it was stated that when Mr Antoine Galea (WSC)

requested AIS to give details on the interfacing with the Dakar, they replied that “2 options are possible, i.e. manual data entry and file export method. Dakar was a non-open database and therefore it is not possible to interface automatically to Dakar payroll.” Mr Bajada clarified that he could have either reported on all existing documentation or analysed and reported on all the software, hardware and integration. He said that the Board had told him to base his report on the first option. He insisted that in his report he made reference to all existing documentation and minutes where seamless integration was mentioned.

Dr Nicolette Cassar, representing the WSC, stated that they concurred with the contents and conclusions of the report which was drawn up by a neutral technical person appointed by the Board.

Mr Rizzo said that they agree with Mr Bajada’s findings and conclusions as stated in their letter dated 28 April 2004 since they were already aware of such documentation when they drew up their adjudication report. Also, it was a confirmation that they had followed the appropriate procedures as far as the analysis and adjudication of the tenders was concerned.

When AIS’ representatives were asked whether they could confirm the contents of Min 35 which was drawn up by Mr Antoine Psaila, Mr Schembri replied that they could confirm that Dakar was a non-open system. He confirmed that they could integrate seamlessly with Dakar system provided that it was open.

When Mr Schembri asked WSC to confirm whether Dakar system was open as requested in the specifications of Payroll and Human Resources tenders, Mr Rizzo replied the AIS were allowed to inspect their system and gave them all requested information, including Dakar data dictionary which was made available on a floppy diskette. AIS claimed that it only contained the structure files that were not encrypted. Mr Pavia stated that it should be Dakar who could confirm whether they had a password and if they were prepared to give it. Mr Bajada said that the question whether the system was open or not was completely a different issue and it could not be taken on face value. Mr Rizzo claimed that they had Dakar Payroll and Human Resources (which was purchased but not yet installed) Systems and that in their tender documents they clearly indicated that they wanted a system which could be integrated seamlessly with them.

When asked by the Chairman whether it was pertinent to state that AIS’s system matched this criterion, Mr Bajada stated that, more for security reasons or to control potential users rather than for commercial interests, no company would permit their database to remain open and be accessible to everybody. Unfortunately, in this case, Dakar was one of the tenderers.

Mr Pavia recalled that, if he were not mistaken, Mr Schranz (DAKAR) had stated that although their system was encrypted they were prepared to give their password for accessibility. When asked by Mr Pavia to state whether, in such instances, it would be possible for AIS' system to integrate seamlessly with Dakar Payroll and HR System, Mr Bajada replied that no software would permit accessibility but, in the prevailing circumstances, once both companies were commercial and operating in the same market, it was in their interest that their systems were compatible and that they collaborated with each other.

Moreover, Mr Bajada said that, according to documents available, although AIS were stating that they could integrate seamlessly, Enemalta were in total disaccord with this claim. On the other hand, Mr Schembri pointed out that this was completely contrary to what was stated by Malta Drydocks.

Mr Bajada said that even if Dakar were to give the password, he could not guarantee that the systems would be seamless because one needed to do a lot of testing and trials first. He said that for any digital system, forensically, it was a non-destructive exercise because before embarking on a project one should keep a backup so that, in case of any damage/fault, one could restore it.

Mr Schembri concluded by stating that the point at issue was to determine whether there was any encryption or password. He said that if there were no commercial barriers AIS's system should not find any difficulty for it to integrate with the Payroll and HR Systems.

Following further analysis of the submissions made during the three public hearings held at that stage, the Public Contracts Appeals Board felt that throughout its deliberations there were still a few of the issues which needed further clarification. However, whilst initially the Board decided to try to elucidate itself on a few grey areas by means of formal correspondence with interested parties, yet it seemed obvious that the necessary clarifications had to be sought through another formal public hearing session. By doing so this Board preferred that such points would be clarified in the presence of all interested parties with anyone left at liberty to express any views in regard.

Consequently, this hearing was held within a reasonably short time in order not to prolong proceedings unduly.

Mr. Antoine Galea confirmed that due to the fact that Dakar had an advantage over the other contenders, the adjudication board gave AIS all necessary information and accessibility to ascertain a level playing field as far as seamless integration was concerned. The Board also gave AIS the concession to see Dakar's Payroll and HR systems giving them in the process access to life data. Mr Galea reiterated that the way specifications were drawn up did not preclude any competitor from tendering and that whoever was entrusted

with writing the pertinent specifications always had his employer's best interest at heart.

With regards to the issue of integration with the Dakar Payroll and HR Systems, which were "non-open", Mr Galea said that Dakar gave the necessary access when this was requested. However, when he was asked to state whether the said access (a.k.a the 'activation key' or 'password') was available or given on request, he said that he believed that in order for all to be ethically correct it is imperative for such access to be given in order to guarantee a level playing field. He proceeded by emphatically stating that should there have been any chance of such thing not happening he would have had no qualms in not tolerating such scenario going as far as resigning from his post.

On his part, Mr David Schranz declared that he did not find any objection to give the necessary access as he argues that, nowadays, there were enough tools available to enable anyone technically-oriented to integrate with the software, the latter being simply a digital data structured in particular format. He contended that if AIS had enough technical knowledge they could integrate with their software without the need of their intervention. In fact there were other companies who integrated with their software in other places of work. However, he said that, from a user point of view, AIS needed to know how the system worked in order to integrate seamlessly.

He said that the WSC had full access to the system because they had the password and the same user had access to switch on or off the encryption. Due to this reasoning, Mr Schranz argued that it is the Corporation that will ultimately decide as to whether such system will be encrypted. Here, Mr Rizzo declared that they would give access to that whichever company would be awarded the contract.

In his final intervention, Mr Schembri stated that most of the queries raised were based on the seamless integration with the existing Payroll and HR Systems at the WSC. He said that it was not true that his Company could integrate seamlessly with the Payroll and HR software module in view of the fact that Dakar was a *non-open* system. He proceeded by stating that should his Company be denied access, it would not be possible to integrate seamlessly. However, what his Company had stated all along was the fact that they had an alternative proposal to seamless integration in case they were not given access.

Finally, Mr Bajada said that what was stated during the hearing regarding the activation key concerning the encryption of the database was completely different from what he was requested to examine. He was of the opinion that, as far as seamless integration was concerned, salient technical information was lacking in the tender documents. He said that there could be a remote but realistic possibility that if Dakar were to someday decide to upgrade the system

AIS would not be in a position to integrate automatically. However, Mr Bajada also pointed out that the onus of such upgrade requirement remained solely within the Corporation's discretion.

Having considered all that was submitted and argued the Public Contracts Appeals Board:

- a. feels that during the adjudication process the WSC gave all the necessary information and was also willing to share and exchange data with Messrs AIS Limited even though this may have been at the time construed by at least a few members to be of a highly confidential nature and this in order to ensure a level playing field amongst tenderers;
- b. notes that Dakar Software Systems has already demonstrated its willingness to collaborate with third parties by allowing accessibility to the latter in order to ensure functionality and smooth integration of systems admitting in the process that it would be naïve in today's software development environment to restrict extent of collaboration considering the high possibility of third parties still gaining access anyhow;
- c. notes that Dakar Software Systems argues that it is ultimately the WSC which holds the key to accessibility even though this claim was somehow contradicted by the technical expert (Mr. Bajada) who stated that software developers could still, eventually, potentially prohibit access through, say, upgrade of systems. Yet, Mr. Bajada reiterated that seamless integration is guaranteed should all parties collaborate.
- d. notes that whilst the technical expert argues that the tender document did not include sufficient technical information to guarantee seamless integration, in his report, Mr Bajada also stated that his interpretation was simple, that is, AIS' system was seamless provided that the system provided by Dakar to WSC was "*not encrypted*".
- e. takes into consideration the fact that the Malta Drydocks were completely satisfied with the integration achieved between the AIS product and the Dakar software. The lack of similar success in the case of Enemalta could be due to extraneous factors which might have negatively effected the level of integration as required by the Water Services Corporation.

As a consequence, The Public Contracts Appeals Board considers that the objection raised by AIS Limited is justified. AIS Limited should find no problem with the integration of the system as once accessibility is guaranteed then there is no particular reason to technically question the validity of the appellant's offer.

Hence, this Board finds in favour of appellant.

Furthermore, the Public Contracts Appeals Board recommends that the appellant should be reimbursed the deposit paid when filing the said objection.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 15th June 2004

Case No. 16

CT 2608/2001, Advert No. CT 391/2001, GPS 03.116.T01DC

Supply of cefuroxime 750mg injections

The call for offers, with an estimated value of Lm 106,401, covering a period of three years, was published in the Government Gazette on the 2nd November 2001 (original closing date was scheduled for 18th December 2001) following a request received by the Director of Contracts from the Government Pharmaceutical Services.

Nine offers were received with the cheaper valid offer being submitted by Messrs. Rodel Limited acting on behalf of Elpen Pharmaceutical Co. Inc. for a global CIF price including relative charges of Lm 82,808.17. This offer was followed by the one submitted by Messrs. Michele Peresso Ltd on behalf of Medochemie which amounted to Lm 85,926.59. Other offers were received from Messrs. Pharma-Cos Ltd., Faran Lab S.A., Kela Laboratoria N.V., Charles de Giorgio Ltd., Alfred Gera & Sons., Pharmachemic Trading and A.M. Mangion Ltd.

Originally, the offer submitted by Rodel Limited was rejected by the Adjudication Board (08th October 2002) on the pretext that the tenderer was not in possession of a valid CPP. However, following further deliberations between pertinent departments and exchange of views and official correspondence, the offer submitted by Rodel Ltd. was considered to be fully compliant with specifications and tender conditions (18th November 2003).

Yet, further contact by telephone between GPS and Rodel Ltd and correspondence sent to GPS by the said tenderer, gave the impression to the pertinent Government Department that Rodel's principals would not have been able to entertain their original offer. Consequently, the Adjudication Board decided to re-evaluate the tender and on 20th January 2004 recommended the offer submitted by Messrs. Michele Peresso as the cheapest and most valid offer following the exclusion of the offer submitted by Messrs Rodel Ltd.

Following publication of such recommendations Messrs. Rodel Ltd. filed an objection with the Director of Contracts on 23rd February 2004.

Present at the public hearing held at the Department of Contracts, Floriana, on 24th March, 2004 to discuss the objection filed by Rodel Ltd, on behalf of their principals Elpen Pharmaceutical Co. Inc., against the decision to award the tender in caption to Michele Peresso Ltd.were, representing

The Public Contracts Appeals Board:

- Mr Alfred Triganza Chairman
- Mr Anthony Pavia Member
- Mr Edwin Muscat Member

Messrs Rodel Ltd

- Dr Norman Vella

Michele Peresso Ltd

- Mr Michael Peresso

Government Pharmaceutical Services

- Ms Anna Debattista (Director GPS)
- Ms Miriam Azzopardi (Pharmacist – Member of the Adjudication Board)
- Ms Sarah Cutajar (Senior Principal, GPS)

Upon being invited by the Chairman to commence the introductory part of the proceedings, Dr Norman Vella stated that the offer of their principals Elpen Pharmaceutical Co. Inc., consisted of two quotations, 'A' and 'B'. He said that the average price of quotation 'B' for 3 years, which was cheaper than Quotation 'A', amounted to US\$ 183,383.20/3 = US\$ 61,127.73 (CIF Malta) per annum. If one were to include 1% provision for delivery, the price would amount to US\$61,739.01. He contended that Elpen's offer was cheaper since Michele Peresso Ltd's offer amounted to US\$64,064 (US\$ 1.12 X 57200 vials) per annum.

He said that following a fax transmission request sent on 18th November, 2003, by the Government Pharmaceutical Services (GPS), Elpen extended the binding period of their offer (comprising both options, Quotations 'A' and 'B') until the 18th January, 2004.

Dr Vella went on to state that his principal's product, a sample of which was submitted to the Adjudication Board, was deemed acceptable and in accordance with specifications.

Mr Michael Peresso, representing Messrs. Michele Peresso Ltd., said that he wanted to enquire whether Elpen's price was changed or remained the same after the extension period and whether an offer 'on behalf of' was considered acceptable to the Department of Health.

Ms Debattista, Director GPS, said that the original closing date of tender was 18th December 2001. Tenderers were requested to supply 57,200 vials of Cefuroxime 750mg Injections for three years. They had to quote separate prices for each year.

During her testimony, she confirmed that Elpen Pharmaceutical Co. Inc. had submitted two quotations marked 'A' and 'B' for this product with the same brand name *Zetagal*, in carton boxes x 1 vial ('A') and x 50 vials ('B') respectively. According to the schedule of prices the latter quotation was cheaper than the first. She said that the product was according to specifications and that Elpen's offer was the third cheapest. The first two cheapest offers were not recommended for acceptance.

Then, Ms Debattista made reference to Rodel's fax dated 4 November 2003 from which she quoted the following paragraph to substantiate her claim that Elpen's original prices were changed and that they could not supply the product by 50 vials:

'Further to our telephonic conversation of today we confirm that our principals Elpen Pharmaceutical Co. Inc. cannot supply at present the above-mentioned product in the 50 vial presentation pack. However, they can offer the same product Zetagal 750mg x 1 vial at USD 1.12 per vial (CIF MALTA) which is equal to 1/50 of the offered price of USD56.06 for a pack of 50 vials corresponding to the third year (Dec. 2003 – Dec. 2004) of their quotation dated 03rd December 2001 under the above-mentioned tender.'

Subsequently Rodel's offer was rescheduled accordingly. In reply to a specific question by the Public Contracts Appeals Board (PCAB), Ms Debattista declared that the global price was changed from Lm 82,808.17 to Lm 86,785.85, which figure was supported by relevant documentation. She declared that, as a result, Rodel's offer did not remain the cheapest acceptable. Michele Peresso's offer, which was the fourth cheapest, became cheaper and was recommended for acceptance.

It is pertinent to point out that this Board did not concur with Ms Debattista's statement that price schedule had to be updated to reflect the latest prices. This Board insisted that prices could not be changed after the opening of tenders.

When she proceeded with her testimony, Ms Debattista said that although the tender was issued in 2001, it could not be awarded earlier as they wanted to clarify the matter regarding the fact that Rodel offered the item 'on behalf of', which according to a Department of Health's Circular, such offers were not acceptable to the Department of Health. However, she explained that the matter had since been clarified and therefore this was no longer an issue in this case.

With regard to what was stated by Ms Debattista regarding the contents of the fax dated 4th November 2003, Dr Vella claimed that in her telephone conversation, Ms Miriam Azzopardi wanted his Company's principals, Elpen Pharmaceuticals Co. Inc., to confirm whether they could supply *Cefuroxime Sodium (Zetagal)* 750mg in the 50 vial presentation pack at the original price. The reply given was that Elpen, at that particular point in time, did not have the 50 vials pack in stock. However, they confirmed that they could only submit the single vial presentation pack. He said that the price of the product corresponded to the one offered for consideration in the third year, namely, US\$1.12 per vial for a pack of 50 vials after taking into account of the fact that the request was made on 4th November 2003 and the closing date of tender was 18th December 2001. He said that apparently there was some misunderstanding because when Ms Azzopardi phoned he thought that they wanted to buy such product through a direct order as they required it urgently. He added that, under normal circumstances, if and when clarifications were required, the Government Pharmaceutical Services always requested them in writing.

Ms Debattista replied by stating that she was convinced that Ms Azzopardi did not query about prices as was being alleged by Dr Norman Vella because her task was to evaluate products and to enquire about their specifications.

In her testimony, Ms Azzopardi insisted that in her telephone conversation with Dr Vella, she only enquired about the sample by 50 vials since they only had the sample by 1 vial. In view of the fact that the offer by 50 vials was being considered for acceptance, they wanted to enquire about the presentation of its outer package to ensure that it was according to specifications and conditions. She declared that in their fax dated 4th November 2003 Rodel Ltd confirmed that Elpen could not supply the 50 vial presentation pack.

She confirmed that in their final report dated 20th January 2004, the Adjudication Board recommended Michele Peresso Ltd, since following the receipt of Rodel Ltd's fax dated 4th November 2003, the former tenderer became the third cheapest.

Ms. Sarah Cutajar's intervention aimed at stating that due to the fact that in the letter where the prices were changed, Dr Norman Vella had made specific reference to "Tender 391 – GPS.03.116.T01.DC", one cannot but establish that this was a clear enough indication that it was not a direct order that he was referring to but to the actual tender in question.

In submitting his final oral statements, Dr Norman Vella continued to insist that the price of US\$ 61,739.01 relating to 'Quotation B' and forming part of

Elpen's tender which was submitted with their letter dated 17th December 2001 was cheaper than the recommended tenderer's price of US\$ 64,064, that is, the offer submitted by Michele Peresso Ltd. He argued that Rodel Ltd's fax dated 4th November 2003 was superseded by GPS's fax dated 18th November 2003 in which they were asked to state whether they were prepared to extend the binding period of their offer up to 18th January 2004. The reply given by Elpen to this request was positive.

Mr Michael Peresso said that Rodel Ltd's fax dated 4th November 2003 clearly showed that the original prices in respect of this particular GPS tender were changed.

In its deliberations this Board took into consideration the fact that the problem that gave rise to this objection clearly arose out of the fax submitted by Rodel Ltd. and dated 4th November 2003.

It was admitted by both sides that the letter was the cause of confusion regarding the price of the goods which had been tendered for. Rodel Ltd. submitted that their intention in sending the fax was to inform the Department of Health about the availability of the injections concerned should the department require to place a direct order. On the other hand, the Health authorities stated that they understood the fax as referring to the Tender in question and assumed that the prices as originally quoted were being changed by the fax.

It is relevant that the fax in question clearly bore the reference of the Tender at present under contention.

It is felt that the Department of Health cannot be held to blame for having understood from the fax that the tender prices were being changed. It is also the opinion of the Board that the fax in question, whether willingly or not, was the cause of the misunderstanding.

On the other hand the Board must give the benefit of doubt to Rodel Ltd. and recognize the fact that the prices submitted in their original tender in fact had not been changed, and that the company's bid remained the most competitive.

During the hearing the representatives of the Department of Health explained to the Board that there was no particular problem regarding the stock of the injections in question as supplies could always be replenished through the issues of direct orders.

This Board therefore considers that a just solution to this objection would be to reissue the relative Tender and decides accordingly.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 12th April 2004

Case No. 17

CT 2640/2002, Advert No. CT 124/2003, WD 761/2002/2

Supply of submersible pumps for Pembroke Wastewater Pumping Station

The call for offers, with an estimated value of Lm 26,335 was published in the Government Gazette on the 9th May, 2003 following a request received by the Director of Contracts from the Works Division, Ministry for Resources and Infrastructure.

Four offers were received with the cheapest offer being the one submitted by Messrs. Rodel Limited for a total average price of Lm 9,106.23 (inc. VAT). The other offers included the next cheapest submitted by Messrs AFS Limited (Lm 33,923.06 incl. VAT) followed by the one submitted by Messrs. Engineering and Technology Ltd (Lm 35,002.00).

The offer submitted by Messrs Rodel Limited was found not to cover several of the items requested in the tender conditions and specifications and as a consequence was discarded on the basis of various clauses.

Following evaluation of the offer submitted by Messrs AFS Limited, although found to be complete (i.e. it covers all requested items) yet it was found to be void of the requested information vis-à-vis stainless steel pipe work and fittings, ventilation system/s and manhole covers. Following clarifications sought by the Adjudication Board, it was decided that apart from the initial reservations, it eventually also transpired that AFS Limited 'have arbitrarily changed the type of product they had offered in their original submission, namely the pump type offered'. Therefore, in view of the discrepancies as submitted by Messrs. AFS Limited the Board decided to discard also this offer.

On the other hand, the Adjudication Board considered the offer submitted by Messrs. Engineering & Technology to be in conformity with the tender specifications.

Following the decision taken by the Contracts Committee to award this tender as recommended by the Adjudication Board, Messrs. AFS Limited filed a notice of objection with the Contracts Department on 24th May 2004.

The Public Contracts Appeals Board (PCAB) met on 9th June, 2004 to discuss the objection raised by AFS Limited against the decision of the General Contracts Committee to award the tender to Messrs Engineering and Technology Ltd (E & T Ltd).

Mr. A. Triganza chaired proceedings accompanied by Messrs. A. Pavia and E. Muscat who formed the other Board members.

During the hearing

- a. the Water Services Corporation (WSC) was represented by Ing. Mark Peres
- b. Mr. Joseph P Attard (Managing Director) represented Attard Farm Supplies Ltd
- c. Mr. Paul Farrugia (Managing Director) represented Messrs Engineering and Technology Ltd (E & T Ltd)

Following a brief introduction by the Chairman of this Board, Mr Joseph P Attard, Managing Director, AFS Ltd, stated that an integral part of the Company's business was the pumping sector which included the supply of drainage pumps.

Mr Attard claimed that in this particular tender the offer submitted by AFS Ltd was cheaper (Lm 33,923 vis-à-vis Lm 35,002) than the one submitted by their competitor, namely Messrs Engineering and Technology and technically, quality standard is according to specifications. Yet, it was not recommended for the award of this contract. As a consequence, management felt aggrieved enough to lodge this objection with the Contracts Department on 24th June 2004.

When Mr Attard made reference to the technical details of the tender documents, he alleged that the specifications were based on those pertaining to a particular product of a specific company. He said that the tender requested specific criteria for the flow of water and head (pressure of water) within the prescribed parameters, namely 65 l/s at 44.2 lt and 97 l/s at 34.62 lt. He said that these hydraulic calculations were computed by their engineers as requested in the tender in order to verify the design and hydraulic load and to determine the size of the pump. At this stage Mr Attard questioned why the tender specifically requested 97 l/s at a particular point and not, say, 95 l/s or perhaps, 100 l/s. He said there were many companies which manufactured pumps, and for copyright reasons, two companies could never have a product, in this case pumps, which had hydro-electric combination having the same figures. The 65 l/s was not objectionable because one could take a point in a performance curve that gave that flow but no other pump would give a flow of 97 l/s at another point in the same curve. He said that the hydraulic efficiency of the pumps offered by his company exceeded the minimum 60% requested in the tender.

With regard to the 'free passage' which determined the space to allow a passage for solids, AFS's representative said that they had chosen an impeller with a free passage of 100mm against the requested minimum of 90mm. He claimed that the word '*throughlet*', which meant 'going through something', was chosen to orientate the tender towards a specific brand as it was only used by one particular company. The terms frequently and commonly used internationally were 'free passage', 'solids handling passage' and 'free ball passage'. He asked Ing. Peres, representing the WSC, to explain (a) why the Corporation used the word '*throughlet*' and (b) to enlighten those present as to how the Corporation's technical people arrived at

'90mm'. Mr Attard said that the minimum size of the free passage was normally 100mm so as to reduce the possibility of blockage as well as enable anyone to mitigate overall maintenance costs.

The appellant inquired why WSC requested that the impeller should '*be of cast iron to BS 1452, Grade 260*'. He said that 75% of European pumps' manufacturers refer to European norms and not to British Standards. However, he acknowledged the fact that the tender was issued when Malta was not yet a member of the European Union. He alleged that the grade chosen by the WSC was a standard used in brochures of the same company referred to earlier adding that there were three types of commonly used cast iron.

AFS Ltd.'s Managing Director insisted that the terminology used in the tender document was not chosen by coincidence but because it was used by a particular company.

Then Mr Attard made reference to paragraph 4.6 of the tender document, which stated that '*The pump casing bottom shall be equipped with a replaceable wear ring.*' He failed to understand why the WSC had requested a replaceable wear ring taking into consideration the fact that nowadays most of the companies used adjustable plates instead. He declared that their product did not need wearing. He proceeded by questioning why this was included in the specifications when it was overruled at adjudication stage.

He alleged that for many years the Drainage Department had chosen one particular brand/product and as a consequence specifications were still being oriented towards one product. He appreciated that WSC engineers may prefer products with which they are familiar such as

- a. interchangeability
- b. a better (overall) after sales service
- c. a universal type of installations

Yet, if this were to be the case, then one should reflect as to how pertinent it is to issue a public call for tenders under similar circumstances.

Finally, Mr Attard made reference to paragraph (5) of his motivated letter of objection wherein it was stated that '*In the final adjudication report the term 'arbitrary' is used vis-à-vis the pumps model offered at tender stage and model at clarification state*'. He insisted that the only model offered was the one listed in their original tender namely ABS Pump Model AFP1555 M 550/4-52Ex. He asked Ing. Peres to clarify the matter as the Board might have misinterpreted the model number terminology.

He concluded by declaring that the minimum requirements were met or exceeded and that they were offering the better pump.

Ing Mark Peres, representing the WSC, emphasised the fact that the Corporation is never biased towards any company while writing specifications for tenders. He argued that when it indicated the minimum size of the impeller '*throughlet*' to be 90mm, it in no way implied an exclusion of a '*throughlet*' of 100mm.

However, he stated that the offer submitted by Messrs AFS Ltd was considered by the Adjudication Board not to be compliant with specifications following analysis of the technical information submitted by the tenderer at clarification stage. Ing Peres said that on 10 September 2004 AFS Ltd furnished the Corporation with a graph having a pump with a characteristic curve that was different from that included in their original offer.

Here, Mr Attard intervened and claimed that the queries raised were of an electrical nature. He confirmed that the pumps offered were explosive proof. He added that the Adjudication Board had accepted the performance curves submitted with their original tender. However, AFS's Managing Director admitted that when asked to clarify certain issues which were totally unrelated to the matter, he erroneously submitted the wrong performance curves which may have ultimately mislead the Board. However, he contended that unfortunately the Board put more weight on the highlighted part of the graph rather than on what was written in their letter. He declared that he submitted the performance curve of another pump by mistake but it was quite obvious that he had made a genuine mistake. Furthermore, the clarification was not even sought with regards to the performance curve and so it happened that his Company was penalised for submitting something that was not even requested. As a consequence, Mr Attard alleged that the Adjudication Board discarded AFS's tender in order to enable the latter to ensure that the pumps in question would be bought from traditional sources. In order to substantiate his claim, Mr Attard tabled a drawing which was attached to the tender documents and which he claims to be a precise copy of a drawing pertaining to a particular company.

Ing. Peres confirmed that AFS's original curve was acceptable and that their offer was cheaper. Also he accepted AFS Ltd's declaration during the hearing that the Company had committed a mistake and that, in retrospect, the Adjudication Board should have noticed the mistake and finally agreed with a remark passed by the Chairman of the PCAB, namely that considering the circumstances, the Adjudication Board should have sought a further clarification from Messrs AFS in regard.

Ing Peres opined that in future the specifications should be revised and improved upon in such a way to ensure that they are more generic and not so restrictive.

Mr Paul Farrugia, Messrs Engineering and Technology's Managing Director, said that his Company, which was previously known as *Malta Installations*, has been active in this business since the early sixties with ongoing direct involvement in various Government projects, including schools, factories, the power station, distribution systems and so forth.

Mr Farrugia stated that his company introduced the submerged pumps in Malta and that they used both 'throughlet' and 'wearing impellers'. Contrary to what was stated by AFS Ltd, Mr Farrugia claimed that every pump had a 'throughlet' and that this terminology was widely used. He contended that in view of the new technology the width of the passage was no longer important. He insisted that the fact that the WSC used the said terminology in their specification did not necessarily mean that they were taken from their catalogue.

In evaluating the oral and written rendition of facts, the Public Contracts Appeals Board

- a. took note of the fact that during the hearing it became evidently clear that at clarification stage Messrs. AFS Ltd committed a gross mistake by submitting erroneous details relating to 'performance curves' especially when one considers that no clarification was being sought in regard as it had already been favourably considered by the Adjudication Board when the original offer was submitted;
- b. took cognisance of the fact that in the Adjudication Board's report of the 3rd October 2003 the latter stated that whilst "*the tenderer should be advised that literature and information submitted now shall be considered final and no further clarifications shall be allowed*", yet it seems quite unnatural for a business entity to re-submit additional details not sought by the Board and, to add insult to injury, structured in a way which disqualifies it from a favourable adjudication;
- c. considered Ing. Peres' testimony as crucial in this respect with the WSC's representative agreeing that it would have been more practical and justified for the Adjudication Board to seek a further clarification from the appellant rather than discarding the offer altogether;
- d. took note of the fact that whilst there may not be an element of bias whilst writing specifications, yet it seems quite evident that the terminology used was quite linear with a more familiar one used by a particular supplier on a particular brand / product type. Whilst this should not be construed as implying unethical practices, yet it also raises a question as to why does the Corporation resort to an open public tender policy when, perhaps, a direct order would be more opportune especially when possible preferences may have already been expressed.

Yet, once a tender is formally issued then no tenderer should be unduly penalised.

- e. took note of Ing. Peres's opinion, namely, that in future the specifications should be revised and improved upon in such a way to ensure that they are more generic and not so restrictive.

The Public Contracts Appeals Board, having gone through the arguments presented, both in favour and against the Contracts Committee's decision, considered that the objection raised by Messrs. AFS Ltd. was effectively and intrinsically justified. As a consequence the Board decided in favour of appellant.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 21st June 2004

Case No. 18

CT 2278/2003, Advert No. CT 214/2003, GPS 68.335.T03.BM

Supply of immunoassay kits with equipment on loan

The call for offers, with an estimated value of Lm 550,676 was published in the Government Gazette on the 18th July 2003 following a request received by the Director of Contracts from the Government Pharmaceutical Services.

The Adjudication Board went through offers received and decided against proceeding with opening the third envelope submitted by Messrs Cherubino Ltd as it considered it not according to Tender specifications.

Following formal publication of the Board's decision, Messrs Cherubino Ltd filed an objection with the Director of Contracts against the decision.

The Public Contracts Appeals Board composed of Mr Alfred Triganza (Chairman), Mr Anthony Pavia (Member) and Mr Maurice Caruana (Member) met on the 16th June 2004 to hear the appellant's objection in order to establish whether the Adjudication Board's decision was correct.

Dr Marcello Basile Cherubino and Mr Nigel Borg (Technical Officer) represented Messrs Cherubino Ltd (the appellant). Ms Anna Debattista (Director GPS), Ms Miriam Dowling (Chairperson Adjudicating Board), Dr Gerald Buhagiar (Consultant Bio-Chemical Department) and Ms Annalise Sciortino (Principal Medical Laboratory Scientist) represented the central health authorities.

In submitting his case before those present for the hearing, Dr Basile Cherubino commented on various points which were indicated to him when he enquired about the adjudication board's decision which lead to the discarding of their tender. The reasons given left much to be desired so much so that it became unavoidable for his Company to seek redress as granted by the law itself.

Messrs. Cherubino Ltd went through issues specifically raised by the Adjudication Board leading to their final decision to bring the process of scrutiny of the offer submitted by the said Company to a halt due to lack of compliance with tender specifications. Such issues related to (i) lack of space; (ii) CD ROM; (iii) condition of equipment; (iv) technical expert; (v) maintenance agreement; (vi) calibration and (vii) anti-TPO.

With regard to lack of space available to Messrs Cherubino (if the Company were to be awarded the tender) to accommodate all the seven instruments the

appellant's representative stated that, in agreement with the end user, they intended to supply five instruments in the laboratory and to keep in their offices the back up instruments, which would be installed in the relevant laboratory on the same day, if and when requested.

Dr Basile Cherubino claimed that in the Board's report it was stated that the CD ROM was considered insufficient for the client's needs. However, the appellant drew the attention of those present by stating that no literature was requested by the Department, yet one has to consider that nowadays the CD ROM was the most modern tool providing all the required information about a system. He said that companies rarely submitted catalogues or literature any more since one could gain access to all systems' information on an interactive CD. However, if the Department felt that the CD ROM was insufficient for their requirement they could have asked for a hard copy or at least some kind of clarification. Furthermore, they were more than willing to send technical experts to explain how the system functioned. He said that '*Remisol 2000 Software*' was a Bechman Coulter system that provided patients' identification and corresponding traffic and particularly used to keep pertinent records of patients.

The Adjudication Board seemed to have been adversely affected by the fact that the tenderer stipulated that, once the contract was terminated, the equipment had to be returned in the same condition in which it would have been originally delivered.

Undoubtedly, Dr Basile Cherubino explained that any Company would have expected at least that at the end of the agreed term the equipment would be returned to the successful tenderer in good condition and not damaged or broken. He was of the opinion that this was a flimsy excuse to exclude them from the next phase.

In September 2003, Backman Coulter sent over to the island Mrs Monique Blom, who was the Product Manager specifically on this type of apparatus, to illustrate and explain how the system functioned. The appellant felt amazed how certain points were not raised at the time when all clarifications could have been made.

Furthermore, Dr Basile Cherubino was baffled by the issue concerning the alleged lack of commitment on his Company's behalf to agree to a maintenance contract covering 24 / 7 all the year round including weekends and public holidays. The appellant stated that this was in the tender document and as a consequence not a question of choice or a topic for further discussion.

Mr Nigel Borg (Technical Officer) said that the technical specifications concerning the issue of dilution, particularly clause 1, entitled "on-board dilutions" of Section B - *Analyser Specifications*, were not quite clear.

He explained that auto-dilution was done by equipment having a specific range which analysed the patient. If the patient were to fall within the specified range, the patient would be accepted but if, for some reason or another the patient would fall outside the range, auto-dilution would bring the patient within range. He said that in view of the fact that their product had a wider range, fewer dilutions were required. As a result this saved time and re-agent consumption. Also their system was cost effective. The actual dilution of samples only involved the typing of the patient identification and indicating the dilution factor on the instrument. The rest was carried out automatically on the Analyser.

He said that Bechman Coulter had another instrument which carried out full auto- dilutions for all parameters but, when technical experts from Bechman Coulter held a meeting with the laboratory officers before the closing date of the tender, it resulted that its cost was beyond the department's budget.

When specifically asked by the Chairman to elaborate on the fact that in their write-up it was stated that *'the technical specifications were not quite clear in regard to dilution'*, Mr Borg replied that in the tender document only 'on-board dilution' was required. He declared that one of their analysers had fully automated on-board dilution but the other was not fully automated. Although human intervention was required, the level of such intervention was considered to be negligible. He contended that 'on-board' dilution was very vague.

In replying to a question asked by a member of this Board, regarding whether the Adjudication Board had sought any clarification relating to this particular issue, Dr Cherubino said that no clarification was requested because of the fact that their system was superior to other systems in so far as *auto-dilution, calibration* (six point instead of two point) and *stability* (28days against 14 days) were concerned. Mr Vella intervened by stating that the fact that the two-point calibration was extended, the resultant six-point calibration curve could only be regarded as an added advantage.

A Board member, drew the attention of those present by referring to Clause 3 of Section A, *Test Kits* where, according to him, it was clearly specified that *'If any pre-treatment procedures of patient samples are required, these should be performed automatically by the analyser.'* Dr Cherubino commented that this should not be taken in isolation but should be considered in conjunction with the calibration system.

With regard to the issue of calibration, Mr Borg stated that the two-point calibration was the minimum required. He said that in view of the fact that their system used six to seven point calibration, it was more advantageous than the two point calibration as the range used was wider and more points were used, it gave more accurate results, it was more stable, it needed less frequent

dilutions to be performed, required fewer re-agents and, as a final consideration, less time was wasted.

The appellant's technical officer stated that Anti-TPO tests were above the limit requested by the laboratory, namely 1,500 tests per year as against 500 tests per year. It was intended that these kits would be offered on an alternative system as their principals (Beckman Coulter) had to introduce the kits on board the Analyser by the end of 2004. This meant that by the time the tender would have been awarded and the equipment and the kits delivered, all kits would be run on board the same system. Thus, the number of tests exceeding the limit would be reduced significantly.

Dr Gerald Buhagiar, Consultant at the Bio-Chemical Department at St. Luke's Hospital, said that the analysers were earmarked for installation and commissioning at Mater Dei Hospital but eventually it was issued for St Luke's Hospital as the migration to the former hospital did not materialise. He said that the tenderer offered seven separate instruments which were not according to specifications. In actual fact they issued the tender for the supply of three identically, fully automated immunoassay analysers. The lack of space was problematic to the Department in the context that the equipment required enough working space within which technologists could work. Furthermore, he insisted that it was indispensable for the equipment to be on site.

With regard to the tenderer's requirement to return the equipment in the same condition in which it was delivered, Dr Buhagiar stated that Cherubino Ltd did not indicate that they would accept ordinary wear and tear. He contended that, despite the fact that their employees handled equipment carefully the Department was not in a position to guarantee or be held responsible for any damages which might be caused due to circumstances beyond their control.

Dr Buhagiar said that paragraph 1 of Section B., entitled '*Analyser Specifications*' of the tender document, which stated that '*High throughput, continuous random access analyser system, with full automation of all procedures, on-board dilutions and a throughput of ...*', was a proof that the specifications regarding auto-dilution were clear and specific. The Consultant contended that the Department wanted the auto-dilution to be fully automated in view of the fact that members of his Department had to deal with large numbers of patients' requests. During the hearing it was confirmed that all recommended suppliers who were short-listed offered auto-dilution.

Experience had thought Dr Buhagiar that a two-point calibration curve was easier to use, more stable and robust than the six-point calibration curve. Dr Buhagiar argued that the fact that Messrs Cherubino Ltd had found it necessary to include more props in between indicated lack of stability and robustness in the system. He was of the opinion that the fact that a 6 to 7 point calibration curve was used did not necessarily mean that you had extended the analytical

range and consequently did not need to do auto-dilution. Immunoassay systems used calibration curves with limited working range to cater for the majority of patients. The two-point calibration curve was more cost effective.

Dr Buhagiar said that, despite the fact that Bechman Coulter was a reputable supplier it was very unlikely that Anti-TPO would be made available in December 2004, since from his experience in the working field, the time taken to validate the system would take longer than anticipated. Thus, if it were to be postponed once again, the service they offered would be negatively affected, more so in this day and age when demand for this service is on the increase. He declared that the system was urgently required.

Dr Buhagiar stated that the tender was issued for major and minor analysers which all had to run on board the same system. He said that Cherubino Ltd offered analysers which ran on two different systems. In fact it was declared that they could meet their requirement by December 2004.

When asked about the drawing up of the tender conditions and specifications, Dr Buhagiar stated that it was the result of a team's effort since they were drawn up after various meetings were held before tender was issued.

Ms Annalise Sciortino, Principal Medical Laboratory Scientist, said that they mentioned auto-dilution twice in the tender specifications because they wanted to be sure that the system was fully automated. She said that they wanted to do without a manual dilution to avoid human errors. Ms Sciortino said that Cherubino Ltd needed a 6 to 7 point calibration because they were afraid that what they were offering was unstable. She said that to date the Department had never resorted to the 6 to 7 point calibration because it was done only once by the parent company before the kit was issued and they only needed to do a re-adjustment of 2 points whenever they used a new kit. With regard to the present system, she said that if a test came outside the range, the analyser would do it within the range automatically without any human intervention.

During the hearing the Department's officials stated that clarifications were only sought from the three tenderers who were short-listed. Cherubino Ltd were not asked to clarify the matter regarding (a) CD-ROM, (b) equipment on site and (c) condition of equipment in view of the fact that the (d) number of separate instruments, (e) the fact that the number of assays was in excess of 1500, (f) the immunoassay analysers, (g) auto-dilutions and (h) calibrations were not according to specifications. However it was stipulated that if such items met the scope of the tender, they would have communicated with Dr Cherubino to clarify the other issues.

The Board,

- having noted that appellant's tender was adjudicated as non-compliant with the technical specifications, and consequently, in terms of regulation 102 (2) of the Public Contracts Regulations, 2003 (Legal Notice 299 of 2003), was discarded unopened since it was not considered eligible to pass on to the next stage of the tender procedure (the consideration of the financial package – “Package Three”);
- having perused the contents of the Technical Adjudication Board's “Final Recommendations” dated 28 April, 2004, in particular, that section of the report which evaluates appellant's bid;
- having re-examined the several reasons given by the Adjudication Board for not recommending appellant's tender for further evaluation, leading to the discarding of the tender;
- having also examined appellant's verbal and written reasons (in terms of his letter dated 16th June, 2004) for contesting the decision taken to discard his tender;
- having cross-examined and put appropriate questions to Dr. G. Buhagiar, the Member representing the Adjudication Board in his capacity of Consultant-in-Charge,

reached the following conclusions:-

1. The question of space inadequacy to house the seven Analyser instruments would not have arisen had the equipment been installed at the Mater Dei Hospital during June, 2004, as originally programmed at the time the tender was published. According to Dr Buhagiar, the decision to install the equipment at St Luke's Hospital until it would be feasible to transfer it to the Mater Dei Hospital, was taken later, when it was evident that the installation programme had to be postponed.

The Board, therefore, does not agree that this particular condition constituted a valid reason for discarding the tender.

2. As regards the Test Kits Specifications, it is clear from the Tender Document that the Contracting Authority was very specific and demanding in this particular requirement, namely,

‘If any pre-treatment procedures of patient samples are required, these should be performed *automatically by the analyser*’

(*vide* condition 3 under “A. Test Kits – Specifications” on page 8 of the Tender Document. Other references emphasising this requirement also feature on page 9 of the said document.)

3. The arguments put forward by the appellant in the sense that
 - the auto-dilution requirements (specifications) were not clear;
 - fewer dilutions would be required on the systems offered because of their high linear ranges of most parameters;
 - the actual dilution of samples only involves typing the patient identification and indicating the dilution factor on the instrument (a 3-minute manual job);
 - the 6-7 point calibration (the system offered) was more accurate than the 2-point system (the system required) and had several intrinsic technical as well as economic advantages.

did not alter the fact that the Contracting Authority’s “auto-dilution” and “automatic performance” expectations from the analyser, as clearly and repeatedly specified in the Tender Document, were not being satisfied, in terms of the equipment offered. As a matter of fact the Contracting Authority’s representatives gave very good practical reasons regarding their insistence on having the specified equipment.

4. The board also noted that the apparatus being used at present at St Luke’s Hospital already possesses the “auto-dilution” capability. It therefore feels that this particular requirement as specified in the Tender Document is an important one and does not allow for alternative interpretations.
5. As regards the “Anti-TPO” kit required in terms of clause 12 under “B. Analyser Specifications”, appellant had offered a phased delivery programme in an attempt to meet the Client’s requirements. However, the Board did not consider this issue as particularly crucial, especially when considered in conjunction with the more important matter concerning the “auto-dilution” requirements.
6. As regards the Laboratory Information System Component, it does not result from the Adjudication Board’s report that appellant’s tender was also being disqualified because (a) he had only submitted a Power-Point presentation on Compact Disc without any other literature and (b) in his statement “*the equipmenthas to be returned in the same condition in which it will be delivered once the contract is terminated*” he did not indicate whether he was prepared to at least make provision for ordinary wear and tear – an issue which was clarified during the hearing.

In conclusion, the Board has no alternative other than accepting the conclusion reached by the Contracts Committee that Messrs. Cherubino Ltd.'s tender was not according to the specifications concerning the Test Kit, especially insofar as the "auto-dilution" and "automatic performance" expectations are concerned. In consequence, the Board has decided to reject the complaint raised by the appellant and authorises the tender award procedure to continue.

A. Triganza

Chairman

PCAB

A. Pavia

Member

PCAB

M. Caruana

Member

Date: 13th July 2004

Case No. 19

CT 2352/2003, Advert No. CT 253/2003, GPS61.026.T03.OT

Supply of dynamic hip screw (dhs) plates

The Government Pharmaceutical Services submitted a request on 23rd June 2003 to the Director of Contracts requesting the latter to formally issue a call for offers for the supply of Dynamic Hip Screw (DHS) Plates.

According to estimates the total value of the tender was not to exceed Lm 83,882.

Following the publication of the call for offers in the Government Gazette on 5th September 2003 five companies submitted their offer.

The Adjudication Board consisted of Ms M Dowling (Chairperson) with Mr D Darmanin and Ms D Gouder acting as the other members whilst Mr Esposito (Consultant Surgeon) was appointed Consultant to the Board.

The Board evaluated the offers submitted and on the 12th January 2004 decided to recommend that the Director of Contracts award the tender to Messrs Pharma-Cos Ltd for a global price of Lm 54,279.

Following public notification of the award, Messrs Rodel Ltd lodged a formal objection on behalf of their principals Merete Medical GmbH against the Committee's decision on 25th March 2004.

As a consequence, the Public Contracts Appeals Board (PCAB), consisting of Mr A Triganza (Chairman) and Messrs A Pavia and E Muscat respectively acting as the other members, convened a public hearing on 14th July 2004.

During the said hearing, Messrs Rodel Ltd. were represented by Dr N Vella. Pharma-Cos Limited were duly represented by Mr Marcel Mifsud (Director), Mr K Segerlund (Area Manager South East Asia – SYNTHES) and Doctors L Lombardi and A Tufigno who acted as the Company's legal advisers.

The Department of Health was represented by Ms M Dowling, Chairperson, Adjudication Board.

Consultants, Messrs F Zammit Maempel and A Bernard were summoned as witnesses.

The appellant, namely Dr Norman Vella, appearing on behalf of Messrs Rodel Ltd, was invited to give a resumé about the motivation of the Company's objection.

He started by stating that the offer of their principals, Merete Medical GmbH, was cheaper in price and that their product was according to specifications. He said that when comparing the prices of the recommended award of tender in favour of Pharma-Cos Ltd with that of Merete's offer, the difference was substantial – the first was about 83% more expensive than the latter.

He said that, although Mr Emanuel Anapliotis, Chairman and Chief Executive of Merete Medical GmbH, could not come to the public hearing, he sent a resumè of the argumentation that he would have submitted during this hearing. Dr Norman Vella read out the relevant documentation. In the first document he gave detailed technical and historical information about the development of the AO/ASIF institution and AO-Osteosynthesis principles. Those present were informed that 'AO' stood for the initial letters of the German words *Arbeitsgemeinschaft für Osteosynthesefragen* which, when translated in English, stood for *Association for the Study of Internal Fixation*.

The second document dealt with the invention and concept of the Dynamic Hip Screw (DHS), Merete's and Mathys/Synthes Specifications, a list of number of clinics which were using their implant (DHS) and Merete's Quality Assurance and Quality Control Certificates.

At this stage Dr Vella proceeded by stating that Merete felt aggrieved due to the fact that Messrs Pharma-Cos Ltd and Mathys Synthes claimed that they were the only ones that manufactured this product according to AO/ASIF specifications.

He claimed that Merete itself, which pre-dated the establishment of some products by Synthes as approved by AO/ASIF, had already previously followed the recommendations and specifications of AO/ASIF. Dr Vella said that there were mainly two particular aspects which were quite anomalous, due to (a) the exclusivity basis under which Synthes operated and (b) the fact that Synthes had three representatives on the Board of AO/ASIF. As a direct consequence, Merete could never be in a position to compete with Synthes once they had to depend entirely on the recommendations and licensing by AO/ASIF. Yet, Dr. Vella reiterated that Merete's product was still being produced according to the standards recommended by AO/ASIF and this ever since the Company was formed. The Company was also covered with the latest quality control certificates. He said that Merete was not a member of the AO Foundation solely for reasons which were purely of a commercial nature emphasising in the process that this was definitely not due to Merete's product being inferior. In actual fact, Dr. Vella argued that Merete engaged the services of most of the same professors forming part of AO in order to design their products and duly patented under Merete.

Dr Vella insisted that the tender specifications and conditions stated only that the product had to be according to AO/ASIF and did not require a branded product of Synthes and alleged that whoever drafted the specifications knew that only Synthes were licensed by AO/ASIF. Merete had confirmed that all their implants were made strictly according to AO/ASIF specifications in respect of both dimensions and design and the material used for the manufacturing of their implants was stainless steel type AISI316L. He tabled two copies of Merete Medical GmbH's Certificates Nos. G1 03 07 32007 008 and Q1N 04 06 32007 010.

Dr Lombardi, commenced her intervention by reading out from the tender specifications and conditions which stated that:

'Dynamic Hip Screw (DHS) Plates 135 of stainless steel material of type AISI316L having tolerances regarding chemical composition, impurity content, mechanical stress, shape and design according to AO/ASIF.'

She argued that it was stated that Merete's *'implants are directly comparable to so called AO implants'* and that they were so similar that surgeons were not able to see the difference. Dr Lombardi stressed that the tender's specifications stipulated that the product, which was a foreign fixation, had to be according to AO/ASIF and not *similar* or *equivalent*. She claimed that the only approved products in the world were those manufactured under the trademark 'Synthes' products and thus no other products apart from 'Synthes' products could claim to be made according to AO/ASIF. Therefore any products claiming to be similar or equivalent were not AO/ASIF approved. She emphasised that the technical committee of AO had to approve every single product that the manufacturer developed, produced, sold and distributed, otherwise it would not be considered to be AO/ASIF approved product.

It was stated that there were three exclusive manufacturers of the original "Synthes" implants for bone surgery, namely Mathys Medical Ltd, Synthes Stratec and Synthes Inc., all of them licensed to produce for AO/ASIF.

She concluded by stating that AO/ASIF implants should not be combined with products of other manufacturers. Implants from various manufacturers could be of different material, construction and quality. The compatibility of instruments and implants was taken into account during development and production. Manufacturing under their production tolerances guaranteed the compatibility with the correspondent SYNTHES instruments. These were also guaranteed whenever their products were modified. The research in this institution was continuous. The use of implants and instruments of different origin instigated the risk of inadequate fixation, increased corrosion and technical complications. National and international standards might limit the risk but could not exclude it. Responsibility for implant material and

construction could not be assumed if they were used in conjunction with implants from other manufacturers.

On his part, Dr Tufigno, explained how the AO Foundation had its own Institutes for Research, Development, International and Clinical Investigation & Documentation. In order to emphasise his point he quoted the following from the Foundation's official website, namely

'Alongside these is the Technical Commission (TK) which monitors the development of new implants and tools and gives the final AO approval necessary for bringing a product to market under the "Synthes" brand.'

With regard to the Management Boards of AO it was stated that:

'The Board of Directors implements the Academic Council's goals and proposals. Its 11 members include 3 representatives of the licensed manufacturers of SYNTHES® products.'

As far as the AO Quality Assurance was concerned, it was stated that *'It establishes and maintains the technical commission's guidelines for new surgical methods and devices according to the decisions of the OATK, the AO Board of Directors (AOVA), and the contracts between Synthes AG, Chur and the Synthes producers.'*

He insisted that only "Synthes Products" were authorised to sell products which were certified by AO/ASIF. It was an International Association for the Study of Internal Fixation, the members of which were medical doctors who were experts in this field and who usually followed what was dictated by AO/ASIF - which was the international standard.

When addressing those present, Mr K Segerlund said that AO was a Foundation which followed all international laws regarding research. Many companies sold their implant products. If they produced a screw and a plate, the tolerance level between them and the instruments was guaranteed. They could not guarantee quality assurance if products of different origin were mixed. Tolerance level was important because products had to be compatible with each other. Synthes would not have been allowed to produce, sell or commercialise such implants without the sanction of AO Group, which was composed of a number of scientists and researchers.

Taking the witness stand, Mr Zammit Maempel, Chairman Orthopaedics Department at St. Luke's Hospital, declared that the decision to award the tender to Messrs Pharma-Cos was taken unanimously by the Department of Orthopaedics' consultant surgeons. Specifications were usually drafted on the advice of the end users. He pointed out that in medicine emphasis was put on care of the patients and not on the price as this was considered irrelevant. He

insisted that the end users had to be satisfied with the implants that Government provided them with, since otherwise, if they were ordered to stick an implant against their advice, they would not shoulder any responsibility if something went wrong with their patients. The call for offers was resorted to in order to ensure transparency in procedure.

He declared that 25 years ago the Health Authorities decided to get AO implants for internal fixation of bones (plates, material etc). The tender stipulated that the DHS plates' specifications had to be according to AO / ASIF because all the equipment they had was AO certified and AO was the flagship in this field. It was issued to replenish only a part (DHS plates) of a whole system because it was out of stock. They would consider other products if it was certified that they would fit with all their equipment.

He said that they had to be convinced that Merete's products were interchangeable and mixable with products of other manufacturers. Furthermore he said that they were not going to put a plate of a different company they had never heard of before. He insisted that when there was doubt about a product they would not take risks. In such instances they had to safeguard the patients' interests first because, if something went wrong, it was they who would have to face the consequences.

When cross-examined, Mr Bernard, another Consultant, stated that the product had to be according to AO/ASIF because this Foundation had the highest quality products. Also, they took into account the continued research and development, education and product improvement. He maintained that once it was disclosed that such Synthes products were not interchangeable and mixable, they would not take that risk. In actual fact this was one of the reasons why they decided to continue using this system. Apart from this, AO was recognised throughout the world as an authority on internal fixation.

In his concluding remarks, Dr Vella presented and read out Merete's reply to Dr Lombardi's letter dated 5th April 2004 and to Mathys / Synthes' letter dated 1st April 2004 which, in general, rebutted all claims of its inability to meet tender specifications.

Dr Tufigno said that Mr Bernard and Mr Zammit Maempel had declared that an entire system of Synthes products were being used in Government Hospital. It was stated that it was dangerous to combine Synthes products AO certified with products that were not AO certified and that different items produced from different chemical compositions could lead to some problems. Neither Messrs Rodel nor Messrs Merete had ever guaranteed that their product did have AO/ASIF specifications but only stated that the quality was comparable. He

said that the technical people who adjudicated the tender had vetted the specifications and had decided that Merete's product was not according to AO / ASIF.

Mr Keneth Segurland emphasised that their instruments were specifically made to fit implants produced by SYNTHES. They could not guarantee the tolerance level of several instruments used with another implant. The supplier of implants should also supply the instruments.

Following a thorough deliberation of all facts and documentation submitted, and

- a. having considered the lack of propensity by the end user to change existing supplier;
- b. having noted the contents of the '*Recommendation Report*' submitted by the Adjudication Board;
- c. having noted both the Adjudications Board's and the Consultants' insistence for offers to be in accordance with AO / ASIF specifications which practically rules out the possible procurement of D.H.S. plates from other sources since it is evidently clear that the number of companies who can manufacture the requested product according to AO /ASIF specifications are very few and that Synthes thereby apparently enjoys a near monopoly;
- d. having in consideration of (a) and (c) above,

the Board deemed the process of this call for offers as having been futile as well as exceptionally costly to the Government's coffers.

the PCAB,

- i. not being in a position to justify the rightful reason for this call for offer when, '*ab initio*', it would have been more beneficial to all those involved, directly or indirectly, for such purchase to be conducted via a '*direct order*';
- ii. not being, in consideration of the reason given above, in a position to determine the justification or not for the local public coffers to be burdened with an additional financial commitment of approximately Lm 24,000, or rather the difference between the global price of the offer awarded the tender and the cheaper offer as submitted by Messrs Rodel Limited;

concludes that the call for offers should be *annulled* and the procedure conducted by way of a '*direct order*'.

The Board, not being technically qualified, cannot possibly comment on whether the decision to restrict the choice to AO approved products only, that is practically products made by Synthes, is correct or not. We recommend, however, that in view of the substantial savings which could be made through procurement from other companies, the question should be looked at carefully by those who possess the necessary technical qualifications.

Finally, this Board rules that Messrs Rodel Ltd should be reimbursed the amount of Lm 839 (Eight Hundred and Thirty Nine Liri) being the amount paid by appellant to lodge objection.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 10th August 2004

Case No. 20

CT 2139/2004, Advert No. CT 88/2004, DH 75/03

Supply of fruits and vegetables to the Health Department

On March 10, 2004, the Director General (Contracts) received a formal request from the Director General (Health Division) for a call for tenders for the supply of fruit and vegetables to be issued.

The value of the tender was estimated to be Lm 42,700.

Following the publication on, 4 April, 2004, of a call for offers in the Government Gazette, the Adjudication Board decided to recommend to the Contracts Committee the award of the tender in respect of the various categories of fruit and vegetables requested as follows:

- a. the offers submitted by Mr Ray Abdilla in respect of oranges, apples, pears, melons, peaches, plums and bananas;
- b. the offer submitted by Mr Anthony Mifsud in respect of vegetables.

This decision excluded in the process the offer submitted by Messrs. Gaetano Mifsud because “Mr Raymond Mifsud, who signed the tender documents, is a registered Pitkal” and clause 2 of the tender document specifically places major emphasis on outright disqualification from the said process as a result of a corresponding contravention of the same terms and conditions.

The decision by the Contracts Committee based on the recommendation of the Adjudication Board prompted a formal objection being lodged on 1 July, 2004, to the Contracts Department by Dr Toni Abela LL.D acting “*on behalf of Raymond Mifsud on behalf and in the interest of Gaetano Mifsud Limited*”.

On 4 August 2004, the Public Contracts Appeals Board (PCAB) convened a public hearing in order to discuss this objection.

Present for this hearing were the following:

The Public Contracts Appeals Board:

Mr Alfred Triganza (Chairman)

Mr Anthony Pavia (Member)

Mr Edwin Muscat (Member)

Representing Messrs. Gaetano Mifsud Ltd

Dr Toni Abela LL.D

Mr Raymond Mifsud

Representing the Government's Health Division
Mr Joe Degiorgio (Chairperson Adjudicating Board)

Representing himself, Mr Raymond Abdilla

The appellant's legal representative, Dr Toni Abela LL.D., acting on behalf of Messrs Gaetano Mifsud Ltd / Mr Raymond Mifsud, enquired about the Adjudication Board's decision which led to the exclusion of their tender, he was informed that, although Gaetano Mifsud Ltd quoted the cheapest prices, their offer was not accepted because Mr Raymond Mifsud, the person who had signed the tender documents, was a licensed/registered 'Pitkal' ('government vegetable broker'). According to the Agriculture Produce Marketing Regulations, a *pitkal* cannot purchase agricultural produce in order to sell it on his own account or sell agricultural produce otherwise than by way of a public auction. Clause 2 of the specifications and conditions of the tender stipulated that "*Tenders which are in contravention of the Agriculture Produce Marketing Regulations will be disqualified.*"

Dr Abela contended that his client was unfairly excluded because notwithstanding the fact that although it was a fact that the person who had signed the tender document namely, Mr Raymond Mifsud, was a government vegetable broker, the tender was submitted by Gaetano Mifsud Ltd which company itself was not a broker. He claimed that

Mr R Mifsud did not sign the form on his own behalf but on behalf of the company. As a matter of fact, Mr Mifsud's legal representative argued that the tender document itself stated *inter alia* that:

'... the person signing the tender should be and is considered to be fully authorised to act on behalf of the Company or Partnership for all purposes relating to the tender.'

Notwithstanding this, Dr Abela said that the Adjudication Board, through an oversight, on seeing that the form was signed by a *pitkal*, decided to exclude Gaetano Mifsud Ltd's offer.

At this stage Dr Abela drew the attention of those present that, despite the fact that the Commercial Partnerships Ordinance (Ord. X of 1962) referred to in the tender document was replaced by the Companies Act, 1995, the forms referred to in the said tender were not updated. The truth of the matter is that the forms in question refer to an Ordinance which does not exist anymore, Dr Abela emphasised.

Mr Joe Degiorgio, in his capacity of Chairman of the Adjudication Board confirmed that the offer submitted by Gaetano Mifsud Ltd was the cheapest.

However, he proceeded by stating that in the tender form submitted by Mr Raymond Mifsud, the latter had given his personal details, namely, his home address as well as the telephone number of his stall (no. 5) located at Ta' Qali's Marketing Centre. As a result, since Mr Raymond Mifsud had applied personally as a broker, Messrs. Gaetano Mifsud Ltd's submission had to be excluded because it was in contravention of the tender specifications as far as the *Agriculture Produce Marketing Regulations* were concerned.

Mr Degiorgio added that Mr Mifsud did not present a Company's resolution or authorisation to represent it and, as a consequence, he had no right to tender on behalf of Messrs. Gaetano Mifsud Ltd.

The Chairperson of the Adjudicating Board said that, according to the list of Directors attached to Registration No C 3587 which was issued by the Malta Financial Services Authority in terms of the Companies Act, 1995 and which was duly submitted to the Public Contracts Appeals Board, Mr Raymond Mifsud was not a Director of Gaetano Mifsud Ltd. In this respect, Mr Degiorgio contended that Mr Mifsud had no say or juridical connection with the said company; one could easily describe Mr Mifsud as a freelance.

Dr Abela intervened by stating that a person did not necessarily need to be a Director to represent a company. A person could be authorised to represent a company either by a resolution or by a verbal appointment. He drew the Board's attention to the fact that during this hearing it was only now that it was being stated that the tender submitted by Messrs. Gaetano Mifsud Ltd. was excluded because Mr Raymond Mifsud had no representation approval by the company and because he gave his personal details in the tender documents. He emphasised that he did not appeal on these considerations for the simple reason that these issues were not even mentioned during the adjudication process. If this were to be the case, he would have proved that Mr Raymond Mifsud had the necessary authorisation from the company to represent it.

Mr Mifsud's lawyer said that the fact that Messrs. Gaetano Mifsud Ltd was not included in the list of brokers referred to earlier was proof enough that the company which tendered for this contract was not a broker (*pitkal*). He claimed that the Adjudication Board had to decide whether the company was excluded either because it was a broker or because it was not correctly represented. Furthermore, he was of the opinion that, in the prevailing circumstances, the Board should have sought clarifications from the said company.

In his concluding remarks, Dr Abela emphasised that the offer was not invalidated or unaccepted because otherwise the Adjudication Board would have rejected it.

During a short intervention, Mr Raymond Mifsud said that, should the contract be awarded to Messrs Gaetano Mifsud Ltd, they would work it together as the company would provide the fruit and he would provide the vegetables.

At the end of the hearing this Board considered further the points raised by the appellant.

One of the major issues that were deliberated upon concerned the fact that it was evident that not enough discussion had taken place during the hearing as regards the allegation made by Dr Abela in his formal complaint, that the awardee of the tender, himself was employed by a pitkal. As a consequence it was decided to seek further clarification on this specific subject matter. Letters were sent to the two parties requesting them to submit more information on this point.

No reply was received from Dr Abela. On the other hand, the Health Department not only confirmed that Mr Anthony Mifsud is not a registered broker but stated that “the adjudicating board ... could not disqualify” Mr Mifsud, even though “he is employed by another “pitkal”.

This Board, having considered all the points raised during the hearing as well as the contents of the clarification received

- understands
 - a. the reasoning behind and the needs for the Department’s policy not to accept tenders submitted by registered brokers (“pitkala”);
 - b. that such restriction could provoke the engineering of various stratagems to be employed to enable brokers to circumvent current policy parameters;
- takes note that:
 - a. during the meeting the said appellant gave clear indication that the would be supplying the vegetables while his brothers in the company would be supplying the fruit, and that
 - b. the appellant is indeed a ‘*bona fide*’ broker (‘pitkal’);

decides that it cannot uphold the appellant’s appeal.

However, this Board recommends that in future similar tenders, the Department of Health should re-examine its policies in this regard to ensure that possible ploys adopted by registered brokers (‘pitkala’) or other persons who may in some way be associated with them, aimed at circumventing the restrictions imposed upon them under the conditions of the tender document, should not be allowed.

Also, the Public Contracts Appeals Board notes that Dr Abela's point relating to the reference to obsolete legislation in the tender document was valid and that the Department should take the necessary action to review the specifications, terms and conditions forming part of future tender documents ensuring conformity with current legislation.

Finally, the Board gives consideration to the fact that there seems to be quite an opaque and somewhat flawed perception as regards the extent of the eligibility of brokers or associated persons to tender for goods in question.

As a result, this Board feels that the appeal was not totally frivolous and decided to authorise the reimbursement of 50% of the deposit paid.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 01st September 2004

Case No. 21
E/G/T/5/2003, CT 2586/2003
Supply of 12kg / 25kg gas cylinders

The call for offers, with an estimated value of Lm 200,000, was published in the Government Gazette on the 14th November, 2003 following a request received by the Director of Contracts from Enemalta Corporation.

Six companies tendered for a total of seven offers with the cheapest offer being the one submitted by Messrs. *Darel Ltd.* for a price of Lm 231,086. The other tenderers were Messrs.

- *Frank Borg & Co. Ltd.*,
- *Shear Gold (UK)*
- *I.M.S.S Co. Ltd.*
- *Zarb Stores Ltd.*
- *J P Baldacchino & Co. Ltd.*

Following receipt of samples the Adjudication Board, consisting of

- a. Ing. Mario Magri
- b. Ing. Michael Falzon
- c. Ing. Michael Mifsud,

disqualified the offers submitted by Messrs. *Darel Ltd* and Shear Gold (UK).

The second cheapest offer was the one submitted by Messrs *J P Baldacchino & Co. Ltd.* However, the Adjudication Board, having considered certain salient points as described in the adjudication report, “*especially the failure of the material to satisfy the requirements of EN 10120 ... decided that this offer is not to spec.*” As a consequence the next cheapest offer was considered, namely the one submitted by Messrs I.M.S.S. Co. Ltd.

Considering that this offer was up to the required tender specifications the Adjudication Board recommended that the tender be awarded to this Company for the total sum of EUR 699,560 (*circa* Lm 302,111 delivered). The Contracts Committee agreed with this recommendation and awarded the tender to Messrs I.M.S.S Co. Ltd.

On the 16th August 2004, soon after the publication of the award, Messrs. J P Baldacchino & Co. Ltd filed an objection with the Director of Contracts.

The Public Contracts Appeals Board met on 24th September 2004 to discuss the objection raised by Messrs J P Baldacchino & Co. Ltd against the decision to award the said tender to Messrs I.M.S.S Co. Limited local representatives of Messrs. Sahamitr Pressure Cont. Co Ltd.

Mr. A. Triganza chaired proceedings accompanied by Messrs. A. Pavia and E. Muscat who formed the other Board members.

During the hearing

- a. *Evas Turkey and J P Baldacchino & Co. Ltd.* were represented by Mr Anthony Baldachino, Mr Adrian Baldacchino, Dr Patrick Galea LL.D and Ing. Adnan Atilla (Evas);
- b. *Sahamitr Press Cont Co Ltd and I.M.S.S. Co. Ltd* were represented by Mr Lawrence Said Ward and Ms Emer Said Ward;
- c. *Enemalta Corporation* was represented by Mr Godfrey Camilleri, Ing. Mario Magri, Ing. Michael Falzon and Dr Damian De Giorgio

The appellant, represented by Mr Anthony Baldacchino, commenced proceedings by drawing the attention of all those present as to what led the Company to file an objection with the Contracts Department following the award of the said tender to Messrs. I.M.S.S. Co. Ltd.

He said that the objection is based on the observations included in Adjudication Board's report.

These observations, which could be short-listed as mentioned hereunder, namely:

- a. *Late Delivery*
- b. *Cavagna / Kosangas valves*
- c. *Vacuum of Cylinders*
- d. *Samples*
- e. *Mechanical properties*

were dealt with in greater detail by the appellant

a. ***Late Delivery***

Mr Baldacchino denied that there was any delay on Evas' part in the delivery of the first consignment of cylinders. He claimed that the letter of acceptance was issued on the 21st August 2003 and the first delivery had to be effected by the end of October 2003 - the whole order had to be delivered within 120 days. The first consignment arrived in Malta on 22nd October 2003 and the balance

was successfully shipped within the term of delivery stipulated in the letter of acceptance. Mr Baldacchino argued that as this contract stipulated a C & F incoterm, this meant that the clearing from Customs was Enemalta Corporation's responsibility. So much so that the Corporation did not impose any penalty for any late delivery meaning that there was no basis or reason for it to do so!

b. *Cavagna / Kosangas valves*

The appellant said that his Company did not offer Cavagna / Kosangas valves but solely the S.R.G. ones. He emphasised that it was Enemalta Corporation who opted to receive the initial 20% of the order (6,000 units) fitted with Cavagna / Kosangas valves because in doing so it would have been in a position to advance on the expected delivery time frame. He insisted that the matter was attended to by the Corporation directly with Cavagna. EVAS was in no way a participant to this decision. Thus, in the prevailing circumstances and taking into account that it was Cavagna / Kosangas which provided these valves, it was not correct to blame EVAS for any defective valves.

He was of the opinion that it was unfair and unreasonable that the Adjudication Board included such comments in its observations to justify the exclusion of a supplier and burden the taxpayer with an additional amount of Lm 66,382.

c. *Vacuum of Cylinders*

As regards the Adjudication Board's remark that consignments were received without a vacuum,

Mr Baldacchino stated that the tender did not stipulate up to what level the cylinders had to be supplied with a vacuum. He claimed that the vacuum was on the same level as that of Germany and the Netherlands, that is, between 1 bar and 1½ bars, which was very low for Enemalta Corporation. He said that when the Corporation drew the Company's attention regarding this problem, prompt action was taken and an understanding was reached between interested parties by which the Company agreed to vacuum the cylinders on site. On 6th September 2004 the Gas Division requested Messrs J P Baldacchino & Co Ltd to continue vacuuming the gas cylinders. He pointed out that in previous tenders, namely, Nos. G/3/95 and G/1/96, the Corporation had imported cylinders without vacuum and so he wondered how come this time around these cylinders were being regarded as defective.

d. *Samples*

Mr Baldacchino said that the 12kg cylinder sample submitted was prepared by hand because the production lines were occupied with a different type of cylinder. However he contended that the fact that EVAS's embossed mark on

the handle was not there, in no way affected the characteristics of the cylinder. He said that it did not make sense to make a sample with a mark because it was very difficult during production. They attached their labels to the samples before delivering and a receipt was issued.

e. ***Mechanical properties***

The last point raised by Mr Baldacchino was that concerning the Adjudication Board's observation that the mechanical properties (*tensile strength and elongation*) of the cylinders received by the Corporation in the last consignment were found to be below the required standard when pertinent material testing was conducted at the Malta Drydocks (MDD).

The appellant tabled a letter dated 22nd September 2004 in which it was remarked that the Specifications of the previous tender stated that '*the material, design, construction, inspection testing and certification of the cylinders shall comply with BS 5045 Part 2 1989*'. The material permissible for propane cylinders under this norm, BS 5045 Part 2 1989, was classified under Table 2 Type B and that from these tables it transpired that the minimum tensile strength was 400NM/ mm² and the corresponding elongation varied from 24% to 29% minimum, depending on the original gauge length.

He claimed that the fact that the MDD's report stated that the results of tests carried out on an 'Evas' cylinder (supplied under the terms and conditions stipulated in tender No T/G/2/2002) showed that the tensile strength of material was equal to 405 N/mm² and Elongation was 29.74%, simply meant that it was still within the stipulated parameters of the norm (i.e. BS 5045 Part 2 1989), hence in conformity with tender specifications. Mr Baldacchino said that consideration should be taken to the fact that electronic machines allowed a tolerance of 1%± and that the environment temperature of the laboratory could affect the tensile strength result. He alleged that MDD's machinery was not precise because it was very old. He said that the certificates issued with every 250 cylinders produced were submitted with each consignment and these demonstrated that the material used was not below the requested standard.

The appellant claimed that his Company reserves the right to carry out its own testing contending that the cylinders had the 'π' mark and also had already passed the tests of an internationally recognised independent inspecting authority which was the TUV.

Messrs J P Baldacchino's legal representative, Dr P Galea, declared that his client's offer was within the specifications' requirements and that for this reason they were contesting the laboratory tests carried out by MDD. He said that the appellant was not informed about the results obtained. He argued that the much more authoritative German TUV had already tested the cylinders in

question and the respective design and type were duly approved. Messrs J P Baldacchino cannot but cast doubt on the validity of MDD's report and as a consequence insists to have these cylinders tested again by an independent laboratory. He requested the Board to issue a ruling about the matter.

Evas' representative, Ing. Adnan Atilla, declared that he was a Mechanical Engineer who had been working for his employers for the last fifteen years.

He said that Evas produced LPG Cylinders for many export markets in Europe, Asia and other parts of the world.

Ing. Atilla claimed that the fact that cylinders had the 'π' mark affixed to them and accompanied by the necessary certification, indicated that they had a good quality system at the production line.

During his testimony Evas' representative criticised the results of the testing carried out by MDD. He declared that his Company satisfied the BS standards and not the EN (European) standards. When he was specifically asked by the Board to state whether the 'π' mark could be attributable to a BS standard, the reply given was in the negative, claiming that this mark was attributable to EN standards.

When he was cross examined by Mr Lawrence Said Ward, representing I.M.S.S. Co. Ltd., he declared that the cylinders submitted as samples and those forming part of the actual consignment were of the same quality and that they were made on the same production line. He could not say why the 12Kg sample did not have the 'π' mark.

Enemalta Corporation's representative, Ing. Mario Magri, started his testimony by confirming that, contrary to what was stated in the Adjudication Board's report, the first consignment was not delayed. However, he emphasised that the third consignment was not submitted within the contract time of 120 days, but after 141days.

He claimed that it was not correct for Mr Baldacchino to state that the Corporation was so much the releasing party and hence should be deemed responsible for the delay in the actual delivery, as the Corporation, whilst still reserving the right to impose a penalty of 1% per week, yet, out of sole benevolence, refrained from applying the penalty clause in this particular instance.

With regard to the vacuum of cylinders, Ing Magri tabled a copy of an e-mail dated 2 January 2004 to prove that cylinders were not supplied with vacuum. In actual fact he said that the cylinders of all three consignments were received without a vacuum.

Ing. Magri confirmed that in view of the fact that 6,000 cylinders were requested immediately, they accepted to receive them fitted with 'Cavagna' valves instead of S.R.G. valves. However, his employers were expecting that such valves were going to be of the same quality as those supplied by S.R.G. All valves proved to be not according to specifications, of an inferior quality and defective. He said that they had two major failures at the Gas Division. As a consequence, it was decided that the Cavagna valves should be replaced at the Corporation's expense as they were not safe. At this stage Ing. Magri tabled a document in order to prove that, contrary to what Mr Baldacchino had stated earlier, the Cavagna valves were chosen by Messrs J P Baldacchino & Co Ltd. and that Evas had direct contact with the Cavagna Group.

The Corporation's representative declared that the 12Kg sample was without a 'π' mark and that, according to the TPE Directive, it was illegal in Malta to import cylinders without such mark. As a result, they took a cylinder from the last consignment and took it to MDD for material testing. He declared that although the sample of 25 kg cylinder had the required 'π' mark it was not sent for such testing.

It was acknowledged that, in view of the missing 'π' mark on 12Kg sample, they could have rejected the offer submitted by Messrs J P Baldacchino & Co Ltd.

During his testimony, Ing Magri tabled the following documents ('a' to 'c') submitted by Evas:

- a. confirming that the material, design, construction, inspection testing and certification of the cylinders should comply with EN 1442, and that cylinder would be in conformity with the Transportable Pressure Equipment Directive;
- b. containing information about the differences between BS 5045 Part 2 1989 and EN 1442 1998;
- c. containing an extract from the tender document in which the supplier, Evas, indicates the type of material used in the production of cylinders.

When Ing. Magri's attention was drawn to the fact that the standards EN 1442 and BS 5045 included in the specifications appeared to be conflicting, he said that the matter had been clarified with all tenderers as they were notified that cylinders had to be in conformity with the PED (Pressure Equipment Directive) and not with BS (British Standards). Mr Baldacchino denied that they had ever received such communication. When Ing. Magri was asked by the Board to go through the relative correspondence in file, it transpired that only those tenderers who had requested such clarifications were notified and Messrs J P Baldacchino had not requested such clarification and as a consequence the Corporation did not notify this Company that the cylinders had to be in conformity with the PED. Yet, Ing Magri claimed that the Corporation had

notified in a previous tender Messrs J P Baldacchino that cylinders had to be in conformity with the Transportable Pressure Equipment Directive and in order to substantiate his claim he produced a document.

With regard to the variation in price between the offers submitted by Messrs J P Baldacchino & Co Ltd and I.M.S.S. Co Ltd, Ing Magri stated that as the total value of offers amounted to Lm 267,331.51 and Lm 302,110.76 respectively, then the difference should be less than the amount of Lm 66,382 mentioned by Mr Baldacchino in his testimony.

Ing. Magri confirmed that Enemalta Corporation had engaged a consultant and decided to submit the cylinders for testing at Omeco Laboratories in Italy. He said that he was informed that the cylinders submitted had failed the tests as they were defective and not up to EN standards.

With regard to the tests carried out in Italy, Ing Michael Falzon, another witness, stated that the Corporation was not in a position to publish the reports as the investigations so far carried out were still at a preliminary phase and very much inconclusive at this stage. He said that cylinders were currently being collected from households as a precautionary measure.

Ms Emer Said Ward, representing I.M.S.S Co. Ltd. quoted clause 1.9 of the tender specifications which stated that:

'A sample of 12Kg cylinder and a sample of 25Kg cylinder is to be submitted. It is to be made clear that without these samples, the tender will not be considered. Samples are to be identical to the cylinders on offer complying with all the requested specifications. Samples are not returnable.'

She declared that they had supplied the samples of the 12Kg and 25Kg cylinders according to specifications inclusive of the 'π' mark and Enemalta Corporation's Logo. She contended that whoever did not actually comply with specifications should have been automatically disqualified and not even considered for evaluation. Furthermore, she stated that the benchmark test showed that the product that was likely to be imported would not meet the required tender specifications.

Ms Said Ward contended that the tender should not have been adjudicated on the basis of a sample pertaining to another tender.

Towards the end of this public hearing, the PCAB suspended the sitting for a few minutes to deliberate on Dr Patrick Galea's request regarding the results of the tests. The Board ruled that, irrespective of the arguments that would be deliberated upon and explained in the sentence which would be referred for publication to the Director of Contracts on another date, there was no need for this Board to doubt the results of the tests which were carried out by recognised

and independent laboratories. Also, it was felt that if the appellant felt aggrieved by these laboratory results, which were being contested, the said appellant had every right to take separate legal action against the parties concerned in a different forum.

The Board, took note that:

- a. tender documents are compiled in a way that, in the absence of proper clarification, one could possibly misinterpret the actual requirements of the specifications requested;
- b. Enemalta Corporation's representative, namely Ing. Magri, had admitted during the hearing that the inclusion of two different set of standards, i.e. BS 5045 and EN 1442, could have easily created a possibility for any tenderer to erroneously interpret which standard one should abide by;
- c. the samples actually submitted do not conform to specifications. This should have sufficed to disqualify the offer as submitted by Messrs. J P Baldacchino & Co. Ltd. '*ab initio*'. As a matter of fact this Board believes that the decision taken by the Corporation to analyse two samples from a current tender supply was the wrong decision to take under the circumstances as this gesture, albeit taken in good faith is a strong deviation from the normal practice as it tends to treat tenderers on uneven levels;
- d. Enemalta Corporation had written on 24th November 2003 to those interested parties who had formally sought clarifications from the Corporation notifying the latter that cylinders had to be in conformity with the PED (Pressure Equipment Directive) and not with BS (British Standards). This Board, whilst recognising that the Corporation committed a mistake by not formally notifying all tenderers and not only those two companies who sought information themselves, yet is also aware of the clarifications made by the Corporation's representative during the hearing wherein it was stated that the Corporation had notified in a previous tender

Messrs J P Baldacchino on 2nd January 2003 that cylinders had to be in conformity with the Transportable Pressure Equipment Directive and in order to substantiate such claim a document was produced;

- e. the sample taken from an existing supply (as consigned by the principals of Messrs J P Baldacchino & Co. Ltd.) was, however, not found to be according to specifications

decides in favour of the decision taken by the Contracts Committee as recommended by the Adjudication Board.

In view of the fact that the filing of this objection is not deemed to be frivolous and may be slightly due to the unclear way of the existing content format of tender specifications as well as the flawed manner in which the Adjudication Board may have decided to conduct the testing of sample cylinders in its process of adjudication, this Board feels that Messrs J P Baldacchino & Co Ltd should be reimbursed the amount paid for the filing of this formal complaint.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 04th October 2004

Case No. 22

CT 2251/2003, Advert No. CT 280/2003, WE 163/2001

Provision of incontinence diapers and pads for Senior Citizens and Persons with Disability

This call for tenders, published in the Government Gazette on the 7th October 2003, was issued by the Contracts Department following a formal request received by the latter from the Department for the Elderly and Community Services.

The global estimated value of the contract in question covering a period of two years was Lm 90,000.

The closing date for this call for offers was 18th November 2003.

The Department for the Elderly and Community Services appointed an Adjudication Board consisting of Messrs:

- a. J Rapinett (Chairperson)
- b. T Cordina (Departmental Nursing Manager)
- c. A Zahra (Nursing Officer)
- d. M Abela (Executive Officer)

to analyse a total of eleven offers submitted by six different tenderers.

Following the recommendation by the Adjudication Board on 22nd June 2004 to the Contracts Committee and the latter's formal agreement thereto signed on 07th July 2004, Messrs. Protex Ltd filed a Notice of Objection on 07th July 2004 against the said award to Messrs. Sarrebico Medical Supplies Ltd (Cost: Lm 21,404 based on two years) based on the following points:

- (a) Protex Ltd. tendered various combinations of requested items resulting in the 1st, 2nd and 5th cheapest offers whereas Sarrebico Medical Supplies Ltd. submitted the 6th cheapest offer;
- (b) Sarrebico Medical Supplies Ltd. did not submit the full range of requested items for Option 'B' offers. Only Option 'A' offer conformed with Clause 13 in Tender Document and therefore Option 'B' should have been disqualified from the process;
- (c) In Option 'A' offer, Sarrebico Medical Supplies Ltd. offered disposable adult diapers instead of children's diapers;
- (d) Sarrebico Medical Supplies Ltd. only submitted samples after closing date of tender.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia and Mr. Edwin Muscat, respectively, as members, convened two public hearings on 15th September 2004 and 01st October 2004 to discuss this objection.

Present for the hearings were:

Protex Ltd

Dr Ronald Aquilina LL.D
Mr Jonathan A. Guillaumier

Sarrebico Medical Supplies Ltd

Dr Anna Mallia LL.D
Ms Alexis Sciberras

Witnesses

Mr Michael Bezzina (Director, Dept for the Elderly and Community Services)
Mr Joe Rapinett (Chairman Adjudicating Board)
Ing John Bugeja (Malta National Laboratory Co Ltd)
Mr Bottiglieri John (Principal, Dept for the Elderly and Community Services)
Miss Silvana Cauchi (Clerk, Dept for the Elderly and Community Services)

The appellant's legal representative, Dr Ronald Aquilina, informed those present that, apart from the points raised in the original letter of objection, he requested to raise a further three issues which, according to him, were considered to be vital to his client's appeal proceedings. Also, he claimed that since such facts came to his client's knowledge soon after the filing of the objection, it was only pertinent for such matters to be considered holistically with the initial objection. As a result, Dr Aquilina requested the PCAB to make sure that:

- a. Sarrebico Medical Supplies Ltd. produce their Trading Licence;
- b. Protex Ltd is furnished with copies of all laboratory tests effected on samples; *and*
- c. the persons indicated by his client in a tabled document, particularly, Ing John Bugeja (Engineering Divisional Manager – Malta National Laboratories Co Ltd) be summoned as witnesses.

Dr Anna Mallia LL.D. on behalf of Sarrebico Medical Supplies Ltd replied that they would produce their Trading Licence in the next public hearing. However, she claimed that in their offer Sarrebico Medical Supplies Ltd indicated that their Trading Licence was valid till December 2003.

With regard to the availability of the laboratory test reports, the PCAB ruled that it intended to follow the same procedure as in previous cases, i.e. only allowing the publication of such documentation whenever witnesses made specific reference to them during their testimony.

Mr Joe Rapinett (Chairman, Adjudication Board), was asked by the appellant's councillor

- a. to explain the procedure adopted in the evaluation of the offers taking into account the fact that in the tender's specifications and conditions it was indicated that '*preference will be given to diapers with the least leakage release*';
- b. whether the tender was adjudicated on the basis of either absorption or leakage.

The Adjudication Board's Chairman replied that adjudication was based both on absorption and leakage. He said that they sent samples for laboratory testing – starting with the cheapest offer. This was arrived at by taking the prices quoted by each contractor for each item in each alternative offer submitted. From this exercise it resulted that the cheapest offer, which was that submitted by G Borg Barthet, had to be discarded because the tenderer failed to submit samples. So the Board decided to send the samples of the second (Krypton Ltd's) and third (Protex Ltd's) cheapest offers for laboratory testing.

Mr Rapinett emphasised that apart from the fact that all samples were opened at room temperature in the laboratory in accordance with ISO standards, these same samples were marked in a different manner so that those carrying out the tests at the Malta National Laboratory would not be able to assign tenderer identification to samples being analysed.

From tests carried out it transpired that the second cheapest offer failed in samples submitted for all sizes of children diapers and sample of incopads while the third cheapest failed in samples submitted for large and extra large diapers for children as well as in sample of incopads. The fourth cheapest offer, which was that submitted by Krypton, failed in all sizes of samples submitted for children diapers and incopads.

In reply to Mr Guillaumier's (Protex Ltd.) question regarding the fact that *absorption* and *leakage* were two separate things, Mr Rapinett stated that the method used in evaluating the offers was that if two samples succeeded in passing the tests in connection with absorption, these would then go through other analysis relating to matters connected with leakage. All things being equal, the Chairman of the Adjudication Board explained, preference will be

given to the diapers with the least leakage release. Yet, Mr Rapinett also proceeded by placing emphasis on the fact that whenever laboratory tests on samples result in failure by the latter to pass the absorbency testing procedure, such samples are generally not tested for leakages in view of the fact that these would have failed to comply with tender specifications. He said that previous tenders did not include leakage in their specifications. All prospective bidders were informed that both *absorbency* and *leakage* (liquid release), are benchmarked by *I.S.O. 11948 Part 1 and 2* and this was considered to form part of the tender document.

Mr Rapinett said that when laboratory results of the lowest bid fail to positively reflect the tender specifications, the Adjudication Board always proceeds to carry out further tests relating to the next cheapest offer and continues to do so until the results of the laboratory test are conclusive. In this particular instance, following the same procedure, the samples submitted by Sarrebico Medical Supplies Ltd managed to pass these stringent tests.

When Dr Aquilina enquired about the structure of Sarrebico Medical Supplies Ltd's offer, the Chairman of the Adjudication Board explained that this consisted of two options, Offer 'A' and Offer 'B'; the first offer included quotations for all items whilst the second offer submitted excluded quotations for children's diapers. Mr Rapinett stated that the Board followed what was felt to be an equitable and plausible solution wherein the cheapest prices of all items were taken into consideration, irrespective of the option under which they would have been included. In fact, from *Offer B* the Board accepted Adult Normal Diapers, Adult Extra Absorbent Diapers and Incopads, whilst Children's Diapers were accepted from *Offer A*.

At this stage Mr Guillaumier intervened, insisting that Sarrebico Medical Supplies Ltd did not submit the full range of the requested items in *Option B* and, as a direct result, should have been disqualified from the tender adjudication process. He claimed that only *Option A* conformed with clause 13 of the tender document which stated that '*Only tenderers who offer the full range of requested pads and diapers will be considered.*' Here Mr Rapinett pointed out that Sarrebico Medical Supplies Ltd had offered the full range and that for the same reason the Board would have had to disqualify Protex Ltd's *Options B* and *C* respectively.

With regard to Mr Guillaumier's remark about Sarrebico Medical Supplies Ltd's late submission of samples, namely, after the closing date of the tender, Mr Rapinett said that, although he was not in a position to state whether or not the samples were submitted before the closing date of the tender, he could, however, confirm that all samples were available to the Board at the time the latter was proceeding with the adjudication process. In order to demonstrate that Mr Guillaumier's claim was unfounded, Ms Sciberras tabled a receipt

following submission of samples, issued by the Department for the Elderly and Community Services dated 18th November 2003, the closing date of the tender in question.

Following an issue raised relating to the validity of the tenderers' trading licence at the time the said tender was closed, the PCAB requested the respective parties to table such licence for evaluation purposes. Protex Ltd obliged but Sarrebico Medical Supplies Ltd refrained to table the licence within the specified timeframe and as a result were asked to do so by the following working day addressing a copy to both the PCAB's secretary as well as to the other party. At this point, Dr Anna Mallia wanted to draw the attention of this Board that the tender conditions did not specify that the offers of those tenderers who had no trading licence were to be considered invalid.

When Mr Bezzina was cross-examined by Mr Guillaumier, he said that, as a Director, his competence was to improve the specifications so as to decrease complaints and ameliorate standards, adding that in this case it was not the quantity that was relevant but the specifications concerning *absorbency*, *leakage* and *measurements*. The Director, Department for the Elderly and Community Services, explained that whilst all three requirements were considered important, yet, it is standard procedure that whenever samples successfully pass the so called 'absorbency tests', then, at this stage, preference would be given to diapers with the least leakage release. He said that in this tender specific reference was made to 'leakage' in view of the fact that most of the complaints were received on this particular issue.

When the witness was cross-examined by Dr Mallia, Mr Bezzina confirmed that the current suppliers to the Department were Protex Ltd. He said that taking into account the consumption of diapers, the number of complaints received from users was considered small and negligible.

Ing. John Bugeja, Engineering Divisional Manager, Malta National Laboratory (MNL), said that he was a specialist in the testing of diapers.

When he was asked by Dr Aquilina to give details regarding test results of samples supplied by Protex Ltd and Sarrebico Medical Supplies Ltd, Ing Bugeja asked Mr J Rapinett to give him the necessary information as he did not know to whom they belonged. The Chairman of the Adjudication Board said that the samples marked AA, BB, CC, DD, EE, FF, GG, HH, II and JJ were supplied by Protex Ltd and those marked ABC, DEF, GHI, JKL, MNO, PQR, STU, VWX, YZ and AAB were submitted by Sarrebico Medical Supplies Ltd.

Ing. Bugeja said that he was requested to test the samples basing his analysis on particular tender specifications relating to measurements, absorbency levels and leakages. At this stage the MNL's official referred to reports of test results

on samples submitted by the two interested parties giving a detailed account of findings relating to Adult Extra Absorbent Diapers (Small, Medium and Large), Adult Normal Diapers (Small, Medium and Large), Children Diapers (Medium, Large and Extra-Large) and Incopads. However, in order to simplify matters, the PCAB requested Ing. Bugeja to submit a comparative analysis between Protex Ltd's and Sarrebico Medical Supplies Ltd's test results and specifications in the form of a tabulation.

Ing. Bugeja said that in the maximum width/hip measurement maximum fit of diapers he had assumed an overlap of 2.5 cm on each side. He contended that, although, he said that they conformed to specifications, it was not his role to formally interpret findings and that the final decision was left entirely to the discretion of his client, in this case the Adjudication Board.

Mr Rapinett stated that the cheapest offer, namely the one submitted by Messrs G. Borg Barthet, had to be discarded as the tenderer failed to quote for *Adult Diapers Extra Absorbent*. He said that the samples submitted by Protex Ltd's, duly marked AA – FF (*Adult Diapers*), were not tested because the samples of the second cheapest offer (submitted by Krypton Ltd) for adult diapers had already passed the tests. As Krypton Ltd's offer failed as regards the samples submitted for children diapers and incopads, the Adjudication Board requested Ing Bugeja to commence the pertinent testing analysis relating to similar samples submitted by Protex Ltd. However, according to Mr Rapinett, in view of the fact that tests carried out on both *large* and *extra large diapers for children* as well as in respect of incopads, had failed, the tender could not be awarded to Protex Ltd.

Conversely, the Chairman of the Adjudication Board contended, all the test reports on samples submitted by Sarrebico Medical Supplies Ltd, specifically declared that these were in conformity with tender specifications.

With regard to the test results of sample marked STU (submitted by Sarrebico Medical Supplies Ltd), Mr Guillaumier said that the Waist/ Hip measurement for Children Diapers/ Extra Large had a Maximum Fit of 84 cm. Consequently, since according to specifications these had to be between 35 and 60 cm, this item was not in conformity with the tender specifications. Also, he noted that the size of this diaper was equivalent to sample GHI for Adult Normal Diaper – Small. He was of the opinion that adult diapers could never satisfy children's needs. Apart from this, he said that, as the size of children's diapers was excessively larger than requested in the tender, such diapers would obviously create discomfort to children. He demonstrated samples of an adult's and child's diaper to prove his point but Sarrebico Medical Supplies Ltd's representatives questioned their sizes.

Ms Silvana Cauchi testified that, as the officer in charge of the *incontinence service*, she was responsible for the receipt and processing of applications as well as dealing with complaints. She confirmed that users of this service have always aired some kind of complaint or other, very often reasonably. One has to appreciate that the users have different requirements dependent on age, size, disability and so forth.

During her cross-examination, she said that they used different sizes of children diapers as it depended on their stature.

Dr Aquilina asked Ms Cauchi to confirm whether the Department she worked for had, over time, received any complaints from clients relating to the fact that in particular instances small adult diapers were distributed instead of children diapers extra large. Ms Cauchi replied in the affirmative.

At this stage the PCAB decided to bring this hearing to a close requesting the representatives of the interested parties, namely Messrs. Sarrebico Medical Supplies Ltd and Protex Ltd respectively, to provide the Board with formal submissions in both printed and electronic format. This Board also ruled that a printed version of the said submissions had to be exchanged between the relevant parties for further analysis by the said Companies. It was also made clear that final points relating to the pertinent submissions had to be made by a date to be stipulated by this Board at a later stage following receipt of the formal submissions by 15th October 2004.

In the meantime the PCAB also decided that:

- a. Sarrebico Medical Supplies Ltd were to submit their Trading Licence (by 04th October 2004)
- b. Ing. John Bugeja was to compile a tabulation with the test results in respect of samples submitted by Protex Ltd and Sarrebico Medical Supplies Ltd and specifications (by 05th October 2004)

This Board also instructed the Board's Secretary to furnish the interested parties with copies of *Trading Licence* (Sarrebico Medical Supplies Ltd's) and *tabulation* (MNL) respectively.

Ing. John Bugeja submitted the following tabulation for this Board's perusal. The results enclosed are tabulated in two groups, namely:

- GG to JJ referring to samples submitted by Protex Ltd
- and
- PQR to AAB referring to samples submitted by Sarrebico Medical Supplies Ltd

Sample	Specifications Waist/Hip measurement	Max fit assuming 2.5cm overlap cm	Minimum Absorption Capacity	Absorption g	Leakage g
GG (Children Diaper / medium)	Not specified	58.5	1000ml	1011	0.26
HH (Children Diaper / Large)	Not specified	59	1300ml	1204	0.09
II (Children Diaper / Ex- Large)	35 – 60 cm	63	1600ml	1344	0.02
JJ (Disposable Pads)	App. 32cm X 11cm	Size 30.5 X 13	700ml	470	0.02
PQR (Adult Extra Absorbent Diaper / small)	50 – 80 cm	85	1900ml	1903	0.04
MNO (Adult Extra Absorbent Diaper / medium)	70 – 110 cm	124	2400ml	2942	0.24
JKL (Adult Extra Absorbent Diaper / Large)	100 – 150 cm	157	2600ml	4400	0.04
GHI (Adult Normal Diaper / small)	50 – 80 cm	84	1600ml	2057	0.02
DEF (Adult Normal Diaper / medium)	70 – 110 cm	125	2000ml	2329	0.26

cont.

.... cont.

Sample	Specifications Waist/Hip measurement	Max fit assuming 2.5cm overlap cm	Minimum Absorption Capacity	Absorption g	Leakage g
ABC (Adult Normal Diaper / Large)	100 – 150 cm	154	2300ml	2603	0.15
YZ (Children Diaper / medium)	Not specified	58	1000ml	1127	0.12
VWX (Children Diaper / Large)	Not specified	68	1300ml	1351	0.02
STU (Children Diaper / Ex- Large)	35 – 60 cm	84	1600ml	1993	0.02
AAB (Disposable Pads)	App. 32cm X 11cm	Size 35 X 15	700ml	741	0.03

Both parties submitted their formal submissions within the time limit.

In their submission **Sarrabico Medical Supplies Limited** stated that “Protex diapers and Pads have failed in one of main requirements that is absorption. The main constitutions of a diaper are its ability to absorb and Protex diapers and pads have failed miserably in this regard. In fact one of the pads does not even attain 50% of the required absorption figure.” Sarrebico Medical Supplies Ltd claimed that “this is what disqualified Protex ...”

According to Sarrebico Medical Supplies Ltd the “fact that Protex Ltd tendered various combinations of the requested items, is irrelevant as the absorption of these diapers was not according to what was specified in the tender requirements.” The fact “*that a world leader employing 2000 people manufactures the diapers does not hold water as the diapers failed in the absorption tests conducted at the Malta National Laboratory*”, claimed Sarrebico Medical Supplies Ltd. proceeding that their Company had “submitted various diapers and they were all according and even exceeding the specifications requested by the department”.

Sarrebico Medical Supplies Ltd placed major emphasis on the fact that, contrary to what was being claimed by Protex Ltd, their Company never tried to mislead anyone. They stated that at no time, for example, did they

- a. offer adult diapers small instead of children diapers extra large;
- b. submit samples after the tender closing date (documentation is available to prove otherwise).

On their part, in their submission, **Protex Ltd**'s legal representatives made reference to quite a list of issues, the salient and the most relevant to this case according to this Board including:

Trading Licence - Sarrebico Medical Supplies Ltd

According to Protex Ltd., the licence presented by Messrs Sarrebico Medical Supplies Ltd. does NOT refer to Sarrebico Medical Supplies Ltd but to Mr. Alexander Sciberras personally.

The appellant claims that this is confirmed by the fact that:

- a. the Trading Licence presented does not refer to Sarrebico Medical Supplies Ltd in any manner whatsoever but refers only to Mr. Alexander Sciberras. When a trading licence is issued in respect of a limited liability company, this would be indicated on the trading licence itself in the field "*Post Licenzjat*", as is the case with Protex Ltd's trading licence. Once this is not the case with the trading licence presented by Sarrebico Medical Supplies Ltd, then the trading licence applies to Mr. Sciberras personally and not to Sarrebico Medical Supplies Ltd.
- b. the VAT number on the Certificate presented (i.e. 1266-1014) is not registered with VAT Department as Sarrebico Medical Supplies Ltd's official VAT number. Sarrebico Medical Supplies Ltd indeed have a different VAT Number. VAT number 1266-1014 refers to Mrs. Alexandra Sciberras personally, whereas trading licence is in the name of Mr. Alexander Sciberras personally, thus giving rise to an evident anomaly.

According to Dr Aquilina, "In her covering letter of the 4th October, Mrs. Sciberras states "*I still operate from the same address*" when referring to the address indicated on the trade licence document furnished by her. The fact that Mrs. Sciberras makes this assertion, however, can be of no comfort to Sarrebico Medical Supplies Ltd. It simply means that Sarrebico Medical Supplies Ltd is operating from those premises without a valid trading licence i.e. in breach of the law." The legal counsel to Protex Ltd elaborated further by stating that at law "a company enjoys a separate and distinct legal personality

from that of its shareholders and other individuals. As such therefore, Sarrebico Medical Supplies Ltd cannot argue that they have a trading licence because Mr. Alexander Sciberras used to have a trade licence in his name. The same also applies even if the trading licence presented by Sarrebico Medical Supplies Ltd were in the name of Mrs. Alexandra Sciberras personally.”

In their submission, Protex Ltd argue that Sarrebico Medical Supplies Ltd's lack of a valid trading licence at the relevant time necessarily leads to their disqualification and Sarrebico Medical Supplies Ltd are therefore not eligible for the award of this contract:

- a. in view of clause 13 of the document "*Specifications And Conditions For The Supply Of Incontinence Diapers And Pads For Senior Citizens And Persons With Disabilities*" relative to this Tender which specifies that: "The Schedule of prices must be properly filled in and a quote submitted for each item. Tenderers who do not comply with this condition will not be considered". The Schedule of Prices clearly indicates that tenderers were to provide both "Police Licence Number" and "Police Licence Valid till date". Sarrebico's lack of trading licence necessarily implies that either the afore-mentioned requested information was not supplied at all or that such information was erroneously supplied;
- b. as legally, no entity is authorized to carry out trading activities without a valid trading licence. Once Sarrebico Medical Supplies Ltd does not hold a trading licence, it cannot trade in the first place, let alone trade with a government department / organisation.

Protex Ltd’s legal representatives also make reference to the fact that past decisions taken by previous members of a similar Board to this confirm the principle that a party which is not properly authorized to carry on trade according to law and therefore not as envisaged in a particular tender cannot be eligible for the award of that tender (*vide* CT 2131/1999 - Supply of Incontinence Pads & Disposable Adult Nappies to the Welfare Committee (CT 106/99) - decision dated 9th December, 1999.

Sarrebico Medical Supplies Ltd – supply of Adult Diapers instead of Children Diapers

The appellant claimed that the *Tender Document* (clause 10) provides that the “diapers must have ... waist/hip measurement and the minimum absorption capacity for the following diapers must be as follows ... Children Extra-large; 35-60 cm waist/hip measurement”

According to the test results supplied by Ing. John Bugeja of Malta National Laboratory Co. Ltd., the samples submitted by Messrs Sarrebico Medical

Supplies Ltd had the following measurements - *Children Extra Large (sample STU) - 84 cm Maximum Fit.*

Protex Ltd claimed that it should be evident that the samples supplied by Messrs Sarrebico Medical Supplies Ltd in respect of Children Extra Large Diapers (sample STU) are substantially not in conformity with tender specifications (by a margin of 40% based on the maximum fit allowed of 60cm). Moreover, at 84 cm, the waist/hip measurement of sample STU is identical to that of sample GHI (Sarrebico Medical Supplies Ltd's Adult Normal Diaper - Small) where even the absorption is also nearly identical. In the circumstances, it should be evident that Sarrebico Medical Supplies Ltd supplied an Adult Normal Diaper - Small instead of a children extra-large diaper as requested in the tender document (clause 10). Incidentally, it should also be evident that Sarrebico Medical Supplies Ltd has passed the absorbency specification for children extra-large diaper by virtue of submitting bigger samples (*Adult Normal Diaper – Small*) instead of children extra-large diapers.

Dr Aquilina proceeded by stating that the “supply of Adult Normal Diapers - Small instead of Children Extra-Large Diapers would obviously create serious and unnecessary discomfort because of an overly excessive size to that expressly requested in the tender, resulting also in further discomfort because of leakages as diapers would be far too loose; the maximum waist measurement is too big whereas the length of the diaper is too long for children. The elastics around the leg area would also be loose whereas the crotch width too wide for children. It should also be noted that the refastenable adhesive tapes system for adult diapers are completely different to those for children’s diapers, and therefore inappropriate. It is pertinent to bear in mind that should Messrs Sarrebico's offer be accepted, children needing extra-large diapers would AS A RULE be supplied with Adult Diapers which are by far too big for their needs. This is intolerable as when in the past this practice was tried on limited occasions, complaints were made by users in view of the serious discomfort caused to them. Vide in this regard the evidence submitted before the Board by Ms. S. Cauchi from the Department for the Elderly and Community Services.”

Protex Ltd’s submission then proceeds to mention a list of items as offered in Sarrebico Medical Supplies Ltd’s tender which are also not in conformity with specifications as stipulated in the Tender Document (Clause 10), e.g.:

- Children Large - no waist/hip measurement specified
- Children Large (sample VWX) - 68 cm maximum fit
- Adult Extra-Absorbent Diaper - Medium (samples MNO) - Waist/hip measurement 124cms instead of 70-110 cm
- Adult Normal Diaper – Medium (samples DEF) - Waist/hip measurement 125cms instead of 70-110 cm

Thus, according to Protex Ltd, practically all items (except for items YZ, GHI, ABC & AAB) submitted by Messrs Sarrebico Medical Supplies Ltd do not conform fully with the specifications required.

Protex Ltd - cheapest offer

In view of the above considerations and in view of the fact that the offer submitted by Protex Ltd is the next cheapest offer, the Company submits that the tender should, in the circumstances, be awarded to Protex Ltd. Protex Ltd's legal representatives claim that the Company should in no way be penalized for the Department's failure to test a number of samples submitted by the same Company, including disposable pads for which an alternative was submitted by appellant. It seems that Protex Ltd has only failed two items (circa 10 % of total contract quantities) as against those failed by Sarrebico Medical Supplies Ltd. According to Dr Aquilina, past decisions of the "General Contracts Committee have awarded contracts to tenderers who have failed a fewer number of samples than the next tenderer in line."

Protex Ltd concluded their submission by stating that, in view of the above, Sarrebico Medical Supplies Ltd's offer should be rejected.

As already explained this Board also ruled that a printed version of the said submissions had to be exchanged between the relevant parties for further analysis by the said Companies.

Such analysis led Sarrebico Medical Supplies Ltd to rebut issues raised by Protex Ltd in the latter's submission. The Company made particular reference to matters relating to Trading Licence, VAT and the Supply of Adult Diapers instead of Children Diapers.

Sarrebico Medical Supplies Ltd stated that in their formal objection dated 16th July 2004, the appellant "never raised the issue of the trading licence and so they could never issue it in the course of the proceedings."

However, in spite of the fact that "the tender conditions do not mention anything about trading licences", Ms Sciberras claimed that, without prejudice, she still wants to draw the attention of this Board that "the Trade Licence issued to Mr Alexander Sciberras is transferable by inheritance." In order to substantiate her claim, Ms Sciberras enclosed a document entitled 'Regulations of 2002 regarding Trade Licences', section 2 paragraph 19, which according to her clearly state this fact.

Sarrebico Medical Supplies Ltd enclosed other documentary evidence (legal declaration taken under oath in front of Notary Public J H Saydon on 21st October 2004) in order to confirm that Mr Alexander Sciberras' legal heirs,

Mr Andrew Sciberras and Ms Angela-Denise Sciberras respectively, declare that they have no objection to Trade Licence in question (07/291) being transferred to them and agree that this Licence should be transferred to their mother in her own capacity or to Sarrebico Medical Supplies Ltd, a Company in which Ms Alexandra Sciberras is the majority shareholder and also has absolute control of the said Company.

Mr Andrew Sciberras' legal heirs also declared that they were unaware of the fact that such a formal transfer of licence was supposedly to be effected within six months from the demise of their father.

Sarrebico Medical Supplies Ltd also rebutted the issue raised by Protex Ltd with regards to VAT claiming that "this does not give rise to disqualification as the matter can easily be rectified."

The reference made in paragraph 1.5 of the appellant's formal submission was also subject to a reaction by Sarrebico Medical Supplies Ltd prompting the latter to include certified documentation "confirming that no further application is needed for the change of use on MEPA B1 application forms."

Sarrebico Medical Supplies Ltd. then brought to the attention of this Board that the quoted case, Vernon Carus vs Sarrebico Medical Supplies, was totally different, stating that "The shareholders of Protex Ltd, were minority shareholders in Vernon Carus (Malta) Ltd. The law states that when the majority shareholders of a company registered in Malta are foreigners and do not reside in Malta, then no trading activity can be carried out by this company. This is has no relation to what Protex is claiming."

In so far as regards the points raised by Protex Ltd in regard to the supply of *Adult Diapers* instead of *Children Diapers*, Sarrebico Medical Supplies Ltd. stated that although they can confirm that the Department had requested that *Children Diapers Extra Large* have the same absorption capacity as the *Adult Diapers Small*, yet one should not go with the idea that these are the same; "there are certain specific differences which make them unique to their particular size, type and supplier. In fact tests conducted by Ing John Bugeja of the Malta National Laboratory confirm this." emphasised Sarrebico Medical Supplies Ltd.

Sarrebico Medical Supplies Ltd. proceeded by stating that "the arguments being raised by Protex regarding the fit of Sarrebico Diapers is totally irrelevant. We can assure the Board that our children's *diapers extra large* take into consideration the anatomy and the comfort of the users of these diapers – be they children or adults.... most of the users are bedridden or wheelchair bound and tend to be much heavier around the waist thus requiring in the diaper the ability to encompass a wider girth."

“The award of the tender to Protex Ltd would mean that they have been awarded a tender when they did not conform to the specifications requested”, concluded Sarrebico Medical Supplies Ltd.

Protex Ltd.’s legal representative also reacted to the other interested party’s formal submission by presenting his comments for this Board’s consideration relative to specific paragraphs of *Sarrebico Medical Supplies Ltd.*’s submission. These comments, formally submitted by Protex Ltd’s legal representative on 21st October 2004, are being reproduced hereunder, quoted not in their entirety, but most importantly, in relation to this Board’s weighting of their importance to objections raised:

- “The function of an incontinence diaper/pad is to absorb and retain fluid in a comfortable and discrete manner for end users. This is only achieved through a synergy of all tender specifications/product conditions; For example, a diaper fails to absorb and retain fluid when it’s size is larger than intended user, and so users will experience further discomfort and distress...”
- “... Sarrebico’s submissions regarding the submissions of Mr. Michael Bezzina and Ms. Sylvana Cauchi are absolutely and directly opposite to what was actually stated by Mr. Bezzina and Ms. Cauchi before the Board. This, if necessary, can be confirmed with the recordings of the relevant sitting. For clarity’s sake, Mr. Bezzina testified that complaints were only few and far between. As a responsible head of Department Mr. Bezzina asked for Protex’s comments. Protex, fully confident in its products, co-operated fully and Mr. Bezzina confirmed that he was satisfied with Protex’s comments.

As regards Ms Silvana Cauchi, she never testified that a large number of complaints were received. She only made reference to some reports regarding an issue of size concerning *Children Extra Large* diapers, and that complaints did ensue when such diapers were temporarily replaced by *Adult Diapers Small* with the client’s consent...”

- “...The fact that a manufacturer supplies products which are accepted by millions of users world-wide, including the American and Japanese markets, is testimony to a high product standard of international recognition...”
- “... It is evident that the sizes for adult diapers small and children’s diapers Extra Large submitted by Sarrebico are identical when the tender specifies different sizes. This is irrefutable evidence that adult diapers were offered instead of children’s diapers, yet Messrs. Sarrebico choose to ignore these facts and instead insinuate Protex is misleading the board...”

Following a thorough analysis of the issues raised and the documentation submitted during the hearings, as well as the formal submissions presented by the respective parties, this Board decided that equal importance should be attached to the three technical specifications laid down in the Tender Document, namely absorbency, leakage and measurements and, within this context, went on to deliberate on the formal objections raised by appellant.

With regards to objection (a) on page 1 of this document, this Board noted that samples submitted by Protex Ltd had been subjected to technical evaluation by the MNL and found not to conform to requirements. The Board feels that the specifications of ‘absorbency’, where Protex Ltd failed, is crucial and it is therefore irrelevant whether their offer was the most advantageous or not.

As regards (b), in terms of Section 13 of the Tender Document which states that “*only tenderers who offer the full range of diapers will be considered ... Tenderers who do not comply with this condition will not be considered*”, this Board noted that the Adjudication Board’s report dated 22nd June 2004 stated that “*in order to arrive at the real cheapest offer, the Board agreed to take the cheapest prices for each item in each alternative offer submitted*” Sarrebico Medical Supplies Ltd. The Board found that the 5th cheapest offer was the one submitted by Sarrebico Medical Supplies Ltd. but this was composed of items extracted from Offers ‘A’ and ‘B’. This Board feels that this was unacceptable as it contravened the said condition.

In so far as the third objection (c) raised by the appellant is concerned, this Board has examined the technical reports and confirmed that samples submitted by Sarrebico Medical Supplies Ltd. have exceeded the maximum sizes laid down in the specifications. This, however, holds also true for samples submitted by Protex Ltd. In the circumstances this Board considers that in both cases the specifications have not been met.

When this Board deliberated on issues concerning the fourth (d) objection raised by the appellant, namely the one relating to samples submitted by Sarrebico Medical Supplies Ltd. not being forwarded to pertinent authority within the time frame stipulated in the Tender Document, this Board feels that this complaint was not substantiated.

The Public Contracts Appeals Board opted, once again, to remain consistent with its stringent procedural policy, operative since its formation. In the light of this policy it cannot consider the objections raised during the hearing regarding Sarrebico Medical Supplies Ltd.’s Trading Licence since such objection was not raised by appellant ‘*ab initio*’ when the formal complaint was initially lodged.

Having considered the above, this Board finds that

- (i) the recommendation made by the Adjudication Board to the Contracts Committee for the latter to award the tender to Sarrebico Medical Supplies Ltd. based on a mix of items selected (by the same Board) from both Options 'A' and 'B' cannot be entertained since Option 'B' had already been considered to be invalid in the process;*
- (ii) the samples supplied by Sarrebico Medical Supplies Ltd. were not in accordance with measurements laid down in specifications. The argument holds true also for the samples submitted by Protex Ltd.*

This Board concludes that, in the circumstances, the tender in question should not be awarded to any of the two tenderers and that a fresh call for offers should be issued.

As witnessed by the above conclusion the board feels that the appeal by Protex Ltd was not frivolous. The board therefore rules that the appellant should be reimbursed with the full amount paid as deposit when lodging the formal claim with the pertinent authority.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 29th October 2004

Case No. 23

MTA/102/2004

Tender for ‘Design and construction of stand at ITB Berlin’

The call for offers was published in the Government Gazette on the 6th August 2004 and in the Official Journal of the EU on 3rd August 2004.

An Evaluation Committee made up of

Mr Leslie Vella	Chairman
Mr Marcel Coppini	Member
Mr Leonard Zammit Munro	Member
Ms Naomi Attard	Member
Ms Claire Briffa	Secretary

was set up to analyse offers received and proceed with the award of the tender.

Nine offers were received and following the evaluation process, the Evaluation Board decided to award the tender to Messrs. J Barzano S.A. for a value of Lm 54,000 inclusive of VAT.

On the 28th October 2004, Messrs. Zaffarese Exhibitions + Events Ltd filed an objection with the Director of Contracts against the decision taken by the Evaluation Board (Malta Tourism Authority) to award the said tender to Messrs. J Barzano S.A. from Barcelona in Spain.

The Public Contracts Appeals Board (PCAB) met on 15th December 2004 to discuss the objection raised by appellant.

Mr. A. Triganza chaired proceedings accompanied by the other Board members, namely Mr. A. Pavia and Mr. E. Muscat respectively.

During the hearing the following people participated in the proceedings:

Representing:

Messrs Zaffarese Exhibitions & Events Ltd

Mr Thomas Farrugia – Managing Director
Mr Benny Zaffarese - Proprietor

Malta Tourism Authority/ Evaluation Board

Mr Leslie Vella – Chief Executive / Chairman
Dr Simon Tortell LL.D – Legal Representative

Summoned as witnesses:

Dr John C Grech – ex Chairman, Malta Tourism Authority (MTA)
Mr Anthony Chircop – ex Chairman, Marketing Board, MTA
Ms Claire Briffa – Senior Executive / Secretary, MTA
Mr Jeffrey Cutajar – Director, Marketing & Promotion, MTA
Mr Marcel Coppini – Financial Controller / Member, MTA
Mr Gerald Miller – Marketing Manager, MTA

Following Mr. Triganza's brief introduction, the appellant, namely Mr B. Zaffarese, representing Messrs. Zaffarese Exhibitions & Events Ltd explained the reasons which motivated his firm to lodge the claim following the award of the tender to Messrs J. Barzano S.A. According to the appellant's representative, the Company decided to file an objection following a thorough consideration of the:

- 1. The tendering process itself as well as specific issues referred to by the Malta Tourism Authority (MTA)*
- 2. An unlevel playing field constituted because of different treatment of VAT application*
- 3. Lack of consultation regarding possible design changes*
- 4. The company's allegedly low capital base*

Opening Statements:**Tendering process**

Mr. Zaffarese claimed that the tendering process was not transparent as the Malta Tourism Authority did not follow the established procedure. He contended that tenderers were neither asked to be present for the sealing of tender documents at noon nor were they called to attend for the opening of the tender box at 13.00 hrs. The appellant proceeded by stating that tenderers were similarly not allowed to see details of the tenderers and corresponding prices quoted claiming that the schedule was never published on the MTA's notice board.

Price / VAT

The appellant said that the difference in price between his Company's offer and that of the Spanish tender was substantially higher than the Authority's calculation of Lm 7,530. Mr Zaffarese pointed out that, after taking into account the VAT element, the discrepancy would amount to approximately Lm 15,000. This was partly due to the fact that the rate of VAT for SMEs in Spain was 16% while that in Malta was 18%. Also, he argued that when a Maltese client ordered work from another EU country and such work was carried out in another EU country, not in Malta, then the contractor concerned

would be exempt from VAT. As a result Maltese contractors were not on the same level playing field.

2.1.3 – Design / changes

As far as the design is concerned, Mr Zaffarese said that this was a subjective matter and that they should have been given the chance to explain their concept. The appellant proceeded by stating that the Adjudication Board should have allowed his company to make a presentation in order to clarify a few issues or at least allowed to elaborate on specific matters. He said that they made it clear in their tender documents that, despite the fact that as regards the design of the Stand they met all specifications and had undoubtedly reached the required standards, they were, however, prepared to discuss any changes to meet the Authority's requests.

Low Capital

Mr Zaffarese stated that another reason given by the MTA, in order for the latter to justify their decision to award the tender to Messrs J Barzano S.A., was that his Company had a low capital base. The appellant said that his company formed part of a Group of Companies that was established in 1982. The Company had more than 22 years experience in this field and had worked for several government departments and organisations. Also, the Skanska Consortium had in the past awarded the tender for the supply and installation of all display signs to the Group. The value of this tender reached the Lm 200,000 figure. He said that his company had a shareholding of Lm 30,000 in the Group.

In a nutshell, the appellant claimed that considering the reasons given for his Company not being awarded the tender, there was sufficient cause to believe that his Company was being discriminated against.

At this stage, Dr Simon Tortell LL.D intervened and categorically denied that the MTA had ever discriminated against anyone, including Messrs Zaffarese Exhibitions & Events Ltd. He agreed with Mr Zaffarese's opinion, namely that this was a question of choice which was subjective. However, contrary to Mr Zaffarese's claim, Dr Tortell reiterated the fact that the MTA had never discriminated against anyone.

The MTA's legal representative claimed that Mr Zaffarese was present for the sealing and opening of the tender box.

As far as the difference in the rate of VAT charged in Spain (16 %) and the one charged in Malta (18 %), Dr Tortell claimed that the consequential effect was neutral because for this type of business VAT was recoverable in both

countries. As a result, he contended that if there was a playing field that was not level this was not the VAT element but other issues such as the cost of labour and/or raw material.

MTA's legal representative said that this tender was not subject to negotiations and therefore MTA was free to choose whichever it wanted. He declared that MTA did not negotiate with the Spanish contractor.

With regard to capital, he said that the Board was composed of people with different skills. He claimed that when MTA's auditors examined Zaffarese's financial statements they found that they had a very low capital base. He wanted to assure those present that the MTA would have, however, looked into the matter differently had the shareholders' loan of Lm 30,000 been converted into capital.

Hearing of evidence:

Dr John C Grech gave evidence in his capacity of ex-Chairman of the Authority. Dr Grech claimed that he could not understand how he was summoned because, apart from the fact that he left his post in March 2004, he had nothing to do with this particular tender!

Upon being asked by Mr Zaffarese whether he was aware that an expression of interest was issued to those contractors who intended to tender during the year, Dr Grech replied that he only knew that Mr Zaffarese used to complain because he felt that he was not being assigned to carry out work for MTA. Subsequently the matter was referred to the Chief Executive Officer and he was given to understand that the situation had been clarified since Mr Zaffarese appeared to be satisfied with the outcome of the discussions that ensued between him and the CEO.

Dr Grech declared that he was not involved in contracts and payments, claiming also that there used to be different directorates at the MTA and that such issues were always dealt with by the Marketing Directorate which had its own set-up.

At this point, Mr Zaffarese explained that following the issue of an expression of interest, his company was chosen because it was considered to be technically and financially competent to tender. Intervening at this stage, Dr Tortell clarified that the fact that Mr Zaffarese's company had been shortlisted only implied that, holistically, he was not eliminated. The expression of interest, MTA's legal representative emphasised, apart from being issued without prejudice, was solely aimed at identifying suitable candidates for future tenders. Mr Anthony Chircop (ex Chairman, Marketing Board) corroborated Dr Tortell's description of facts.

Dr Tortell proceeded by claiming that Mr Zaffarese's company's economic viability was just one of a number of reasons why the tender was not awarded to them.

The MTA's Chief Executive & Chairman of the Selection Committee, Mr Leslie Vella was cross-examined by Dr Simon Tortell. Mr Vella explained that the documentation regarding the ITB tender was issued late in July 2004 and that the expression of interest was issued some time in 2003. The purpose of the latter was to shortlist the companies which designed and constructed such Stands. He emphasised that, considering the fact that the Authority regularly participates in similar high profile exhibitions abroad, it was indispensable for such Stands to be of the highest standard. Following Mr Zaffarese's initial complaints and as a result of the discussions which ensued between the parties involved, namely the MTA and Messrs Zaffarese Exhibitions & Events Ltd, it was decided that a call for tenders be issued specifically for each exhibition that MTA would participate in overseas.

Mr Vella said that following the introduction of the amendments in the Public Contracts Regulations, 2003, on 3rd August 2004, MTA was removed from Schedule 3 and placed under Schedule 2. In view of these amendments, the MTA's CEO decided to empower Ms Claire Briffa with the responsibility of ensuring that the new procurement procedures are in accordance with the provisions of these regulations. Moreover, Ms Briffa had to see to the standardisation of tender specifications and format.

During his testimony Mr Vella gave details of how the Adjudication Board proceeded with the submission and opening of tenders and the evaluation and award of tender. He said that all documentation was kept in sealed envelopes in the tender box while scale models and technical drawings were kept in his office under lock and key. He confirmed that Mr Zaffarese was present for the opening of the envelopes. Here, Mr Zaffarese intervened and insisted that the established procedure regarding the opening of tenders was not followed and that the process was not transparent. As a result, he could not exclude the possibility that tenders were submitted after the deadline.

In actual fact, in reply to a specific question, Mr Vella confirmed that two offers were delivered after the closing time which, according to para 2.5.1 of the tender document, the tenders had to be submitted by 12.00 hours (noon) of Monday, 27th September 2004. *Furthermore, these late offers were also opened and considered after the tenders that had been received within the stipulated time were opened.* He referred to para 1.3 of the selection committee's minutes of meeting held on Monday 27th September 2004 which stated that *'Two packages were delivered by courier after the deadline. One package was delivered by UPS at 14.15 hours. The second package was delivered by FedEx at 16.15 hours. The Committee unanimously agreed to accept both tenders given that they have been delivered from overseas by*

courier.' In para 1.4 of the same minutes it was indicated that these pertained to Messrs Kadoke Display Deutschland GmbH and J. Barzano S.A. respectively. He said that they had also taken into consideration the fact that none of the evaluation committee members had left the CEO's office after the opening of the tenders. He confirmed that they did not extend the deadline for the submission of tenders.

Here Dr Tortell quoted Regulation 26 (5) (d) of the Public Contracts Regulation, 2003 which stated that '*Tenders shall be submitted in writing. However, when authorised by the Contracting Authority, tenders may be submitted by any means provided that tenders are opened after the time limit for their submission has expired.*' Mr Zaffarese insisted that, according to tender conditions, offers submitted after the deadline had to be disqualified. Dr Tortell admitted that this was undoubtedly not the best procedure to be followed but the most important thing was that the decision regarding the award of tender was taken in the best interest of the country since the one chosen was the best offer. He said that one should also appreciate that this was the first tender that was issued because previously such contracts used to be given by direct order.

MTA's CEO continued by stating that Messrs J Barzano S.A.'s offer was the more expensive, albeit still within the Authority's budget for this particular tender. Mr Vella confirmed that they did not publish the schedule with the names of contractors and relative prices. The reason given was that at that time they thought that they were not obliged to do so.

He said that the basis of awarding the contract was on the *Evaluation Matrix* given to the Selection Committee by the Contracts Department, for which each contractor was awarded points on different criteria relevant to the tenders submitted. The evaluation committee compared the relativity of one tender with the other so that it would be ascertained that the tender was awarded to that contractor who had that Stand which could best represent Malta's image abroad. In actual fact the committee agreed to award the tender to Messrs J Barzano S.A. on the basis that it obtained the highest points which satisfied all criteria. The comparative analysis regarding the evaluation of tenders was minuted during meetings held on 30th September and 8th October 2004.

Finally he declared that the Selection Committee members were all competent in their field and some had vast experience in similar fairs.

Ms Claire Briffa, in her capacity as Senior Executive and Secretary to the Selection Committee, confirmed that Messrs J Barzano S.A.'s financial report was audited.

With regard to the issue of the ITB tender, Ms Briffa said that the Contract Notice was dispatched by MTA to the Official Journal of the European Union on 26th July 2004. Such line of action was taken in accordance with the advice given on e-mail received from the Contracts Department on 16th July 2004 which stated that *'In the cases of tenders above Lm 20,000, but less than Lm 80,000, only the Contract Notice has to be published in the Official Journal'*. It was published thereon on the 3rd of August 2004. Mr Zaffarese was of the opinion that MTA did not need to publish the tender in the Official Journal because the value thereof was below the threshold. He supported his claim by forwarding to the Board a copy of the EC Procurement Thresholds. Ms Briffa said that the notification was published in the Malta Government Gazette on 6th August 2004.

During her testimony she said that she always followed the procedure according to the instructions given by the Contacts Department.

When Dr Tortell asked Ms Briffa to state whether any representative from Messrs Zaffarese Exhibitions and Events Ltd had ever requested to be present during the sealing and opening of tenders, the reply given was in the negative. Mr Zaffarese intervened and insisted that he did not need to ask MTA to allow him to be present as this right was granted by the regulations. Also he said that the decision should have been referred to the Department of Contracts.

Ms Briffa said that she would have minuted any incidence of anyone leaving the office after the opening of tenders and before Messrs J. Barzano S.A. 's tender was received.

The MTA's Director (Marketing & Promotion), Mr Jeffrey Cutajar, testified that although he did not form part of the Selection Committee, in view of his vast experience in international fairs, he was asked to give an opinion on the designs submitted for this tender.

At this stage, Mr Cutajar drew the attention of all those present that the 15th of December 2004 at 17.30 hours was the deadline for the submission of technical designs and drawings to the organisers in Berlin. The Chairman PCAB pointed out that after this hearing the Board needed its time to deliberate on the matter before arriving at its decision. However, he suggested that MTA should take the necessary action to ask the organisers in Berlin for an extension of the deadline.

Mr Cutajar continued by declaring that the ITB Fair, Berlin was considered as the most important tourism and premier Fair in the world. As a result, Malta could not afford not to be there because the effects on Malta could be quite catastrophic in view of prestige, goodwill and the unquantifiable amount of business involved.

He concluded his testimony by stating that while he was in Spain for the EIBTU (Business Trade Fair) he received an e-mail from Mr Barzano wherein he invited him for a meeting. However he declared that, as the case was still *sub iudice*, he decided not to meet him.

Mr Marcel Coppini, the MTA's Financial Controller, declared that he was the person responsible for the financial analysis of the companies that submitted their offers for this tender. The tenderers were requested to provide their latest annual reports and auditors' certificates because they needed to analyse and assess the financial viability of each company. This was due to the fact that they were entering into a commitment for three years. He said that the audited financial statements of Messrs Zaffarese Exhibitions and Events Ltd for the year ending December 2003 disclosed that the company had an extremely low capital base of Lm 1,997.

Following the hearing of the witnesses summoned, the parties were asked by this Board to deliver their final verbal submissions.

In his concluding submission, Mr Zaffarese, representing Messrs Zaffarese Exhibitions and Events Ltd, said that during the proceedings it was clearly demonstrated that

- a. the process lacked transparency,
- b. the MTA did not know the proper tendering procedures,
- c. the selection exercise was not based on relativity, and,
- d. the public contracts regulations were infringed.

He was of the opinion that the evaluation committee should have asked for clarifications and for a presentation since they were prepared to make alterations to suit MTA's requirements. He argued that, in view of the fact that his Company had always delivered, the question of low capital base was irrelevant. Mr Zaffarese did not agree with the method used in the evaluation process as the price did not carry enough weight. He pointed out that the

difference in price was substantial. Furthermore the difference in the rate of VAT created unfair competition for Maltese contractors and that according to local fiscal regulations, the MTA could not claim back VAT.

Mr Zaffarese clarified that he could not mention certain points in the letter of objection because, as he said earlier, the process was not transparent and because certain facts came to his knowledge afterwards.

Concluding remarks:

In his concluding, remarks Dr Simon Tortell LL.D., representing the Malta Tourism Authority, insisted that the fact that everything was minuted without hesitation was a confirmation that the process was transparent. He said that:

- a. the selection committee accepted late submission of tenders in *bona fide*,
- b. no irregularities had occurred, and,
- c. no discrimination was proved.

He insisted that the Appeals Board should not consider the issue regarding the fact that the Selection Committee had accepted to evaluate the two tenders which were received after the deadline because Mr Zaffarese did not make any reference to this point in the motivated letter of objection. Apart from this, he argued that the late submission of tenders could have been caused through the inefficiency of the couriers concerned.

He said that the tender was awarded to Messrs J. Barzano S.A. on the latter's own merit since the Spanish Company was the tenderer who obtained the highest points, specifically in so far as the design is concerned. From these proceedings it resulted that Mr Zaffarese was present for the most important process, that is, the opening of the tenders. It had to be taken into consideration that the selection committee was straddled between two different procurement procedures.

With regard to Messrs Zaffarese Exhibition & Events Ltd's financial position, Dr Tortell remarked that, unfortunately, from the financial statements presented by the Company, it was evidently clear for anyone to notice that the Company was not adequately capitalised.

Conclusions of the Public Contracts Appeals Board:

Having considered all that was submitted and argued, the Public Contracts Appeals Board –

- a. finds that the objection made in respect of the lack of transparency shown by the Evaluation Board is justified considering that the Evaluation Board members did not fully comply with procurement procedures as specified in current regulations;
- b. notes that although no specific proof was brought forward against the standards of professional and ethical conduct demonstrated throughout the evaluation stage, yet, this Board feels that tenderers were precluded from experiencing the proper transparent process of the adjudication by not being invited to attend the opening of the offers submitted;
- c. notes that the Evaluation Board accepted offers received by courier mail from foreign tenderers in spite of the fact that such offers were received after the official closing time, scheduled for 12:00 hours (noon). In the case of the offer submitted by Messrs J Barzano S.A. the Evaluation Board received the offer at 16.15 hrs contrary to normal procedure followed in the adjudication of tenders.

The board took into consideration Dr. Tortell's plea that the Appeals Board should not consider the fact that the Evaluation Board had accepted to scrutinize two tenders received after the closing time since this had not been brought forward in Messrs. Zaffareses Exhibition & Events Ltd's original letter of motivation. The Appeals Board decided that although this issue had not been specifically raised in the motivated letter of appeal, the fact that this letter included a reference to lack of transparency and aftermaths resulting therefrom, could be accepted to include also this eventuality. The PCAB, therefore, decided that it was its responsibility to take cognisance of the fact that tenders had been received and accepted following the formal closing time.

As a consequence, the Public Contracts Appeals Board considers that the objection raised by Messrs Zaffarese Exhibitions & Events Ltd is justified.

Hence, this Board finds in favour of appellant.

This Board recommends that the award of this tender should now proceed without consideration being given to the two late entries, namely the offers submitted by Messrs. Kadoke Display Deutschland GmbH and Messrs J Barzano S.A. respectively.

Furthermore, the Public Contracts Appeals Board recommends that the appellant should be reimbursed the deposit paid when filing the said objection.

A. Triganza
Chairman
PCAB

A. Pavia
Member
PCAB

E. Muscat
Member
PCAB

Date: 27th December 2004

Conclusion

The year 2004 was the first during which the General Contracts Committee heard complaints by aggrieved bidders in public contracts having an estimated value between Lm 5,000 and Lm 20,000 and issued by a Local Council or a Schedule 2 Contracting Authority (mainly Government Departments). The General Contracts Committee heard three such cases during the year. The Public Contracts Appeals Board, on the other hand, heard and decided eighteen objections relating to public contracts with an estimated value of over Lm 20,000 during 2004.

I take the opportunity to thank the members of the General Contracts Committee for their invaluable advice as well as the Chairman and members of the Public Contracts Appeals Board for their sterling work during the year.

Edwin Zarb
Director General (Contracts)

June 2005