

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 188**

#### **M464/2009**

#### **Tender for the Development and Delivery of an ICT Diploma for the ESF 2.12 Second Step Training Programme**

The closing date for this call for tenders, which was published on 19.05.2009, for a contracted estimated value of € 745,000 covering atwo (2) year period was 30.06.2009

Four (4) different tenderers submitted their offers.

On 24.09.2009 Messrs STC Training Ltd filed an objection against the intended award of the above-mentioned tender to Messrs Computer Domain Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 17.02.2010 to discuss this objection.

Present for the hearing were:

#### **STC Training Ltd (STC)**

Mr Patrick Pullicino	Chief Executive Officer
Mr David Catania	Representative

#### **Computer Domain Ltd**

Mr Nicholas Callus	Representative
Dr Robert Sultana	Legal Representative

#### **Malta Information Technology Agency (MITA)**

Dr Pauline Debono	Legal Representative
Dr Ron Galea Cavallazzi	Legal Representative
Dr Kristina Pullicino	Legal Representative

#### **Adjudication Board**

Ms Daniela Busuttil	Chairperson
Ms Caroline de Marco	Member
Mr Anton Mifsud	Member

Mr Krassimir Andreinski	Advisor and Dep. Dir. ICT MCAST
Dr Enest Cachia	Advisor and Dean ICT University of Malta
Mr Ivan Alessandro	Financial Controller MITA

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

Mr Patrick Pullicino, CEO of STC Training Ltd, the appellant Company, pointed out that the difference between the last two competing bidders was 29.6 out of 745 marks and went on to explain that his firm based its objections on three aspects:

1. Level

Mr Pullicino remarked that it had been alleged that the course level presented by his firm was QCF 5 - Qualification and Credit Framework (England, Wales and Nth. Ireland) - instead of 4, as requested in the tender dossier. He declared that, at the tendering stage, the level they presented was equivalent to level 4 and that this had also been presented in other tender submissions and had been accepted as such. He added that, in this instance, besides submitting Level 4, his firm included also some modules from Level 3 since it was considered that this mix of Levels 3 and 4 would still result in an overall Level 4 as clearly requested in the tender. Mr Pullicino referred to a letter dated 4<sup>th</sup> September 2009 – i.e. after the closing date of the tender which was 19<sup>th</sup> May 2009 – issued by the Malta Qualifications Council (MQC) to back his contention that the qualification they presented was equivalent to Level 4 and declared that he was not aware that any developments had taken place that altered that situation.

2. Audited Accounts

Mr Pullicino also explained that STC Training Ltd was a subsidiary of and fully owned by Nucleus Training International Ltd – he claimed that for some time MITA was one of the shareholders - with the same premises and employees but that it was STC Training Ltd that submitted the tender in question. Mr Pullicino said that the tender document asked for the audited accounts of the previous 5 years and since STC Training Ltd had not been set up for 5 years they had to submit the audited accounts of Nucleus Training International Ltd in order to cover the 5-year period. He stated that the accounts in respect of 2008 had not been audited by the closing date of the tender but a declaration to that effect had been submitted.

3. Timeframe

Mr Pullicino stated that the tender document requested the delivery of this training programme over a period of 1 ½ years. He explained that, given their experience in delivering the *First Step* course (i.e. up to level 3), they were aware that the participants were either in employment or housewives and, therefore, they felt that it would be better to get the students to the training centre on 2 to 3 days a week rather than on a daily basis which schedule would allow students more time to carry out their assignments. Mr Pullicino remarked that the contracting authority had noted that the number of hours indicated by STC Training Ltd was not enough to deliver this course whereas he insisted that the course could be delivered over a shorter period of time than that provided in the tender.

Dr Ron Galea Cavallazzi, representing MITA, explained that:

- (i) the contracting authority could not rely on the audited accounts and resources of third parties irrespective of the legal connection between the two entities unless the third party concerned presented a guarantee that it would provide the resources

*and*

- (ii) with regard to the programme level, the contracting authority requested Level 4 of the Malta Qualification Framework (MQF) which was identical/equivalent to the European Qualification Framework (EQF), whereas the appellant presented Level 4 of the QCF which, however, was equivalent to Level 5 of the MQF/EQF and therefore a level higher than that requested.

Dr Pauline Debono, legal advisor of MITA, explained that the purpose of this tender was to provide a training programme for students who had finished Level 3 that would lead them to Level 4 (in all instances level refers to European/Maltese Levels unless otherwise indicated). She added that the proposal put forward by the appellant provided for a training programme which led to Level 5, which meant that the students would find it difficult to follow the appellant's training programme as it skipped Level 4 altogether. Dr Debono informed the hearing that all the other bidders had adhered to the level 4 requirement in the call for tenders.

Mr Nicholas Callus, representing Computer Domain Ltd, an interested party, explained that the First Step course reached Level 3 EQF (=MQF), which was equivalent to 'O' Level Standard, the Second Step reached Level 4 which was equivalent to 'A' Level Standard and that Level 5 onwards related to a degree course and beyond (Level 8 led to a Ph.D).

Mr Callus remarked that the Maltese Levels were equivalent to the European Levels, however, the qualification levels proposed by his firm, which was Level 3, and by the appellant Company, which Mr Callus claimed to be Level 5, were British Levels (QCF), which differed from the Maltese/European Levels as follows:

<i>British Level (QCF)</i>	<i>European (EQF)/Maltese (MQF) Levels</i>
2	3
3	4
4 and 5	5

Mr Callus corrected Mr Pullicino in the sense that this was an 'A' level course and that the duration was 2 years and not 1 ½ years.

*At this point the PCAB noted that the duration of the training programme, whether it is delivered on a full-time or a part-time basis, should not be extended further than two years..... - 3.3.1 (ii) at page 15 of the tender document.*

Mr Callus then referred to para. 1 bullet 3 of the appellant Company's letter of objection and to a letter dated 26<sup>th</sup> June 2009 from NCC (UK), where the appellants indicated that their proposal was equivalent to the first year of a degree course and that NCC (UK) confirmed that it corresponded to Level 4 of the British National Standards.

Mr Pullicino intervened and maintained that the letter issued to his firm on 4<sup>th</sup> September 2009 by the Malta Qualifications Council indicated that their course was equivalent to MQF Level 4. He argued that at the tender submission stage he felt that his proposal was equivalent to MQF Level 4 and, later on, he backed his submission up by this official MQC document. Mr Pullicino claimed that the Maltese and the British education systems differed especially with regard to the 'Sixth Form' phase.

The Chairman PCAB remarked that, apart from concentrating on the different qualification frameworks, one had also to go into the content of the proposals to assess to which levels these related.

Mr Krassimir Andreinski, Advisor to Adjudication Board and Dep. Dir. IICT MCAST, made a declaration and, *inter alia*, gave the following evidence:

- he stated that he was in charge of curriculum development at IICT MCAST and that he had been asked to act as consultant on other tenders. He said that in the case of the tender for the First Step course he was a member on the adjudication board which awarded the tender to STC Training Ltd

and

- he explained that in 2006 Malta opted to align its qualifications with the European Qualification Framework according to the Bologna Process, the advantages of which were mutual recognition of qualifications and easier access to Maltese students to follow ICT courses overseas. He added that the Malta Qualifications Council was established as per LN 347 of October 2006 as the sole authority to deal with such levels and standards.
- he informed the hearing that, since 2006, the Maltese Levels no longer reflected the British Levels but, instead, reflected the European Standards. Mr Andreinski then referred to the reference manual issued by the Malta Qualifications Council, particularly to page 84 which displayed a comparative table no. 27 showing the various qualification frameworks and how they compared with one another which table established the legally accepted standards in Malta. He remarked that the tender document requested EQF level 4 which was equivalent to QCF level 3 whereas QCF levels 4 and 5 were equivalent to EQF 5 (as indicated earlier on)

Mr Pullicino, remarked that the report referred to by Mr Andreinski was still under discussion as part of a consultation process and that, up till then, there was no final document. Mr Pullicino continued that the reference report quoted by Mr Andreinski was issued in September 2009, i.e. after the closing date of the tender in May 2009.

Mr Andreinski continued giving evidence by:

- reiterating that the Maltese Levels had been aligned with the European Levels since 2006 and that those levels were applicable when the tender was issued, however, one had to appreciate that both the Maltese and the British levels were going through a transition period;
- explaining that the tender requested a matriculation level whereas the appellant presented a first year of a B.Sc course, which was a level higher than that requested and thus it would make it difficult for Level 3 students to follow the programme submitted by appellant Company as that meant that they would be skipping level 4 and move directly to level 5, which proposal was unacceptable;
- remarking that STC Training Ltd had also included in its proposal modules that belonged to British Levels 3 and 4, yet, most of the modules were of level 4 which were equivalent to European Level 5. Mr Andreinski remarked that it was not acceptable to mix levels. He added that, officially, the appellants quoted the registration number of the higher British Level, i.e. 4;
- noting that a programme had three components, i.e the level, which was crucial, the content and the duration. Mr Andreinski referred to page 41 of the Malta Qualifications Council reference manual wherein it was demonstrated that:
  - 1 credit = 25 hours of learning, of which 6.22 hrs were contact/supervised hours and the remaining 18.75 hrs were to study on one's own;
  - and
  - from level 2 to level 7 it took 60 credits per year x 25 hours per credit = a total of 1,500 hours per year out of which 375 hours had to be guided/supervised study;
- pointing out that the tender document requested a 2-year programme, however, the appellant Company's tender submission presented a programme of about 320 hours which was equivalent to a course of (less than) 1 year, so much so, that on the website of STC Training Ltd it was advertised as a 1-year programme;
- questioning how could the 2-year programme requested in the tender be delivered by the appellants in 1 year. He added that the standards established that anything less than 60 credits (1,500hrs) per year for levels 2 to 7 would not lead to a full certificate and hence would not lead to the next level;
- arguing that it was in the interest of the tenderer to present his submission as clearly and as detailed as possible to enable the adjudication board to be in a position to properly understand and evaluate the submission. He informed the hearing that, with regard to content, the other tenderer/s presented 3 totally different programmes with each having different topics except for 1 topic which was common to 2 programmes. In the case of STC Training Ltd, Mr Andreinski noted that it was offering 3 programmes which had 8 of the modules common to all 3 programmes with only 1 or 2 modules being different from one programme to the other, which meant that the bulk of the content was practically the same in each programme presented by STC Training Ltd. Mr Andreinski remarked that the marks given to the appellant Company with regard to service requirements

reflected these shortcomings – 213.4 to STC Training Ltd compared to 294 to Computer Domain out of 370 points;

- explaining that he carried out his assessment of the bids on criteria that he had set himself and which he applied across the board. Mr Andreinski added that (i) he was given the technical part of the submissions and that his evaluation was limited to the technical requirements and (ii) when the two advisers concluded their separate and independent evaluation they met with the Chairperson of the adjudication board to discuss their findings and it had transpired that, in essence, both of them came to the same conclusions, in the sense that 3 bidders had failed on matters of level and content whereas the recommended tenderer was the one that could deliver the service requested in the tender;

and

- concluding that if he were the adjudicating board he would have disqualified the appellant Company from the tendering process because it did not present the level requested in the tender dossier, something which was crucial in this contract.

Mr Pullicino explained that since his firm was aware of the level reached by the students in Step 1, it was decided to present a mix of Level 3 and Level 4 modules and it was also considered a good idea to share a number of modules between the three programmes at foundation level. Mr Pullicino opined that his firm's submission still constituted a Level 4 course and that the offer met the timeframes set out in the tender document.

Mr Andreinski insisted that the tender clearly indicated a 2-year course and that, both academically, as well as, according to the Bologna Process, that meant an established number of hours.

Mr Callus intervened to remark that it was clear from the appellant Company's submission that it proposed a 1-year course (at degree level) stretched over 2-years. The recommended tenderer's representative stressed the point that since his Company's offer abided by the tender requirement of a 2-year course, its bid involved a considerable number of additional hours when compared to the appellants' 1-year course with the logical consequence that its price was much higher than that quoted by the appellant, so much so, that Computer Domain had been heavily penalised with regard to price – 170 scored by Computer Domain as against 248 scored by STC Training Ltd out of 320 points – which, in turn, had a significant bearing on the overall score.

Mr Andreinski stated that the 'mix-and-match' modules from different levels adopted by the appellant Company was out of the question. He remarked that in the previous call for tenders the bidders were at liberty to propose modules that they felt appropriate for the development and delivery of the First Step course but, in this case, the tender document was very specific in the sense that tenderers had to provide for a Level 4 course and no mix-and-match or leeway were allowed.

Dr Ernest Cachia, Dean ICT at the University of Malta and adviser to the Adjudication Board, under oath, gave the following evidence:

- he confirmed what Mr Andreinski had stated in the sense that both experts had carried out their evaluation independently and that, at one point, they met to discuss their findings;
- his main concern was the content of the submission and, in that regard, he had reported that none of the tenderers were a perfect match to the tender requirements but, at the end of the day, what he considered important was how and to what extent/level a topic was going to be delivered to the students;
- at the University of Malta they covered levels 5 to 8 and that mixing a level with another was not recommendable at all but one had to stick to the universally established levels, even if one held a different personal opinion on these levels;

and

- at evaluation stage the advisors were aware of who the bidders were

Mr Pullicino reiterated that his firm had submitted a Level 4 course and that he presented a document from the Malta Qualifications Council dated 4th September 2009 to that effect. Mr Pullicino argued that, had the evaluators checked with the Malta Qualifications Council, they would have been furnished with the same document and added that it was not mandatory on the tenderer to furnish such a certificate at tendering stage. Mr Pullicino argued that since it was rather difficult, if at all possible, for a firm to have a diploma that matched exactly to the one requested in the tender, his firm decided to take certain aspects from other diplomas of the same or lower levels in order to arrive at the diploma requested in the tender, in the process stressing that that was an accepted practice and certainly not an irregular one. He remarked that when a student was going to take up a course he was at liberty to request the Malta Qualifications Council to rate the level of that particular course.

The Chairman PCAB noted that the document referred to by the appellant was not available to the adjudication board and that the same document was not reflecting what had been said during the hearing. After the Chairman PCAB read out this document, Mr Callus observed that the diplomas requested in the tender were not among those listed in the document. Dr Debono confirmed that the three diplomas requested in the tender were (a) Diploma in Information Technology, (b) Diploma in Computing and Information Systems and (c) Diploma in Information Systems.

Mr Callus pointed out that from the hearing it emerged that (a) the appellant Company presented a different level than that requested in the tender; (b) the appellants presented a mix of modules from two different levels, and (c) the three diplomas requested in the tender were very distinct from one another whereas the three diplomas presented by the appellants were practically the same in content except for 1 or 2 modules, which situation was not acceptable.

Dr Sultana submitted that with regard to the relationship between STC Training Ltd and Nucleus Training International Ltd and the audited accounts provided by the appellant Company, the appellant failed to abide by what the tender document provided for in the case of a joint venture and for the submission of the accounts of

other companies. Dr Sultana remarked that, in itself that could have been enough to disqualify the appellant Company. He also submitted that the Malta Qualifications Council letter was inadmissible since it had not been submitted with the original tender submission while noting that the same document did not prove that the appellant Company's proposal met the specifications set out in the tender.

On his part Dr Galea Cavallazzi declared that it was evident that the appellants did not propose what the contracting authority had requested in the tender dossier.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 28.09.2009 and also through their verbal submissions presented during the public hearing held on the 17.02.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company's basis for objection based on issues relating to '**Level**' (*level presented by appellants was QCF 5 - Qualification and Credit Framework (England, Wales and Nth. Ireland) - instead of 4, as requested in the tender dossier*), '**Audited Accounts**' (*the tender document asked for the audited accounts of the previous 5 years and since STC Training Ltd had not been set up for 5 years they had to submit the audited accounts of Nucleus Training International Ltd in order to cover the 5-year period with appellants representative stating that the accounts in respect of 2008 had not been audited by the closing date of the tender but a declaration to that effect had been submitted*) and '**Time Frame**' (*that the contracting authority had noted that the number of hours indicated by STC Training Ltd was not enough to deliver this course whereas the appellant Company was insisting that the course could be delivered over a shorter period of time than that provided in the tender*);
- having also taken note of the fact that, according to the appellant Company's representative's own admittance, besides submitting Level 4, his firm included also some modules from Level 3 since it was considered that this mix of Levels 3 and 4 would still result in an overall Level 4 as clearly requested in the tender;
- having also noted Mr Pullicino's claim that the letter issued to his firm on 4<sup>th</sup> September 2009 by the Malta Qualifications Council indicated that their course was equivalent to MQF Level 4;
- having considered the point raised by appellants' representatives wherein it was stated that since the said firm was aware of the level reached by the students in Step 1, it was decided to present a mix of Level 3 and Level 4 modules and it was also considered a good idea to share a number of modules between the three programmes at foundation level;
- having heard the MITA representatives (a) state that the contracting authority could not rely on the audited accounts and resources of third parties irrespective of the legal connection between the two entities unless the third party concerned presented a guarantee that it would provide the resources, (b) explain that the purpose of this tender was to provide a training programme for students who had finished Level 3 that would lead them to Level 4 with contracting authority



requesting Level 4 of the Malta Qualification Framework (MQF) which was identical/equivalent to the European Qualification Framework (EQF) and (c) claim that the proposal put forward by the appellant Company provided for a training programme which led to Level 5, which meant that the students would find it difficult to follow the appellants' training programme as it skipped Level 4 altogether as it was a level higher than that requested;

- having also heard Dr Debono state that all the other bidders had adhered to the level 4 requirement in the call for tenders;
- having taken full cognizance of Mr Callus' - representing an interested party - intervention wherein he (a) explained the way course 'levels' are structured going into details as to, *inter alia*, the equivalence of British Level (QCF) to European (EQF) / Maltese (MQF) Levels and so forth, (b) stated that, contrary to what had been erroneously stated by appellant Company's representative, this was an 'A' level course and that the duration was 2 years and not 1 ½ years, (c) referred to the appellant Company's letter of objection and to a letter dated 26<sup>th</sup> June 2009 from NCC (UK), where the appellants indicated that their proposal was equivalent to the first year of a degree course and that NCC (UK) confirmed that it corresponded to Level 4 of the British National Standards, (d) remarked that since his Company's offer abided by the tender requirement of a 2-year course, its bid involved a considerable number of additional hours when compared to the appellants' 1-year course with the logical consequence that its price was much higher than that quoted by the appellant, so much so, that Computer Domain had been heavily penalised with regard to price – 170 scored by Computer Domain as against 248 scored by STC Training Ltd out of 320 points – which, in turn, had a significant bearing on the overall score and (e) pointed out that the three diplomas requested in the tender were very distinct from one another whereas the three diplomas presented by the appellants were practically the same in content except for 1 or 2 modules;
- having noted Mr Andreinski's testimony wherein, *inter alia*, he (a) informed the hearing that, since 2006, the Maltese Levels no longer reflected the British Levels but, instead, reflected the European Standards, (b) remarked that the tender document requested EQF level 4 which was equivalent to QCF level 3 whereas QCF levels 4 and 5 were equivalent to EQF 5 – as per reference manual issued by the Malta Qualifications Council, particularly to page 84 which displayed a comparative table no. 27, (c) stated that despite of what Mr Pullicino had claimed, namely that the report referred to by him - which was issued in September 2009, i.e. after the closing date of the tender in May 2009 – (1) was still under discussion as part of a consultation process and that (2) up till then, there was no final document – he (Mr Andreinski) reiterated that the Maltese Levels had been aligned with the European Levels since 2006 and that those levels were applicable when the tender was issued albeit, admittedly, both the Maltese and the British levels were going through a transition period, (d) explained that the tender requested a matriculation level whereas the appellant presented a first year of a B.Sc course, which was a level higher than that requested and thus it would make it difficult for Level 3 students to follow the programme submitted by appellant Company as that meant that they would be skipping level 4 and move directly to level 5, which proposal was unacceptable, (e) remarked that STC Training Ltd had also included in its proposal modules that belonged to British Levels 3 and 4, yet, most of the modules were of level 4 which were equivalent to European

Level 5, adding that it was not acceptable to mix levels, (f) pointed out that the tender document requested a 2-year programme, however, the appellant Company's tender submission presented a programme of about 320 hours which was equivalent to a course of (less than) 1 year, so much so, that on the website of STC Training Ltd it was advertised as a 1-year programme, (g) questioned how could the 2-year programme requested in the tender be delivered by the appellants in 1 year, (h) argued that, unlike the other bidders, the appellant Company was offering 3 programmes which had 8 of the modules common to all 3 programmes with only 1 or 2 modules being different from one programme to the other, which meant that the bulk of the content was practically the same in each programme presented by STC Training Ltd, (i) stated that the 'mix-and-match' modules from different levels adopted by the appellant Company was out of the question, remarking that the tender document was very specific in the sense that tenderers had to provide for a Level 4 course and no mix-and-match or leeway were allowed, (j) remarked that the marks given to the appellant Company with regard to service requirements reflected these shortcomings – 213.4 to STC Training Ltd compared to 294 to Computer Domain out of 370 points, (k) stated that if he were the adjudicating board he would have disqualified the appellant Company from the tendering process because it did not present the level requested in the tender dossier, something which was crucial in this contract and (l) insisted that the tender clearly indicated a 2-year course and that, both academically, as well as, according to the Bologna Process, that meant an established number of hours;

- having fully considered the testimony given by Dr Cachia, Dean ICT at the University of Malta and adviser to the Adjudication Board;

reached the following conclusions, namely:

1. Since no evidence to the contrary was produced during the hearing, the PCAB is satisfied that the adjudication process was correct and sees no reason to modify it in any way
2. The PCAB also feels that the appellant Company had substantially deviated from what was really requested by the contracting authority in the tender document making its bid inadmissible and unacceptable;

As a consequence of (1) to (2) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*14 March 2010*