

PUBLIC CONTRACTS REVIEW BOARD

Case No. 440

RN/01/12

Tender for the Provision of Authorised Officer Services – Regjun Nofsinhar

This call for tenders was published in the Government Gazette on the 24th January 2012. The closing date for this call with an estimated budget of € 330,000 was the 15th March 2012.

Two (2) tenderers submitted their offers.

Synthesis Management Services Ltd filed an objection on the 10th May 2012 against the decision of Regjun Nofsinhar to consider its offer as not the most technically and financially advantageous offer and to award the tender to TOAD Management Services Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Thursday, 2nd August 2012 to discuss this objection.

Present for the hearing were:

Synthesis Management Services Ltd (Synthesis Ltd)

Dr Kevin Camilleri Xuereb	Legal Representative
Dr Vincent Galea	Legal Representative
Mr Raphael Carabott	Representative
Mr Raymond Grima	Representative
Mr Charles Zammit	Representative

TOAD Management Services Ltd (TOAD Ltd)


Dr Rachel Tua	Legal Representative
Mr David Soler	Representative

Regjun Nofsinhar

Dr Alex Sciberras	Legal Representative
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Evaluation Board

Ms Claudette Abela Baldacchino	Chairperson
Mr Reuben Sciberras	Executive Secretary



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

Dr Kevin Camilleri Xuereb, legal advisor of Synthesis Management Services Ltd, the appellant company, stated that his client's request to obtain information on the points awarded to the recommended tender had been turned down. He said that his client required this information to enable him to make a comparative analysis and to verify the way individual evaluation board members allocated the points and requested that such information would be made available during the hearing not for the purpose of embarking on a fishing expedition but to reinforce his arguments in connection with the reasons quoted in the letter of objection.

Dr Camilleri Xuereb also referred to the Public Procurement Regulations which provided that unsuccessful bidders shall be notified with the outcome of the evaluation process and will be provided, among other information, with the reasons why the tenderer did not meet the technical specifications, the notification that the offer was not the cheapest or the score obtained by the unsuccessful bidder and the score of the successful bidder (as applicable).

Dr Alex Sciberras, legal advisor of the *Regjun Nofsinhar*, submitted that the contracting authority was prohibited from divulging certain information as per proviso to Reg 44 (3) (c). He added that it was most likely that the appellant company required the points allocated by each evaluator to each bidder so as to substantiate its claim laid down at section (v) of its letter of objection where it was claimed to have presented the more advantageous offer. At this point Dr Sciberras placed emphasis on the fact that it was not role of the Public Contracts Review Board to substitute the evaluation board in its evaluation of the bids but the Public Contracts Review Board's role was to ensure that the tendering process was conducted in full respect of the principles of equal treatment and transparency, which view was backed up by case law of the European Court of Justice.

The Chairman Public Contracts Review Board remarked that his board had access to all the information connected with this tendering process. He added that (a) the bidder could be furnished only with that information related to the company's tender submission and (b) commercially sensitive information on competitors' bids and/or restricted internal documentation of the contracting authority, e.g. the full evaluation report, could not be furnished to the appellant.

i) COMMUNICATION OF THE NOTICE OF AWARD

Dr Camilleri Xuereb referred to the first point raised in his client's letter of objection dated 10th May 2012 regarding the contracting authority's failure to follow the procedural requirements set out under Regulation 84(1), namely that '*The notice shall be filed within ten calendar days following the date on which the contracting authority has by fax or other electronic means sent its proposed award decision.*' He added that the notice of award dated 30th April 2012 was received via normal post on 2nd May 2012 thus reducing the 10 calendar day period for reply to 6 calendar days.

Dr Sciberras referred to Reg 45 'Communication' which stated, among other things, that "*All communication and information exchange may be by post, by fax, by electronic means...*" He added that, as a result, it was quite regular to send such a notification by post and whilst the appellant company could have asked for the ten day period to commence from the date of the actual receipt of the notice of award, yet the appellant company, evidently, suffered no prejudice so much so that the company lodged its appeal in time.

ii) INFORMATION ACCOMPANYING THE NOTICE OF AWARD

Dr Camilleri Xuereb referred to the second point raised in his client's letter of objection concerning the contracting authority's failure with regard to the following provision:-

'The communication to each tenderer of the proposed award shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 44(3), and by a precise statement of the exact standstill period.'

Dr Camilleri Xuereb added that the contracting authority's letter dated 30th of April, 2012 only stated that "the offer submitted by you was not successful since the other bidder placed first in the technical and financial ratings" and that "the tender is being recommended for award to TOAD Management Services Limited for the amount of €42,000, exclusive of VAT" - no summary of the relevant reasons relating to the rejection of the tender was given.

Dr Sciberras remarked that, in this case, the reason for the non-award of the tender to the appellant company was that (a) its offer was not the most technically and financially advantageous one and (b) the contracting authority had communicated all the relevant information in its letter dated 30th April 2012, i.e. the reason why its bid was unsuccessful, the technical and financial scores, the recommended tenderer and the price and the right to appeal the decision.

iii) AMOUNT TO BE DEPOSITED WITH THE APPEAL

Dr Camilleri Xuereb referred to the third point raised in his client's letter of objection dated 10th May, 2012 where it was indicated that "*If you intend to object to this decision, Regulations allow for an official objection, which in this case has to be lodged by noon of the 10th May 2012 at the Department of Contracts against a deposit of 3,300 (1% of the tender estimate).*"

Dr Camilleri Xuereb further submitted that:-

- a. on the 3rd May 2012, the contracting authority explained that the deposit had to represent 1% of the estimated value of the tender and that the estimated value of the tender had to be taken over the 5 year contract period, i.e. €330,000;
- b. Regulation 84(1) of the Public Procurement Regulations provided as follows:

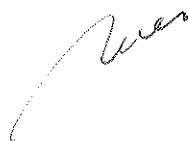
English text: *The notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender submitted by the tenderer, provided that in no case shall the deposit be less than one thousand and two hundred euro (€1,200) or more than fifty-eight thousand euro (€58,000).*

Maltese text:- *L-avviz ta' oggezzjoni għandu jkun biss validu jekk fimbien miegħu ikun hemm depozitu ekwivalenti għal wieħed fil-mija tal-valur stmat tal-offerta kif magħmula mill-offerent izda f'ebda każ m'għandu d-depożitu jkun ta' anqas minn elf u mitejn euro (€1,200) jew iżjed minn tmienja u hamsin elf euro (€58,000).*

- c. whilst, constitutionally, in case of conflict between the Maltese and English texts, the Maltese text should prevail, yet, in his opinion, there was no conflict;
 - d. the legislator's intention was clear that the deposit had to represent 1% of the offer made by the tenderer (the appellant company) and L.N. 296 of 2010 spoke of the estimated value of the tender submitted by the tenderer (not the originator's) and did not speak of the tender being taken as a whole but to one per cent based on the estimated value of the offer made by the tenderer, which in this case was €50,586,48 (p.a.);
 - e. in response to (d) above the contracting authority, via Dr Sciberras, had conceded that the deposit should represent 1% of the offer made by the appellant company but to cover the entire contract period of 5 years, namely the deposit had to amount to €2,529.32;
- and
- f. although in disagreement with the interpretation given by the contracting authority, his client deposited the amount of €2,529.32.

Dr Sciberras explained that:-

- i. prior to drawing up its letter dated 30th April 2012, the contracting authority had sought advice from the Department of Contracts regarding the deposit which had to be paid, namely €3,300 representing 1% of the estimated value of the tender i.e. €330,000;
- ii. although one might concede that there was a discrepancy between the English and Maltese text of Reg. 84 (1), one had to consider the pertinent legislation in a holistic manner in the sense that Reg 84 (1) provided that "*The notice of objection shall only be valid if accompanied by a deposit equivalent to 1% of the estimated value of the tender*" and Regulation 16 (1) had the answer to the question as to who established the estimated value of the tender, viz:



'In calculating the estimated value, the contracting authority shall consider the estimated value of remuneration due to the successful tenderer net of VAT...'

- iii. therefore, according to Reg. 16, the estimated value of the tender was established by the contracting authority and not by the bidder and, as a consequence, the interpretation given by the Department of Contracts that the deposit represented 1% of the estimated value of the tender was correct;
 - iv. the contract period was to run for 5 years with an option to extend by another year and, as a result, one could argue that the total estimated price was either €330,000 for 5 years or €396,000 for 6 years and the resultant deposit either €3,330 or €3,960;
- and
- v. if, in the circumstances, the Public Contracts Review Board were to determine that the deposit made by the appellant company of €2,529.32 was not the correct one, then the appeal would not be admissible for the purposes of Reg. 84 which stated that the *'notice of objection shall only be valid if accompanied by a deposit equivalent to one per cent of the estimated value of the tender....'*

iv) FORWARDING OF DRAFT TENDER DOCUMENT TO TOAD LTD PRIOR TO TENDER PUBLICATION

Dr Camilleri Xuereb referred to the fourth point raised in his client's letter of objection dated 10th May, 2012, and, particularly, to his client's letter dated the 12th April, 2012 concerning the fact that on the 22nd November 2011 Mr Samuel Herd, executive secretary to the Regjun Centrali, sent via email a copy of the draft tender document to Mr David Soler, director of TOAD Ltd, the recommended bidder, which email was also discussed at the Public Contracts Review Board hearing held on 18th May 2012.

Dr Camilleri Xuereb submitted that:-

- a. although that incident involved the Regjun Centrali, the final tender document was identical in all the calls for tenders issued by all the regions for authorised officer services and so the tendering procedures of the other regions were likewise compromised by the action of Mr Herd;
 - b. once TOAD Ltd was made aware beforehand of the contents of the draft tender document then that company gained an advantage over its competitors such that his client had 52 days to draw up its tender submission whereas TOAD Ltd had three extra months to do so;
- and
- c. the draft tender document in question was still in the making and, as a consequence, confidential so much so that it was forwarded to a selected few - members of the regions - for their feedback.

Dr Sciberras made the following submissions:-

- i. Mr Samuel Herd was attached to Regjun Centrali and not to the Regjun Nofsinhar;
- ii. even if, momentarily, one were to concede that in the case of the Regjun Centrali the dispatch of the email by Mr Herd to a third party, namely Mr David Soler of TOAD Ltd, somehow breached the principle of equal treatment to all bidders, that, by itself, was not sufficient to the annulment of the tender procedure because the appellant company had first to prove that that action had prejudiced its case;

At this point Dr Sciberras presented a copy of (i) the tender document which had been issued prior to the introduction of the regions, (ii) the draft tender document which had been sent to all the regions and which Mr Herd had forward to Mr David Soler on 22nd November 2011, and the tender document published on 24th January 2012.

- iii. when one considered the amendments proposed in the draft tender document one would notice that (a) only minor changes were made to the effect that, instead of referring to a 'joint committee' it referred to a 'regional committee' and so forth, and (b) the significant change in the role of the 'authorised offer', whose management/administrative functions were being assigned to the executive secretary was common knowledge and even the appellant company was well aware of it in its capacity of authorised officers;
- iv. the changes effected to the tender document did not constitute an advantage to TOAD Ltd over the appellant company and later, on evidence, would be produced that the appellant company had the draft tender document in its possession in 2011;
- v. the most significant change between the previous tender document and the current tender document concerned the 'award criteria' where the previous tender document referred to 'the cheapest price' whereas the tender document published in January 2012 referred to 'the most economically advantageous tender'. Also, nevertheless, this important change did not feature in the draft tender document which the Office of the Prime Minister sent to the regions and which Mr Herd forwarded to TOAD Ltd;
- vi. from the foregoing, it was evident that even if a bidder did have the draft tender document in hand prior to its publishing date that, in itself, provided no advantage over one's competitors as only minor changes were involved which, then again, were known to all those involved in this activity;
- vii. in Case T-345/03 Evropaiki Dynamiki [2008], where the successful bidder had been provided with the technical specifications 3 weeks before the issue of the tender, the European Court of Justice held that:-

"147. According to case-law, a procedural defect can lead to the annulment of the decision only if it is shown that, but for that defect,

the administrative procedure could have had a different outcome if the applicant had had access to the information in question from the beginning of that procedure and if there was even a small chance that the applicant could have brought about a different outcome to the administrative procedure.

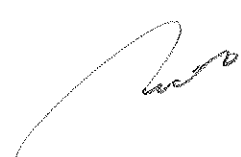
148 In that connection, the Court will examine, first of all, whether the unequal treatment alleged, consisting in a delay in providing the tenderers other than the successful tenderer with certain technical information, constitutes, as such, a procedural defect in that information that was in fact necessary for the preparation of the tenders was not made available to all the tenderers as soon as possible.

149 If such a defect is established, the Court will then examine whether, but for that defect, the procedure could have had a different outcome. From that point of view, such a defect can constitute an infringement of the equality of opportunity of tenderers only in so far as the explanations provided by the applicant demonstrate, in a plausible and sufficiently detailed manner, that the procedure could have had a different outcome as far as it was concerned".

- viii. the appellant company had failed that far to demonstrate in a “plausible and sufficient manner” that the procedure could have had a different outcome as far as it was concerned if he had been in possession of the draft tender document prior to its publication and only that could lead to the annulment of the decision taken by the contracting authority;
- ix. the directors of Synthesis Ltd were employees of TOAD Ltd before and even after the publication date of this tender, so much so that the employment of Mr Raymond Grima and Mr Raphael Carabott with TOAD Ltd was, effectively, terminated on the 4th April 2012. One has to bear in mind, continued Dr Sciberras, that these same persons, as far back as September 2011, already had the intention to set up their own company to compete for these contracts and at the same time continued representing TOAD Ltd at meetings and that, in itself, constituted an advantage to the future director of Synthesis Ltd and a disadvantage to TOAD Ltd;

and
- x. TOAD Ltd did not file an appeal in this regard because being the selected bidder it did not suffer any prejudice.

Dr Camilleri Xuereb reiterated that it was only with hindsight that one got to know that the draft tender document only included minor amendments however it was not acceptable that a confidential/restricted document ended up in the possession of a third party in November 2011 and that compromised the tendering process.



v) SYNTHESIS LTD'S OFFER WAS THE MORE ADVANTAGEOUS OFFER

Dr Camilleri Xuereb referred to the fifth point raised in his client's letter of objection dated 10th May, 2012, where it was claimed that, taken as a whole, the offer made by Synthesis Ltd was the more advantageous one of the two bids submitted satisfying the technical and administrative criteria when considering that TOAD Ltd was offering 40 hours active duty and the rest on call while Synthesis Ltd was offering about 70 hours active duty without any on call duty.

Dr Sciberras made the following submission:-

- a. it was the role of the evaluation board to assess which bid was the most economically advantageous whereas the Public Contracts Review Board had the role to ensure that the evaluation process was carried out in a regular manner satisfying the principles of equal treatment and transparency and that clear distinction was also made by the European Court of Justice;
- b. with regard to administrative and technical compliance he referred to clause 12.1 'Eligibility/Selection Criteria' provided, among other things, that:-

'In order to be considered eligible for award of the contract, tenderers must provide evidence that they meet or exceed certain minimum qualification criteria described hereunder:-

Evidence of relevant experience in carrying out services of a similar nature over the past 3 years including the nature and value, as well as contracts in hand and contractually committed;

The minimum value of projects of a similar nature completed shall be no less than 50,000 per annum;

The minimum number of projects of a similar scope/nature completed in the last 3 years must be at least 3 in number;'

- c. the appellant company did not satisfy these criteria and therefore the company did not qualify as a tenderer and as such should have been excluded from the beginning of the evaluation process;
- d. *Synthesis Ltd was set up on 1st of February, 2012, and, as a result, it did not have neither the required experience nor did it manage similar contracts which exceeded the value of €50,000 per annum;*
- e. one must keep in mind that this bid was submitted by Synthesis Ltd and as such it could not benefit from any individual experience and contracts managed by its directors when they were in employment with TOAD Ltd;
- f. had they tendered in their personal capacity, not even the directors of Synthesis Ltd qualified in terms of the selection criteria as the contracts they might have administered were the property of the company they were

employed with, namely TOAD Ltd the competing bidder;

- g. the situation would have been different had the appellant company succeeded in bringing or had, effectively, bought the operations of another company which had experience in this sector which was not the case;

and

- h. whilst Synthesis Ltd could perhaps claim ownership of the two contracts carried out by one of its directors who used to be the authorised officer on behalf of the Floriana and Valletta Local Councils, yet, those were two and not three contracts and none of them amounted to €50,000 per annum;

and

Dr Vincent Galea, also presenting Synthesis Ltd, remarked that if one were to give that interpretation to the eligibility/selection criteria then one had to question whether, locally, there are any companies with three years' experience in this sector except for the recommended bidder.

At this point Mr Reuben Sciberras, executive secretary Regjun Nofsinhar, under oath, gave the following evidence:-

- a. he confirmed that on the 14th November 2011, Mr Samuel Herd, his counterpart at the Regjun Centrali, requested a copy of the draft tender document, which, apparently, he had mislaid, and he obliged knowing that in his capacity of executive secretary Mr Herd already had access this document;
- b. he stated that, at the stage, the draft tender document was sent by the Office of the Prime Minister to the regions and he considered that document as confidential and he would not have made it available to third parties;
- c. he conceded that, at tendering opening stage, by mistake, he had indicated that TOAD Ltd's offer referred to a 30hr instead of 40hrs active duty as was clearly indicated in the its tender submission and confirmed that he recorded this correction in para. 1.7 of the minutes of the tender adjudicating meeting held on 11th April 2012;
- d. he confirmed that, upon being made aware by Mr Edgar Gatt, an evaluator, that during the adjudication of a similar tender for Regjun Centrali, the evaluators had given identical points to both bidders for technical compliance since, more or less, they were on the same footing leaving the price as the deciding factor, he (Mr Sciberras) had objected and, eventually, each evaluator gave separate technical scores;
- e. he stated that, following consultations with the Contracts Department the following scoring picture emerged: the average technical scores were 93 for TOAD Ltd and 80 for Synthesis Ltd and since both exceeded the 67% threshold they both qualified for financial consideration where TOAD Ltd offered €42,000 per annum and Synthesis Ltd offered €50,586.48 per annum

thus the final overall score of TOAD Ltd was 100 (having placed first) while the final score of Synthesis Ltd was 81 - at that stage it was observed that the percentage technical score in respect of Synthesis Ltd should have read 86 and not 80 and, consequently, the overall score should read 86 (85,8) as against the 100 scored by TOAD Ltd;

- f. he claimed that when he drew the attention of the evaluation board that it was not clear whether Synthesis Ltd had satisfied the eligibility/selection criteria with regard to the mandatory requirements concerning experience and past projects, which could have led to disqualification, the board members decided not to resort to disqualification but that each individual evaluator would take this issue into account in the allocation of marks – these points were recorded in the minutes at para. 2.2 and 2.3 of the evaluation report;
- g. he stated that the tender document did not indicate the number of hours required but it referred to a work plan;
- h. he also stated that the number of hours on duty and/or on call was not an issue for the adjudicating board as the 40 hrs on duty plus on-call duty offered by TOAD Ltd and the 70hrs on duty offered by Synthesis Ltd were both considered sufficient to render the service requested;
- i. he drew the attention of those present that the prices quoted by bidders had been made public in the summary of tenders received;
- j. he confirmed that this tender was published in the EU Journal and, as a result, it was open to bidders from other EU member states.;

and

- k. the appellant company was furnished with all the documentation in line with the advice obtained from the Department of Contracts and that excluded the entire evaluation report and the minutes of the region's meetings – it later transpired that the latter were in the public domain anyway.

Dr Sciberras pointed out that the 'Matrix for Points Scoring' at page 13 of the tender document did provide scoring guidelines when one or more non-core aspects were left unexplained or required additional information.


Mr Raphael Carabott, director of Synthesis Ltd, under oath, claimed, argued and stated the following:-

- i. whereas the recommended bidder was offering 40 hrs on duty plus on-call hrs, Synthesis Ltd was offering the same number of on duty hours as those normally worked by local wardens, i.e. from 10 to 11 hrs daily or 70 per week, even though the tender document did not specify the number of hours required;

- ii. looking at it differently, the fact that Synthesis Ltd was charging about €13.90 p/hr whereas TOAD Ltd was charging about €20 p/hr, one had to question whether this aspect was taken into account in the financial evaluation;
 - iii. under 'ancillary services' TOAD Ltd included six services at a charge whereas Synthesis Ltd included only two services at a charge with the rest, e.g. 'prosecution services', being included in its quote for 'authorised officer services';
 - iv. the quote submitted by Synthesis Ltd for 'authorised officer services' included ancillary services;
 - v. it is a fact that the tender document did not specify that the authorised officer had to perform the duties of prosecutor and, as a result, one could say that prosecution services were not requested;
 - vi. he had received the email dated November 2011 in the letter box of his private residence on 10th April 2012 and, acting on the advice of his lawyer, he reported this incident right away;
 - vii. along with Mr Raymond Grima, he used to execute this kind of contract and that was how they possessed 12 years' experience in this line of work;
 - viii. on the 14th October 2011 TOAD Ltd had informed him, among other things, that he would not be forming part of its team of Authorised Officers for the forthcoming round of tenders in the field;
- and
- ix. in the circumstances, he entered into lengthy talks with Mr Raymond Grima and Mr John Bonavia with the aim of setting up of a company without informing TOAD Ltd.

Dr Sciberras remarked that (a) the tender document did not request prosecution services but TOAD Ltd offered it, along with other services, over and above and apart from its financial offer for authorised officer services, (b) at this juncture it was convenient for the appellant company to declare that its quote for authorised officer services included ancillary services, such as prosecutor services, but the fact remained that it made no such declaration in its tender submission, (c) his client offered to the contracting authority 7 ancillary services whereas the appellant company offered 3 such services, and (d) recently, a separate tender had been issued for the provision of prosecution services because the authorised officer was only charged with the management of local wardens and, as far as the tribunal was concerned, the said officer only had to see that the logistics were in place for the sessions to run smoothly.

The Chairman Public Contracts Review Board remarked that 'authorised officer services' were mandatory and the tenderer had to quote for those specific services whereas ancillary services were not mandatory and if the appellant company included in its quote services which fell outside the duties of an 'authorised officer' then one would have inflated one's quote unnecessarily. He added that the appellant company



should have enquired about what was meant by 'ancillary services' and/or 'authorised officer services'.

Mr John Bonavia, authorised officer employed by TOAD Ltd, under oath, gave the following evidence:-

- a. the authorised officer had no active role in the proceedings of the tribunal but he would only monitor that the tribunal's work proceeded smoothly but that did not include the function of a prosecutor as such;
 - b. Mr Raphael Carabott and Mr Raymond Grima had approached him about the setting up of a company with the aim of bidding for such tenders but, after due consideration, he advised them that it would be better to settle any differences within the company (TOAD Ltd) rather than set up a separate competing company but they informed him that it would be better for him to join them otherwise he might eventually end up without a job;
 - c. on the 26th September 2011 he received a draft memorandum of association in connection with the proposed new company;
 - d. about mid-December 2011 he was in possession of the draft tender document without any emails attached to it – but refrained from divulging how he got hold of it - and although at the time he considered it of little importance to him he made copies of it for his then colleagues, Mr Carabott and Mr Grima, aware that they were facing certain difficulties but he did not forward it to TOAD Ltd;
- and
- e. at that time he used to work with another firm, Reno's, which had the same directors/shareholders as TOAD Ltd, i.e. Mr Soler and Mr Borg Caruana.

Dr Sciberras submitted that there was ample evidence that the appellant company was aware of the existence of the draft tender document prior to the issue date of this tender and, as a result, if the appellant company felt that it was irregular that such a document had been divulged to third parties then the company had every opportunity to make a formal complaint at pre-tendering stage and not sit on it with the intention of using it should Synthesis Ltd be unsuccessful in the outcome of the upcoming tendering process.

The Chairman Public Contracts Review Board remarked that it appeared that representatives of both bidding companies were well aware of what was going on with regard to the reform of the Local Enforcement System (LES) and, therefore, it was questionable how one side could bring up the question of unequal arms in this regard.

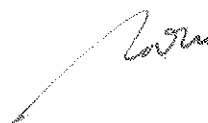
Ms Marie Lourdes Lautier, executive secretary of the Regjun Xlokk, under oath, offered the following explanations:-

- i. Local Government Department Memo 124 of 2011 issued on the 30th December 2011, regarding call for tenders for authorised officer services was addressed to all mayors, deputy mayors, local councillors, local councils and executive secretaries and copied to the Parliamentary Secretary in the Office of the Prime Minister, Principal Permanent Secretary, Auditor General, Ombudsman and others;
 - ii. attached to Memo 124 of 2011 there was the tender document for authorised officer services incorporating all the recommendations received from the Regional Committees, the Association of Local Councils and the Department of Contracts;
 - iii. about one month prior to the issue of this tender, the relative tender document had been widely available, at least to 65 or so local councils via their generic email boxes which was accessible to a number of persons, e.g. customer care and clerical staff;
- and
- iv. the instructions in Memo 138 of 2010 issued on 2nd November 2010 regarding the tender document for the provision of 'Local Warden Services' were to apply to Memo 124 of 2011, except for the composition of the adjudicating board where the 'authorised officer' was replaced with the executive secretary due to conflict of interest.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 10th May 2012 and also through their verbal submissions presented during the hearing held on the 2nd August 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the appellant company's request to obtain information on the points awarded to the recommended tender had been turned down, (b) the Public Procurement Regulations provided that unsuccessful bidders shall be notified with the outcome of the evaluation process and will be provided, among other information, with the reasons why the tenderer did not meet the technical specifications, the notification that the offer was not the cheapest or the score obtained by the unsuccessful bidder and the score of the successful bidder (as applicable), (c) the contracting authority failed to follow the procedural requirements set out under Regulation 84(1), namely that '*The notice shall be filed within ten calendar days following the date on which the contracting authority has by fax or other electronic means sent its proposed award decision.*', (d) in its letter dated 30th of April, 2012 the contracting authority only stated that "the offer submitted by you was not successful since the other bidder placed first in the technical and financial ratings" and that "the tender is being recommended for award



to TOAD Management Services Limited for the amount of €42,000, exclusive of VAT” - no summary of the relevant reasons relating to the rejection of the tender was given, (e) the appellant company’s letter dated the 12th April, 2012 placed particular emphasis on the fact that on the 22nd November 2011 Mr Samuel Herd, executive secretary to the Regjun Centrali, sent via email a copy of the draft tender document to Mr David Soler, director of TOAD Ltd, the recommended bidder, which email was also discussed at the Public Contracts Review Board hearing held on 18th May 2012, (f) although that incident involved the *Regjun Centrali*, the final tender document was identical in all the calls for tenders issued by all the regions for authorised officer services and so the tendering procedures of the other regions were, likewise, compromised by the action of Mr Herd, (g) once TOAD Ltd was made aware beforehand of the contents of the draft tender document then that company gained an advantage over its competitors such that the appellant company had 52 days to draw up its tender submission whereas TOAD Ltd had three extra months to do so, (h) the draft tender document in question was still in the making and, as a consequence, confidential so much so that it was forwarded to a selected few - members of the regions - for their feedback, (i) it was only with hindsight that one got to know that the draft tender document only included minor amendments however it was not acceptable that a confidential/restricted document ended up in the possession of a third party in November 2011 and that compromised the tendering process, (j) taken as a whole, the offer made by Synthesis Ltd was the more advantageous one of the two bids submitted satisfying the technical and administrative criteria when considering that TOAD Ltd was offering 40 hours active duty and the rest on call while Synthesis Ltd was offering about 70 hours active duty without any on call duty, (k) if one were to give that interpretation to the eligibility/selection criteria then one had to question whether, locally, there are any companies with three years’ experience in this sector except for the recommended bidder, (l) Synthesis Ltd was charging about €13.90 p/hr whereas TOAD Ltd was charging about €20 p/hr, one had to question whether this aspect was taken into account in the financial evaluation, (m) under ‘ancillary services’ TOAD Ltd included six services at a charge whereas Synthesis Ltd included only two services at a charge with the rest, e.g. ‘prosecution services’, being included in its quote for ‘authorised officer services’, (n) the quote submitted by Synthesis Ltd for ‘authorised officer services’ included ancillary services, (o) it is a fact that the tender document did not specify that the authorised officer had to perform the duties of prosecutor and, as a result, one could say that prosecution services were not requested, (p) Mr Carabott had received the email dated November 2011 in the letter box of his private residence on 10th April 2012 and, acting on the advice of his lawyer, he reported this incident right away, (q) along with Mr Raymond Grima, Mr Carabott used to execute this kind of contract and that was how they possessed 12 years’ experience in this line of work and (r) on the 14th October 2011 TOAD Ltd had informed Mr Carabott, among other things, that he would not be forming part of its team of *Authorised Officers* for the forthcoming round of tenders in the field and that, in the circumstances, he entered into lengthy talks with Mr Raymond Grima and Mr John Bonavia with the aim of setting up of a company without informing TOAD Ltd;

- having considered the contracting authority’s representatives’ reference to the fact that (a) the contracting authority was prohibited from divulging certain information as per proviso to *Reg 44 (3) (c)*, (b) that it was not the role of the

Public Contracts Review Board to substitute the evaluation board in its evaluation of the bids but the Public Contracts Review Board's role was to ensure that the tendering process was conducted in full respect of the principles of equal treatment and transparency, which view was backed up by case law of the European Court of Justice, (c) whilst the appellant company could have asked for the ten day period to commence from the date of the actual receipt of the notice of award, yet the appellant company, did not but, nevertheless, suffered no prejudice so much so that the company lodged its appeal in time, (d) in this case, the reason for the non-award of the tender to the appellant company was that (1) its offer was not the most technically and financially advantageous one and (2) the contracting authority had communicated all the relevant information in its letter dated 30th April 2012, namely the reason why its bid was unsuccessful, the technical and financial scores, the recommended tenderer and the price and the right to appeal the decision, (e) Mr Samuel Herd was attached to Regjun Centrali and not to the Regjun Nofsinhar, (f) even if, momentarily, one were to concede that, in the case of the Regjun Centrali, the dispatch of the email by Mr Herd to a third party, namely Mr David Soler of TOAD Ltd, somehow breached the principle of equal treatment to all bidders, that, by itself, was not sufficient to the annulment of the tender procedure because the appellant company had first to prove that that action had prejudiced its case, (g) when one considered the amendments proposed in the draft tender document one would notice that (1) only minor changes were made to the effect that, instead of referring to a 'joint committee' it referred to a 'regional committee' and so forth, and (2) the significant change in the role of the 'authorised offer', whose management/administrative functions were being assigned to the executive secretary was common knowledge and even the appellant company was well aware of it in its capacity of authorised officers, (h) the changes effected to the tender document did not constitute an advantage to TOAD Ltd over the appellant company, (i) the appellant company had the draft tender document in its possession in 2011, (j) the most significant change between the previous tender document and the current tender document – which, nevertheless, this important change did not feature in the draft tender document which the Office of the Prime Minister sent to the regions and which Mr Herd forwarded to TOAD Ltd - concerned the 'award criteria' where the previous tender document referred to 'the cheapest price' whereas the tender document published in January 2012 referred to 'the most economically advantageous tender', (k) from the foregoing, it was evident that even if a bidder did have the draft tender document in hand prior to its publishing date that, in itself, provided no advantage over one's competitors as only minor changes were involved which, then again, were known to all those involved in this activity ... 149 *If such a defect is established, the Court will then examine whether, but for that defect, the procedure could have had a different outcome. From that point of view, such a defect can constitute an infringement of the equality of opportunity of tenderers only in so far as the explanations provided by the applicant demonstrate, in a plausible and sufficiently detailed manner, that the procedure could have had a different outcome as far as it was concerned".*, (l) the appellant company had failed that far to demonstrate in a "plausible and sufficient manner" that the procedure could have had a different outcome as far as it was concerned if the said company had been in possession of the draft tender document prior to its publication and only that could lead to the annulment of the decision taken by the contracting authority, (m) considering that the directors of

Synthesis Ltd were employees of TOAD Ltd before and even after the publication date of this tender, so much so that the employment of Mr Raymond Grima and Mr Raphael Carabott with TOAD Ltd was, effectively, terminated on the 4th April 2012, one has to also bear in mind the fact that these same persons, as far back as September 2011, already had the intention to set up their own company to compete for these contracts and, at the same time, continued representing TOAD Ltd at meetings and that, in itself, constituted an advantage to the future director of Synthesis Ltd and a disadvantage to TOAD Ltd, (n) TOAD Ltd did not file an appeal in this regard because being the selected bidder it did not suffer any prejudice, (o) with regard to administrative and technical compliance clause 12.1 'Eligibility/Selection Criteria' provided, among other things, the requirement for (1) the evidence of relevant experience in carrying out services of a similar nature over the past 3 years including the nature and value, as well as contracts in hand and contractually committed, (2) the minimum value of projects of a similar nature completed to be no less than 50,000 per annum, (3) the minimum number of projects of a similar scope/nature completed in the last 3 years to be at least 3 in number, (p) *Synthesis Ltd was set up on 1st of February, 2012*, and, as a result, it did not have neither the required experience nor did it manage similar contracts which exceeded the value of €50,000 per annum, (q) one must keep in mind that this bid was submitted by Synthesis Ltd and, as such, it could not benefit from any individual experience and contracts managed by its directors when they were in employment with TOAD Ltd, (r) whilst Synthesis Ltd could perhaps claim ownership of the two contracts carried out by one of its directors who used to be the authorised offer on behalf of the Floriana and Valletta Local Councils, yet, those were two and not three contracts and none of them amounted to €50,000 per annum, (s) the tender document did not request prosecution services but TOAD Ltd offered it, along with other services, over and above and apart from its financial offer for authorised officer services, (t) recently, a separate tender had been issued for the provision of prosecution services because the authorised officer was only charged with the management of local wardens and (u) there was ample evidence that the appellant company was aware of the existence of the draft tender document prior to the issue date of this tender and, as a result, if the appellant company felt that it was irregular that such a document had been divulged to third parties then the company had every opportunity to make a formal complaint at pre-tendering stage and not sit on it with the intention of using it should Synthesis Ltd be unsuccessful in the outcome of the upcoming tendering process;

- having also considered the views expressed by Mr Reuben Sciberras, particularly those referring to when (a) he confirmed that on the 14th November 2011, Mr Samuel Herd, his counterpart at the Regjun Centrali, requested a copy of the draft tender document, which, apparently, he had mislaid, and he obliged knowing that in his capacity of executive secretary Mr Herd already had access this document and that, at the stage, the draft tender document was sent by the Office of the Prime Minister to the regions and he considered that document as confidential and he would not have made it available to third parties, (b) he confirmed that, upon being made aware by Mr Edgar Gatt, an evaluator, that during the adjudication of a similar tender for Regjun Centrali, the evaluators had given identical points to both bidders for technical compliance since, more or less, they were on the same footing leaving the price as the deciding factor, he (Mr Sciberras) had objected



and, eventually, each evaluator gave separate technical scores, (c) he stated that, following consultations with the Contracts Department the following scoring picture emerged, namely the average technical scores were 93 for TOAD Ltd and 80 for Synthesis Ltd and since both exceeded the 67% threshold they both qualified for financial consideration where TOAD Ltd offered €42,000 per annum and Synthesis Ltd offered €50,586.48 per annum thus the final overall score of TOAD Ltd was 100 (having placed first) while the final score of Synthesis Ltd was 81 - at that stage it was observed that the percentage technical score in respect of Synthesis Ltd should have read 86 and not 80 and, consequently, the overall score should read 86 (85,8) as against the 100 scored by TOAD Ltd, (d) he claimed that when he drew the attention of the evaluation board that it was not clear whether Synthesis Ltd had satisfied the eligibility/selection criteria with regard to the mandatory requirements concerning experience and past projects, which could have led to disqualification, the board members decided not to resort to disqualification but that each individual evaluator would take this issue into account in the allocation of marks – these points were recorded in the minutes at para. 2.2 and 2.3 of the evaluation report, (e) he stated that the tender document did not indicate the number of hours required but it referred to a work plan, (f) he also stated that the number of hours on duty and/or on call was not an issue for the adjudicating board as the 40 hrs on duty plus on-call duty offered by TOAD Ltd and the 70hrs on duty offered by Synthesis Ltd were both considered sufficient to render the service requested and (g) the appellant company was furnished with all the documentation in line with the advice obtained from the Department of Contracts and that excluded the entire evaluation report and the minutes of the region's meetings – it later transpired that the latter were in the public domain anyway,

- having also considered the views expressed by the recommended tenderer's representative, namely, Mr John Bonavia, particularly with reference to the fact that (a) Mr Raphael Carabott and Mr Raymond Grima had approached him about the setting up of a company with the aim of bidding for such tenders but, after due consideration, he advised them that it would be better to settle any differences within the company (TOAD Ltd) rather than set up a separate competing company but they informed him that it would be better for him to join them otherwise he might, eventually, end up without a job, (b) on the 26th September 2011 he received a draft memorandum of association in connection with the proposed new company, (c) about mid-December 2011 he was in possession of the draft tender document without any emails attached to it – but refrained from divulging how he got hold of it - and although at the time he considered it of little importance to him he made copies of it for his then colleagues, Mr Carabott and Mr Grima, aware that they were facing certain difficulties but he did not forward it to TOAD Ltd and (d) at that time he used to work with another firm, Reno's, which had the same directors/shareholders as TOAD Ltd, namely, Mr Soler and Mr Borg Caruana ,
- having also considered the views expressed and explanations made by Ms Marie Lourdes Lautier, particularly those referring to the fact that (a) the Local Government Department Memo 124 of 2011 issued on the 30th December 2011, regarding call for tenders for authorised officer services, was addressed to all mayors, deputy mayors, local councillors, local councils and executive secretaries

and copied to the Parliamentary Secretary in the Office of the Prime Minister, Principal Permanent Secretary, Auditor General, Ombudsman and others, (b) attached to Memo 124 of 2011 there was the tender document for authorised officer services incorporating all the recommendations received from the Regional Committees, the Association of Local Councils and the Department of Contracts, (c) about one month prior to the issue of this tender, the relative tender document had been widely available, at least to 65 or so local councils via their generic email boxes which was accessible to a number of persons, e.g. customer care and clerical staff and (d) the instructions in Memo 138 of 2010 issued on 2nd November 2010 regarding the tender document for the provision of 'Local Warden Services' were to apply to Memo 124 of 2011, except for the composition of the adjudicating board where the 'authorised officer' was replaced with the executive secretary due to conflict of interest,

reached the following conclusions, namely:

1. The Public Contracts Review Board argues that with regard to the issues raised in connection with 'COMMUNICATION OF THE NOTICE OF AWARD', it has little more to add considering that all parties had ample time to review their position and prepare themselves in a timely and effective manner for the hearing under review.
2. With regard to the appellant company's stand on 'INFORMATION ACCOMPANYING THE NOTICE OF AWARD', this Board feels that the contracting authority should have been more informative from the start as, in that way, it would have avoided any undue false interpretations of facts as well as the creation of misleading perceptions.
3. The Public Contracts Review Board takes full cognisance of the points raised with regard to the issue concerning the 'AMOUNT TO BE DEPOSITED WITH THE APPEAL' and feels that its position was made clear through its acceptance to convene the hearing.
4. This Board feels that in so far as concerns one of the issues raised by the appellant company, namely, the 'FORWARDING OF DRAFT TENDER DOCUMENT TO TOAD LTD PRIOR TO TENDER PUBLICATION', it has deliberated in a thorough manner in view of the fact that the evidence submitted by all interested parties provided this Board with quite a few contrasting issues. Following analysis of all that was submitted this Board feels that:

Mr Samuel Herd's decision to send via email a copy of the draft tender document to Mr David Soler, director of TOAD Ltd, the recommended bidder, would have, under normal circumstances - although that incident involved the *Regjun Centrali*, wherein the final tender document being identical in all the calls for tenders issued by all the regions for authorised officer services - been deemed to have compromised the tendering procedures of the other regions. This Board also acknowledges that, potentially, the appellant company's argument regarding the fact that, once TOAD Ltd was made aware beforehand of the contents of the draft tender document then that company gained an advantage over its competitors such that the appellant company had 52 days to draw up its tender submission whereas TOAD Ltd had

three extra months to do so, could have, all things being equal, adversely effected its chance of being at par with the recommended tenderer with regard to adequate preparation leading to tender submission. Furthermore, this Board is also inclined to uphold the argument raised by the appellant company wherein, despite it was only with hindsight that one got to know that the draft tender document only included minor amendments, yet it was not acceptable that a confidential / restricted document ended up in the possession of a third party in November 2011 thus, possibly, compromising the tendering process.

Nevertheless, the Public Contracts Review Board, cannot but take full cognizance of Mr John Bonavia's evidence wherein, *inter alia*, the latter stated that (a) Mr Raphael Carabott and Mr Raymond Grima had approached him about the setting up of a company with the aim of bidding for such tenders but, after due consideration, he advised them that it would be better to settle any differences within the company (TOAD Ltd) rather than set up a separate competing company but they informed him that it would be better for him to join them otherwise he might, eventually, end up without a job, (b) on the 26th September 2011 he received a draft memorandum of association in connection with the proposed new company, (c) about mid-December 2011 he was in possession of the draft tender document without any emails attached to it – but refrained from divulging how he got hold of it - and although at the time he considered it of little importance to him he made copies of it for his then colleagues, Mr Carabott and Mr Grima, aware that they were facing certain difficulties but he did not forward it to TOAD Ltd. Undoubtedly, this testimony, *sui generis*, raises a great amount of doubt on the sequence of events as manifested by the appellant company. This evidence provided this Board with doubts as to whether even the appellant company's representative had, indeed, themselves prior knowledge of the document in question. Also, the fact that (a) on the 26th September 2011, namely, four months prior to the actual publication of the call under review, Mr Bonavia received a draft memorandum of association in connection with the proposed new company as well as (b) the fact that, according to Mr Carabott, on the 14th October 2011, TOAD Ltd had informed Mr Carabott, among other things, that he would not be forming part of its team of *Authorised Officers* for the forthcoming round of tenders in the field, casts a certain amount of doubt on the way matters were attended to. Undoubtedly, this Board has also given particular attention to the contracting authority's position, namely, the fact that considering that the directors of Synthesis Ltd were employees of TOAD Ltd before and even after the publication date of this tender, so much so that the employment of Mr Raymond Grima and Mr Raphael Carabott with TOAD Ltd was, effectively, terminated on the 4th April 2012, one has to also bear in mind the fact that these same persons, as far back as September 2011, already had the intention to set up their own company to compete for these contracts and, at the same time, continued representing TOAD Ltd at meetings and that, in itself, may be seen as constituting an advantage to the future director of Synthesis Ltd and a disadvantage to TOAD Ltd.

Finally, on this particular subject matter, the Public Contracts Review Board has duly considered the evidence given by Ms Marie Lourdes Lautier. Indeed, Ms Lautier's evidence has provided this Board with a considerable amount of food for thought as well as concerns, particularly, the fact that (a) the Local Government

