

PUBLIC CONTRACTS REVIEW BOARD

Case No. 441

RX/01/12

Tender for the Provision of Authorised Officer Services – Regjun Xlokk

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 28th June 2012 against the decision of Regjun Xlokk to consider its offer as not the most 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 Alex Sciberras	Legal Representative
Mr David Soler	Representative

Regjun Xlokk

Evaluation Board

Chev. Paul Farrugia	Chairman
Mr Anthony Valvo	Member
Ms M' Lourdes Lautier	Executive Secretary

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

Dr Kevin Camilleri Xuereb, legal representative of Synthesis Management Services Ltd, the appellant company, claimed that his client had requested the pertinent authority to obtain information on the points awarded to the recommended tender but such request was turned down. He argued that his client required this information to enable the company's representatives to make a comparative analysis and to verify the way individual evaluation board members allocated the points. As a result he requested that, during the hearing, this Board would enable access to the appellant party to information not for the purpose of embarking on a fishing expedition but to reinforce its arguments in connection with the reasons quoted in his client's 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 representative of TOAD Ltd, 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 (vi) of its letter of objection where it claimed to have presented the more advantageous offer. Dr Sciberras added 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 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 any interested party could be furnished only with that information related to one's own tender submission. At this point the Chairman placed emphasis on the point that commercially sensitive information on competitors' bids and/or restricted internal documentation of the contracting authority, such as the full evaluation report, could not be furnished to the appellant.

Dr Sciberras remarked that, in this case, the reason for the non award of the tender to the appellant company was that its offer was not the cheaper offer and the contracting authority had, rightly, communicated that reason in its letter dated 20th April 2012 and the prices had been published in the summary of tenders received.

i) ERRONOUS REGULATION QUOTED TO LODGE AN APPEAL

Dr Camilleri Xuereb referred to the first point raised in his client's letter of objection dated 28th June 2012 where it was pointed out that:-

- i. in its notice of award dated 20th June 2012 the contracting authority informed his client that "*Should you object to this decision, the Regulations*

allow for an official objection, in which case, this has to be lodged at the Public Contracts Review Board, Ministry of Finance, South Street, Valletta, as per Legal Notice 296/2010 Reg. 83(4) of the Public Procurement Regulations”;

- ii. when his client queried the reference to Reg. 83(4) the Regjun Xlokk replied on the 21st June 2012 that the appeal had to be lodged at the Public Contracts Review Board, Ministry of Finance, South Street, Valletta, as per Legal Notice 296/2010 of the Public Procurement Regulations and not as erroneously quoted in its letter dated 20th June 2012 - however, no specific Regulation was indicated;

and

- iii. clause 20 of the tender document (page16) dealt with ‘Appeals’ and referred the tenderer to Annex 10 which reproduced Part III (Reg. 84) of the Public Procurement Regulations.

Dr Camilleri Xuereb added that the Court of Appeal had decided that if an authority took it upon itself to indicate the Act or Regulation under which an aggrieved person were to seek redress it had to be quoted correctly.

Dr Sciberras remarked that the tenderer was expected to be diligent and reasonably informed and, as the appellant company itself stated, the tender document itself reproduced in its entirety Part III (Reg. 84) of the Public Procurement Regulations which spelled out the procedure how to file an appeal and so the appeal procedure was available to all tenderers from the date of issue of the tender. He added that it was the responsibility of the tenderer to read and to understand the provisions of the tender document.

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, whilst the contracting authority's letter dated 20th June, 2012 only stated that "the offer submitted by your company was not successful since your offer was not the most financially advantageous one", yet 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 simply that its offer was not the cheapest and in its letter dated 20th June 2012 the contracting authority had communicated that information in clear terms and since the prices of both bidders were public there was nothing that it could have been fruitfully added.

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 28th June 2012 concerning the contracting authority's failure to inform his client of the amount that had to be deposited to file an appeal and of the deadline for lodging the appeal when para. 19.2 of the 'General Rules Governing Tendering' (version 1.1 dated October 2011) provided that:

Unsuccessful bidders shall be notified with the outcome of the evaluation process, and will be provided the following information:

- (v) *the deadline for filing a notice of objection (appeal);*
- (vi) *the deposit required if lodging an appeal.*

Dr Sciberras explained that:-

- i. as already pointed out earlier on, the tender document itself reproduced in its entirety Part III (Reg. 84) of the Public Procurement Regulations which spelled out the procedure how to file an appeal, including the ten day deadline and the deposit that had to be paid;
- 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 was to run for 5 years and, as a result, the total estimated price of the tender was €330,000 and 1% thereof amounted to €3,300;
- and
- v. if, in the circumstances, the Public Contracts Review Board would determine that the deposit of €2,430 made by appellant company was not the correct one then the appeal would not have been 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 28th June, 2012, and particularly to his client's letter dated the 12th of 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 Xlokk;
- 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) ALLOCATION OF POINTS FOR TECHNICAL COMPLIANCE

Dr Camilleri Xuereb referred to point (v) of his client's letter of objection and submitted that:-

- (a) the 'Technical Compliance Grid' showed that the two competing tenderers scored identical points, amounting to 80%, and one could not comprehend how all the members of the adjudicating board allocated the same number of points to both bidders;

Criterion	Maximum Score Possible	Synthesis Management Services Ltd	Toad Management Services Ltd
Work Plan	40	30	30
Organizational Capabilities	30	24	24
Quality Standards	20	14	14
Commitment Potential	10	8	8
Total	100	80%	80%

- (b) clause 12.2 stated, among other things, that "*When evaluating technical offers, each evaluator awards each offer a score out of a maximum 100 points in accordance with the technical criteria and sub-criteria as outlined below. The*

aggregate final score is arrived at by calculating the arithmetical average of the individual final score of each evaluator”;

and

- (c) whilst it was logical to question how the three evaluators working separately ended up allocating the same marks to both bidders, yet it was most likely that the three evaluators acted as a group and, if that were to be the case, then the Public Contracts Review Board should consider those scores as irregular for the purposes of clause 12.2

Dr Sciberras explained that:-

- i. what happened was that Mr Edgar Gatt, who was appointed by the central government on the evaluation board of each region, advised the other evaluators that in similar evaluations involving other regions once both tenderers were technically compliant then the evaluators allocated the same mark to both bidders and then the deciding factor was the price;
 - ii. during the evaluation process it was normal practice that the evaluators would discuss among themselves the various aspects to the tender submissions and to point out their strengths and weaknesses prior to allocating the marks and, in a way, that was healthy as all evaluators would have a wider view of the contents of the tender submissions;
 - iii. the fact that the evaluators gave identical points to each bidder at technical evaluation stage might appear anomalous but, at no point, did the tender document declare that if two bids obtained identical marks at technical compliance stage then that, in itself, rendered the process irregular or illegal;
- and
- iv. the way the evaluating board acted, in fact, favoured the appellant company because its tender submission was deficient in other respects, such as the eligibility/selection criteria, but, nonetheless, it was not disqualified;
 - v. 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;

- vi. the appellant company did not satisfy these criteria and, as a consequence, it did not qualify as a tenderer and, as such, should have been excluded from the beginning of the evaluation process;
 - vii. Synthesis Ltd was set up on 1st of February, 2012, and, therefore, it did not have the required experience and neither did it manage similar contracts which exceeded the value of €50,000 per annum;
 - viii. 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;
 - ix. 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 other competitor in this procedure;
 - x. the situation would have been different had the appellant company succeeded in or bought the operations of another company which had experience in this sector, which was not the case;
 - xi. 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, however, those were two and not three contracts and none of them amounted to €50,000 per annum;
- and
- xii. his client had not appealed from the decision of the adjudicating board not to disqualify the appellant company from the tendering process on the basis of its non-compliance with the selection criteria because his client, being the recommended bidder, was not prejudiced by said decision and, not having suffered such prejudice, his client could not present an objection but, nonetheless, the Public Contracts Review Board should consider this issue in its final decision.

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.

It was verified that this tender was published in the European Union Journal and therefore it was open to bidders from other EU member states.

vi) SYNTHESIS LTD OFFER WAS THE MORE ADVANTAGEOUS OFFER

Dr Camilleri Xuereb referred to the sixth point raised in his client's letter of objection dated 28th June, 2012, where it was claimed that taken as a whole the offer made by

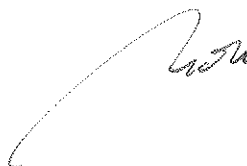
Synthesis Ltd was the more advantageous one of the two bids submitted when considering that TOAD Ltd was offering 40 hours active duty plus on call while Synthesis Ltd was offering about 70 hours active duty without any on call duty.

Dr Sciberras declared that 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.

Mr Anthony Valvo, Mayor of Xghajra and member of the adjudicating board, under oath, gave the following evidence:-

- i. whilst the evaluation board was aware of the provisions of clause 12.2, 'Award Criteria', which laid down, among other things, that 'each evaluator awards each offer a score', yet, the evaluation board took into account the advice of Mr Edgar Gatt, appointed by the central government to sit on all boards evaluating identical tenders, in the sense that, in the adjudication of similar tender/s, the evaluation board had decided that since both bidders were technically compliant they were given the same number of points and then the price was the deciding factor;
 - ii. the evaluation board considered Mr Gatt's advice as quite reasonable;
 - iii. both himself, as member of the Joint Committee - the predecessor of the Regional Committee - and Dr Alexei Dingli, Mayor of Valletta and a member of the evaluation board, knew the representatives of both bidders and were convinced that both of them were competent to execute this contract and, as a result, both bidders were awarded the same marks with regard to technical compliance;
 - iv. he confirmed that the technical evaluation of the tender submissions was not carried out individually but as a group;
 - v. the evaluation board did not go into the details of the experience required as per 12.1 'Eligibility/Selection Criteria', e.g. whether both bidding companies had the 3 years experience and the past projects requested but the evaluation board considered that it was sufficient that the representatives of both bidding firms were experienced in this sector;
- and
- vi. the tender submission of Synthesis Ltd did not contain the list of works/services and accompanying certificates as evidence as required in Reg. 52 (2) (a) (ii) with regard to past projects/services over the previous three years.

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.

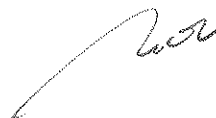
The Chairman Public Contracts Review Board remarked that 'authorised officer services' were mandatory and the tenderer had to quote for those specific services whereas ancillary services were not mandatory and if the appellant company included in its quote services which fell outside the duties of an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



Mr 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 28th June 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 appellant company's letter dated 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, (d)

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, (e) 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, (f) 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, (g) 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, (h) the 'Technical Compliance Grid' showed that the two competing tenderers scored identical points, amounting to 80%, and one could not comprehend how all the members of the adjudicating board allocated the same number of points to both bidders, (i) clause 12.2 stated, among other things, that "*When evaluating technical offers, each evaluator awards each offer a score out of a maximum 100 points in accordance with the technical criteria and sub-criteria as outlined below. The aggregate final score is arrived at by calculating the arithmetical average of the individual final score of each evaluator*", (j) whilst it was logical to question how the three evaluators working separately ended up allocating the same marks to both bidders, yet it was most likely that the three evaluators acted as a group and, if that were to be the case, then the Public Contracts Review Board should consider those scores as irregular for the purposes of clause 12.2, (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) 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, (m) 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, (n) 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 (o) 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 representative's reference to the fact that (a) whilst the evaluation board was aware of the provisions of clause 12.2, 'Award Criteria', which laid down, among other things, that 'each evaluator awards each offer a score', yet, the evaluation board took into account the advice of Mr Edgar Gatt, appointed by the central government to sit on all boards evaluating identical tenders, in the sense that, in the adjudication of similar tender/s, the evaluation board had decided that since both bidders were technically compliant they were given the same number of points and then the price was the

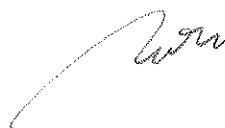
deciding factor, (b) the evaluation board considered Mr Gatt's advice as quite reasonable, (c) both himself, as member of the Joint Committee - the predecessor of the Regional Committee - and Dr Alexei Dingli, Mayor of Valletta and a member of the evaluation board, knew the representatives of both bidders and were convinced that both of them were competent to execute this contract and, as a result, both bidders were awarded the same marks with regard to technical compliance, (d) he confirmed that the technical evaluation of the tender submissions was not carried out individually but as a group, (e) the evaluation board did not go into the details of the experience required as per 12.1 'Eligibility/Selection Criteria', e.g. whether both bidding companies had the 3 years' experience and the past projects requested but the evaluation board considered that it was sufficient that the representatives of both bidding firms were experienced in this sector and (f) the tender submission of Synthesis Ltd did not contain the list of works/services and accompanying certificates as evidence as required in Reg. 52 (2) (a) (ii) with regard to past projects/services over the previous three years;

- having also considered the views expressed by the recommended tenderer's representatives, namely, those relating to the fact that (a) the contracting authority was prohibited from divulging certain information as per proviso to *Reg 44 (3) (c)*, (b) 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) in this case, the reason for the non-award of the tender to the appellant company was that its offer was not the cheaper offer and the contracting authority had, rightly, communicated that reason in its letter dated 20th April 2012 and the prices had been published in the summary of tenders received, (d) Mr Samuel Herd was attached to Regjun Centrali and not to the Regjun Xlokk, (e) 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, (f) 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, (g) the changes effected to the tender document did not constitute an advantage to TOAD Ltd over the appellant company, (h) the appellant company had the draft tender document in its possession in 2011, (i) 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', (j) 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", (k) 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, (l) 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, (m) TOAD Ltd did not file an appeal in this regard because being the selected bidder it did not suffer any prejudice, (n) with regard to why all the members of the adjudicating board allocated the same number of points to both bidders (1) what happened was that Mr Edgar Gatt, who was appointed by the central government on the evaluation board of each region, advised the other evaluators that, in similar evaluations involving other regions, once both tenderers were technically compliant, then the evaluators allocated the same mark to both bidders and then the deciding factor was the price, (2) during the evaluation process it was normal practice that the evaluators would discuss among themselves the various aspects to the tender submissions and to point out their strengths and weaknesses prior to allocating the marks and, in a way, that was healthy as all evaluators would have a wider view of the contents of the tender submissions, (3) the fact that the evaluators gave identical points to each bidder at technical evaluation stage might appear anomalous but, at no point, did the tender document declare that if two bids obtained identical marks at technical compliance stage then that, in itself, rendered the process irregular or illegal, (4) the way the evaluating board acted, in fact, favoured the appellant company because its tender submission was deficient in other respects, such as the eligibility/selection criteria, but, nonetheless, it was not disqualified, (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 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. With regard to the issues raised in connection with 'ERRONOUS REGULATION QUOTED TO LODGE AN APPEAL' the Public Contracts Review Board feels that its position was made clear through its acceptance to convene the hearing.
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 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. Needless to say that such a widespread distribution network could have facilitated all potential bidders from gaining prior knowledge of the tender document and, as

a consequence, whilst this Board cannot but agree that Mr Herd's 'modus operandi' was highly inopportune, yet, it is also a fact that, considering Ms Lautier's testimony, the tender document ended up being, erroneously, freely accessible to one and sundry prior to its official launch.

This Board - taking full cognizance of the contracting authority's reference to 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, with the European Court of Justice holding, *inter alia*, that

(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"

acknowledges that the appellant company had failed to demonstrate in a "plausible and sufficient manner" that (a) 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 (b) the appellant company itself was not also in possession of the draft documents prior to the official publication of the tender.

5. In considering the appellant company's arguments raised in connection with 'ALLOCATION OF POINTS FOR TECHNICAL COMPLIANCE', this Board would like to express its dissonance with the fact that points were allocated by each evaluator after having been agreed to amongst themselves.
6. The Public Contracts Review Board considered also the arguments raised by all parties concerned in connection with the matter relating to the appellant company's contention that 'SYNTHESIS LTD'S OFFER WAS THE MORE ADVANTAGEOUS OFFER'. This Board took full cognizance of the evaluation board's decision (a) initially, not to disqualify the appellant company despite it not satisfying the eligibility/selection criteria with regard to the mandatory requirements concerning experience and past projects, which, as a matter of fact, should have led to disqualification and then (b) decide 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. Albeit this Board has no doubt that such decision was taken in good faith, yet this Board considers this decision to be highly flawed as an evaluation board should establish, first and foremost, whether a participating tenderer is administratively and technically compliant prior to proceeding with the price evaluation. This Board maintains that it is futile for an evaluation board to allow a tenderer to proceed with an evaluation process for the latter's bid to be penalised albeit it makes it theoretically through to the pertinent stage.

In view of the above, this Board

- a. finds against the appellant company as, in this particular instance, this Board considers the said company as having been ineligible due to it not meeting the pertinent tender requirements referred to in clause 12.1, 'Eligibility/Selection Criteria', namely

'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;

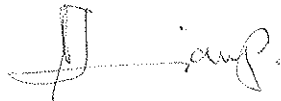
The minimum number of projects of a similar scope/nature completed in the last 3 years must be at least 3 in number;'

At this juncture this Board cannot but express its concern as regards the fact that the evaluation board simply proceeded with the evaluation of this tender albeit being cognizant of the fact that the appellant company was not administratively compliant. Undoubtedly, this Board opines against the decision taken by the evaluation board wherein the latter, arbitrarily and against the remit entrusted to its members, decided not to resort to disqualification but rather resorted to ensure that each individual evaluator would take this issue into account in the allocation of marks.

- b. nevertheless, recommends that the entire process be annulled and a fresh call to be reissued as this Board considers such process to have been vitiated by the highly abnormal number of people and entities who had prior knowledge of the content of the tender document. The effect of the issue relating to the doubts which have been raised as to whether the same appellant company or its directors / employees had itself / themselves prior knowledge is perhaps mitigated - as much as it remains pertinent - and this considering the fact that this tender was also published in the EU Journal and, as a result, it was open to bidders from other EU member states. Indeed, this lack of manifestation of an equitable procedural treatment amongst all potential bidders - namely between those who had access and others who did not have such (a) generic access to the same content distributed in various correspondence as evidenced by Ms Lautier and (b) handpicked access to such content as evidenced by Mr Bonavia – renders this entire process as flawed.
- c. feels that the purpose of evaluating a tender on a *Most Economically Advantageous Tender* basis was to have a number of evaluators examining the technical aspects of each bid independently from one another and then the points allocated by each evaluator would be aggregated to arrive at the final mark. As a result, the fact that all the evaluators in question awarded the same number of points to both tenderers on all the different criteria that featured in the 'Technical Evaluation Grid' led to the evident conclusion that points were allocated by each evaluator after having been agreed to amongst themselves. This

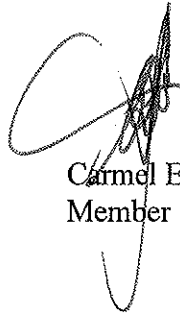
Board contends that the way the technical evaluation was carried out defeated the scope of the contracting authority resorting to the *Most Economically Advantageous Tender* procedure and, in the Board's opinion, as a consequence, tainted the technical evaluation process.

- d. opines that the contracting authority, as well as the evaluation board, could have administered, deliberated and decided upon this particular tender in a more cautious, transparent and effective manner.
- e. suggests that the evaluation board to be appointed by the contracting authority to evaluate the tenders submitted in the fresh call will consist of new members in no way connected with the tender under review.
- f. also recommends that the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed as, all things being equal, it became evident that the appellant company was not properly notified by the contracting authority as to the real reasons for it not being favourably considered.



Alfred R Triganza
Chairman

8th October 2012



Carmel Esposito
Member



Joseph Croker
Member