



Report on the Working of the
General Contracts Committee and the
Public Contracts Appeals Board
During 2007

Department of Contracts

Ministry of Finance, the Economy and Investment

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

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Introduction

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

General Contracts Committee

The composition of the General Contracts Committee during 2007 was as follows:

Mr Francis Attard – Director General, Chairman ex-officio
Mr Joseph Borg Grech B Arch BE & A, A & CE
Mr Carmel J Delicata CPAA, FCIB, FIA, FICIS
Mr Carmel Gatt ACIB
Mr Joseph Mizzi B Eng, A & CE
Ms Doris Aquilina
Mr Vincent Grech
Mr Vincent Camilleri
Mr Oliver Vassallo

During the year the General Contracts Committee held meetings twice a week on Tuesdays and Thursdays for a total number of 102 sittings. During these sittings 1,310 contractual issues were considered. These issues ranged from pre-contractual matters, such as approval of clarifications to prospective bidders, to post-contractual ones involving approval of extra works/variations. Amongst these cases the Committee evaluated reports and recommendations submitted by contracting authorities. This resulted in the issue of 333 Letters of Acceptance / Contracts for locally funded contracts and 34 contracts financed through various European Union Programmes as well as EEA Financial Mechanism and Norwegian Financial Mechanism. The total value of these contracts amounted to Euro 74,645,786. The Committee deliberated on fourteen objections emanating from appeals lodged against recommendations of award of contracts pertaining to departmental tenders.

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

The Public Contracts Regulations, 2005 provide that in tenders having an estimated value between Lm5,000 and Lm20,000 and are issued by a Local Council or by a Contracting Authority listed in Schedule 2, an aggrieved bidder shall have a right to make a complaint to the General Contracts Committee. During 2007, the General Contracts Committee heard 16 such complaints and the text of the final decisions is published in Part I.

Public Contracts Appeals Board

The Public Contracts Appeals Board which is appointed by the Prime Minister is constituted as follows:-

Chairman: Mr Alfred R Triganza BA (Hons) (Accty), FIA, CPA, Dip M (UK),
MCIM. (UK), MIM
Members: Mr Anthony Pavia DPA
Mr Edwin Muscat
Mr Maurice Caruana MQR (substitute member)

During 2007 the Public Contracts Appeals Board heard 18 objections in terms of Regulations 82, 83 and 84 of the Public Contracts Regulations, 2005. The text of the final decisions is published in Part 2 of this publication.

PART 1

Complaints decided by the General Contracts Committee

Case No. 1

Meeting of the General Contracts Committee

19 January 2007

Inland Revenue Department – Tender for the Supply of Pressure Seal Forms (IR 149/01)

Galaxy Ltd objected to the decision of the Department of Inland Revenue for the recommendation of award for the above tender to Beck Graphics Ltd through letters dated 30 November 2006 and 18 January 2007.

The following persons were present for the hearing:

Inland Revenue	–	Mr Ray Brincat Mr Joe Cutajar
Galaxy Ltd	–	Mr Andrew Zarb Mr Reuben Zarb
Beck Graphics Ltd	–	Mr William Beck

Mr Andrew Zarb stated that they are objecting to the letter issued by the Department of Inland Revenue on the 01 December, 2006 because it implied that Messrs Galaxy Ltd had a bad track record. He requested that the letter was to be removed from file because it was going to give his company, which has tendered with the government for the past 18 years, a bad name.

He further continued that for the last 7 years they have supplied the Department of Social Security with approximately two million of the same offered product and that when they were the suppliers of the Inland Revenue Department there was only one instance when a part of a supplied batch was problematic and his company did its utmost in order to keep up with the production.

Mr Zarb pointed out that on the boxes there were written instructions regarding storage and that due to the cohesive glue used on these papers they were not supposed to be stored in stacks of more than five. He also said that the expiry date of goods was also printed on the box. Mr Zarb continued that these forms were covered with a warranty period of eighteen months and that they always replaced any damaged goods before delivery.

It was also brought to the attention of the General Contracts Committee that even though their offer was cheaper by only Lm20, these were still public funds and that the tender should have been awarded to them as theirs was the cheaper offer. Mr Zarb stressed that the Department's Adjudication Committee did not supply a Technical Report because their recommendation was not based on the specifications of the product but on an experience that the department encountered two years ago.

Mr Joe Cutajar said that the Lm20 difference in price was insignificant and should therefore not be the determining factor as to whom the tender should be awarded. He stressed that past experience showed that they encountered difficulties in printing and sealing when using the material offered by Galaxy Ltd which led to time loss and that for just Lm20 the Department was not taking the risk. He confirmed that the samples were up to specifications.

It was also confirmed that it was only once that the machine got jammed because the forms were stuck and that Messrs Galaxy Ltd took the boxes in order to have the forms fanned. Mr Cutajar said that their storage was air conditioned because they were stored alongside the computers. They were careful to keep in line with the storage instructions.

Mr Ray Brincat confirmed that it was only during the last tender awarded to Galaxy Ltd that they encountered problems with part of a batch and that they used expired material.

After deliberating on the submission and from the evidence given the Committee arrived at the following conclusions:

- 1) Galaxy Ltd's request to have the letter of the Department of Inland Revenue dated 01 December 2006 removed from all the records goes beyond the competence of this Committee and therefore cannot be considered.
- 2) Galaxy Ltd were never officially informed in writing that their products were not meeting the required standards and therefore their tenders cannot be excluded.
- 3) The Inland Revenue gave too much weight to problems encountered with supplies in one particular batch supplied by Galaxy Ltd. The Department itself has admitted that it has tried to print forms which were past their expiry date.

Hence, the General Contracts Committee resolved that the objection by Galaxy Ltd should be upheld. The Committee also agreed that the deposit paid should be refunded.

Case No. 2

Meeting of the General Contracts Committee

22 January 2007

Malta College for Arts Science and Technology – Tender for the Supply, Delivery, Installation, Testing and Commissioning of a Passenger Lift for the Institute of Community Services at the MCAST Main Campus, Corradino, Paola (MCAST T.13/06)

Mekanika Ltd objected to the decision of MCAST for the recommendation of award for the above tender to Central Power Installations Ltd through a letter dated 29 November 2006.

The following persons were present for the hearing:-

Mr Fredrick Fearne – Project Director Perit Deborah Borg Ing Simon Scicluna]	for MCAST
Mr Oliver Degiorgio Mr Michael Francica]	for Mekanika Ltd

Mr Francica outlined the reasons leading to his firm's lodging of the objection:-

- 1) the non-slip rubber flooring as offered in Mekanika Ltd's offer was an option which was included in the tender specifications;
- 2) the one year warranty erroneously given can be extended to three years as requested in the tender document;
- 3) the generic literature submitted includes details of side-opening doors but central opening doors are manufactured too by their suppliers;
- 4) the stainless steel panelling offered complies with the tender requirements;
- 5) the offered lift complies with the required 120 starts per hour as indicated in Section 4 of Mekanika Ltd's offer; its typewritten submission supersedes its written submission of 90 starts per hour in another part of its tender submission.

The MCAST representatives then gave their comments on the above:-

- a) the Adjudication Board had to be very adamant on the warranty period issue;
- b) the assessment of the offered lift was based on the submitted literature;
- c) although the maintenance period given was for three years, this does not necessarily mean that the warranty period is also for three years;
- d) the stainless steel panels offered are not indicated in the literature as being scratch-proof;
- e) the ventilation system, details of which were requested in the tender document, was not well defined in Mekanika Ltd's submission;
- f) the EN 70 standards with which the lift had to be mandatorily compliant were not confirmed in Mekanika's offer;
- g) the hand written table indicating the number of starts per hour is 90 not 120.

During further exchanges of views on the above points, Mr Francica at one time stated that extension of the warranty from 1 to 3 years – which point was the main reason for rejection to Mekanika Ltd's offer – could be given at an additional value of Lm160.

After deliberating on the submissions and from the evidence given the Committee arrived at the following conclusions:

- 1) Given the conflicting information submitted by Mekanika Ltd in its tender offer it is not convinced that the company has submitted a clear proposal as to what its offer was going to be.
- 2) Mekanika Ltd has confirmed that it had not offered a 3 year warranty but was prepared to extend its offer in this regard but at an increase in price. Once the prices of the competing tenderers have been published this is unacceptable.

The General Contracts Committee resolved that the objection of Mekanika Ltd is to be rejected since it failed to provide the requested warranty in its original tender submission. The Committee agreed that the deposit established by law at Lm100 should be forfeited. Any overpayment of deposit should be refunded.

Case No. 3

Meeting of the General Contracts Committee

31 January 2007

WasteServ Malta Ltd – Tender for the Transport of Rejects, Waste Material and Shredded Material from Sant’ Antnin Plant (WSM 19/2003/5)

Emm Mallia and Associates on behalf of Messrs Alex Fenech and Wayne Cassar objected to the decision of WasteServ Malta Ltd for the recommendation of award for the above tender to Messrs Bugeja & Bugeja Ltd.

The following persons were present for the hearing:

- | | | |
|----------------------------|---|---|
| WasteServ Malta Ltd | – | Dr Victor Xerri
Ing Aurelio Attard
Ing Mario Agius
Ing Alex Vassallo |
| Messrs Fenech & Cassar | – | Dr James D’Agostino
Mr Alex Fenech
Mr Wayne Cassar |
| Messrs Bugeja & Bugeja Ltd | – | Mr William Bugeja |

Dr D’Agostino stated that WasteServ were justified when they recommended for award the rate of Lm4.11 instead of Lm4.50 that was shown in the schedule of prices. There could have been no mathematical error in a rate submission.

He further stated that his clients were contesting the department’s motivation to refuse the submitted trucks as one of the submitted trucks (WJM 022) was up to specifications as it had already been used by WasteServ in a previous tender and therefore this truck should have been exempted from being presented for another inspection.

Another truck (N412WJA) was inspected by Ing Alex Vassallo (WasteServ Malta Ltd) and was found to be up to the tender requirements. Truck DAF 850 was withdrawn from the tender.

Ing Attard explained that a landfill charge of Lm0.39 was applicable only on Item 1 (transportation of rejects) whereas the Messrs Bugeja & Bugeja Ltd submitted a rate of Lm4.11 and a total rate of Lm4.50 for the same Item 2

(transportation of shredded material). In the opinion of the Evaluation Committee this was a mathematical error and the correct rate was that of Lm4.11.

Ing Attard said that Clause 6.11 of the Tender Document clearly stated that two trucks were to be presented for inspection while Messrs Fenech & Cassar presented only truck N412WJA which was found to be technically compliant after inspection took place.

Truck WJM 022 was not presented for inspection. Truck DAF 850 was withdrawn from the tender and another truck was six wheeler instead of eight wheeler therefore it was not up to specifications. This resulted that out of the required two trucks only one truck was technically compliant even though it's driver lacked experience because when demonstrating the hook loader, the container almost fell.

Ing Attard also stated that the tenderer phoned him and said that truck WYM 022 could not be presented for inspection because it was not insured. This is not acceptable for WasteServ because it could have meant that the truck did not even pass the VRT test. Furthermore, three years had elapsed since truck WYM 022 was under contract with WasteServ during which time modifications could have been made.

Ing Attard quoted Clause 6.1.4 of the Tender Document where it stated that a valid log book for each truck was to be presented.

When asked by the Chairman of the General Contracts Committee about the value of this tender, Ing Attard confirmed that the budget was that of Lm23,000 VAT Inclusive.

After deliberating on the submissions and from the evidence given the Committee arrived at the following conclusions:

- a) It is not clear as to whether Messrs Bugeja & Bugeja Ltd made a mistake in the quoted rate for Item 2 or in the total of the rate of the same item, that is, the rate of Lm4.11 or the total rate of Lm4.50;
- b) Since the technical specifications obliged tenderers to present two eight wheeler trucks for inspection Messrs Fenech & Cassar are technically non compliant; and
- c) As the value of the contract exceeded the amount of Lm20,000, according to the Public Contracts Regulations the tender does not qualify as a Departmental tender and should have been issued by the Department of Contracts.

The General Contracts Committee resolved that the objection of Messrs Fenech & Cassar is to be rejected since its offer is technically non

compliant. The Committee however agrees that WasteServ cannot award the contract to Messrs Bugeja & Bugeja Ltd as it is not clear as to what is the correct rate quoted by tenderer. The tender is to be re-issued through the Department of Contracts. In the circumstances, 50 per cent of the deposit paid by Messrs Fenech and Cassar should be refunded while the rest is to be forfeited.

Case No. 4

Meeting of the General Contracts Committee

07 February 2007

Malta Tourism Authority – Light Fittings: Embellishment at Santa Margherita Garden, Cospicua (MTA/025/2006)

Apex Interiors Ltd objected to the decision of the Malta Tourism Authority to recommend award of the above captioned tender to E Calleja & Sons Ltd.

The following persons were present for the hearing:-

- | | | |
|-------------------------|---|---|
| Malta Tourism Authority | – | Mr Patrick Attard (Procurement Manager)
Perit Kevin Fsadni |
| Apex Interiors Ltd | – | Mr Joe Vella |
| E Calleja & Sons Ltd | – | Mr Jesmond Camilleri
Mr Fabian Mallia |

Mr Vella on behalf of Apex Interiors Ltd explained that the company feel aggrieved by the decision taken by the Malta Tourism Authority. He explained that the company's offer was the cheapest and the product offered had the necessary fittings so that the light will be reflected downwards. Besides, the offered product was of a good quality as it was very difficult to break.

Perit K Fsadni submitted the following comments relative to the preparation and subsequent issue of this tender and also to the adjudication procedure:

- 1) following discussions with Malta Environment and Planning Authority regarding the type of lights considered acceptable (by MEPA) for fixing in this particular place (Santa Margherita Garden), a tender was issued which included specifications and drawings of the type of lights agreed upon with MEPA;
- 2) the tender included a drawing of the lights that the MTA wished to procure. It excluded any form of globes but included a top reflector;
- 3) the cheapest offer by T.2, Titan International was administratively non-compliant and was rejected outright;

- 4) the offer by Apex Interiors Ltd consisted in globe type lightings which do not comply with the drawings published in the tender document. The offer by Apex Interiors Ltd was not therefore adjudicated according to the evaluation grid included in the tender document;
- 5) the adjudication process was carried out in accordance with the evaluation grid on the remaining three tenders (T.1, T.3 and T.5). The offer by T.1 obtained the highest points and was actually recommended for award. This recommendation was confirmed by the Malta Tourism Authority Tenders Committee.

Mr J Vella (Apex Interiors Ltd) stated that there were no clauses in the tender specifications that exclude globe type lightings. Furthermore, his offered lightings satisfy or exceed the requirements of the tender at a cheaper price than that accepted.

Perit Fsadni reiterated that the drawings of the tender document clearly indicate an external reflector while the reflectors (baffles) of the lightings offered by Apex Interiors Ltd are included inside the globe rendering them non-compliant. The price element had only a 45% bearing in the evaluation grid and was not a determinant factor in the tender recommended for award.

Mr J Vella stated that lights of the type indicated in the tender drawings could be offered by his suppliers who however opted to offer the globe type lightings which satisfy the tender requirements in a more exhaustive way. However, Mr Vella admitted that the product offered in Apex Interiors Ltd's tender was not compliant with the design published by the MTA in the tender drawings.

The General Contracts Committee resolved that the objection of Apex Interiors Ltd is to be rejected since it failed to provide a product compliant with the tender drawings. The Committee agreed that the deposit established by law at Lm100 should be forfeited.

Case No. 5

Meeting of the General Contracts Committee

16 March 2007

Social Security – Tender for the Supply and Delivery of 300,000 Pressure Seal Forms (DCS/166/2006)

Galaxy Ltd objected to the decision of the Department of Social Security for the recommendation of award for the above tender to Beck Graphics Ltd.

The following persons were present for the hearing:

- Social Security – Mr Alan Grima (Chairman, Evaluation Committee)
Mr John Sciberras (Asst Dir, Office of the Perm Sec)
- Galaxy Ltd – Mr Andrew Zarb (Director)
Mr Reuben Zarb (Director)
- Beck Graphics Ltd – Mr William Beck (Managing Director)

Mr Reuben Zarb stated that they are basing their objection on the premise that their offer “C” was by far the most advantageous offer as it was both cheaper and up to the requested specifications because the submitted samples passed all testing when used in the high-volume laser printers as well as the Ministry’s pressure seal machines.

He further continued that they do not agree with Mr Naudi’s, (Department’s expert) opinion that their paper would leave a lot of fluff and in order to prove that it was not the case they sent their sample to the Malta National Laboratory Co Ltd which is an ISO certified international company. When their sample was tested by qualified engineers who even used the Scrub Test Method, it transpired that there was no fluff present.

Mr Alan Grima stated that they received four offers and they took into consideration the cheapest offers. Then they sent the samples to their expert who reported that the sample that pertained to Galaxy Ltd would leave fluff when in use and as they usually printed more than one million the probability was that the machinery would give them trouble if any fluff was left in them. He further stated that it was better to spend a little more and get a good product and that was the reason why they chose the product submitted by Beck Graphics.

Mr Andrew Zarb pointed out that all office machines at some point or other accumulated fluff and that is why one had to service them and a vacuum cleaner is normally used.

Mr Grima argued that Mr Naudi only saw one sample submitted by Galaxy Ltd and when they had a previous tender which was also awarded to Galaxy Ltd, they also took Mr Naudi's advice. He also pointed out that at the moment as a temporary solution his department is printing correspondence on ordinary A4 paper.

Mr John Sciberras stated that the sample submitted by Galaxy Ltd was also weak in its resistance to friction, that meant that the papers could stick to each other and create a paper jam and as they had time constraints they could not afford to waste time especially since they had to print pension cheques.

When asked if there was any reference to fluff in the tender specifications Mr Sciberras stated that there was no direct reference but it was stated that the paper must be problem free and the elimination of fluff and friction was standard knowledge. The representatives of the Department of Social Security confirmed that the cheapest offer of Galaxy Ltd was not chosen in view of the advice received by its expert on the issue of fluff. Mr Grima said that before the final award, the recommended tenderer was to supply the department with a test pack of 1000 papers with all the requested art work. Mr Naudi was to be present during this demonstration.

After deliberating on the submission and from the evidence given the Committee agreed that the Department of Social Security was not correct in their recommendation for award because in the tender specifications there was no reference fluff free paper.

Hence, the General Contracts Committee resolved that the objection by Galaxy Ltd should be upheld. The Committee also agreed that the deposit paid should be refunded.

Case No. 6

Meeting of the General Contracts Committee

21 March 2007

University of Malta – Supply, installation and commissioning of a fire fighting system for the Auditorium at the Junior Lyceum College (UM1201)

Alberta Ltd objected to the decision of the University of Malta to recommend award of the above captioned tender to Central Power Installations Ltd. The following persons were present for the Hearing:-

University of Malta	–	Mr Karm Saliba Ing Emanuel Scerri Perit Chris Spiteri Ms C Attard (Consultant)
Alberta Ltd	–	Mr Charles Camilleri Dr Katia Merieca

Central Power Installations Ltd No representatives

Mr C Camilleri, on behalf of Alberta Ltd, stated that according to reasons given to them upon publication of the recommended award to CPI Ltd, their cheaper offer had been rejected because of the long completion period and because of a missing mechanical alarm safety device. Mr Camilleri continued that Alberta Ltd could carry out the actual works within 3 weeks as stipulated in the conditions of tender as long as the mechanical works were ready and the relative equipment is available. He explained that certain equipment has to be imported and this alone will take from 4 to 6 weeks. He repeatedly asserted that the time it would take the only local manufacturer to supply the purposely required fibreglass tank, and the time needed for the importation of the specifically required water pump make the requested 3 week completion period impossible. In this regard his company feels that the complete programme of works would be around 10 weeks. Dr K Mercieca argued that the “order to start works” should be issued after the preparatory works have been completed. In this way, the 3 week completion period would be more realistic. As for the “missing” mechanical alarm device, Mr Camilleri stated that this was offered by Alberta Ltd as an option at an additional cost of over Lm700. This was offered as an option because although included in the specifications, this device is not shown in the drawings published as part of the tender document. On being asked if they had queried the “short” completion period before the

tender closing date, Mr Camilleri stated that Alberta Ltd had only requested an extension of the publication period, which, however, had not been granted.

Mr K Saliba stated that he saw no reason why they should depart from the usual procedure whereby the order to start works can be issued at any time after award of contract. Ing E Scerri pointed out that the Clause 2.29 clearly emphasized the completion period of works at 3 weeks from issue of order to start works. When replying to a straight question on whether Alberta's offer was technically compliant, Ing E Scerri stated that the offer could only be considered compliant if the option for the mechanical alarm device is taken as part of the offer. This would render the respective offer costlier than the other competing offer.

The General Contracts Committee resolved that the objection of Alberta Ltd is to be rejected since it cannot guarantee the delivery period as stipulated in the conditions of tender and the full cost of the system as requested by the University of Malta will render its offer costlier than that of the other bidder. The Committee agreed that the deposit established by law at Lm100 should be forfeited.

Case No. 7

Meeting of the General Contracts Committee

17 May 2007

Ministry for Gozo – Tender for the hire and mounting of Lighting, Sound and Projection for the activities in connection with ‘Lejlet Lapsi’ – Notte Gozitana (CUL 50/2006/1)

Present for this meeting there were:-

- Ministry for Gozo – Mr Joe Vella, Technical Consultant to Ministry for Gozo
- Light Sound Vision – Mr Adrian Figallo, Manager i/c tendering projects
Ing Angelo Attard, Technical Consultant
Mr Mario Camilleri, Managing Director
Dr Malcolm Mifsud

Light Sound Vision objected to the Ministry for Gozo’s Adjudicating Report regarding the tender mentioned above. The tenderer based its protest on a series of principles namely

- Price
- Performance criteria of the equipment
- Unfair competition

Light Sound Vision through ITC Ltd explained that they have been involved in major national events. They stated that they have vast experience in this field. They maintained that the technical specifications were vague and were not informed as to what productions were to be organized. The tenderer complained that they could not specify quality of equipment prior to being informed exactly as to what type of lighting is required. The tenderer quoted a global sum including a discount. This was almost half the price of the awarded contract. The contractor also stated that the quoted price included any possible variations that may become necessary in connection with the events being organized. The General Contracts Committee was informed that an e-mail was received by the contractor on Friday, 11 May 2007 at 5.00pm requesting details of the equipment to be provided. However, this was not possible as the company was about to close shop. Furthermore, there were no contact persons in Gozo during the weekend.

Light Sound Vision has drawn the attention of the General Contracts Committee that the order to start work has already been given. It maintained

that sufficient time should have been given in order for any possible filing of an appeal as provided in the Public Contracts Regulations.

Light Sound Vision stated that even if the Ministry for Gozo will request the brand name this will not guarantee the required performance. Therefore it was very important that the Ministry should have provided more detailed specifications. The contractor also complained of unfair treatment in view of an accident during a previous event which was beyond its control. The equipment was certified by the Government engineers.

The representative of the Ministry for Gozo stated that the specifications were generic on purpose. This would allow more flexibility should the need to change the venue of events arise. This type of tender was also issued for similar events such as Notte Bianca and no similar problems arose. The Ministry feels that information on the brand name is very important since it provides information as to what type of service can be provided.

Light Sound Vision maintained that it was important to have a site visit in order to understand the requirements for this activity. The contractor maintained that it would not have increased its charges should there have been any requests for different equipment contrary to what normally happens.

The representative of the Ministry for Gozo stated that any tenderer could have asked for clarifications. He referred to incidents to equipment provided by Light Sound Vision that occurred during other cultural events.

The General Contracts Committee asked for a number of clarifications to both parties. The representative for the Ministry for Gozo stated that past incidents involving this contractor were given a lot of weight in the adjudication of this tender. The contractor stated that it is now convinced that this was a Departmental tender following the discussion that has taken place. The contractor also stated that two e-mails requesting clarifications have been sent. When requested to produce a copy or indicate the date when these have been sent he stated that this is not available. The representative for the Ministry for Gozo stated that he is not aware of such communications.

The General Contracts Committee perused the relevant file and discovered that the original submission of the bidder in question did not contain any breakdown of details in respect of items and prices as had been required in the tender conditions but only gave a global sum for each site under Schedule B where these facilities had to be installed and provided. Moreover it was observed that no discount was mentioned in the original submissions.

The General Contracts Committee also observed that Clause 13 of the conditions of this tender provided for the organizer to reserve the right to

refuse any tender even the most advantageous if it did not meet “inter alia” any of the conditions including the lack of provision of details as requested.

Having considered the above the General Contracts Committee feels that the appeal should be refused mainly on the ground that Light Sound Vision did not submit an itemized quotation as requested in the tender document. Article 13 of the same tender empowers the Ministry for Gozo to refuse any one or all of the tenders that does not give all the details. However, the Committee deplores the fact that the Ministry for Gozo could have asked in the most appropriate time (and not on Friday 11 May 2007 at 5.00pm) and manner (i.e. following urgent consultation with Director General Contracts) to request all the necessary information, including the breakdown of details from Light Sound Vision.

The General Contracts Committee feels that in view of the mentioned administrative shortcomings the deposit should be refunded.

Case No. 8

Meeting of the General Contracts Committee

25 May 2007

Welfare Committee – Supply of Toilet Ware Hampers to the Welfare Committee (CT 441/2006)

Final Decision

Panaco Marketing Ltd objected to the decision of the Welfare Committee for the recommendation of award for the above tender (Item 1) to Lobo Investments Co Ltd.

The following persons were present for the hearing:

Welfare Committee – Mr Alfred Briffa (Chairman, Evaluation Committee)
Mr Vincent Ellul (Secretary, Welfare Committee)
Ms Josanne Debono (Enrolled Nurse, Evaluation Committee)
Mr John Bottiglieri (SPO, Evaluation Committee)
Mr Jesmond Sammut (Health Assistant/Res Barber)
Mr Raymond Desira (Health Assistant/Res Barber)

Panaco Marketing Ltd– Mr Rodney Degiorgio (Manager)

Mr Degiorgio stated that his company is objecting to the decision taken by the Evaluation Committee in respect of Item 1 (Gents Toilet Ware Hampers) because he was the cheapest bidder. He further continued that when he asked for the reasons as to why his offer was rejected he was given an extract from the Evaluation Report stating that “*Sample of twin disposable blades submitted did not reach our standard when tested by Residence barbers*”.

Mr Degiorgio emphasized that this was not a sufficient reason to reject his offer because in the tender specifications it was indicated that twin disposable blades were to be submitted and that is what he offered. He did not agree with the Evaluation Committee that there was something wrong with the submitted blades as these were used in Europe. He further supported his argument by saying that one could not adjudicate a tender on a sample of only five blades.

Mr Briffa said that the blades of the first two cheapest bidders were given to the Resident’s barbers to have them tested and the barbers chose the blades submitted by Lobo Investments Ltd over the ones submitted by Panaco Marketing Ltd. He stated that during the practical test done by the

barbers it was found that the blades submitted by Panaco Marketing Ltd left abrasions on the residents' face. Mr Sammut and Mr Desira both confirmed these experiences.

He further stated that he did not prefer one tenderer to another and this showed in the adjudication of both Items 2 and 3 where Panaco Marketing Ltd were the recommended bidders.

Mr Degiorgio said that these same blades are the ones used at Mount Carmel Hospital and his company never received any complaints about them and that the Lm1.15 price difference was substantial. He further stated that the blades did not leave the same effect on everyone and just because abrasions were left on the face of some residents it does not necessarily mean that the same would happen to all residents.

Mr Ellul pointed out that there were verbal complaints regarding the blades supplied at Mount Carmel Hospital. He also stated that the price for the Gents Toilet Ware Hampers for the last three years was that of Lm3.22 while the recommended offer was Lm3.25.

Mr Ellul brought to the attention of the General Contracts Committee Clause 14 of the Conditions of Tender where it was stated that *“All items supplied must be of an acceptable quality. In this respect, the Committee’s decision shall be final and binding.”*

After deliberating on the submission and from the evidence given the Committee agreed that the Welfare Committee had a right to reject even the most favourable offer if the products offered were not in accordance with Clause 14.

Hence, the General Contracts Committee resolved that the objection by Panaco Marketing Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.

Case No. 9

Meeting of the General Contracts Committee

09 July 2007

Malta College for Arts Science and Technology – Supply and Installation of a Soffit Ceiling and Gypsum Partition at West Wing (MCAST T.03/07)

Guillaumier Ltd objected to the decision of the Malta College for Arts, Science and Technology for the recommendation of award for the above tender to Xuereb Ltd.

The following persons were present for the hearing:

MCAST – Mr Frederick Fearne
Perit Deborah Borg

Guillaumier Ltd – Mr Raphael Carabott
Mr Keith Shaw
Mr Manuel Ciantar

Xuereb Ltd – Mr Stephen Cachia

Mr Raphael Carabott stated that they are basing their objection on the premise that there was some sort of misunderstanding regarding the tender specifications. He pointed out that MCAST has informed his company that it had five variances from the tender specifications, namely, (i) light reflection (ii) moisture resistance (iii) panel sample (iv) partition thickness (v) sound attenuation. Mr Carabott explained these differences but agreed that the first three items were not technically compliant. The light reflection was 85% instead of 90% while the moisture resistance was 95% instead of 99%. Mr Carabott argued that their product carried a fifteen years warranty period in case of any sagging and that seeing as how the percentage difference was minimal and the toilet soffits represented only 25% of the whole contract, MCAST should not have eliminated their offer.

Mr Carabott confirmed that the Panel Sample was not tegular but they were going to submit tegular panels in their actual offer and the partition thickness that they were going to supply was that of 150mm as requested in the tender specifications and not 125mm as indicated by MCAST. In respect of the Sound attenuation Mr Carabott stated that the material that his company was offering was going to reach a Sound Attenuation of 60db even though the product indicated in the offer reached only 57.9db.

Perit Deborah Borg said that they sent clarifications to all bidders on various items. She further continued that they based their evaluation on the submitted documentation and that they kept with the tender specifications so that they will be consistent with every offer. Perit Borg stated that in the specifications it was clearly specified that the soffit sample had to be tegular and that even though Guillaumier Ltd stated that the Sound Attenuation of 60db was attainable, they did not substantiate it with technical literature. She also stressed that the sound insulation is critical for this tender as they had offices very close to each other. Perit Borg stated that the sample submitted was not in accordance with the specifications.

Mr Shaw asked how MCAST arrived to the requested specifications because if the requirements were taken from a particular company it would have been difficult for them to attain the best result.

Mr Carabott enquired about the possibility of seeing the certification that the recommended tenderer satisfied all the technical requirements.

Perit Borg said that the technical specifications were fair because they were taken from different companies and not just one. She also confirmed that the recommended contractor is fully technically compliant.

After deliberating on the submission and from the evidence given the Committee agreed that once Xuereb Ltd by its own admission is not fully technically compliant the Malta College for Arts, Science and Technology were correct in their recommendation for award.

Hence, the General Contracts Committee resolved that the objection by Guillaumier Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.

Case No. 10

Meeting of the General Contracts Committee

19 July 2007

Ministry for Tourism and Culture – Tender for Light, Sound and Projection – Summer Arts Festival (MTAC/292/06)

Light Sound Vision Ltd objected to the decision of the Ministry for Tourism and Culture for the recommendation of award for the above tender to SA Consortium.

The following persons were present for the hearing:

- | | | |
|--------------------------------|---|--|
| Ministry for Tourism & Culture | – | Mr Francis Albani
Mr Joe Vella
Ms Davina Galea |
| Light Sound Vision Ltd | – | Dr Cedric Mifsud
Mr Adrian Figallo
Eng Angelo Attard
Mr Mario Camilleri |

The Chairman brought to the attention of all those present that the Contracts' Department had nothing to do with the award of this tender since it was a Departmental Tender.

Dr Mifsud said that they are basing their objection on the following two points:

- 1) They did not include the diesel's price in their offer because it couldn't be quantified as they did not know the amount of diesel to be consumed. He also pointed out that the previous year his client (LSV Ltd) was awarded this tender and they did not quote a lump sum for the diesel to be used so he did not see any reason why it was imperative now to do so. Dr Mifsud pointed out that the amount of diesel consumed the previous year was in the range of Lm750, their submitted offer for this tender was Lm2,200 cheaper than the recommended offer, therefore he concluded that if the amount of Lm750 was added to their submitted offer they would still have the cheaper bid.

- 2) They were also objecting to the reference made by the Evaluation Committee regarding LSV's Ltd track record. He stressed that as no inquest by the Ministry was carried out and there was no hard evidence that the accidents that took place were due to negligence from LSV the Evaluation Committee could not penalize LSV Ltd for something that could not be proven.

Mr Albani said that last year LSV Ltd were the only bidders and they were awarded the tender. He pointed out that for last year the generators were only used as stand-by generators and that this year they were the only source for the light supply and thus no comparison could be made. He further continued that it was not in the department's competence to calculate the diesel price as it fluctuates.

In fact Mr Albani stated that if LSV were so sure of the Lm750 for the diesel they should have quoted it in their offer. In order to be fair with all bidders the Evaluation Committee had to compare like with like and as LSV did not quote a price for the diesel to be used this could not be done, this meant that the submitted offer was incomplete and the tender had to be eliminated.

He also pointed out that the other tenderers included the price of the diesel in their offer and could see no reason why LSV did not do the same.

In respect of LSV's track record Mr Albani stated that there was more than one incident the previous year and that even though there was no inquest LSV was responsible for the proper execution of the works. He stated that he felt that the contract was not satisfactorily executed.

On the issue of the track record of LSV Ltd it transpired from the evidence that no official enquiry was carried out by the Department on the incidents which took place during last year's Arts Festival. Therefore, the General Contracts Committee is stressing the fact that they were not influenced by the allegations brought up by both parties regarding the company's track record.

Both sides agreed that there were no written clarifications especially on the issue of diesel consumption prior to the Recommendation for Award of this tender.

After deliberating on the submission and from the evidence given the Committee agreed that the Ministry for Tourism and Culture were correct in their recommendation for award.

The General Contracts Committee is basing this decision solely on the fact that price of diesel was not included in the submitted offer. Hence the tender was deemed to be incomplete. The Committee is also of the opinion that it was in

the interest of LSV Ltd to submit written clarifications if they were in doubt of the way that the Bill of Quantities should have been filled in.

Hence, the General Contracts Committee resolved that the objection by Light Sound & Vision Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.

Case No. 11

Meeting of the General Contracts Committee

19 September 2007

Police Department – Tender for the Supply of waterproof jackets to the Malta Police Department (P 3/2007)

Pace Associates Ltd objected to the award of tender for the sum of Lm17,730. The company felt that the waterproof jackets that it offered are in accordance with the tender specifications and this could be ascertained from the sample provided.

The following persons were present for this meeting:-

Police Department: – Inspector Kenneth Haber
Sergeant Anthony Cachia

Pace Associates Limited – Ms Doreen Pace
Ms Mary Louise Pace

Ms Doreen Pace (obo Pace Associates Limited) stated that their offer is cheaper than the accepted one and that their offered product complies with the specifications.

Inspector Kenneth Haber (obo of the Police Department) stated that the Adjudicating Board's recommendations for award of contract were based on the normal procedure of accepting the cheapest bid complying with the conditions and specifications of the call for tenders. He pointed out that the sample jacket submitted by Pace Associates Ltd failed to comply with Special Conditions 2 and 6 and with Specifications 6, 8, 9, 10 to 12 and 17.

He stressed that past experience had taught that the sample should be an **actual** sample of the proposed jacket – Condition 2 was expressly included for this reason. In the case of Pace Associates Limited this was not the case.

Ms Mary Louise Pace stated that their offered sample was not a “dummy” sample but a representative sample of a large size jacket without the ‘PULIZIJA’ labels requested in Specifications 10 and 11. It was however indicated in their tender offer that these particular requirements would be satisfied in case of award of contract. This should have proved of no difficulty for the assessment of the proposed jackets.

At this point Inspector Kenneth Haber intervened to explain that waterproofing tests on jackets with labels and the same jackets without the labels could give different results. This was due to the fact that in certain instances, where the waterproofing tape which is affixed on the inside of the jacket to cover the points where labels are sewn, is not properly done, the waterproofing properties of the jacket as a whole would be compromised.

The Chairman asked Ms Pace whether she considered her offer as complying with Clause 9 of the Specifications regarding the separate hood. She confirmed that her sample had an affixed hood which could be folded inside the collar when not in use. She however admitted that this is not 100% compliant with the tender specifications.

After deliberating on the submissions and from the evidence given the Committee concluded that it was evident that the sample offered by Pace Associates Ltd was not fully compliant with the tender specifications. The Committee feels that for the sake of transparency Contracting Authorities should provide extracts from adjudication reports relative to tenderers enquiring on the reason for the non acceptance of their offer.

Hence, the General Contracts Committee resolved that the objection by Pace Associates Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.

Case No. 12

Meeting of the General Contracts Committee

19 September 2007

Police Department – Tender for the Supply and delivery of winter trousers / skirts for the Malta Police Department (P 6/2007)

Yorkie Clothing Industry Limited objected to the awarding of contract in respect of Items 1 & 2 of Police Tender 6/2007. The company has drawn the attention of the Commissioner of Police that the material submitted by the recommended tenderer Messrs BTI, is not according to the required specifications published in the tender, since the threads / cm are far beneath the minimum requirements. Yorkie Clothing Industry Limited requested that the award of contract in respect of Items 1 and 2 for this tender be withdrawn and awarded to the next tenderer who has furnished all specifications as per tender documents. If no tenderer has met all specifications a fresh call for the said items 1 & 2 is to be issued.

The following persons were present for the hearing:-

Police Department: – Inspector Kenneth Haber
Sergeant Anthony Cachia

Yorkie Clothing Industry Ltd – Mr Jeffrey Calleja (Director)

Mr J Calleja (Yorkie Clothing Industry Ltd) was invited to explain the basis of his objection. He stated that the main arguments were:-

- 1) The laboratory test results regarding the warp and weft threads relative to sample material submitted for items 1 and 2 by the accepted tenderer BTI Ltd failed to reach the minimum requirements set out in the tender specifications.
- 2) The use of inferior quality material for requirements under items 1 and 2 must be reflected in the respective rates submitted by the BTI Ltd as in fact is shown from the schedule of prices where Yorkie's rates for the same items, but using cloth material which complies with the specifications, are significantly higher.
- 3) If Yorkie knew that lower quality material other than that specified would be considered for acceptance, then perhaps they could have offered an option for such material at a lower price than that of BTI Ltd.

Inspector Kenneth Haber gave his comments on the arguments brought forward by Yorkie. He explained that:-

- 1) It was true that the results on warp and weft testing of the BTI sample cloth material showed deficiencies which rendered it below specifications.
- 2) All tests carried out on cloth material submitted by Yorkie proved that this was 100% compliant with specifications.
- 3) The wool content and weight of the BTI sample were according to specifications.
- 4) The delivery period quoted by BTI Ltd was 10 weeks maximum as requested in the tender document while that quoted by Yorkie was way outside at 185 days.
- 5) On consideration of the above four points and of the respective prices, the Adjudication Board consulted the Malta National Laboratory (MNL) regarding the seriousness of the deficiencies relative to the BTI sample. The advice given was that if despite the tested sample's shortcomings the user department deemed the material as acceptable upon visual and feeling of texture inspections, then it could be considered for acceptance. This advice led the Adjudication Board to actually recommend BTI Ltd's offer for award of contract in relation to items 1 and 2.

Mr J Calleja was invited to give his reactions to the Department's comments. He stated that he was aware that in past contracts awarded to BTI, the delivery period of uniforms was not honoured. He also opined that if the deficiencies of the BTI sample regarding warp and weft are taken on a percentage basis, these can in no way be interpreted as being minimal. It was also pointed out that the fact that the delivery period of 185 days was considered unacceptable for items 1 and 2 and acceptable for items 3 and 4 showed gross inconsistency in the Adjudication Board's reasoning. Mr Calleja wanted also to put on record that despite any long completion period for a whole contract that was awarded to Yorkie, urgent need of small numbers of uniforms was always entertained within 2 to 4 days. It was preferable to Yorkie to give a realistic completion period which however exceeded the requested one and honour it rather than quoting the maximum delivery period set out in the tender document to secure the order and then keep on making deliveries way past the determined completion date. Mr Calleja acknowledged that the delivery period quoted by Yorkie was not in accordance with the tender conditions.

After deliberating on the submission and from the evidence given the Committee agreed that once the offers received in respect of Items 1 & 2 did

not fully satisfy the technical and delivery conditions as specified in the tender documents the tender could not be awarded.

The General Contracts Committee resolved that the objection by Yorkie Clothing Industry Ltd should be upheld. The Committee also agreed that the deposit paid should be refunded.

Case No. 13

Meeting of the General Contracts Committee

12 December 2007

Sannat Local Council – Tender by the Sannat Local Council for the service of collection and separation of household and commercial waste

Mr Anthony and Ms Maria Mercieca appealed from the decision taken by the Sannat Local Council by which the tender for the collection of domestic waste was not awarded to them despite that their offer was the cheapest one. They were informed of this decision by means of a letter dated 23 November 2007. Although Mr and Mrs Mercieca had requested the reasons for this decision the Local Council had refrained to provide written reasons. For this reason, Mr and Mrs Mercieca appealed from this decision in view of the fact that there were no valid reasons why this tender was not awarded to them.

Present for this sitting, besides the Chairman and member of the General Contracts Committee were:-

Mr Anton Mercieca)

Ms Maria Mercieca)

Appellants

Mr Anton Mercieca

Mr Arthur Bajada

Dr Grezzju Mercieca

Mayor, Sannat Local Council

Secretary

Legal Advisor to Sannat Local Council

Mr Anthony Mercieca stated that he had submitted the cheapest rates for this tender and that on the 26 November 2007 he had received a letter indicating that the tender in question was going to be awarded to another tenderer at higher priced rates. No reasons for the rejection of his offer were given by the Sannat Local Council when he enquired about this at the same council. After lodging his formal appeal, he was however notified that this tender had been rejected on the basis of unacceptable track record regarding unsatisfactory service given under the previous contract/s. He stated it was not true that he had performed unsatisfactorily and as a proof of this he had been given only one written warning in this respect. Furthermore, he said that the written warning was about non-collection of farm refuse which cannot be considered as forming part of his contractual duties.

Dr G Mercieca (on behalf of the Sannat Local Council) then gave his comments on what was stated by the appellant and on the reasons why the

tender by Mr and Mrs Mercieca could not be accepted for award. The main points raised were:

- 1) the service given by this contractor during the past five/six years was unacceptable. It was true that only one written warning was issued but verbal warnings were continuously given. Harsher penalties could not be inflicted by the Council on the contractor since up to quite recent times he had a monopoly on rendering this service. Such a situation forced the Council to try to reach agreements with the contractor every time there were grounds for complaints and warnings. He hoped that his approach would not now be interpreted as acquiescence on the part of the Council. All complaints by residents are recorded in the Council's Minutes. In fact, agreement by the Council members not to accept Mr and Mrs Mercieca's tender was unanimous.
- 2) at one time, the appellant had interrupted his services on the grounds that he could not continue with the agreed rates because of the higher prices of diesel and other expenses. It was worth noting here that after agreement for higher rates was reached, the rates offered for this latest contract are substantially less than those formerly agreed upon. This may perhaps have happened after the appellant came to know that other tenderers had come to the scene offering competition to his former monopoly.
- 3) the schedule of prices (Bill of Quantities) relative to the tender submitted by the appellant was not signed as requested in the tender document itself.
- 4) a set of photographs depicting rubbish strewn around certain skips and allegedly left there by the appellants were proof of the bad level of service rendered. These photos were shown to the General Contracts Committee.

During the second round of interventions, Mr A Mercieca (the appellant) rebutted the Council's accusations:

- a) it was not true that he enjoyed any sort of monopoly in offering refuse collection services.
- b) the photos exhibited could not actually be considered as proof of bad service. They could have been shot before the skips were emptied.
- c) building material refuse could not be included in his expected services because this cannot be disposed of in Qortin landfill unless at much higher rates.
- d) In certain cases, animal manure was expected to be collected by farmers when the contract covers domestic and industrial waste. Complaints in this regard could not surely be remedied by the contractor.

Winding up the Council's further comments, Mr A Bajada confirmed the Council's legal advisor's views and added that the tender by Mr A Mercieca

was not the only one disqualified on the grounds of missing signatures. Another tender quoting rates higher than those recommended for acceptance was also considered incomplete and invalid in line with the provisions of Clause 11 of the published tender document. He also denied that the uncollected farm refuse was not of the domestic type.

The representatives of the Sannat Local Council were asked whether they considered the unsigned Bill of Quantities as irregular. Their reply was in the affirmative. They also stated that they suspect that it was done on purpose by the tenderers as this will give them the opportunity to disown that statement in the future and will make it possible for them to claim for increases. The attention of the appellants was drawn to the provisions of Clause 11 and their failure to submit a signed Bill of Quantities. Mr A Mercieca (appellant) stated that he was illiterate and the required signature on the Bill of Quantities was omitted through an oversight. On being asked by the Chairman whether he considered his submitted tender as valid, Mr Mercieca replied in the negative.

After deliberating on the submissions made during the hearing the General Contracts Committee agreed that in terms of Clause 11 of the Instructions to Tenders the Sannat Local Council has the right to reject any tender. For this purpose the Committee has decided that the appellants' appeal could not be accepted.

The Committee also notes that the Sannat Local Council has never communicated with the tenderers informing them of the outcome of the result following the call for tenders. Although the Council was not bound to give any reason for rejecting any or all tenders, for the sake of fairness and transparency the Council should have officially informed tenderers with the decision taken in this call for tenders. As a result of the attitude of the Council and in view of Clause 11 appellants could never know of the reason for the rejection of their tenders without filing an official objection. The Committee feels that all tenderers should be accorded the opportunity to know the reasons why they have not been successful in any call for tenders. Without these reasons no tenderer can submit a proper motivated letter in his appeal. In this regard the Committee has decided that the deposit should be refunded.

Case No. 14

Meeting of the General Contracts Committee

21 December 2007

Police Department – Tender for the Supply of Winter Trousers / Skirts to the Police Department (P 7/2007)

BTI Company Ltd objected to the decision taken by the Police Department to award the tender for the supply of winter trousers and skirts to Messrs Astor Co Ltd and Yorkie Co Ltd. BTI objected on the grounds that (i) the accepted offers are higher than its prices and (ii) the quality of material is according to tender specifications.

The following persons were present for the hearing of this appeal:-

Supt Kenneth Haber
Mr Joe Farrugia

	Police Department
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Mr Vincent Farrugia
Dr Massimo Vella
Ms Caroline Buhagiar
Mr Godfrey Farrugia

	BTI Ltd
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Mr Jeffrey Calleja - Interested party

Dr M Vella (on behalf of BTI Ltd) stated that BTI Ltd had on its own initiative submitted for testing at the MNL (Malta National Laboratory) a sample piece of the same material forwarded to the Police Department in support of their tender. The results of testing carried out on the sample which BTI submitted to MNL proved that it complied with the tender specifications while the sample tested on behalf of the Police Department failed in the “warp” test obtaining 27 instead of the specified 28. He further quoted that as had been confirmed by MNL itself, a tolerance of +/- 5% does not constitute a failure. Since the price of BTI Ltd was cheaper, tender should have been awarded in their favour. Considering the price difference between BTI Ltd’s prices and the accepted ones, BTI’s offer surely presents the best value for money, more so, when the reported “deficiency” is insignificant and within acceptable tolerances.

Insp K Haber stated that the Adjudication Board was strictly guided in its decision on the indications of the MNL which had classified the sample

by BTI Ltd as failing to reach the required specifications. Recommendation for award was therefore made in favour of the cheapest offer/s whose samples complied fully to the published specifications.

On indicating that he wished to intervene, Mr J Calleja, as an interested party, stated that the tender specifications indicate a “warp” content of 28 as being the minimum. Samples obtaining less than this minimum should be considered as non-compliant. This holds more ground when it is known that the figure given in the MNL report represents an average worked out on more than one test.

BTI Ltd were asked as to whether it had any doubts that the sample submitted by the Police Department was not the same submitted by the company. BTI Ltd replied in the negative. The company had no doubts on the sample sent for testing by the Police Department but it wished to convey the message that the same sample can give different results. BTI Ltd admitted that the variations can be positive and negative.

In view of the foregoing, the General Contracts Committee feels that the sample submitted by BTI Ltd failed to meet the tender specifications. In the circumstances the Police Department acted correctly by eliminating BTI’s offers.

The General Contracts Committee resolved that the appeal filed by BTI Ltd should be rejected and the deposit established by law at Lm100 should be forfeited.

Case No. 15

Meeting of the General Contracts Committee

21 December 2007

Call for Tenders for the Provision of Architectural and Civil Engineering Services in connection with the Conversion of Offices for the Superintendence of Cultural Heritage at Fort St. Angelo, Vittoriosa (Advert SCH 247/2007)

Final Decision

Architecture Project submitted an objection to the decision taken by the Superintendence of Cultural Heritage dated 09 November 2007. It reported that to its knowledge the official results of the tender adjudication have not been published in accordance with Legal Notice 177 of 2005. Furthermore no information has been made available on the procedure or time limit within which tenderers may lodge an appeal. It was therefore being assumed that Architecture Project was within its rights to object on the adjudication process for such tender.

Architecture Project made the following representations:

- The e-mail response above states that “The Adjudication Board found Architecture Project could not be considered since its submitted costs included time-based fees that could not be computed and the final cost could not be determined.” Reference was made to Clause 1.05 of the tender document wherein it was stated that “firms are to submit a clear fee structure for the project which takes into consideration the whole works including restoration, internal and external finishes, time charges, etc.”. Thus the submission of time-based fees was contemplated in the tender document, which did not specify for which services time-based fees were contemplated.
- The works described in the tender and confirmed in the Superintendence of Cultural Heritage’s correspondence dated 29 August 2007 consist of the following phases: inception, Feasibility, Outline Proposals, Scheme Design, Detail Design, Production Information, Bill of Quantities. The fee proposal submitted by Architecture Project was structured as follows. A percentage fee of 8.5% of the estimated cost was proposed for those services listed as Basic Services, namely Inception and Feasibility, Outline Proposals, Making Estimates of Costs, Scheme Design, Production Documentation, and the preparation of Bills of

Quantities as outlined in their Schedule 1a submitted. The fee proposal further lists a number of services that could be provided by Architecture Project as Additional Services upon request by the Superintendence of Cultural Heritage. These services are not contemplated and requested in the tender document, but could be provided by Architecture Project as additional services on a time-based fee. Therefore Superintendence of Cultural Heritage's statement that the final price could not be ascertained is unfounded since the services specifically requested in the tender document are clearly covered by the fee of 8.5% of the estimated cost. Furthermore AP's proposal was in accordance with the fee structure indicated in Tariff K of Schedule A to the Code of Organisation and Civil Procedure (Chapter 12, Laws of Malta), the contents of which periti are bound to adhere to.

- Clause 1.07 of the tender document states that "In the adjudication of this offer, consideration of the experience and track record of the firm and its nominated consultants will be taken into account.". AP feels that the complete elimination of its offer from the adjudication process was unwarranted, and that its proposal should have been considered in conjunction with those of the other tenderers. Furthermore it appears that the experience and track record of its firm were not taken into consideration; this in a call for tenderers where it was clearly stated that the Superintendence of Cultural Heritage reserved the right to reject even the most advantageous offer.

AP made a reference to the various ambiguous clauses within the tender document which were later clarified by the Superintendence following a request for clarification by Architecture Project. However, such clarifications were received by e-mail on the 30 August 2007, just one day before the prescribed date for submission of tender, and not within specified period of "five days prior to the closing date for receipt of Tenders" as stipulated in Clause 1.16.2 of the tender document.

AP also referred to Article 20 of Legal Notice 177 of 2005 wherein it is stated that "The contracting authority shall be obliged to issue a notice and affix an advertisement, in a prominent place at its premises, indicating the awarded public contract, the financial aspect of the award and the name of the successful tenderer". This procedure has not, to AP's knowledge been adhered to. This has resulted in the preclusion of Architecture Project from the right to recourse in accordance with the provisions of the Legal Notice. Furthermore, information on the successful tenderer has not been forthcoming despite AP's request to this effect.

The General Contracts Committee convened to discuss and decide the objection raised by M/S Architecture Project.

The following persons were present for the hearing of this appeal:-

Perit David Felice Perit Simone Vella Leniker	<input type="checkbox"/>	Architecture Project
Mr Nathaniel Cutajar	<input type="checkbox"/>	Superintendence of Cultural Heritage
Perit Valerio Schembri Dr Paul Lia	<input type="checkbox"/>	Interested parties

Perit D Felice (on behalf of Architecture Project – A.P.) stated that they had received a communication whereby they were notified that their tender was not considered because the respective bid contained time-based charges which could not be computed for comparison purposes. He explained that his firm’s bid was based on Tariff K rates for the requested services and (time – based) charges/fees for additional services which the Superintendence of Cultural Heritage (S.C.H.) might wish to procure further to the requested ones. At this point he also made specific reference to Clause 1.05 of the tender document where “time charges” are requested. He sustained that the relative Regulations had not been followed during the tender procedure. Requesting a lump sum fee for an unpriced project is not the correct way to procure architectural services.

Perit Felice also made reference to the ambiguous wording in the tender document. His firm had requested clarifications on this tender but the reply from the Superintendence of Cultural Heritage arrived just 2 days before the closing date.

He also complained that the result of the adjudication process was not published. AP only became aware of its disqualification through an e-mail dated 9th November 2007.

In reply to Perit Felice’s intervention, Mr N Cutajar (for S.C.H.) explained that the offer submitted by A.P. was a mixture of a fixed sum plus time-based fees and tariffs in accordance with Tariff K. The Adjudication Board felt that this offer could not be quantified. In the circumstances, the Board unanimously decided that this offer was to be disqualified.

In the second round of interventions Perit D Felice stated that Tariff K is part of the laws of Malta and it is not in the discretion of the S.C.H. whether to consider and refer to these rates or not. Tariff K defines clearly the services and the rates applicable for each service. A.P.’s offer presents no problems regarding interpretation of which services are offered at Tariff K rates and which ones are offered as optional additions. Perit Felice enquired where in the tender document there is a statement which states that offers as those submitted by AP should be disqualified.

Dr Paul Lia, on behalf of Valerio Schembri Workshop Ltd, intervened as an interested party in this appeal. He stated that the Bill of Quantities in the tender document requests a lump sum whether based on Tariff K or otherwise. He contended that Tariff K indicates maximum (not fixed) rates, and adherence to it is not compulsory. Dr Lia stated that any measures hindering competition are contrary to EU regulations. He further stated that four tenderers understood this requirement and submitted a lump sum. It would be grossly unfair to cancel the tender when there were four tenderers submitting bids according to requirements.

The General Contracts Committee asked Mr Cutajar (S.C.H.) what type of offers was his organization expecting in accordance with the tender document. Mr Cutajar replied that tenders could submit a lump sum or a lump sum plus rates or rates only.

In view of the foregoing the General Contracts Committee feels that the offer submitted by Architecture Project should not have been disqualified. The Committee feels that the Superintendence of Cultural Heritage should therefore re-evaluate also this offer in accordance with the tender conditions without adding any award criteria which have not been published prior to the closing date of tender.

The General Contracts Committee resolved that the appeal filed by Architecture Project should be upheld and the deposit paid as established by law should be refunded.

Case No. 16

Meeting of the General Contracts Committee

14 December 2007

Call for Tenders for the Provision of Architectural and Civil Engineering Services in connection with the Conversion of Offices for the Superintendence of Cultural Heritage at Fort St. Angelo, Vittoriosa (Advert SCH 247/2007)

Final Decision

Valerio Schembri Project Workshop Ltd submitted an objection to the decision taken by the Superintendence of Cultural Heritage to award a contract for the provision of architectural and civil engineering services to Perit Martin Farrugia.

The reasons for the objection are the following:

1. Tender could never be awarded to Perit Martin Farrugia since the offer requested a quote on a lump sum basis and said tenderer quoted in a lump sum and rates and hence should have been disqualified immediately.
2. Since Valerio Schembri Project Workshop Ltd's set up was more than adequate to cater for the services being requested and this was confirmed verbally by Mr Nathaniel Cutajar, then tenderer EMDP Ltd cannot classify in a more favourable position than this office since his offer is Lm388.00 dearer.

The General Contracts Committee convened to discuss and decide the objection raised by Valerio Schembri Project Workshop Ltd after the published recommendation by the Superintendence of Cultural Heritage for award of the above captioned tender to Perit Martin Farrugia.

The following persons were present for the hearing:

Superintendence of Cultural Heritage	-	Mr Nathaniel Cutajar
Valerio Schembri Project Workshop Ltd	-	Perit Valerio Schembri Dr Paul Lia
Interested Party	-	Perit Martin Farrugia

Dr Lia stressed that up till that moment his client was not given a copy of the Evaluation Report and that they needed it in order to see on what grounds their offer was rejected. He further stated that there was no indication in the tender of the estimated cost of the project. The Bill of Quantities indicated that a lump sum was being requested. Therefore all those tenderers who submitted rates instead of a lump sum should have been disqualified as they did not conform with the tender requirements. He stated that it could not be otherwise. If offers on the basis of rates were to be accepted then there will be the possibility that the value of this tender will exceed the threshold of Lm20,000 and therefore will render this departmental tender illegal. He further explained that tenderers were requested to submit a lump sum and a fee structure for the services to be provided.

Dr Lia stated that as the recommended tenderer submitted rates in his offer, he should have been disqualified and Perit Valerio Schembri was to be recommended for award as his offer was the cheapest one and he was also technically compliant.

Perit Schembri said that Superintendence of Cultural Heritage should have indicated more clearly the procedure of evaluation in the tender document and not give marks during the evaluation process. The Superintendence of Cultural Heritage confirmed that his firm is competent and able to provide the services requested.

Mr Cutajar stated that he sought out the advice of the Ministry for Tourism and Culture before drawing up the tender document. The Works Division was also consulted on the estimated cost of this tender. The Superintendence of Cultural Heritage was advised that the cost should not be greater than Lm20,000. Therefore the tender should qualify as a departmental one. The estimate of the project, that is, the conversion of offices, is Lm200,000. He further stated that since not all the requested services were covered by Tariff K, they had to be quoted specifically. Therefore in the submitted offers they were expecting a fee structure which include Tariff K rates and other costs. One of the tenderers was eliminated. The adjudication of the offers received was not carried out on the basis of the price criteria only but consideration was also taken of the experience and track record.

Dr Lia said that in the tender document S.C.H should have mentioned that they were expecting a mixture of rates and lump sum but this was not the case not even after clarifications were provided. The tender estimate of Lm200,000 was not indicated in the tender document. The submission of rates was dangerous because there was no limit to the increase in price. He asked why the award criteria was given after the tenders were offered. This was a dangerous way to evaluate the tender because the evaluators could have been influenced by what they saw in the submitted offers. He insisted that it was unfair to award this tender to someone with no clear lump sum.

Mr Cutajar argued that they worked on a basic and simple award criteria and that the estimate that they had was correct as it was very near to the submitted offers. He admitted that the criteria was adopted after the publication of the tender. He insisted that the tender did not indicate that the offers should be a lump sum only.

Perit Farrugia said that according to the Chamber of Architects, estimates and payments for services provided by architects were to be made according to Tariff K. He further stated that his company clarified this issue before the closing date of the tender. The lump sum quoted by him was in respect of an architectural study that has been requested.

Dr Lia stated that there was no law stating that payments were to be done against rates only. He further stated that the tender document clearly indicated that a lump sum was to be submitted and that this was not a case of a re-issue. Once those tenderers who did not submit a lump sum were disqualified, then the tender should be given to Valerio Schembri Project Workshop Ltd.

The General Contracts Committee asked Mr Cutajar whether the award criteria was published in the tender document. The latter replied that no points were published and that it was during the evaluation that the board decided on the weighting procedure.

The General Contracts Committee feels that the tender document is ambiguous and leaves much to be desired. The Bill of Quantities refers to a lump sum only but in other parts of the tender, reference was made to the submission of rates. The representative of the Superintendence of Cultural Heritage has testified that his organization was not expecting a lump sum only.

The Public Contracts Regulations state that contracting authorities shall determine the award of public contracts either on (a) the most economically advantageous offer or (b) the lowest price offered compliant with the tender specifications. The General Contracts Committee observes that S.C.H. has carried out the adjudication of the offers received on award criteria which were not published by the closing date of the tender. This goes against Regulation 27 (5) of the Public Contracts Regulations which state that

“Where the contract is to be awarded on the basis of the most economically advantageous offer, the contracting authority shall, in the contract document or, in the case of a competitive dialogue, in the descriptive document, indicate all the criteria it intends to apply in the determination of the award, indicating the relative weighting which can be expressed by providing for a range with an appropriate maximum spread”

On this basis the General Contracts Committee feels that the Superintendence of Cultural Heritage should re-evaluate the offers received in accordance with

the tender conditions without adding any award criteria which have not been published prior to the closing date of tender.

The General Contracts Committee resolved that the appeal filed by Valerio Schembri Project Workshop Ltd should be upheld and the deposit paid as established by law should be refunded.

PART 2

**Complaints decided by the
Public Contracts Appeals Board**

PUBLIC CONTRACTS APPEALS BOARD

Case No. 95

**Re: CT 2146/2005 – Advert No 119/2005 – ECCD 163/2005:
Provision of Incontinence Diapers and Pads for Senior Citizens and
Persons with Disability**

This call for tenders was originally published in the Maltese Government Gazette on 03 May 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Department of the Elderly and Community Care on 02 March 2005.

Five (5) different tenderers originally submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Protex Ltd filed an objection on 23 October 2006 against the intended award of the said tender to Ms A Sciberras.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 29 November 2006 to discuss this objection.

Also present for the hearing were:

Protex Ltd

Dr Ronald Aquilina – Legal Advisor
Mr Jonathan A Guillaumier

A Sciberras

Dr Anna Mallia – Legal Advisor
Ms Alexis Sciberras

Elderly and Community Care Department

Mr Michael Bezzina – Director

Adjudication Board

Mr George Pavia – Chairman
Mr Mario Abela

Malta National Laboratory Co Ltd

Ing John Bugeja

Employment and Training Corporation

Mr Philip Bonnici

Following the Chairman's brief introduction, Protex Ltd's legal representative, Dr Ronald Aquilina, was invited to explain the motive leading to the filing of his clients' objection.

Dr Aquilina, started by clarifying that his clients were objecting only on that part of the tender that was recommended for award to A Sciberras because the other part of the tender was recommended for award to them.

He said that Protex Ltd decided to lodge this appeal because there were so many shortcomings in the evaluation of this tender, amongst which the recommendation to award part thereof to A Sciberras. The extent of these 'so-called' deficiencies, contended the appellants' legal representative, vitiated the whole process.

Dr Aquilina said that the Evaluation Committee failed to inspect the proposed distribution centres from where the contractor had to provide the service. He argued that such evaluation should have formed an integral part of the tender adjudication process because Clause 6 of the tender document specified *inter alia* that 'Tenderers who do not offer acceptable distribution centres will not be considered.'

Furthermore, Dr Aquilina alleged that subsequent to the submission and adjudication of the tender, Ms Sciberras moved her Company's distribution centre in Żebbuġ to another premises in Birkirkara. He brought to the attention of those present that the tender did not permit such changes at that stage because according to Clause 6, referred to earlier tenderers were obliged to 'give full details of these centres at the tendering stage.'

Also, apart from this, the appellants' lawyer maintained that the outlet in Birkirkara was not an 'acceptable' distribution centre because it was not easily accessible and lacked adequate parking facilities or, at least, car stopping possibilities. He claimed that such premises did not satisfy the tender requirements because under the same clause it was also specified that the centres had 'to be situated in an easily accessible location and on the ground floor.'

Dr Aquilina said that another issue mentioned in their motivated letter of objection dealt with the trading licence. He said that the trading licence indicated by Ms Sciberras in her tender offer could not have covered such premises because the premises in Birkirkara were acquired only recently. The appellants' lawyer questioned whether Ms Sciberras had a valid trading licence to operate from the said premises or for import/wholesale activity.

Furthermore, he doubted whether they had the required manpower and resources to execute the tender because otherwise it would be necessary to resort to subcontracting.

Dr Aquilina said that another aspect of their appeal concerned the specifications of the products that were offered by Messrs A Sciberras. He said that they requested the person who physically performed the testing of the tender samples to give evidence because in their opinion the evaluation of the specification was not carried out properly.

At this stage, the appellants' legal representative referred the Board to its decision (Case Reference No 75) relating to the first objection in connection with the same subject matter, and contended that the wording of the tender and the PCAB's decision indicated that the contract could not be divided but should be awarded as a whole.

Following this statement, the PCAB intervened and drew Dr Aquilina's attention regarding the fact that in its decision, the PCAB made no reference to this issue. It was pointed out that in that decision, referred to by appellants, the PCAB had only recommended the Adjudication Board to re-calculate the total costs (X 2years) based on actual consumption levels (over the previous two years) because the mathematical workings left much to be desired. It was explained that this conclusion was arrived at since it was impossible to have a consumption of 10,000 units of each item.

Continuing, Dr Aquilina said that it would be unfair on tenderers to split the contract because of the running costs and all the overhead expenses involved in managing the two distribution centres. Also he argued that the awarding of the contract to more than one party would cause unnecessary inconvenience and undue hardship to a substantial proportion of beneficiaries of the service.

In her intervention on this issue, Dr Anna Mallia, representing Ms Sciberras, insisted that Clause 29 of the General Conditions of the tender stipulated that '*The Government reserves the right of accepting any tender wholly or in part, or of dividing the contracts among two or more tenderers*'. However, Protex Ltd's legal representative responded by stating that Clauses 3 and 6 of the specifications and conditions of the tender document indicated that the contract could not be split. He contended that the specific conditions superseded the general conditions.

Mr Jonathan Guillaumier, intervening on behalf of Protex Ltd, remarked that the decision to split the tender was only taken following the advice given by the Department of Contracts because in its original decision the Adjudication Board recommended that the tender should be wholly awarded to Protex Ltd.

The first witness to take the stand was Mr George Pavia, Chairman of the Adjudication Board, who was cross-examined by Dr Aquilina. He confirmed that during the tender evaluation the Adjudication Board did neither visit the distribution centres indicated by the tenderers nor checked the

Trading Licenses submitted with the offers. He testified that their evaluation was mainly based on the quality of the product.

Mr Pavia declared that the premises indicated in Messrs A Sciberras' offer were those located in Żebbuġ, B'Buġia and Gżira respectively and that he was not aware that during the evaluation process Messrs A Sciberras were operating from the premises in Birkirkara instead of those located in Żebbuġ, as previously declared in the tender. However, the PCAB remarked that, in spite of this, Messrs A Sciberras still appeared to have satisfied the tender requirements as far as the number of distribution centres was concerned because tenderers were required to provide only two distribution centres.

When specifically asked by the appellants' lawyer to state whether full details of the distribution centres were given, the witness replied that they gave the full addresses of the above-mentioned three distribution centres and that they would be opened daily including Saturdays between 8am and 7pm.

During Mr Pavia's testimony, the PCAB drew his attention that it was indispensable for the Evaluation Board to visit the distribution centres because they needed to verify whether these were in conformity with the tender's requirements, namely that they were situated in an easily accessible location and on the ground floor. The PCAB pointed out that in the prevailing circumstances it could neither have comfort with regard to the other offers because the whole adjudication process was perverse. Here, Dr Anna Mallia corroborated with this statement arguing that the same questions could be asked in respect of the appellants' offer.

When Ing John Bugeja, Engineering Divisional Manager, Malta National Laboratory (MNL) took the witness stand, he was asked specifically to state whether the diaper samples were tested to establish whether they conformed with the specifications under Clause 10 of the tender document. The said witness declared that only two out of seven requirements were checked, namely the,

(i) diapers had 'an absorbent and fluff mixture with increased absorbency in crotch area' (this item included leakages and it was checked as whole product)

and

(ii) 'waist/hip measurement and the minimum absorption capacity'

The witness confirmed that he did not check whether the diapers

- (a) had waterproof polythene backing
- (b) had complete covering
- (c) had special leg design with soft lycra threads

- (d) had re-fastenable adhesive tapes *and*
- (e) were elasticated around the leg area in order to minimise leakages.

Ing Bugeja emphasised that he always based his analysis in accordance with his clients' specific requests and in this particular case he was only required to carry out tests in respect of measurements, absorbency levels and leakages.

Mr Michael Bezzina, Director of the Department for the Elderly and Community Care, intervened by pointing out that the tender specifications were attached with their request to the MNL.

On his part, Mr Pavia said that they based their decision on the results received from the MNL and confirmed that the Adjudication Board had not checked further to ensure that the specifications which were missed out by the MNL were included in the various offers.

The PCAB saw it highly pertinent to intervene to demonstrate its disgruntlement at the amateurish way observance of tender specifications was made by the same Adjudication Board whose primary objective is predominantly to ensure that such observance was made by third parties. As such, the PCAB pointed out, the adjudication had to be based on what was requested in the tender document because it was imperative for the Evaluation Board to determine that the tenderer's offer was compliant with the specifications and satisfied tender's requirements.

Protex Ltd's representatives agreed that, in view of the testimony given by the witnesses representing the Department, there was no need for Mr Philip Bonnici, representing the Employment and Training Corporation (ETC), to testify on the number of persons employed with Messrs A Sciberras as originally requested by the appellants.

In his concluding remarks, Dr Aquilina reiterated that the evaluation was not appropriately carried out because it had been established that neither the *Distribution Centres* nor the *Trading Licenses* were checked and the *samples* were not properly tested.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 31 October 2006, and also through their verbal submissions presented during the public hearing held on 29 November 2006, had objected to the decision taken by the General Contracts to award the tender to Messrs A Sciberras;

- having taken into consideration the points raised by all parties concerned particularly the fact that the Adjudication Board failed to inspect the tenderers' distribution centres;
- having noted that certain issues raised by the appellants were considered as irrelevant as the PCAB concludes that once a tenderer participates in a process one should not expect to be taken seriously for arguing at an appeals stage that terms and conditions of a particular tender were 'unfair' or impossible to be met;
- having also noted that the Adjudication Board failed to ensure that the requirements listed in the specifications were fulfilled as admitted by the Chairman of the same Board during the hearing;
- having also noted the issue raised, namely that, in the prevailing circumstances, it is impossible for the adjudication process to be considered effective enough to enable decisions to be drawn therefrom;

concludes, that this particular adjudication process gave rise to more questions than it managed to establish a decision-making scenario.

As a result of the above-mentioned points, this Board decides that the entire evaluation and adjudication process was fallacious and based on an overall demonstration of administrative incompetence.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the call for offers be re-issued, properly evaluated and adjudicated within the next three months from publication of this decision.

Furthermore, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

14 December 2006

(this Final Decision was not included in the Annual Report for year 2006)

PUBLIC CONTRACTS APPEALS BOARD

Case No. 96

**Re: CT 2557/2006 – Advert No CT/WSC/T/57/2006:
Supply of High-pressure Cleaning Jetting-Suction Browsers**

This call for tenders was published in the Maltese Government Gazette and the EU Journal on 15 September 2006 and was issued by the Contracts Department following a request transmitted to the latter on 12 September.2006 by the Water Services Corporation.

The closing date for this call for offers was 07 November.2006 and the global estimated value of the contract was Lm300,000 (inclusive of VAT)

Seven (7) different tenderers originally submitted their offers.

Following receipt of notification from the Department of Contracts informing them that their bid had been disqualified as the tender guarantee submitted by them was erroneously “drawn up on the name of the Water Services Corporation in lieu of the Director of Contracts”, Messrs *Polisal Projects Ltd* filed an objection on 14 November 2006.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 14 December 2006 to discuss this objection.

Also present for the hearing were:

Polisal Projects Ltd

Mr Boris Farrugia
Arch Joseph Cachia

Water Services Corporation

Ing Mark Perez
Mr Anthony Camilleri
Mr Stefan Vella

S R Services

Mr David Muscat

Department of Contracts

Mr Mario Borg

Following the Chairman's brief introduction, the representatives of Polisal Projects Ltd were invited to explain the motive of their objection.

Mr Boris Farrugia, representing Polisal Projects Ltd, started by stating that the bank guarantee submitted with their offer was drawn up on the name of the Water Services Corporation as the Contracting Authority. He stressed that the same specimen of the TENDER GUARANTEE FORM that was attached to the tender document specified that the bid bond had to be issued in favour of the Contracting Authority which, as *per* definition, in the Draft Contract that was attached to the tender document was indicated as the Water Services Corporation.

In reply to a specific question by the PCAB, Mr Farrugia confirmed that there were no definitions in the tender document itself.

Mr Anthony Camilleri, one of the Water Services Corporation's representatives, responded by stating that Clause 22, *Tender guarantee*, under *Instructions to Tenderers* it was clearly specified that the tender guarantee had to be drawn up in the name of the Director of Contracts. Mr Camilleri declared that the General Contracts Committee had rejected the appellants' offer because the tender guarantee was made in the name of the Water Services Corporation. He explained that at tendering stage, if the need arose, it was the Director of Contracts and not the Water Services Corporation who had to claim the bid bond.

The main witness in these proceedings was Mr Mario Borg, representing the Department of Contracts, who gave his testimony under oath.

On cross-examination by the PCAB, Mr Borg testified that there were instances where tenderers were requested to draw up bid bonds in favour of the Water Services Corporation. However, in this particular tender, he felt that he had to draw the General Contracts Committee's attention because, under Clause 22 of the *Instructions to Tenderers*, bidders were specifically requested to draw up the tender guarantee in the name of the Director of Contracts. At this point, Mr Farrugia intervened by stating that bid bonds in respect of tenders pertaining to the Malta Maritime Authority, WasteServ Malta Ltd and Water Services Corporation, although issued by the Department of Contracts, were drawn up in favour of the entities, corporations and authorities concerned and not the Director of Contracts. Also, he pointed out that the tender documents had conflicting demands and information because, although Clause 22 indicated the Director of Contracts, in the specimen of the Tender Guarantee Form, reference was made to the Contracting Authority which was named as the Water Services Corporation in the Draft Contract.

In reply to a specific question by the PCAB, it was declared that the bid bonds of the other six bidders were made in the name of the Director of Contracts.

As a direct result of this, the PCAB reflected on the fact that there appeared to be no conflicting information in the specifications. In actual fact Clause 22 specifically mentioned the Director of Contracts.

Mr Farrugia raised the issue regarding the wording of the bid bond, stating that this was approved by the WSC in reply to an e mail that was sent to the Corporation by his company.

Mr Stefan Vella, representing the WSC declared that Mr Farrugia's claim was not at all correct as in his e-mail dated 06 November 2006 he (Mr Vella) only confirmed the wording because on the tender guarantee that was sent by the appellants to the Water Services Corporation through their bankers there was no indication of who was the Contracting Authority, Department of Contract or Beneficiary. Mr Vella tabled a copy of the tender guarantee that was attached to their e-mail. Arch Joseph Cachia, the other representative of Polisal Projects Ltd, intervened to explain that the Beneficiary on the specimen of the tender guarantee was the Contracting Authority, that is, the Water Services Corporation.

Ing Mark Perez, also representing the WSC, stated that he was of the opinion that such communication should not be taken into consideration because, according to the tender conditions, clarifications should have been communicated to tenderers 6 days before the closing date of tenders. He said that WSC's reply was submitted *bona fide* because the appellants' e-mail was received only one day before the deadline for submission of tenders. At this point, Mr Mario Borg drew the attention of those present that, according to Clause 13 under *Instructions to Tenderers*, tenderers had to submit questions in writing up to 16 days before the deadline for submission of tenders.

On his part, Mr Farrugia made reference to Article 4 *Order of precedence of contract documents*, a copy of which was tabled claiming that the Draft Contract had precedence over the Contractor's Tender Document. However, his attention was drawn to the fact that this issue was not mentioned in their reasoned letter of objection.

In his concluding remarks, Mr Farrugia continued to argue that the tender document contained conflicting scenarios about the name on whose behalf the bid bond had to be drawn.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 17 November 2006, and also through their

verbal submissions presented during the public hearing held on 14 November 2006, had objected to the decision taken by the General Contracts Department wherein they were informed that their bid had been disqualified as the tender guarantee submitted by them was erroneously “drawn up on the name of the Water Services Corporation in lieu of the Director of Contracts”;

- 2 having taken into consideration the points raised by all parties concerned particularly those concerning the tender guarantee form and the draft contract;

- 3 having established that during the hearing the appellants did not come up with any evidence which could possibly persuade the PCAB that the wording of the tender document itself and the ancillary documentation attached thereto may have possibly given rise to ambiguous interpretation of requirements, terms and specifications concludes that:
 1. the Evaluation Board acted in a reasoned, objective and effective operational manner.

 2. this Board considers the decision reached by the Contracts Committee as justified.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of Regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

27 December 2006

(this Final Decision was not included in the Annual Report for year 2006)

PUBLIC CONTRACTS APPEALS BOARD

Case No. 97

**Re: CT 2215/2006 – Advert No 231/2006 – GPS 99.005.T06.CA:
Supply of Ipratropium Bromide Nebuliser Solution**

This call for tenders was published in the Maltese Government Gazette on 06 June 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Government Pharmaceutical Services (GPS) on 09 February 2006.

Two (2) different tenderers originally submitted their offers.

The closing date for this call for offers was 27 July 2006 and the global estimated value of the total contract covering three years was Lm98,556.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Drugsales Ltd filed an objection on 20 December 2006 against the intended award of the said tender to Messrs Vivian Corporation Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 02 February 2007 to discuss this objection.

Also present for the hearing were:

Drugsales Ltd

Prof Ian Refalo – Legal Representative
Mr Alfred Gera de Petri
Ms Giulia Gera de Petri
Dr Andrea Gera de Petri

Vivian Corporation Ltd

Dr Albert Grech – Legal Representative
Dr Stephania Zerafa – Legal Representative
Ms Joanna Cremona
Ms Maria Formosa

Government Pharmaceutical Services (GPS)

Ms Anna Debattista – Director GPS

Following the Chairman's brief introduction, Prof Ian Refalo, legal representative to Drugsales Ltd, the appellants, started by stating that his clients' offer was cheaper than that submitted by the recommended tenderer, namely Vivian Corporation Ltd, by about Lm17,000. He pointed out that their product was registerable in terms of the current regulations.

The appellants' lawyer argued that, in view of the fact that

- a. the product offered by his clients was in accordance with specifications and registered in the United Kingdom, and
- b. his clients had specifically declared that they were going to register the product if awarded the tender,

the said product was fully qualified to be considered and should not have been excluded on the basis of its lack of registration.

Furthermore, the appellants' legal representative insisted that the regulations for this type of registration should have been put in place before the tender was issued in June 2006.

Prof Refalo remarked that the new regulations that came into force provided for the possibility of the registration of a product even if, when offered to the authorities, it was still unregistered. He pointed out that there were instances where medicinal products were even registered after award of contracts.

Dr Albert Grech, legal representative of Vivian Corporation Ltd, responded by stating that tenderers were obliged to abide by the conditions of this particular tender which stipulated that the product had to be registered. At this stage he made reference to paragraph 3b in the *Declaration Sheet for Medicinal Products – A* wherein tenderers were required to indicate that the product was effectively registered under 'PMA/MA/EU (delete where applicable)' and also it was stipulated that '*If this is not completed in ALL respects, where applicable, offer will not be considered*'. Dr Grech said that it was clear that the appellants did not fulfil the tender requirements.

Ms Joanna Cremona, also representing Vivian Corporation Ltd, explained that the Medicines Authority introduced a system whereby all medicinal products that were registered with a valid Certificate of a Pharmaceutical Product (CPP) prior to November 2002 were granted a Provisional Marketing Authorisation (PMA) after submission of the necessary dossiers. When the required documentation was positively assessed, a full Marketing Authorisation (MA) was then issued for such products. She contended that the appellants' product could not be registered at tendering stage in view of the regulations that were in force at that time.

Mr Alfred Gera de Petri, representing the appellants, clarified that, prior to the accession to the EU, Malta did not have registration procedures of medicinal products. He said that Malta was given a derogation for the introduction of such procedures and that during the transition period there were many problems due to the different types and complexity of registrations and the small size of the island, which were sorted out only some time before the end of the derogation period. Mr Gera de Petri declared that they included the above mentioned condition in their bid because the tender was issued during the transition period and the regulations were not yet defined.

Mr Gera De Petri further explained that there were three types of procedures recognised for a Marketing Authorisation to be granted as well as for the said product to be able to be placed on the Maltese market, namely

- (i) the National Registration which was very expensive;
- (ii) Mutual Recognition Process which could be achieved by asking other Member States to mutually recognise the Marketing Authorisation granted by the Reference Member State; and
- (iii) Article 126a.

He contended that albeit their overseas suppliers wanted to register their product under Article 126a, yet they could not submit such an application because, at tendering stage, discussions on this type of registration were not yet concluded.

Ms Anna Debattista, Director Government Pharmaceutical Services (GPS), when cross examined by the PCAB, gave some background information about the registration procedures of medicinal products. She said that prior to EU accession medicinal products were placed on the Maltese market by the submission of a valid Certification of Pharmaceutical Products (CPP). During the negotiations for accession, Malta was granted a transition period on the registration of pharmaceuticals up to December 2006 since all products placed on the Maltese market had to be registered before they could be sold in Malta. According to Ms Debattista, medicinal products with a CPP were first granted a PMA, subsequently proceeding to a full MA in line with EU requirements. She said that, given a number of factors, there were various problems and the end result was a drop in the number of medicines available on the market.

The same witness declared that in this particular tender's conditions it was stipulated that the product had to be registered up to the closing date of tender. She said that when they assessed the two bids it resulted that the product offered by Drugsales Ltd was cheaper and according to specifications but it did not fulfil the registration criterion while that submitted by Vivian Corporation Ltd was registered under the PMA procedure and complied with the

specifications. Ms Debattista emphasised that the offers could only be adjudicated on the basis of the tender conditions as at closing date of tender.

In reply to a specific question by the PCAB, Ms Debattista declared that the regulatory conditions did not preclude anyone from applying for the registration of medicinal products provided that applicant/s complied with the local regulations of the Medicines Authority. The appellants' product could be registered under the MA procedure subject to all appropriate documentation being presented. When asked about the number of days taken for an application to be processed from the date it is submitted, the witness replied that these were specified in the legislation.

In his concluding remarks Prof Refalo invited the PCAB to look at Article 126a. He explained that according to EU law, as reflected in the Treaty, they had a right for a Marketing Authorisation under Article 126a but, in practice, it was not possible because the discussions concerning the registration procedures were not yet concluded. The appellants' lawyer reiterated that this type of registration was put in place only in December 2006 following agreement reached by the Malta Chamber of Pharmacists and the Health Authorities. Prof Refalo pointed out that his clients had since submitted an application for the registration of their product. However, he insisted that the state was obliged to make the registration possible under this article before the tender was issued.

When asked to state whether any clarifications had been sought on the matter from the tendering authority, Mr Gera de Petri replied in the negative and the reason given was that any queries raised could not be answered in view of the fact that discussions were still underway and too complicated to be addressed at the time. Nevertheless, he added that, during the tender adjudication process they could have been contacted about the alternative offered in their tender.

Dr Stefania Zerafa, also acting as legal representative to Vivian Corporation Ltd, contended that her clients' offer was submitted in accordance with all the conditions and requirements of the tender.

On her part, Ms Cremona concluded by remarking that in other instances, whenever Vivian Corporation Ltd did not submit tenders which were not in order with terms and conditions, these were rejected.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 21 December 2006, and also through their verbal

submissions presented during the public hearing held on 02 February 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Vivian Corporation Ltd;

- 2 having noted that appellants' arguments against them being unjustifiably excluded on the basis of lack of registration of product offered;
- 3 having considered Vivian Commercial Ltd's legal advisor's claim regarding the fact that tenderers were obliged to abide by the conditions of this particular tender which stipulated that the product had to be registered, as well as the fact that in not being duly registered, appellants did not fulfil the tender requirements;
- 4 having also noted Mr Gera de Petri's chronological rendition of facts, as well as, the explanation given relating to the three types of procedures recognised for a Marketing Authorisation to be granted;
- 5 having also noted the evidence given by the Director GPS, especially her statement regarding the fact that in this particular tender's conditions it was stipulated that the product had to be registered up to the closing date of tender and that, according to the same witness, offers could only be adjudicated on the basis of the tender conditions as at closing date of tender

concludes, that:

- a. the Director, Government Pharmaceutical Services' explanation and description of facts are considered credible enough;
- b. the decision taken by the appellants' foreign suppliers to only, conditionally, register the product is to be construed as a legitimate administrative decision which, albeit may have been regarded as commercially viable and appropriate, yet implied a non-observance of the tender's specific requirements;
- c. the appellants had enough time to seek clarification or draw the attention of the pertinent authorities as regards the anomalous scenario applicable at the time of issue of this particular tender and corresponding submission of respective offer/s and, yet, no similar initiative was taken by the said appellants simply because the latter's foreign suppliers simply wanted to participate according to their own commercially-inclined rules.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board

recommends that the deposit submitted by the appellants in terms of Regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 February 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 98 and Case No. 99

**Re: CT 2530/2006 – Advert No CT 377/2006 – FTS C 15-06:
Tender for the Construction of a New Secondary School at Mosta
(Ta' Żokrija)**

This call for tenders was originally published in the Maltese Government Gazette on 10 October 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Foundation for Tomorrow's Schools on 11 August 2006.

The closing date (following extension) for this call for offers was 12 December 2006 and the global estimated value of the total contract was Lm1,407,265.

Nine (9) different tenderers' offers were considered by the Adjudication Board.

Soon after being informed that they had failed to comply with Clause 1.14.1 of the tender document due to their failure to submit a bid-bond which remains valid for a period of six months from the closing date set for the submission of tenders, Messrs *Ritemix (Gatt Bros) Ltd* and *A X Construction Ltd* respectively, filed two separate objections (dated 20 December 2006: *Ritemix (Gatt Bros) Ltd* and 21 December 2006: *A X Construction Ltd*) with the Department of Contracts contesting the decisions taken.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 02 February 2007 to discuss this objection.

Also present for the hearing were:

Ritemix (Gatt Bros) Ltd

Dr Adrian Delia – Legal Advisor
Dr John L Gauci – Legal Advisor
Mr Carmelo Gatt

AX Construction Ltd

Dr David Wain – Legal Advisor
Mr Angelo Xuereb

Foundation for Tomorrow's Schools

Arch Andrew Ellul

Contracts Department

Mr Anthony Cachia – Director (Operations)
Mr Mario Borg

Other interested parties present

Mr Josef Cachia – Elbros Construction Ltd
Dr Aldo Vella LLD – Vassallo Builders Ltd

The PCAB's Chairman commenced proceedings by asking interested parties whether they would find any objection with the Board conducting two hearing sessions concurrently in view of the fact that both appeals concerned the same objection relating to the same tender. All parties replied positively to the said proposal.

Before proceeding with the actual hearing, on Dr Adrian Delia's request, Dr Aldo Vella and Mr Josef Cachia, representing Vassallo Builders Ltd and Elbros Construction Ltd respectively, declared their interest in this case.

Subsequently, Dr Vella, raised a point of order stating that the objection filed by AX Construction Ltd was not accompanied by the requested deposit of Lm25,000 but by one of Lm7,000. Dr David Wain, representing AX Construction Ltd, one of the appellants, explained that his clients had earlier contested the requested deposit because the amount of Lm25,000 by far exceeded the 0.5% of the estimated tender value. In actual fact, even the Department of Contracts acknowledged the mistake and reduced the stated amount accordingly. Dr Delia confirmed that when his clients were formally presenting their objection accompanied with a deposit of Lm25,000, they received a fax from the Department of Contracts informing them that 'due to an oversight the stated amount of Lm25,000 for an eventual lodging of an objection should have read Lm7,000' and therefore the amount on their notice of objection was amended accordingly. Dr Vella responded that he had raised the issue because they did not have any information about these developments and declared that he was satisfied with the explanations given.

At this stage, the appellants' representatives were invited to explain the motive leading to their respective objections. These explanations were followed by the intervention of the other interested parties' representatives as well as the testimonies given by the Department of Contracts' representatives, namely Messrs Anthony Cachia and Mario Borg.

Dr Wain started by stating that the reason for the disqualification of his clients' bid as given by the Director General (Contracts) in the letter dated 12 December 2006 was that AX Construction Ltd had failed to comply with Clause 1.14.1 of the tender document due to their "failure to submit a bid-bond which remains valid for a period of six months from the closing date set for the submission of tenders." However, he pointed out that Clause 1.14.1 of the

Tender Document specified that a “.. Bid Bond must be valid for a period of six months from the date set for the submission of tenders”. Dr Wain said that the wording quoted by the Director General (Contracts) in his letter dated 12 December 2006 was significantly different from that contained in Clause 1.14.1 of the tender document. AX Construction Ltd’s representative insisted that there was no particular date set for the submission of tenders but an expiry date.

Dr Delia, legal representative to Ritemix (Gatt Bros) Ltd added that the refusal was specifically because they were in breach of Clause 1.14.1 which stipulated that the bid bond had to be valid for six months from the date set for the submission of tender. He said that his perspective was slightly different than the one previously expressed by Dr Wain, in a way that, according to Dr Delia, there was no date set but a period for the submission of tenders. The said period started from 14 November 2006 (which according to him was the publication date of tender) until the 12 December 2006 (regarded by the appellants as the closing date of tender). Dr Delia claimed that in the refusal letter the Contracts Department mentioned “closing date set” but in the tender document reference was made to a period. He insisted that in the advertisement notice there was no closing date but a submission period. Dr Delia contended that the Contracts Department had misquoted Clause 1.14.1.

When he was referred to the specimen of the Bid Bond (Annex V) wherein it was indicated that this ‘guarantee expires within six (6) calendar months starting on the closing date of tender’, Dr Delia replied by stating that this document was in direct contradiction to Clause 14.1.1 which was the only reason given for the disqualification of their offer.

Dr Vella intervened and remarked that the scope of the Bid Bond was to ensure that a Tenderer would not withdraw the offer during the adjudication process. He claimed that, on the basis of the submissions made by the appellants’ representatives, it would be illogical to have a number of tenders with bid bonds having different expiry dates. Thus, Dr Vella contended that it was evident that the expiry period of different bid bonds was to be linked with the closing date of the tender.

Furthermore, Vassallo Builders Ltd’s lawyer contended that Clause 1.14.1 should be considered in its entirety because it was also stipulated that ‘*Each tender must be accompanied by a valid and original Bid Bond issued by a Maltese Bank to the amount of Twenty-one Thousand Malta Liri (Lm21,000) in the form of the attached specimen Bid Bond*’ wherein it was clearly specified that ‘*This guarantee expires within six (6) calendar months starting on the closing date of tender, that is it is valid for six (6) calendar months from the closing date of this tender*’. He pointed out that AX Construction Ltd’s bid bond was valid up to 23 May 2007. Dr Vella claimed that the final date for the

submission of tenders was subsequently extended up to 12 December 2006 and that all prospective bidders were notified accordingly.

Mr Angelo Xuereb intervened to explain that this situation occurred because when the closing date of tender was extended to 12 December 2006, the Bid Bond was already available before the original closing date of tender, i.e. 23 November 2006. On the same issue Dr Delia intervened to state that the bid bond presented by his clients would have expired on 07 June 2007 because it was made available 5 days before the last date they could submit the tender, namely 12 December 2006. However, Dr Delia pointed out that the bid bond would be replaced by a performance bond once a tender was accepted.

With regard to AX Construction Ltd's letter of objection dated 20 December 2006 wherein it was stated that, when the closing date of tender was extended to 12 December 2006 the Contracts Department did not indicate that the Bid Bond had to be extended, Dr Vella said that tenderers were asked to extend their Bid Bond not before closing date of tender but when more time was required for the award of the contract.

Mr Josef Cachia, representing Elbros Construction Ltd, intervened to remark that when, on another occasion, the Company he represents did submit a tender for the Construction of a Secondary School at Ta' Karwija, on that occasion their bid was actually disqualified because their *Bid Bond* had an incorrect expiry date. The PCAB observed that, in the circumstance, Elbros Construction Ltd could have availed themselves of their right to appeal, since they had failed to do so the PCAB cannot take the plea in consideration at this stage.

In reply to a specific question by the PCAB, Mr Mario Borg, testifying on behalf of the Contracts Committee, declared that, as far as the Contracts Department is concerned, 'the date set for the submission of tender' and the 'closing date of tender' are considered to be referring to the same thing. However, Dr Delia reiterated that there was one closing date of tender and various "submission dates" of tender.

On cross examination by the appellants' lawyers, Mr Anthony Cachia, representing the Contracts Department, claimed that every tenderer had the opportunity to submit the tender up to the closing date which was the last date for the submission of tender, that is the 12 December 2006 and therefore tenders submitted before closing date were accepted. He contended that the appellants' offers were rejected because they failed to submit a bid bond which remained valid for a period of six months from the closing date of tender. Mr Cachia said that the other seven (7) tenderers submitted a Bid Bond with the correct expiry date.

When asked to state whether the “date of submission of tender” and the “closing date of tender” were the same, the reply given was in the negative. However, the witness later maintained that the “date set for the submission of tender” was the same as “the closing date of tender”.

Mr Cachia declared also that up to the original closing date of tender, namely the 23 November 2006, no offers were received and he confirmed that all prospective bidders were notified about the extension of the closing date of tender. The Department’s representative contended that, according to standard practice, the Contracts Department never notified tenderers to extend their Bid Bond before closing date of tender even when this was extended. The witness argued that, at tendering stage, it was the responsibility of the tenderers to extend the expiry date of their Bid Bond. Mr Cachia concluded his testimony by stating that the tenderers were asked to extend their Bid Bond if, at the adjudication stage, more time was required for the contract to be awarded.

In his concluding remarks Dr Wain submitted that bidders were regulated and bound by the wording of the particular clause in the tender document and not by the Department’s interpretation.

Dr Delia concluded by stating that the Contracts Department should have changed the wording of the tender by clearly stating that the Bid Bond had to be valid for six months from either the ‘final date for submission of tender’ or the ‘closing date of tender’. He reiterated that the wording of the actual tender document indicated that the Bid Bond was required to be valid for six (6) months from any of the date between the published and the closing dates of tender.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 20 December 2006: Ritemix (Gatt Bros) Ltd – and 21 December 2006: AX Construction Ltd respectively, and also through their verbal submissions presented during the public hearing held on 02 February 2007, had objected to the decisions taken by the General Contracts Committee;
- 2 having noted Dr Wain’s issues raised with respect to the ambiguous nature of some of the conditions referred to in the tender document;
- 3 having taken note of Dr Delia’s reference to a contradiction between Annex V of the *Bid Bond* and Clause 14.1.1, specifically quoted by the

Contracts Department as the reason leading to the ultimate disqualification of appellants;

- 4 whilst acknowledging that, 'ceteris paribus', Dr Vella's argument regarding the illogical implication of different bid bonds having different expiry dates, the PCAB, however, also acknowledges the argument raised by appellants with regards to possible confusion brought about as a result of ambiguous declarations;
- 5 having considered the points raised by officials from the Contracts Department

concludes, that the Contracting Authority may have, inadvertently, misguided tenderers as a result of incongruous statements of terms and conditions resulting in potential ambiguity.

As a result of the above-mentioned points, this Board decides that, in the circumstance, this Board feels that it would be prudent to give the benefit of the doubt to appellants and so decides in their favour, recommending that a higher degree of care be given by contracting authorities to ensure that similar ambiguities do not recur in the future.

Finally, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 82, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 February 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 100

**Re: CT 2509/2006 – CT/WSC/T/68/2006:
Supply of Bills and Window Envelopes for Automailer**

This call for tenders was published in the Maltese Government Gazette on 11 August 2006 and was issued by the Contracts Department following a request transmitted to the pertinent authorities by the Water Services Corporation (WSC).

Three (3) different tenderers submitted their offers.

The closing date for this call for offers was 19 September 2006 and the global estimated value of the total contract was Lm23,000.

Following the publication of the *Notification of Recommended Tenderers*, Messrs InServ Ltd filed an objection on 22 January 2007 against the intended award of the said tender to Messrs Printex Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 07 March 2007 to discuss this objection.

Also present for the hearing were:

InServ Ltd

Dr Joe Mifsud – Legal Representative
Mr Richard Pace Bonello

Printex Ltd

Mr Peter Galea

Water Services Corporation

Ing Mr Mark Perez

Adjudication Board

Mr Stephen Zerafa – Chairman
Mr Charles Fardell – Member

Following the Chairman's brief introduction, *InServ Ltd's* representatives were invited to explain the reason which led to their objection.

Dr Joe Mifsud, the appellants' legal representative, started by stating that his client felt aggrieved by the General Contracts Committee's decision to award the tender under reference to Printex Ltd because their offer was 55% or Lm7,340.40 cheaper than that submitted by the recommended tenderer. Dr Mifsud pointed out that InServ Ltd had supplied 1.6 million similar envelopes (*Business Reply Envelopes*) to the Corporation without ever receiving any verbal or written complaint whatsoever. Undoubtedly, Dr Mifsud claimed, his clients had an exceptional track record with the WSC!

The appellants' lawyer contended that the product offered by his clients was in compliance with the specifications of the tender. He argued that when tenderers were requested to submit samples they did not necessarily need to provide them in the exact sizes because samples were required during the adjudication process to check the quality of the paper. Moreover, Dr Mifsud pointed out that in their offer his clients had clearly indicated that they were committed to supply the *Bills* and *Window Envelopes* for the 'Automailer' in the same quality and size as the samples attached by the WSC.

Dr Mifsud highlighted the importance of the international tolerance standards and produced a document regarding the *British Paper and Board Trade Tolerance*. He questioned whether in its decision the Adjudication Board took into consideration these tolerance standards.

InServ Ltd's legal representative also remarked that, despite the fact that the validity period of the tender had expired, the bidders were not asked to extend the validity of their offer. Moreover, he said that, during the adjudication process, no clarifications were sought from InServ Ltd even though, in their tender documents, his clients invited the WSC to contact them in case they needed to clarify any issue.

The appellants' legal representative questioned the criteria used by the Adjudication Board for not awarding the tender to that bidder who had submitted an offer which was 55% cheaper and according to specifications.

Mr Stephen Zerafa, Chairperson of the Adjudication Board, intervened to state that, although the appellants had, in the past, supplied the Corporation with *Business Reply Envelopes*, the contract under review dealt with a different type of envelope, namely *Window Envelopes*. He explained that the automailer machine had critical specifications and the envelopes submitted by InServ Ltd were not according to the published specifications insofar as the window location, the overall dimensions and the design of the closing flap and panel were concerned.

In reply to a specific question by the PCAB regarding the published specifications of the envelopes/samples, Mr Zerafa said that these were

included under *Clause 3 Window Envelopes for Automailer* which stipulated that:

- 3.1 The size of the envelopes shall be 115mm X 235mm;
- 3.2 The size of the window well gummed shall be 100mm X 34mm;
- 3.3 The paper shall be white 90 gsm matt paper printed in black on the outside back flap;
- 3.6 Samples of at least one hundred (100) envelopes (both ordinary and recycled paper) according to size, grammage and texture are to be supplied with the tender offer, in a separate package bearing tender reference and name of tenderer. This quantity of envelopes will be required to ensure compatibility with the existing automailer. Offers without samples will not be considered.'

At this stage, Mr Richard D Pace Bonello, Managing Director of InServ Ltd, intervened, stating that it was impossible for a tenderer to submit an envelope exactly as requested by WSC because the production of such envelopes was costly since they needed a special cutter. Mr Pace Bonello said that although the sample was not exactly as the WSC specimen envelope attached with the tender, in their offer they clearly indicated that the window envelopes would be submitted 'Same as WSC sample'. In reply to a specific question by the PCAB, Mr Pace Bonello explained that when they provided their foreign supplier with all the specifications it was confirmed that it would not be a problem to produce the envelopes in compliance with the WSC specifications.

On cross-examination by the PCAB, Mr Charles Fardell, a member of the Adjudication Board, declared that Printex Ltd had been supplying these envelopes for some ten years without any problem and that past experience had shown that when the tender was awarded to another supplier (not the appellants) the envelopes caused problems due to some incompatibility with the automailer's mechanism. He also confirmed that the specifications in the tender document reflected the specifications of the automailer and that the samples of the envelopes were required to ensure compatibility with their automailer. Albeit, when specifically asked by the PCAB to state whether he knew of other suppliers who supplied the same type of envelopes Mr Fardell replied in the negative, yet, he also wanted to emphasise the fact that there was more than one supplier who had submitted an offer.

With regard to the PCAB's concern regarding the need for total transparency in the tendering process as well as the need to ensure a level playing field for all participants, Ing Mark Perez, also representing the WSC explained that the fact that there were many similar machines on the market and sold worldwide was a

proof that the automailer was not custom made to WSC and that there were many suppliers who could produce such envelopes. Furthermore, he said that even the appellants declared that the goods would be supplied in the same quality and size as the WSC samples. Ing Perez confirmed that the sample of the envelope submitted with the appellants' offer did not conform to the WSC sample and the difference in size was substantial. He remarked that the documentation submitted by the appellants in their offer did not really highlight the fact as to whether the supplier was ready to alter the dimensions because it was only stated 'Same as WSC sample'.

At this point, the PCAB maintained that, in their opinion, there could have existed grounds for clarification because although the specifications of the appellants' offer were in line with those indicated in the tender document those of the sample were not. Ing Perez claimed that the WSC's policy was that if samples submitted did not conform to specifications, the relative offers would not be considered and in this case it was imperative that the samples were accepted by the automailer. On his part, Dr Mifsud intervened to claim that the WSC's interests were safeguarded because of the bank guarantee and insisted that they could have sought clarifications and requested a sample exactly as required.

Mr Peter Galea, representing Printex Ltd, addressed those present by stating that in Clause 1 Scope of the tender it was stipulated that:

'This tender calls for the supply to the Water Services Corporation, Malta, all charges paid including Value Added Tax (VAT) of bills and window envelopes, in accordance with these specifications and the attached schedule.

The make of the automailer currently installed at WSC is a Pitney Bowes, model F400. This machine will soon be replaced by a PFE new Maximailer.'

Mr Galea emphasised that in the tender document it was clearly indicated that the samples were required for testing purposes. He claimed that bidders were expected to demonstrate exactly what they were offering. He noted that the sample of the envelope submitted by the appellants with their offer was *self adhesive* which was a type of envelope that could not be inserted in the automailer. Replying to a question by the PCAB, Mr Galea said that the sample of the envelope needed to satisfy the requested specifications in order to ensure that it was compatible with the existing automailer.

Mr Pace Bonello, reiterated that samples were submitted to test the quality of the paper. He insisted that, taking into consideration the period between the issue and the closing date of tender, there was not enough time to provide the

sample as requested. Mr Pace Bonello claimed that the only suppliers who had the sample already available were Printex Ltd.

On the issue of the restricted time-frame available, Mr Galea responded by stating that the appellants could have asked their foreign suppliers to provide them with the samples of the envelope. Furthermore, he said that even the sample of the Bills submitted was not according to the specifications because of its size and absence of perforation. Mr Galea claimed that offers that did not comply with the tender specifications should be automatically disqualified. Dr Mifsud intervened to clarify that the tender specifications only stipulated that 'offers without samples will not be considered.'

In his concluding remarks Dr Mifsud invited the PCAB to analyse thoroughly the Adjudication Board's report and the comments made on the recommended tenderers' and appellants' offers in order to verify whether the question of the samples had any bearing on its decision and to establish the exact reasons behind its decision.

Replying to a specific question by the PCAB, Mr Zerafa said that in their report it was stated that 'the envelope was not according to specs and past experience has shown that these envelopes cause problems with the automatic inserting machine.'

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 22 January 2007, and also through their verbal submissions presented during the public hearing held on 07 March 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Printex Ltd;
- 2 having analysed the arguments raised by all interested parties during the hearing;
- 3 having analysed documentation considered pertinent to the case including the Adjudication Board's report and recommendations;
- 4 having established during the hearing that no interested party could have been precluded in any way from participating in the said tender on a level playing field in view of the fact that anyone could have either imported or else manufactured the requested 'bills' and 'window envelopes' for the Corporation's automailer, subject to one having *inter alia* the right business know how to do so;

- 5 having taken note of the fact that during the hearing the appellants stated that whilst having the know how and the potential to supply the requested samples in accordance with Tender Document specifications, yet, solely due to financial considerations, namely a cost of approximately Lm100 (One Hundred Maltese Liri), Messrs InServ Ltd decided to refrain from providing the Contracting Authority with the requested, specifically defined, quantity of samples required, which samples had to be provided in the correct size (bills) or as per specimen envelope attached in *Annex B* of the document (window envelopes for automailer), despite being specifically admonished that “offers without samples will not be considered” (Clauses 2.6 and 3.6 respectively);
- 6 having observed that the appellants could have availed of the right to seek clarifications and even an extension of the time frame prior to submission of offer once the same appellants became aware that, in the Company’s opinion, it was impossible for them to provide the requested sample in time and in the same size as specified in the tender document due to production changes (mould, interruption of normal production flows and so forth) necessary;
- 7 having noted that in the appellants’ offer, Messrs InServ Ltd, albeit stating that they will be offering the said bills and envelopes ‘same as WSC sample’, yet did not give any justification as to why their offer was not fully compliant at that stage, by making particular reference to their inability to supply the requested quantities (samples) and type (including ‘perforation’) as specifically referred to in the Tender Document;
- 8 having considered the fact that, whilst it is true that the appellants were not fully compliant as referred to in ‘6’ above, yet it is also evident that the Corporation did not seek any clarification whatsoever as to why the appellants’ offer was compliant with regards to confirmation of specifications but then such documentation fell short of including the samples (and quantities) requested by the Contracting party;
- 9 having taken cognisance of the fact that it seems that the Adjudication Board members could have based their deliberation on issues which were not specifically mentioned in the specifications but simply manifested in the sample attached in *Annex B*. For example, particular reference could be made to the fact that the Board rejected samples submitted by other tenderers which “had a different type of construction and opening flap”. This is a process of deliberation which could be flawed in other circumstances where the sample/s requested purposely attached in the Tender Document is not further specifically reflected in the written document. In this regard, one could also

mention the issue raised with regards to self-adhesive envelopes being preferred when no specific mention was made in regard in the said Tender Document;

concludes, that:

- a. albeit both interested parties had some degree of shortfalls, yet this Board feels that, *ceteris paribus*, the Tender Document is quite straightforward and devoid of areas which could potentially give rise to equivocal interpretations of facts, terms and conditions;
- b. despite the fact that the appellants' offer may have been some 55% cheaper – Lm7,340.40 – as stated by the appellants in their *Reasoned Letter of Objection*), than the one which ended up being recommended, yet, this Board considers the reasons referred to in (1) to (9) above as adequate vindication of the Board's final recommendations;
- c. the fact that all tenderers were participating on a level playing field and that the appellants could have submitted the requested samples (quantity and type) had they not decided, purely on commercial terms (which they considered to be unviable at the time), not to do so (thus nullifying their commercial risk), in spite of the fact that they were fully aware that they were arbitrarily not abiding by the terms and conditions of the Tender Document, tantamount to an erroneous commercial decision taken by the appellants;
- d. the PCAB also considered the fact that this is not the first case that it has examined, where in a tender document a sample or a working system had been specified as a necessary part of the offering and which was not submitted as requested. In all these cases this Board has ruled against the appellants concerned;
- e. although the Adjudication Board did not appear to have gone into all the details which were considered during the Appeals Board hearing to enable it to arrive at the decision that it had taken, there are insufficient grounds to prompt this Board to annul their decision and recommend the award of the tender to the appellants.

In view of the above the Public Contract Appeals Board rules that the decision taken by the Adjudication Board was in line with the Public Procurement Regulations and should stand as is.

As a result, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

20 March 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 101

**Re: CT 2273/2005 – Advert No 4/2006 – GPS05.037.T05SC:
Supply of Aqueous Cream BP**

This call for tenders was published in the Maltese Government Gazette on 13 January 2006 and was issued by the Contracts Department following a formal request to the latter by the Government Pharmaceutical Services (GPS) dated 30 March 2005.

Four (4) tenderers originally submitted their offers.

The closing date for this call for offers was 23 February 2006 and the global estimated value of the total contract covering three years was Lm34,888.

Following the decision taken by the General Contracts Committee on the 16 February 2007 and the subsequent publication of the *Notification of Recommended Tenderers*, Messrs Vivian Corporation Ltd filed an objection on 26 February 2007 against the intended award of the said tender to Messrs Pharmachemic Trading AG.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 04 April 2007 to discuss this objection.

Also present for the hearing were:

Vivian Corporation Ltd

Ms Joanna Cremona	–	Executive Director
Ms Maria Formosa	–	Tender Business Manager

Pharmachemic Trading AG

Mr Salvino P Farrugia	–	Managing Director
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Government Pharmaceutical Services

Ms Anna Debattista	–	Director GPS
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Adjudication Board

Ms Miriam Dowling	–	Chairperson
Mr Mark Spiteri	–	Member

Following the Chairman's brief introduction, *Vivian Corporation Ltd's* representative was invited to explain the motive leading to appellants' objection.

Ms Joanna Cremona, Executive Director, Vivian Corporation Ltd, started by stating that they had appealed from the General Contracts Committee's decision to award the said tender to Pharmachemic Trading AG because the price of their product appeared to be *prima facie* cheaper than that offered by the awarded tenderers. Ms Cremona claimed that the prices (submitted by appellants) per unit offered for the three years covering this contract were Lm0.32, Lm0.33 and Lm0.34 respectively, whilst those offered by the awarded tenderer were Lm0.34 for the first two years and Lm0.34,5 for the third year.

Furthermore, Ms Cremona said that the product offered by Vivian Corporation Ltd was of a very high standard, it was according to specifications and it complied with BP standards. Also, she declared that her firm had been supplying such product to Central Government for the last 3 years and that the GPS had extended the contract for a further 6 months.

Vivian Corporation Ltd's representative said that their product was manufactured in Ireland and that it was classified as a pharmaceutical product, on which no VAT was payable. Ms Cremona declared that the products offered by them and by the recommended tenderer were not registered at tendering stage. However, she said that they had already submitted the necessary application with the Medicines Authority for its registration.

Mr Salvino P Farrugia, Managing Director, Pharmachemic Trading AG, responded by stating that when the tender for the 'Aqueous Cream BP' was issued, they asked their foreign suppliers for the 'Marketing Authorisation' for the said product. Mr Farrugia claimed that following this request, their supplier informed them that in England this product was considered as a beauty care product or as a cosmetic. He declared that in their offer the product was indicated as a 'cosmetic cream' and therefore they included 18% VAT, hence the higher price structure submitted. The recommended tenderer's representative said that when he verified with the Malta Customs Analyst about its classification, he was informed that in England it was classified as a beauty care product while in Malta it was considered as a medicinal.

On cross examination by the PCAB, Ms Anna Debattista, Director GPS, who was giving witness under oath, confirmed that albeit the prices offered by the parties concerned were as those stated by the appellants' representative, yet, she declared that whilst the appellants' prices were exclusive of VAT, those of the recommended tenderer were inclusive of VAT. Ms Debattista explained that this product was rated 0% VAT by the Customs authorities and so they had to remove the 18% VAT component from the prices submitted by the awarded

tenderer. As a consequence, when they worked out the price schedule, it resulted that the recommended tenderers' prices were cheaper!

In reply to specific questions by the PCAB, the witness confirmed that both tenderers submitted samples, the quality of the products was acceptable and that both products were not registered locally.

Ms Debattista said that the *Aqueous Cream* was used in hospitals for its cosmetic property. She declared that the *Borderline Classification Committee* did not consider this product as a medicinal product.

Ms Debattista also testified that the tender document stipulated that delivery was to be effected within 8 weeks from the date of order and that orders were to be submitted in quantities stated on each requisition. She said that Pharmachemic Trading AG complied with the tender's requirements and that it had quoted deliveries of 6–8 weeks. On the other hand, Vivian Corporation Ltd quoted deliveries of 10–12 weeks and stated that they would submit 'Minimum order Quantity 21,600 tubes X 100gm'. However, the Director GPS remarked that the decision was primarily taken on the price factor.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 01 March 2007, and also through their verbal submissions presented during the public hearing held on 04 April 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Pharmachemic Trading AG;
- 2 having noted the price consideration made by appellants as well as the claim made in respect of quality of product being offered;
- 3 having considered the fact that the products offered by both tenderers were not registered at the time the bidders submitted their bid implying that both tenderers were allowed to participate within a level playing field;
- 4 having also noted that the Adjudication Board had established that the products offered by both tenderers were according to the specifications listed in the Tender Document;

- 5 having observed the insistence shown by the appellants to alter the terms and conditions as stipulated in the Tender Document in order to make such terms more advantageous to their own Company

concludes, that:

- a. the Director, Government Pharmaceutical Services' explanation and description of facts are considered credible enough and that the Adjudication Board treated all participants in an equitable manner;
- b. the PCAB cannot accept a scenario wherein bidders try to change or negotiate terms and conditions with a view to dictate their own and, in due course, alter those officially stipulated by the Contracting Authority in the Tender Document;
- c. any price adjustment aimed at including or excluding the VAT element will retain the successful bidder's offer as the most advantageous.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

23 April 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 102

**Re: GPS04.100.D06BB – Advert No MST 733/06:
Food Preparation - Elemental 028[®] Extra Powder**

This call for tenders was published in the Maltese Government Gazette on 27 October 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Government Pharmaceutical Services (GPS) on 15 September 2006.

Two (2) tenderers originally submitted their offers.

The closing date for this call for offers was 27 November 2006 and the original global estimated value of the total contract covering three years was Lm18,549.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Alfred Gera & Sons Ltd filed an objection on 01 March 2007 against the intended award of the said tender to Messrs P & D Pharmaceuticals Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 04 April 2007 to discuss this objection.

Also present for the hearing were:

Alfred Gera & Sons Ltd

Ms Anne Curmi

Government Pharmaceutical Services (GPS)

Ms Anna Debattista – Director GPS

Adjudication Board

Ms Miriam Dowling – Chairperson

Absent

Although the recommended tenderer, namely P & D Pharmaceutical Ltd, was informed about the public hearing, none of its representatives were present.

The appellants' representative, namely Ms Anne Curmi, followed the Chairman's brief introduction, by providing those present with a brief account of what prompted her Company to formally object against the award of the tender to another bidder.

Ms Curmi started by stating that they had offered a more advantageous price of Lm3 less per 10 sachets. As a consequence, their offer was cheaper than that submitted by the recommended tenderer, namely P & D Pharmaceutical Ltd, by Lm600 annually or Lm1,800 over the 3 year contract period. She also pointed out that their product conformed to the tender specifications.

Ms Curmi explained that when GPS requested her Company to state whether they were in a position to supply the item in quantities as required by Government, Alfred Gera & Sons Ltd advised that, due to freight costs, they preferred to supply in two consignments yearly of approximately half the annual consumption (100 packs). She maintained that the tender did not stipulate the quantities that were to be supplied annually but only requested delivery on demand. However, the appellants' representative said that they were available for further discussion on this issue.

Ms Anna Debattista, Director GPS, responded by stating that the delivery conditions in the tender document *inter alia* specified that:

‘Goods are to be supplied in consignments as requested by the Director Government Pharmaceutical Services, in the quantities stated on each requisition.’

She explained that they wanted to order the quantities according to the exigencies of the Department in order to keep stock at a minimum due to expiry problems.

Ms Debattista said that, in their offer, Alfred Gera & Sons Ltd specified that they would supply the product in minimum consignments of 100 X 10 X 100g. She claimed that in their current contract the appellants did not have a minimum order clause.

At this point, the Director GPS made reference to an e-mail that was sent to the appellants' representative on 03 January 2007 wherein it was stated that:

‘With reference to above mentioned item and your offer dated 08 November 2006, please note that minimum order indicated on offer is not acceptable to GPS. As such you are kindly being requested to state if you are in a position to supply item in quantities according to GPS needs.

Request is being made without any commitment whatsoever and an early reply would be greatly appreciated.’

In her reply Ms Anne Curmi wrote that:

‘We would prefer to supply in approx 6 monthly consignments of approx 100 x 10 sachets per consignment. Shelf life remaining will be 1 year, so this should be acceptable. Otherwise for much smaller consignments freight costs will be increased.’

Here, Ms Curmi’s attention was drawn to the fact that they should have indicated such increase in relevant costs in their offer.

Continuing, Ms Debattista said that in the tender document they requested a delivery period of 8 weeks. In their offers, the appellants and the recommended tenderer, indicated delivery periods of 14 – 16 weeks and 28 days respectively.

As far as payment conditions were concerned, Ms Debattista declared that all GPS tender documents specified payment terms of 150 days. She claimed that in their offer Alfred Gera & Sons Ltd stated that:

‘Payment conditions acceptable to us are as follows:

“The contracting parties agree that interest in case of late payment shall start to accrue and shall become payable automatically without the necessity of a reminder after the expiry of a period of 90 days that shall start to run from the date of receipt of the goods or services rendered. The rate of interest is set at seven (7%) percentage points over the central intervention rate established by the Governor of the Central Bank of Malta in accordance with Legal Notice 233 of 2005.”

Acceptance of our offer shall be deemed to be acceptance of the foregoing.’

In reply to specific questions made by the PCAB on the recommended tenderer’s offer, the Director GPS said that P & D Pharmaceuticals Ltd had abided with all the tender conditions. She said that once no comments were made on payment terms and no minimum consignment was stipulated, this, automatically, implied that they had accepted these tender conditions.

In her concluding remarks, Alfred Gera & Sons Ltd’s representative insisted that there should have been further discussions between her Company and the Contracting Authority to clear issues whilst maintaining that the price offered in their bid was more advantageous than that of the recommended tender.

During the hearing, the PCAB remarked that in such proceedings the Appeals Board had to ensure that all tenderers were treated equally and in a transparent manner and all parties abide with tender conditions and specifications. The attention of the appellants’ representative was drawn to the fact that they had no right to submit a conditional tender or to hold discussions at adjudication

stage. It was emphasised that, if necessary, such discussion could only take place before the submission of tenders and through the Department of Contracts. It was also pointed out that tenders were not evaluated solely on the merit of price. In fact, it was stated that even EU tenders were adjudicated on the basis of the 'Most Economically Advantageous Tender' (MEAT).

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 01 March 2007, and also through their verbal submissions presented during the public hearing held on 04 April 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs P & D Pharmaceuticals Ltd;
- 2 having noted that the delivery period requested in the Tender Document was supposed to be 8 weeks but instead the appellants included a period which covered 14 to 16 weeks;
- 3 having considered the fact that the payment terms as requested by the appellants in their bid were different than the terms stated in the Tender Document, including a payment of interest on overdue payments;
- 4 having also noted that the terms and conditions as stated in the Tender Document were adhered to by the successful bidder;

concludes, that:

- a. the Director, Government Pharmaceutical Services' explanation and description of facts are considered credible enough and that the Adjudication Board treated all participants in an equitable manner;
- b. the PCAB cannot accept a scenario wherein bidders submit conditional tenders and then try to change or negotiate terms and conditions with a view to dictate their own and, in due course, alter those officially stipulated by the Contracting Authority in the Tender Document;
- c. the PCAB cannot accept the appellants' proposal for further discussions to be held between them and the contracting authority in order to clarify certain issues as if this Board were to accede to this request it would be itself going against the rules governing public procurement.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

23 April 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 103

**Re: CT 2478/2006 – Advert No CT/WSC/T/59/2006 – WSC 559/2006:
Supply and Delivery of Threaded Stopcocks**

This call for tenders was published in the Maltese Government Gazette on 04 August 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation (WSC) on 24 July 2006.

Four (4) tenderers submitted their offers.

The closing date for this call for offers was 26 September 2006 and the original global estimated value of the total contract was Lm84,375.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Alfred *Ragonesi & Co Ltd* filed an objection on 12 February 2007 against the intended award of the said tender to Messrs *Inter-Power Ltd* (Lm35,202).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 13 April 2007 to discuss this objection.

Also present for the hearing were:

Ragonesi & Co Ltd

Dr Franco Vassallo, LLD
Mr Roberto Ragonesi

Inter-Power Ltd

Mr Edward Micallef St John

Water Services Corporation

Ing Mark Perez

Adjudication Board

Ing Tonio Muscat – Chairman
Ing Ronald Pace – Member
Mr Anthony Camilleri – Member

Malta National Laboratory Co Ltd (MNL)

Ing John Bugeja – Witness

Following the Chairman's brief introduction, *Ragonesi & Co Ltd*'s legal representative, Dr Franco Vassallo, commenced his intervention by stating that Malta National Laboratory's documents made available to the Adjudication Board indicated that his clients' offer was in total conformity with the Tender Document's specifications and that some other stopcocks did not meet the BS1010 criteria. The appellants interpreted such documents to mean that Inter-Power Ltd's offer did not conform to specifications/standards requested.

The appellants' lawyer contended that the WSC (or any other entity) did not draw up specifications haphazardly because, as administrators of public funds, they had to procure the best quality products. Furthermore, he emphasised that when a tender document demanded certain standards, such conditions were binding both on the entity concerned as well as on prospective bidders.

Dr Vassallo explained that his clients, who continuously monitored the market, knew that the prices of those products that were manufactured according to the highest standards did not fluctuate. However, he said that such products were more expensive because, when a producer requested such high standards, they were subject to more checks and analysis.

Mr Tonio Muscat, Chairman of the Adjudication Board, responded by stating that while Dr Vassallo based his arguments on the MNL's report only, they also had certifications from independent bodies of international repute. He said that Inter-Power Ltd submitted a certification by Bureau Veritas wherein it was certified that their product conformed to the required standards. The Adjudication Board's Chairman remarked that in the MNL's report it was also stated that "the final interpretation whether sample conforms to the specification is to be taken by the client".

On cross-examination by the PCAB, Mr Muscat said that every tenderer submitted a sample which was then sent to the MNL for testing. He declared that tenderers also submitted certifications from the respective manufacturers and from recognised bodies confirming that the products were according to specifications. Also, he confirmed that the price was pivotal in their decision.

The Chairman of the Adjudication Board said that there was no specific reference in the tender document to govern the case where the certifications submitted by tenderers differed from the reports issued by the laboratory where samples were tested.

The PCAB intervened to state that the arbitrary manner by which the decision was taken was a matter of concern and that it was useless to send the sample for testing once they relied on the certifications submitted by tenderers. Mr T Muscat explained that in sending the samples for testing, the Adjudication Board were simply following terms and conditions stipulated in the tender document.

In reply to a specific question by the PCAB regarding the substantial difference in prices between the two offers under consideration, Mr Muscat explained that the last three/ four tenders showed that products were sometimes cheaper and in other instances were more expensive even though they were produced by the same manufacturer.

The Chairman of the Adjudication Board said that in this particular case they had two certificates, one from MNL which was based on one sample submitted with the tender and another from a reputed body which was based on a series of tests conducted during a production run. He claimed that, as far as Inter-Power Ltd's sample was concerned, only the dimension of a washer which closed the stopcock was found to be out of range and the variation was so small that it was not considered as significant to the function of the item in question. Mr Muscat said that, although it was confirmed that the size of the washer was out of the tolerance level stipulated in the standards, the dimensions were based on the previous standards which were being phased out. However, in reply to a specific question asked by the PCAB, it was declared that the standards were not changed in the interim ever since the call for offers was published and pertinent tests duly carried out.

Dr Vassallo remarked that it was clear that there was an element of recklessness on the part of the tenderer because they should have checked the stopcock before submitting it with their offer and not presenting a sample that did not even conform to the certifications attached with their tender. The appellants' legal representative maintained that, considering the fact that the WSC were accepting such a variation, it would be only fair to suggest that his clients could have offered a product that was not according to BS 1010, may be of an inferior quality, but definitely at a more competitive price. Furthermore, Dr Vassallo insisted that the Corporation should not have changed the rules of the game at the adjudication stage because otherwise they would be ignoring the principles of transparency and level playing field among all economic operators. He said that Article 1 of the technical specifications clearly specified that:

‘The stopcocks are required on water services pipes, just downstream of the water meter, and shall comply as to a quality of materials, design and workmanship with BS 1010: Part 2: 1973 or its equivalent.’

Mr Edward Micallef St John, InterPower Ltd.'s representative argued that, although according to the test, their sample had failed on the dimension of the washer it did not affect the functioning of the stopcock. At this point he presented a document from the manufacturers, namely, Fornara SpA wherein it was stated that:

‘The samples presented with the tender WSC are according to BS 1010: 1973 – Part 2.

According to the British Standard Institute, the size of the washer as 19.2mm is still accepted together with the new size of 18.5mm etc.

We took the liberty to send you a sample with the washer size 19.2mm since it is a fraction of a millimetre bigger and makes a better sealing.

However, we also manufacture the size 18.5mm and in this regard, we can deliver according to your preference.”

Mr Micallef St John also presented a copy of an e-mail received from BSI – British Standards - wherein it was declared that ‘*BS 1010-2: 1973 is still current but has been declared Obsolescent.*’. He explained that this meant that the previous standards were not obsolete but were being phased out.

Ing John Bugeja, being the Engineer who tested the samples, was then asked to take the witness stand.

Ing Bugeja testified that the four stopcocks that were sent for testing to the MNL were marked 1, 2, 3 and 4 and during the said testing the tenderers were kept anonymous. He also said that sample No 1 (duly identified by the Adjudication Board’s Chairman during the public hearing as the sample submitted with Messrs Ragonesi & Co Ltd’s offer) was completely up to specification, while sample No 4 (duly identified as the sample submitted with Messrs Interpower Ltd’s offer) had the washer’s external diameter measuring 19.7 instead of the measurement as specified in the quoted BS 1010, namely anywhere falling within the range 18.3 to 18.7.

Ing Bugeja pointed out that in his report it was stated that the washers were tested ‘in received condition’ because, all things being equal, for a better analysis the said washers had to be tested immediately as soon as they are manufactured.

The PCAB asked Ing Bugeja to state whether, according to the BS 1010 of 1973 the washer submitted as sample was acceptable. The witness replied by quoting from his report wherein he had declared that:

‘As indicated some stop valves attributes did fail BS 1010 and although these might have negligible or minor effect on the intended use of the stop valves it cannot be stated that valves conformed to BS 1010.’

Ing Mark Perez, representing the WSC, argued that the tests carried out on the washers at MNL should not be taken into consideration because, in his testimony, Ing Bugeja implied that these were not carried out according to the standards.

Ing Bugeja intervened to clarify that the standards stipulated that washers were to be measured before being used.

On its part, the PCAB drew Ing Perez's attention to the fact that the stopcocks submitted as samples were all tested under the same conditions and that, in the document presented by the representative of the Inter-Power Ltd, the supplier had confirmed that the size of the washer was 19.2mm.

When the PCAB specifically asked Ing Bugeja to declare whether, on the basis of the tests carried out, the recommended tenderer's washer conformed to the standards quoted in the tender document, the reply given was in the negative.

Ing Perez, once again interjected to declare that he was satisfied with the explanation given by Ing Bugeja, namely, that the washer submitted by Inter-Power Ltd had failed to satisfy the BS1010. However, he claimed that the washer was not up to specifications because the current standards reduced the size of the washer. Moreover, Ing Perez said that, whenever the discrepancy is considered to be a minor one, the Corporation would usually request the supplier with the cheaper offer to state whether they would be in a position to effect the necessary changes for the same price originally offered.

Dr Vassallo insisted that this was not permitted in terms of Tender regulations.

The PCAB drew the attention of Ing Perez as well as of all those present for the hearing, that at that stage in a tendering adjudication process, contracting authorities are not allowed to negotiate with tenderers.

The PCAB ascertained that albeit, at one stage during the hearing, Ing Perez had given the impression that the appellants' sample did not have the 'WSC' mark, Ing Bugeja confirmed that the Letter 'WSC' were included on sample No 1, namely the sample submitted with the appellants' offer.

Here, Dr Vassallo remarked that in their letter dated 26 September 2006 which was sent with their offer, there was an undertaking by his clients that the 'letters "WSC" will be 'roll stamped' on the stem of the valve.' He also continued to quote from the said letter wherein it was further stated that his clients wanted to bring to the attention of the recipients of the letter's that:

“some tenderers may offer products at lower price levels from China, Italy, Spain etc and state that these conform to BS 1010 Part 2. We too are able to offer this cheaper quality product, as the quality of brass and their performance are widely acceptable and used in the United Kingdom, but again they do not strictly conform to BS 1010 Part 2 as requested.’

In his concluding remarks, Mr Muscat said that the Adjudication Board based its decision after taking into consideration various elements, namely, (a) the report of the laboratory where samples were tested, (b) the certification by *Bureau Veritas* which confirmed that the recommended tenderer's product was according to standards and, last but not least (c) the price.

Dr Vassallo concluded by stating that, in this call for tenders, prospective bidders were requested to offer the stopcocks strictly in compliance with specific standards. He maintained that once the sample submitted by Inter-Power Ltd failed to comply with the said specifications, considering the prevailing circumstances, it was not proper for the WSC to recommend the award of this tender to Messrs Inter-Power Ltd. He also argued that, if his clients would have been made aware that the WSC were not going to be strict on the requested standards, Messrs Ragonesi & Co Ltd could have submitted an inferior product at a cheaper price and would have been awarded the tender.

The appellants' legal representative also contended that, once his clients were excluded from participating due to a non-observance of the requested BS as stated in the Tender Document compiled by the same Corporation's technical staff members, the contracting authority should be judged as having vitiated the tendering process.

Finally, Dr Vassallo contended that his clients, the appellants, being the only tenderers who had complied with the specification, should, as a consequence, be awarded the tender.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

Following the public hearing the Secretary, PCAB contacted Ing Tonio Muscat, Chairman of the Adjudication Board, and asked him to go to his office to show the original certificate issued by *Bureau Veritas*, a document amply referred to by Mr Muscat during the public hearing. This was necessary in view of the fact that such certificate could not be traced in the files relating to the tender in question. However, following a thorough search in the said files it transpired that the certification of the international reputed body submitted by InterPower Ltd in actual fact had been drawn up by SGS Italia S.r.l and not *Bureau Veritas*.

As this incident occurred after the public hearing and in the absence of most of the original participants in the said hearing, the PCAB requested Mr Muscat to sign the following declaration on the copies of the relevant documents, namely:

'This is to confirm that this is the document I was referring to during the PCAB's hearing held this morning.'

Mr Muscat acceded to the PCAB's request and duly signed documents as requested.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 14 February 2007, and also through their verbal submissions presented during the public hearing held on 13 April 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Inter-Power Ltd;
- 2 having noted appellants' claim that that Malta National Laboratory's documents made available to the Adjudication Board indicated that their offer was in total conformity with the Tender Document's specifications and that some other stopcocks did not meet the BS1010 criteria;
- 3 having considered Mr Muscat's declaration that tenderers submitted certifications from the respective manufacturers and from recognised bodies confirming that the products were according to specifications as well as the fact that the price factor was pivotal in the Adjudication Board's decision-making process;
- 4 having also reflected on Mr Muscat's explanation regarding the fact that (a) in sending the samples for testing, the Adjudication Board were simply following terms and conditions stipulated in the tender document, and (b) there was no specific reference in the tender document in case the certifications submitted by tenderers differed from the reports issued by the laboratory where samples were tested;
- 5 having considered Mr Muscat's remark regarding the fact that as far as Inter-Power Ltd's sample was concerned, only the dimension of a washer which closed the stopcock was found to be out of range and the variation was so small that it was not considered as significant to the function of the item in question;
- 6 having noted that while the size of the washer was not according to the dimensions stipulated in the standards, yet Mr Muscat also declared that the standards were not changed in the interim ever since the call for offers was published and pertinent tests duly carried out;
- 7 having taken full cognizance of the fact of Dr Vassallo's remark relating to the fact that the Corporation should not have changed the rules of the game at the adjudication stage because otherwise they would be ignoring the principles of transparency and level playing field among all economic operators;

- 8 having considered the fact that whilst Fornara SpA had taken the liberty to send a sample to their representatives in Malta “with the washer size 19.2mm since it is a fraction of a millimetre bigger and makes a better sealing”, yet in the same letter they also state that they manufacture the size 18.5 and in this regard, they can deliver according to InterPower Ltd’s preference;
- 9 having established that, according to Ing Bugeja, sample No 1 (pertaining to Messrs Ragonesi & Co Ltd’s offer) was completely up to specifications, while sample No 4 (the sample submitted with Messrs InterPower Ltd’s offer) was not according to the same specifications and this albeit such stop valves even when one considers that these might have negligible or minor effect on the intended use of the stop valves;
- 10 having acknowledged that Ing Perez declared that he was satisfied with the explanation given by Ing Bugeja, namely, that the washer submitted by InterPower Ltd had failed to satisfy the BS1010;
- 11 having noted its concern about the erroneous perception that certain WSC senior management may have regarding what distinguishes a clarification from a negotiation process, the latter not being permissible at all;
- 12 having taken into consideration to appellants’ legal advisor’s contention that had his clients been made aware of the fact that the WSC were not going to be strict on the requested standards they could have submitted an inferior product at a cheaper price and would have been awarded the tender

concludes, that:

- a. there is little comfort derived from the fact that different authorities (SGS Italia srl and MNL) have produced two different results thus making the whole process inconclusive;
- b. whilst there were other tenderers’ offers which were considered to be not according to specifications, yet it seems quite evident that the Adjudication Board was more focused on the price factor rather than total adherence to specifications listed in the Tender document and this has given rise to an absence of an equitable metric amongst all participants;
- c. appellants may have been deprived from submitting a cheaper offer thus becoming more competitive;

- d. the extent of inconsistencies demonstrated by the Adjudication Board as well as the latter's blatant deviation from the Tender's specifications does not permit this Board to confirm the award of the contract to Messrs InterPower Ltd. Yet, this Board's public profile and corresponding role entrusted upon it, does not permit it to leave the price differential between the offer awarded the tender (Lm35,202) and the offer submitted by appellants (Lm57,290) to pass unnoticed, especially, when it appears that the Contracting Authority seems to consider scenarios which are less emphatic on supreme quality standards considering the price variance.

As a result of the above-mentioned points, this Board whilst (a) accepting in part appellants' claim requesting this Board to cancel the award of this tender to the preferred bidder, (b) recommends a re-issue of the tender in question enabling the Contracting authority to try to have more flexibility and, at the same time, ensure level playing field amongst all potential participants, (c) recommends also that the deposit submitted by the same appellants in terms of Regulation 83, be refunded.

Furthermore, this Board also suggests that the WSC management seeks further clarification from pertinent entities regarding the issue of what differentiates a clarification from a negotiation in order to avoid potential appeals in the future as well as the possibility of the same public entity contravening procurement public procedures.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

04 May 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 104

**Re: CT 2019/2007 – Advert No CT 31/2007 – FTS C 23-06:
Aluminium Works at the New Secondary School, Qormi (Tal-Handaq)**

This call for tenders was published in the Maltese Government Gazette on 26 January 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Foundation for Tomorrow's Schools (FTS) on 12 December 2006.

Eleven (11) tenderers submitted their offers.

The closing date for this call for offers was 08 March 2007 and the original global estimated value of the total contract was Lm102,695.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Mifsud Aluminium Ltd filed an objection on 26 March 2007 against the intended award of the said tender to Messrs Sun Aluminium (Lm78,070.67).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 25 April 2007 to discuss this objection.

Also present for the hearing were:

Mifsud Aluminium Ltd

Mr Anthony Mifsud
Dr Jeffery Mifsud Farrugia – Legal Advisor

Sun Aluminium Ltd

Mr Mario Sciberras
Mr George Deguara
Dr Michael Sciriha – Legal Advisor
Dr Franco Galea – Legal Advisor

Foundation for Tomorrow's Schools (FTS)

Adjudication Board

Mr Chris Pullicino – Chairman
Arch Andrew Ellul – Member

Technical Advisor

Arch Leonard Zammit

The Chairman of the PCAB commenced proceedings by inviting Messrs Mifsud Aluminium Ltd's (the appellants) representatives to explain the motive behind their objection.

Mr Anthony Mifsud, acting on behalf of the appellants, started his intervention by stating that, in spite of the fact that they had the best tender price, the results published on the Contracts Department's notice board showed that the tender was awarded to Messrs Sun Aluminium Ltd. However, Mr Mifsud continued by stating that from enquiries he carried out, it transpired that the cheapest offer was that of the recommended tenderer and the reason given was that Sun Aluminium Ltd had made a mistake in the computation of the Bill of Quantities (BoQ). Appellants argued that there was no mistake in such offer and, as a consequence, they were appealing against the decision taken by the General Contracts Committee to award the tender to Messrs Sun Aluminium Ltd.

Dr Jeffery Mifsud Farrugia, the appellants' legal representative said that the main issue was Item 1.14 of the BoQ wherein tenderers were specifically requested to '*Allow sum for a master key system for all the above listed doors.*' He contended that every tenderer had quoted a price for the master key system on the basis of the number of doors requested in the tender, that is, 68 doors.

The appellants' legal representative claimed that Sun Aluminium Ltd had effectively quoted a price of Lm200.60 after multiplying the amount of Lm2.95 per unit price by 68 doors. He failed to understand how the amount of Lm200.60 was adjusted to Lm2.95 because it was impossible to offer a master key system, which included anti panic locks, tira-apri handles and master lock system, for Lm2.95! Furthermore, Dr Mifsud Farrugia stated that if Lm2.95 were to be divided by 68 doors, each would cost a mere 4 cents! This showed that the mistake in the calculation was in actual fact made by the Adjudication Board and not by the tenderer since the latter had worked out the computation correctly. Dr Mifsud Farrugia argued that the adjustment in the original calculation made by the Adjudication Board ended up favouring the awarded tenderer as the offers were not being equitably compared.

Dr Michael Sciriha, legal advisor to Sun Aluminium Ltd, replied by stating that the appeal could be resolved because Clause 1.18.2 of the tender dossier stipulated that:

'If, after the receipt of the Tender, a discrepancy is found between the total amount inserted by the Tenderer against any item in the Bill of Quantities, and the amount that is determined by applying the corresponding rate or price inserted to the quantity stated for that item in the Bill of Quantities, the Director General (Contracts) shall alter the total amount to conform to the amount obtained by applying the rate or price entered to the quantity stated and the total price shall be adjusted accordingly. Similarly, if an error should be found in the summation of

the various total amounts entered, the total price inserted in the Tender will be corrected by the Director General (Contracts). The Tender Price so corrected shall be considered as binding.'

Dr Sciriha said that, in this instance, the Director General (Contracts) had no alternative but to comply with what was stipulated under this clause and confirmed also under Clause 2.08.02 – 'Tender Evaluation'. He contended that it was the rate that was binding and not the amount. Dr Sciriha was of the opinion that the appellants were trying to put under scrutiny the performance of the Director General (Contracts).

Sun Aluminium Ltd.'s legal representative contended that the Director General (Contracts) had access to all the documents, and therefore, if in doubt he could have requested a detailed cost analysis as stipulated under Clause 1.18.4 wherein it was specified that:

'During the tender evaluation period, Tenderers may be required to submit detailed cost analysis to show how rates have been calculated.'

Furthermore, Dr Sciriha claimed that the appeal lodged by Mifsud Aluminium Ltd was null and could not be acceded to because in their reasoned letter of objection the appellants asked *'the General Contracts Committee to reconsider the recommendation made'*. The appellants' legal representative maintained that such appeals were heard before the PCAB and not the General Contracts Committee and that the PCAB's jurisdiction was either to confirm or overturn decisions or to award tenders. At this point, Dr Sciriha asked the PCAB to deliberate as to whether the appeal was valid or not.

The PCAB decided to proceed with the hearing, arguing that the original letter of appeal did not make reference to the General Contracts Committee and the form of that appeal was acceptable for the purpose of the regulations, it was only in the reasoned letter of objection that the reference to the Committee was found. Also, it had to be established whether the Adjudication Board had made a mistake in the calculations as was being stated by the appellants, it had to be ensured that the process was carried out correctly and transparently, and that all tenderers were treated equally. Dr Sciriha replied that even if it was determined that there was a mistake the decision was legally 'binding'. The PCAB responded by stating that the 'binding' element was included for a purpose. Furthermore, it was also stated that, in the process, a mistake should not be made to the detriment of the other tenderers, possibly resulting in the exclusion of participants from the adjudication process.

Dr Mifsud Farrugia maintained that the whole argument was that there was no mistake in the calculations made by Sun Aluminium Ltd because the multiplication was worked out correctly, namely, Lm2.95 x 68 doors.

At this stage the Chairman (Mr Chris Pullicino) and one of the members of the Adjudication Board (Arch Andrew Ellul) and the Foundation's technical advisor (Arch Leonard Zammit) were called to the witness stand.

During their testimony, which was given under oath, it was established that the other tenderers' rates for Item 1.14 were Lm4, Lm250, Lm241, Lm200, Lm25, Lm340 and Lm120 respectively.

Dr Sciriha said that if they were to compare Mifsud Aluminium Ltd's offer with those submitted by the other bidders it would result that there were instances where the appellants' offers were excessively high and others where they were excessively low. Therefore, he maintained that, while his client was declared excessively low under this particular item, Mifsud Aluminium Ltd was excessively low in others without being declared.

Mr Pullicino testified that when the Adjudication Board received the tenders, the prices quoted by Mifsud Aluminium Ltd and Sun Aluminium Ltd (as published on the Department of Contracts' Notice Board) amounted to Lm78,169 and Lm78,268.32, respectively. He confirmed that the rates quoted for Item 1.14 by Sun Aluminium Ltd and Mifsud Aluminium Ltd were Lm2.95 and Lm2,800 respectively. The witness said that these tenderers quoted an amount of Lm200.60 and Lm2,800 respectively for the same item. Mr Pullicino explained that when the Adjudication Board worked out the computation of each item in the BoQ it transpired that there was an arithmetical mistake under Item 1.14 as submitted by Sun Aluminium Ltd and so they adjusted the quoted amount since the rate of Lm2.95 X quantity (1) was equal to Lm2.95 and not Lm200.60. The witness declared that they had complied with what was stipulated in the tender conditions and that the mistake was made by the tenderer.

At this stage Dr Mifsud Farrugia drew Mr Pullicino's attention to the fact that the quantity marked '1' as stated by the appellants referred to the 'master key system' in its entirety including all 68 doors and not one door! The appellants' legal advisor contended that, in actual fact, Sun Aluminium Ltd had quoted a rate of Lm2.95 for one door and then multiplied this rate by 68 doors. He argued that there would have been level playing field if the amount of Lm2,800 was compared with Lm200.60 since it was blatantly obvious that the amount of Lm2.95 simply referred to one door. The appellants' lawyer continued by stating that when Mifsud Aluminium Ltd quoted Lm2,800 they took a commercial risk in the same manner that all tenderers have taken when quoting for all the items included in this tender. This was one of the reasons why prices differ.

During his testimony, Mr Pullicino declared that both offers were basically up to specifications and that, as far as quality is concerned, there was no difference between the two offers. The Chairman of the Adjudication Board said that if

Mifsud Aluminium Ltd's offer were cheaper, the tender would have been awarded to them.

Architect Andrew Ellul, a member of the Adjudication Board, said that as a standard procedure a mathematical check of all BoQs is first carried out. If, upon carrying out this mathematical check it transpires that a tenderer would have made a mistake, the schedule of tenderers would be corrected in accordance with the provisions of the tender conditions. Arch Ellul explained that after this consideration the Adjudication Board usually evaluates the first three tenders to verify whether they are according to the Tender Document's specifications. As regards this particular case, the witness confirmed that the value of the offer submitted by Sun Aluminium Ltd was amended because there was a mistake in the multiplications of the rate by the quantity (Lm2.95 X 1) against Item 1.14. He confirmed that the recommended tender's offer was acceptable on the basis of prices and technical specifications.

In reply to specific questions by Dr Sciriha, Arch Ellul said that both tenderers had a good track record with the Foundation for Tomorrow's Schools and that the price of that particular item was relatively low when compared to the whole contract value. Here, the PCAB pointed out that, albeit minimal, it was crucial enough to change the order of the cheapest tenderer!

On cross examination by the PCAB, Arch Ellul said that in the price comparison of the *Technical Report* it was stated that the rates of Lm2.95 and Lm2,800 submitted by Sun Aluminium Ltd and Mifsud Aluminium Ltd respectively, the quotations were excessively low and excessively high. The PCAB intervened to remark that, considering the fact that the difference in the rates was significant and that it was not clear whether it was the rate of Lm2.95 or the amount of Lm200.60 that was correct, the Adjudication Board should have asked the General Contracts Committee to seek the necessary clarifications. However, Arch Ellul said that they had to abide by the requirements of the tender conditions.

On cross-examination by the PCAB, Arch Zammit, explained that all aluminium doors had anti panic locks and handles and that each door had three individual keys and another master key for all locks. He declared that the *Master Key System* did not comprise anti panic locks and handles as stated by the appellants' legal representative because these were included under other items in the BoQ. The witness said that the other tenderers quoted for such items separately. Here, it was stated that this could have been the reason why the appellants' quote under this item was excessively high. Mr Zammit concurred that this could have been a possibility.

In reply to another question by the PCAB, Mr Zammit stated that the correct method of making out the offer was intended to be that both the columns

relating to unit price and total price would show the same figure, not as quoted by Sun Aluminium Ltd.

Mr Zammit testified that he had analysed the technical specifications and that the samples that were not submitted by the appellants were considered as a minor item. He claimed that although some items were cheaper and others were more expensive, globally the offers were very close. However, Mr Zammit maintained that the recommendation was based on the rates of the whole tender and not on one item because the tender was adjudicated holistically.

In his concluding remarks, Dr Mifsud Farrugia asked the PCAB to deliberate on the issues of excessively low and excessively high. He contended that the latter was accepted but at the risk of the tenderer. However, as regards the other issue, it was indispensable for the PCAB to establish whether the excessively low was Lm2.95 or Lm200.60. This issue was crucial because the difference between these two amounts had changed the order of the cheapest tenderer. He insisted that the total sum worked out by Sun Aluminium Ltd was Lm2.95 X 68 which was equivalent to Lm200.60. He maintained that, as a consequence, the Adjudication Board made a mistake when it replaced Lm200.60 with Lm2.95 because this did not reflect the cost of a master key system for the entire 68 doors.

Dr Sciriha insisted that it was a general principle of law that it was his client who had a juridical interest to appeal from decisions that were to his disadvantage and not the other party. He contended that the appellants had no '*locus standi*' in the proceedings because their juridical interest was different. Dr Sciriha said that the appeal should have been based on different reasons, such as, that their offer was more credible or that it was more economically favourable. The lawyer claimed that the general principles of law were also binding on the PCAB, and therefore they should deliberate on whether the PCAB should give right to a third party to defend a mistake which affected his client's offer.

The recommended tenderer's legal representative said that both the Adjudication Board and the technical advisor did not have any concern on the quality of the product offered by Sun Aluminium Ltd. He pointed out that the PCAB could not assume the role of the technical advisor and alter such an opinion in view of the technical competence deemed necessary to do so!

Dr Sciriha explained that the law anticipated similar situations where discrepancies were found in the BoQs, so much so that the Adjudication Board had altered the amount in accordance with the applicable rate and quantity as well as correcting the total price in accordance with the provisions of Clauses 1.18.2 and 2.08.2 of the tender conditions.

Sun Aluminium Ltd's legal advisor emphasised that the Adjudication Board's decision was final unless the affected tenderer objected to such alterations because the last sentence of these clauses stipulate that *'The Tender price so corrected shall be considered as binding'*. Therefore, he claimed that the tender dossier was contractually binding on both the tenderer and the client.

Dr Sciriha said that Mifsud Aluminium Ltd's appeal was not based on the lowest price but on the economically advantageous offer since in their reasoned letter of objection the appellants stated that

'The role of the Committee is not only that of recommending the cheapest offer but also the most advantageous after considering the prices quoted for the items requested to ensure that the State is getting not only good value for money but also good quality products and service.'

He contended that this appeal should have been legally based in accordance with Regulation 27 (3) of LN 177/2005 wherein it was stipulated that:

'Contracting authorities shall determine the award of public contracts on the following criteria:
(a) the most economically advantageous offer; or
(b) the lowest price offered compliant with the tender specifications.'

He explained that the law stipulated 'the most economically advantageous' or the 'lowest price' because there could be instances where one criteria could be more favourable than the other.

The recommended tenderer's legal representative said that, in their reasoned letter of objection, the appellants asked the *'the General Contracts Committee to reconsider the recommendations made.'* He maintained that in the prevailing circumstances the appeal should not have been referred to the PCAB because it was not the General Contracts Committee. As a consequence, in its deliberations, the PCAB should first stipulate whether the appeal was filed before the appropriate tribunal and since its functions were governed by the provisions of Regulation 33(2) of LN 177/2005 which stipulated that:

'It shall be the function of the Board to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement by those authorities listed in Schedule 1 and whose value exceeds Lm20,000, in accordance with the procedures laid down in Parts XII and XIII.'

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 2 having noted that the appellants, first through their formal letter of objection and later in terms of their 'reasoned letter of objection' dated 26 March 2007, and also through their verbal submissions presented during the public hearing held on 25 April 2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Sun Aluminium Ltd.;
- 3 having noted the appellants' claim regarding the fact that despite quoting the lowest price, their offer was not accepted and that an offer submitted by another tenderer which was dearer was awarded the tender;
- 4 having considered that during the public hearing all witnesses, including the Chairman of the Adjudication Board, testified that both offers were basically up to specifications and that, as far as quality is concerned, there was no difference between the two offers and that had Messrs Mifsud Aluminium Ltd's offer been cheaper, the tender would have been awarded to them;
- 5 having also noted the point raised by Dr Sciriha relating to the contents of Clause 1.18.2 of the tender dossier which, *inter alia*, stipulated that "if an error should be found in the summation of the various total amounts entered, the total price inserted in the Tender will be corrected by the Director General (Contracts). The Tender Price so corrected shall be considered as binding."
- 6 having taken full cognizance of Dr Sciriha's statement wherein he stated that even if it was determined that there was a mistake, the decision was legally 'binding';
- 7 having reflected on Dr Sciriha's argument which considered the fact that in their reasoned letter of objection, the appellants asked the '*the General Contracts Committee to reconsider the recommendations made.*', maintaining that, in the prevailing circumstances, the appeal should not have been referred to the PCAB once the General Contracts Committee were erroneously referred to in the said letter;
- 8 having also reflected on all the legal provisions and the potential repercussions referred to by Dr Sciriha;
- 9 having also considered the fact that there were instances where the appellants' offers were excessively high and others where they were excessively low;

10 having heard Mr Pullicino declaring during the hearing, (a) that the Adjudication Board made an adjustment to the computation as originally submitted by the awarded tenderer, which, ultimately, resulted in the latter's offer being cheaper and (b) this was solely due to compliance requirements with what was stipulated in the tender conditions;

11 having acknowledged that the appellants' lawyer remarked that the quantity marked '1' as stated by the appellants referred to the 'master key system' in its entirety including all 68 doors and not one door and, as a consequence, prior to amending the computation methodology, the Adjudication Board was morally bound to clarify via the Contracts Department whether their computation was reflecting what was the precise intention of the tenderer when the latter submitted a price of Lm200.60 as opposed to Lm2.95 as subsequently modified by the Adjudication Board;

12 having also taken into consideration the fact that, albeit the appellants had refrained from submitting some samples as required by the Tender Document, yet the samples that were not submitted by the appellants were considered as a minor item and that these could have easily been forwarded after the submission of tender;

concludes, that:

- b. it is true that it seems justified to state that the Adjudication Board may have had all the legal prerogative to deliberate as it did, yet considering the fact that
 - (1) the awarded tenderer had originally submitted a figure (Lm200.60) which, mathematically, worked out to be precisely what it was intended to be in the first place;
 - (2) all witnesses reiterated the fact that there was no difference between the two offers and that had Messrs Mifsud Aluminium Ltd's offer been cheaper, the tender would have been awarded to them, thus indirectly, placing major emphasis on the pivotal role that price had in the adjudication process; and that
 - (3) in lacking common sense to the extent that, faced with such a situation, the said Adjudication Board did not avail of another legal prerogative that any Board acting in the same scenario would normally resort to, namely that of clarifying any anomalous points via the Contracts Department, in

order to elucidate themselves more prior to adjudicating tenders,

the Adjudication Board has given rise to a miscarriage of a transparent, equitable and fair adjudication process;

- c. whilst there is no doubt as to the explicit manner in which Clause 1.18.2 states that the '*Tender Price so corrected shall be considered as binding*', yet one had to consider this statement within the context of procedure being followed in a way that it ensures a transparent and equitable manner and, in the absence of pertinent clarifications, this Board does not feel that the adjudication process as followed in this particular tender ensured absolute presence of transparency and equity; the PCAB also feels that the mistake was not merely one of the summation of the various amounts, as referred to in the regulation but a more radical one where the two columns, which should have carried a unique price showed different amounts, this could, and in the Board's view should, have alerted the Adjudication Board to seek further clarification.
- d. although the appellants, in their reasoned letter of objection, had erroneously requested '*the General Contracts Committee to reconsider the recommendations made*' yet, the PCAB's function and parameters in which it has to operate are governed by legislation and not by what is textually stated elsewhere, irrespective of whether these are right or wrong in their interpretation of the same legal provisions and, as a consequence, the PCAB does not concur with Dr Sciriha's argument;
- e. Dr Sciriha's claim regarding the validity of the appellants' objection, considering that the issue referred to changes to his clients' computation method rather than anything which emanated from issues concerning the same appellants, would have, all things being equal, been a valid argument to follow. However, in this particular instance, this Board finds that the appellants were, as a matter of fact, directly and negatively effected by the methodology adopted by the Adjudication Board and it seems only obvious that they became a very much interested party indeed.

As a result of the above-mentioned points, this Board upholds the appeal lodged by the appellants and that as a result, apart from nullifying the award previously given, recommends that the award be given to Messrs Mifsud Aluminium Ltd.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of Regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

09 May 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 105

**Re: CT 2115/2007 – Advert No CT 114/2007 – GPS76.003.T05PR:
Supply of Orthotics**

This call for tenders was published in the Maltese Government Gazette and the European Journal on 09 March 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Government Pharmaceutical Services (GPS).

Only one (1) tenderer submitted an offer.

The closing date for this call for offers was 03 May 2007 and the original global estimated value of the total contract covering a period of three consecutive years was Lm300,000.

Messrs Orthotic Services Ltd filed an objection on 08 May 2007 after being informed that their offer had been disqualified because their Bankers submitted a 'Bid Bond' containing restrictions that were not acceptable and not in conformity to Clause 3 and to the specimen shown in the tender document.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 06 June 2007 to discuss this objection.

Also present for the hearing were:

Orthotic Services Ltd

Mr John Young – Managing Director
Mr Victor Froggatt – Works Manager / Clinical Technician

Government Pharmaceutical Services

Ms Isabelle Grima – Assistant Director
Ms Miriam Dowling

Contracts Department

Mr Anthony Cachia – Director (Operations)

Following the Chairman's brief introduction regarding this particular objection, the appellants' representatives, *Orthotic Services Ltd*, were invited to explain the motive leading to their objection.

Mr John Young, Managing Director – Orthotic Services Ltd, started by stating that their Company had been successfully supplying this product to Malta for the last seven years.

Mr Young went on to explain that they had a *bid bond* currently in place of about Lm17,000 but this was in connection with this particular tender. He claimed that, as far as this tender was concerned, everything was filled in correctly, except for the wording of the *bid bond*. However, he maintained that they had subsequent meetings with their Bankers in the UK who agreed to issue a new guarantee through Bank of Valletta according to the required wording.

Mr Anthony Cachia, representing the Department of Contracts, declared that this tender was published under the *Three Package Procedure*, wherein package ‘1’ included the *Bid Bond*, package ‘2’ incorporated all *technical details* relevant to their offer and package ‘3’ contained the *price* of the tender. He said that the said packages were opened in the same numeric sequence and, as a consequence, once the appellants’ bid was disqualified after the opening of the first package, it could not be confirmed whether the others were filled in according to the requirements of the tender because these were still sealed.

Mr Cachia explained that the appellants’ offer was disqualified because the *Bid Bond* contained restrictions that were not acceptable and in conformity with (a) ‘Clause 3’ and (b) to the specimen of the *Bid Bond* shown in the tender document. He claimed that the appellants’ Bank in the UK had placed a condition whereby it was stated that

‘.. on receipt of your first demand in writing over original handwritten signature(s), accompanied by your signed statement certifying that the Seller is in breach of his/ her obligations under the tender conditions ...’

and that

‘this guarantee shall be governed by English Law.’

The Department of Contracts’ representative maintained that the specimen of the *Bid Bond* attached to the tender document was very clear and bidders could have just copied it and signed it. He said that the most crucial quote in this document was that the *‘guarantee becomes payable on your first demand and it shall not be incumbent upon us to verify whether such demand is justified.’*

Also, in his intervention, Mr Cachia pointed out that no changes could be permitted after the opening of the tenders’ packages.

In reply to a specific question by Mr Young, Mr Cachia said that the most important thing for the EU was that the tendering procedures were carried out

in a fair and transparent manner and that the tender conditions were set by the Contracting Authority concerned and not the EU.

Finally, when Mr Victor Froggatt, another representative appearing on behalf of the appellant Company, asked the PCAB as to whether the samples that were submitted with their offer, considered to be rather expensive as some of them were specifically designed and manufactured for this particular tender, could be returned, his attention was drawn to the fact that it was beyond the PCAB's responsibility to decide on the issue and that he may refer the matter to the pertinent Contracting Authority.

During the proceedings, the PCAB pointed out that it was the duty of the tendering company to check that all pertinent documents submitted with offers were according to the requirement of the tender conditions.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, first through their formal letter of objection and dated 08 May 2007, and also through their verbal submissions presented during the public hearing held on 06 June 2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the wording of all documentation submitted, particularly the *Tender Document*;
- 3 having considered the points raised by the Contracts Department's representative;

concludes, that it is:

- a. not permissible for any entity to alter terms and conditions stipulated in a local tender document compiled by a local entity;
- b. not permissible for terms and conditions in any document to be negotiated after the submission of an offer and this in order to align with terms and conditions which were amply clear at tendering stage;
- c. normal praxis for a bidder to seek clarifications prior to submitting an offer rather than first altering parameters and then seeking redress after matters are not to one's liking;
- d. not permissible for any appellant to argue that since their bid was the only one submitted then the Contracting Authority,

the Contracts Committee as well as the PCAB should be more lenient and pragmatic in their approach as formalities remain as such under all circumstances despite the number of participants. As a matter of fact, if any pertinent authority should ever contemplate to change the goal posts dependent on the number of participants it would be setting an undesirable precedent and thereby causing a huge public disservice.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 June 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 106

**Re: CT 2194/2007 – Advert No CT 163/2007 – DH 1649/2006:
Provision of Cleaning Services, including labour, training, equipment and
materials at Mater Dei Hospital**

This call for tenders was published in the Maltese Government Gazette on 13 April 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry of Health, the Elderly and Community Care on 28 February 2007.

Three (3) tenderers submitted their offers.

The closing date for this call for offers was 05 June 2007 and the original global estimated value of the total contract, covering a period of 5 years, was Lm6,000,000.

An objection was filed on 12 June 2007 by *BCGL Advocates* on behalf of *Servizi Malta Consortium* after the latter were informed that their tender had been disqualified because they had failed to submit a bid-bond which remained valid for a period of twelve months from the closing date of tenders.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 27 June 2007 to discuss this objection.

Also present for the hearing were:

Servizi Malta Consortium

Dr Andrew Borg Cardona – Legal Representative
Mr John Zarb
Ms Claudine Sullivan
Mr Manwel Degiorgio
Mr Joe Degiorgio
Mr Jason Degiorgio

Hospital Cleaning Consortium

Dr Albert Grech – Legal Representative
Dr Stephania Grech – Legal Representative
Mr Yves Debarro
Mr Morgan Azzopardi
Mr Simon Turner

Ministry of Health, the Elderly and Community Care

Mr Joe Degiorgio

Contracts Department

Mr Francis Attard – Director General (Contracts)

Mr Anthony Cachia – Director (Operations)

Mr Mario Borg

The Chairman commenced proceedings by introducing the case to those present which was followed by an invitation to the appealing party's legal representative, Dr Andrew Borg Cardona, to present his case in front of the Public Contracts Appeals Board.

Dr Borg Cardona, started by stating that there were various strands which demonstrate that the public interest would be more safeguarded and the EU Competition Policy would be more respected if his clients, Servizzi Malta Consortium, were allowed to compete on the merit of the tender. He made reference to various European sentences wherein it was decided that the basic principle in each tender procedure was that during the adjudication process the Authority concerned should identify the most economic advantageous tender.

The appellants' legal representative maintained that, taking into consideration the opening and operational dates of the new hospital, the requirement to submit a Bid Bond that was valid for 12 months from closing date of tender was neither reasonable nor realistic. He claimed that when the tender would be awarded, the date of validity would be immaterial and the Bid Bond would become irrelevant because the Bid Bond was there to guarantee the price up to award of tender, which in this case would surely not take 12 months to decide.

Dr Borg Cardona pointed out that this was not a case where the four Bid Bonds submitted by his clients, forming a consortium, were invalid or not signed by the Banks. He claimed that the only difference was in the date of a particular Bid Bond as compared to the time frame requested in the Tender Document. Dr Borg Cardona stated that if one were to agree on the time frame envisaged in the Tender Document, then this would be tantamount to a deviation of less than 0.5% error factor. The appellants' reiterated that once the bid bond, as submitted, covered more than 99.5% of the stipulated period and, considering the fact that the tender would be awarded months before expiry date, then the five days would be irrelevant. As a consequence, Dr Borg Cardona claimed that the Bid Bonds, as submitted, did materially satisfy the requirements of the Tender Document.

Furthermore the appellants' legal representative claimed that the Tender Document itself was not 100% accurate because he found 12 points of

inconsistencies. He insisted that their bid bond should be evaluated with the same level of accuracy.

At this point Dr Borg Cardona made reference to the case of Messrs Ritemix (Gatt Bros Ltd) relating to tender CT 377/2006. The lawyer claimed that the Appeals Board had given the benefit of doubt to the appellants because there was an element of inconsistency in the Tender Document. Dr Borg Cardona said that the disqualification of their tender should be reversed because there was an element of inconsistency and inaccuracy in the specimen of the Bid Bond whereby it stipulated that:

‘This guarantee expires within twelve (12) calendar months starting on the closing date of the Tender, that is, it is valid for twelve (12) months from the closing date of this Tender at the close of business..’

He explained that this was inconsistent in the sense that the guarantee had to expire either ‘within twelve months’ or ‘valid for twelve months’. Dr Borg Cardona claimed that it is amply clear that the fact that his clients submitted the four bid bonds is proof enough that they had every intention to respect the tender. However, he argued that in spite of the fact that the Tender Document ‘per se’ was not accurate, tenderers were expected to be accurate.

Mr Anthony Cachia, Director (Operations) at the Department of Contracts, responded by stating that this was a very clear case because the Tender Document specified that *‘These Bid Bonds must be valid for a period of twelve calendar months from the date set for the closing dated of tenders’*. He claimed that one of the appellants’ Bid Bonds did not meet this requirement because the closing date of the call for offers was 05 June 2007 and the date of the Bid Bond in question expired on 24 May 2008.

The Contracts Department’s representative pointed out that the appellants’ lawyer had admitted the mistake in one of the Bid Bond and it was this mistake that disqualified them from participating further in the adjudication process. Mr Cachia emphasised that they had legal advice which is more than emphatic with regards to the fact that, as representatives of a Government Department, they were not allowed to interpret what was written in the Tender Document.

When the Chairman of the PCAB made reference to Clause 4.1 of the *General Instruction* in the Tender Document which specified that *‘In the case of companies applying as a consortium, each company must supply the requested details individually’*, Mr Cachia said that, in the case of a consortium, they usually accepted one Bid Bond and usually tenderers submitted a declaration that all partners were ‘jointly and severally responsible’. Although Mr Cachia could not confirm whether the appellants had submitted such declaration, he claimed that their contention was not about the partners but on the validity date of one of the Bid Bonds. Mr Cachia added that, if the need arose, the

Department of Contracts would call upon all four Bank Guarantees. Dr Borg Cardona clarified that, according to the Commercial Law, in the absence of such declaration it was automatically assumed that each partner was 'jointly and severally liable'. At this stage, it was established that *Hospital Cleaning Consortium*, another participant, had submitted their Bid Bond as a consortium.

In reply to a specific question by the PCAB regarding the alleged inconsistency in the Bid Bond, Mr Cachia said that the particular sentence should be read in its totality whereby it was clearly specified that the Bid Bond had to be valid for 12 months from the closing date of tender. At this point Mr John Zarb, another representative acting on behalf of the appellants, intervened and stated that they had interpreted the wording of the Bid Bond in good faith.

During their intervention, Messrs Joseph Degiorgio and Mario Borg, representatives of the Ministry for Health, the Elderly and Community Care and the Contracts Department respectively, explained that tenderers were requested to submit two Bid Bonds of Lm80,000 and Lm10,000 because the tender consisted of two offers: Offer 'A' for the Provision of Cleaning Services and Offer 'B' for the Supply of Cleaning Materials, Equipment and Training for use by the clients' own cleaners.

Dr Albert Grech, acting as legal representative of Hospital Cleaning Consortium, said that the contract requested certain formalities and these had to be respected. He maintained that the Contracts Department had a valid reason for disqualifying the appellants' offer because, if the need arose, the bank guarantee could not be claimed during the 12 day period, that is, between 24 May 2008 and 06 June 2008. He claimed that, if there was an element of doubt in the first part this was further clarified by the words '*that is, it is valid for twelve (12) months from the closing date of this tender at the close of business.*' He maintained that, in this particular tender, the relative Clause was clear and did not give rise to misinterpretation.

Dr Grech argued that once it had been acknowledged that there was a mistake in the Bid Bond, the appellants should not be allowed to continue in the adjudication process since otherwise they would discriminate against those who had complied with the requirements of the tender. He claimed that the appellants should have examined the documents before presenting them.

In his concluding remarks Dr Borg Cardona asked the Appeals Board to take into consideration (i) the reality of the situation since the 12 months requested were excessive, (ii) the inconsistency in the wording of the specimen of the Bid Bonds, (iii) the fact that the mistake in the date was a minor one and highly irrelevant and (iv) the requirements of competitiveness and transparency in the award of contracts.

On his part, Mr Zarb said that the issue of tenders was intended to safeguard Government's commercial interests and also to procure in a transparent manner and to get the most advantageous and best offers. He concluded by stating that they had been excluded on a small technical error.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants through their 'reasoned letter of objection' dated 12 June 2007, and also through their verbal submissions presented during the public hearing held on 27 June 2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the points raised by appellants regarding EU policy and the most economic advantageous tender (MEAT) principle;
- 3 having reflected on the appellants' claim regarding the fact that the 12 month validity period was considered excessive and irrelevant considering the fact that the opening of the new hospital was scheduled for a much earlier date;
- 4 having also noted the fact that the appellants admitted that the Tender Document was not fully complied with even though they claimed that the mistake committed was very negligible when considered within a wider context;
- 5 having taken full cognizance of the fact that the appellants referred to inconsistencies which rendered the Tender Document not 100% correct either;
- 6 having noted the appellants' reference to a previous appeal heard by the PCAB;
- 7 having also reflected on the point mentioned by representatives of the Contracts Department who stated that they had legal advice whereby they were told that they were not allowed to interpret what is written in a Tender Document but to take facts for what they are;
- 8 having acknowledged the points raised by Dr Grech, especially the issue raised with regards to the phrase 'that is

- 9 having also taken into consideration Mr Zarb's reference to the need to safeguard the Government's commercial interests in procurement procedures,

concludes, that:

- a. the appellants' reference to (i) the excessive nature of the time frame / validity envisaged and (ii) the point raised in connection with inconsistencies found by appellants in the Tender Document, should have been addressed prior to submission of tender and addressed to the pertinent forum and not at this stage;
- b. the reference made to a previous ruling given by the same Appeals Board is not valid as the issues discussed then were not within the same context as those discussed in this appeal;
- c. the point raised by Mr Zarb would, under normal circumstances, be one of the most crucial aspects of the whole deliberation process. However, in this particular instance, one should not extend the MEAT and transparency principles beyond the limits within which they are meant to be operative. In the PCAB's opinion, it would be unwise for it to change parameters on the pretext of ensuring principles as, within the same context, this Board holds 'consistency' as highly crucial to ensure an ongoing guarantee of level playing offered to all participants in any tender they participate in. Thus, inconsistent judgements which are meant solely at being more expedient are not permissible in view of future repercussions which, in the long term, could become hyperbolically uncontrollable and unsustainable;
- d. further to (c) above, as well as in line with Dr Grech's concluding remarks, this Board notes that any doubts which the appellants may have had regarding the time frame involved, these could have been clarified with the Contracts Department prior to submission of tender, albeit, in this particular instance, the PCAB concludes that the terms and conditions as specified in the attachments entitled 'Bid Bond Offer 'A'' and 'Bid Bond Offer 'B'' respectively, as well as in the tender document itself under Item 4 – INSTRUCTIONS TO TENDERERS, heading Envelope No. 1, line 7, are emphatic and clear, leaving no space for misinterpretation or misunderstanding of Tender Document requirements;
- e. despite all the good faith demonstrated by the appellants and the bankers of one of four bidders forming part of the consortium, the *onus* of proper submission of documentation to pertinent authorities

remains on the tenderer and in this particular instance it is evident that a lapse committed by the Bank was not noticed in time;

- f. there is no reason for this Board to think that the General Contracts Committee did not only carry out the job entrusted to them in an efficient and effective manner, strictly adhering to formal procedures, but also acted in a highly transparent and fair method.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

09 July 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 107

**Re: CT 2747/2006 – Advert No CT/WSC/T/95/2006 – WSC 881/06:
Quality Assurance Services for Pipe Networks Infrastructure Extension and
Renewal Project and other Construction Project by Water Services
Corporation**

This call for tenders was published in the Maltese Government Gazette and the Official Journal of the European Union on 26 December 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation on 30 November 2006.

Five (5) tenderers submitted their offers.

The closing date for this call for offers was 15 February 2007 and the original global estimated value of the total contract was Lm178,000.

An objection was filed on 26 April 2007 by Cordina Zammit & Associates Ltd after the latter were informed that their 'tender was not among the selected ones since it has been adjudicated as not complying with the tender specifications because "three of the periti listed as key experts are presently employed at the Malta Transport Authority, with the responsibilities of management and implementation of road projects, on behalf of this public agency". Therefore, their function within the regulator's managerial staff is in breach of the Articles and Clauses on independence, ethics and conflict of interest. Their employment within a public agency is in breach of Clause 9.5 which precludes such engagements'.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 11 July 2007 to discuss this objection.

Also present for the hearing were:

Cordina Zammit & Associates Ltd

Dr Patrick J Galea.	–	Legal Representative
Dr Lycia Cordina	–	Legal Representative
Arch Daniel Cordina		
Arch Gordon Zammit		

Solid Base Laboratory Ltd

Dr James Muscat Azzopardi	–	Legal Representative
Arch Joe Bugeja		

Mr Gordon Baldacchino
Mr Paul Bugeja

S & A Quality Assurance Surveyors Ltd

Ing Emanuel Scerri
Mr Sebastian Brincat

Water Services Corporation

Ing Mark Perez

Adjudication Board

Arch Carmel Ellul	–	Chairman
Ms Natasha Mallia	–	Member
Mr Anthony Camilleri	–	Member

After the Chairman's brief introduction about this case, the legal representatives of *Cordina Zammit & Associates Ltd* were invited to explain the motive leading to their objection.

At the beginning of the hearing, Dr Patrick Galea, legal representative of *Cordina Zammit & Associates Ltd*, requested a clarification because the appellants were not notified about the presence of other interested parties (except for WSC's representatives).

Following these interventions, the PCAB ruled that in view of the fact that this was a public hearing no one was precluded from attending and although the Chairman PCAB asked those present to identify themselves, yet, he sustained that it remains the Appeals Board's prerogative whether one is given a chance to intervene or not. Dr Muscat Azzopardi and Ing Emanuel Scerri, acting as representatives of Solid Base Laboratory Ltd and S & A Quality Assurance Surveyors Ltd respectively, declared their presence and direct interest in these proceedings, stating that the main reason was that both parties were specifically mentioned in the appellants' motivated letter of objection.

Dr Patrick Galea commenced his submission by stating that the tender submitted by *Cordina, Zammit & Associates Ltd (CZA)* was fully compliant with the tender. He claimed that his clients had been excluded because of alleged 'Conflict of Interest' since the three architects listed as Key Experts were employed with the Malta Transport Authority (ADT). He explained that they were contesting the decision because the Adjudication Board had confused the 'tenderers' with the 'key experts'. The appellants' legal representative said that, if after the award of the contract the need arose, the key experts could be replaced. Furthermore, Dr Galea emphasised that the issue of 'conflict of interest' should arise at a later stage since only *Section A – Instructions to Tenderers* was relevant and applicable at tender evaluation stage.

Dr Galea said that the ADT could have availed itself of other remedies since Article 9.2 under the heading *9 Conflict of Interest* stipulated that *'The Contracting Authority reserves the right to verify that such measures are adequate and may require additional measures to be taken if necessary. The Consultant shall ensure that its staff including its management, are not placed in a situation which could give rise to conflict of interest.'* He maintained that the Key Experts indicated by his clients were experienced in this specific field and that the potential conflict of interest could only arise on the part of Key Experts and not the tenderers. Thus, they believed that the measure of disqualification was unnecessary, extreme and not applicable.

When a member of the PCAB asked about the relevance of Clause 14 (b) to this case, wherein it was specified that *'The tenderer must not be affected by any potential conflict of interest and shall have no particular link with other tenderers or parties involved in the project'*, Dr Lycia Cordina, the other appellants' legal representative, replied that there was no potential conflict of interest because her clients did not have any connections with the contractor carrying out the roadworks, and their role as contractors for WSC would be in the same direction as that of ADT because their function consisted of certifying the quality of works. Also, she presented an extract of the collective agreement (Article 4.5 Extra Work) which demonstrated that government 'architects' were allowed to undertake private work.

When asked to comment on the remarks made in their motivated letter of objection regarding the other interested parties, Dr Cordina remarked that:

- (a) Solidbase Laboratory Ltd is itself also a contractor and therefore this may give rise to a conflict of interest. She argued that the tenderer cannot be the testing and inspectorate agency at the same time. The terms of reference of the tender call for transparency and accountability. Therefore, the testing and inspection have to be separate from each other and not executed by the same company, that is, Solidbase Laboratory Limited;
- (b) S & A Quality Assurance Surveyors Limited failed to submit the requested signed declaration as indicated in paragraph 4.2 of the tender document. This is evident in the schedule of tenderers where, it is indicated that S & A Quality Assurance Surveyors Limited did not present a signed declaration.

Dr Galea added that there was a potential conflict of interest because Solid Base Laboratory Ltd could not act as an inspection body and at the same time as a certifying body.

Dr Muscat Azzopardi, legal representative of Solid Base Laboratory Ltd, denied such allegations. He explained that if Solid Base Laboratory Ltd were

to be awarded the contract it would be the authority concerned that would ask them to test the works carried out by contractors and not the contractors themselves. This was corroborated by Mr Paul Bugeja, also acting on behalf of Solid Base Laboratory Ltd. On the other hand, Architect Carmel Ellul, Chairman of the Adjudication Board, explained that any sampling testing would be carried out according to the Quality Assurance Programme that would be formulated between the WSC and the company concerned before the commencement of works.

With regards to the appellants' comment that Solid Base Laboratory Ltd was 'a profit making entity', Dr Muscat Azzopardi said that they were not a charitable institution and that every tenderer submitted the offer with the intention of making a profit.

Mr Sebastian Balzan, representing S & A Quality Assurance Surveyors Ltd, intervened by stating that they did not submit the signed declaration because they were not a joint venture and that the laboratory was a sub-contractor. Also, he said that the Service Tender Document was required at a later stage.

Architect Ellul, responded to Dr Galea's comments regarding the possibility of replacing the Key Experts after the award of contract by stating that such declaration should have been submitted in writing with the tender and should have also indicated alternative arrangements. Furthermore, the Chairman of the Adjudication Board emphasised that the Key Experts were subject to evaluation according to the *Evaluation Grid* wherein it was indicated that the overall total score for the four (4) Key Experts amounted to 50 out of 100 points. Architect Ellul explained that they were not in a position to grant points to unknown experts and therefore, considering the fact that every tenderer had to obtain at least 80 out of 100 points to qualify for the next stage of adjudication, the appellants' tender still would have been automatically disqualified at a later stage.

Architect Ellul contended that they were of the opinion that there could be a conflict of interest as far as testing and inspections were concerned. Architect Ellul explained that material testing and process' inspection are two distinct areas. This tender involves road trenching and once the works are carried out, the roads have to be restored as before. The three architects are employed with Malta Transport Authority - they cannot be judge and jury at the same time, he claimed.

The PCAB asked Mr Ellul whether there can be a conflict between the contractors and the quality assurance laboratories. The Chairman of the Adjudication Board said that, as far as they were aware, when they analysed the laboratories indicated by the five bidders, it did not result that the one mentioned by Solid Base Laboratory Ltd formed part of a company which supplied material. Dr Cordina intervened to state that they never said that Solid

Base Laboratory Ltd was linked in any way with suppliers of materials because its competence as a laboratory was to test and to certify. However, they were stating that its independence could not be guaranteed because of testing and certifying the same material on behalf of the contractors and the authority concerned.

At this point the PCAB (Mr Muscat) remarked that there would be a conflict of interest if the material was certified by the same laboratory, however, this would not be the case if this was certified by another laboratory.

The Chairman of the Adjudication Board proceeded by explaining that the appellants' tender was not considered eligible for award because three of the *architects* listed as 'key experts' were employed with the ADT which is the regulator and, as a consequence, this meant that their function was in breach of tender clauses dealing with independence, impartiality, conflict of interest and their employment within a public agency. In order to corroborate his argument, Architect Ellul made reference to Clause 9.1 which specified that '*The Consultant shall take all necessary measures to prevent or end any situation that could compromise the impartial and objective performance of the contract*' and to Clause 9.5 where it was stipulated that '*Civil servants and other agents of the public administration of the beneficiary country, regardless of their administrative situation, shall not be recruited as experts in contracts in the beneficiary country*'.

Arch Ellul said that, according to the organisational structure featuring on ADT website, Arch David Vassallo (Key Expert 2) was indicated as the Project Manager (Domestic Projects) who inspected works carried out by contractors on behalf of the Authority. He also questioned whether Architects Daniel Cordina and Gordon Zammit (Key Experts 3 and 4 respectively), as Directors of Cordina Zammit and Associates would be safeguarding the interests of their fulltime employers, namely the Water Services Corporation and ADT respectively.

The Chairman of the Adjudication Board said that two other tenderers were disqualified for breaching Articles and Clauses on independence, ethics and conflict of interest.

At this stage the PCAB Chairman questioned whether it is professionally ethical to have the same person performing a role with the latter judging the same work carried out by no other than oneself. To this effect the PCAB Chairman asked whether the tenderers can judge their own work. Dr Galea intervened to state that tenderers cannot judge their own works.

The PCAB Chairman reminded those present that the crux of the appeal is that three of the architectural experts are employed with a public entity, in this case,

the Malta Transport Authority (ADT). This seemed to be in breach of Article 9.5 namely that:

“Civil servants and other agents of the public administration of the beneficiary country, regardless of their administrative situation, shall not be recruited as experts in contracts in the beneficiary country.”

As a consequence, the PCAB, commented the Board’s Chairman, should concentrate on that aspect.

The PCAB also referred to Article 14b of the tender wherein it is stated that

“The tenderer must not be affected by any potential conflict of interest and shall have no particular link with other tenderers or parties involved in the project.”

Referring to this particular article, Dr Cordina sustained that the three experts do not have any links with contractors - their role at the ADT is to certify works. She proceeded by stating that had they been chosen by the WSC, they would have the same role to certify the works. Such scenario would not create any conflict of interest. Dr Cordina commented that the three experts are full time employees with the ADT but they can work privately, quoting Article 6 of their contract of service with the Malta Transport Authority which allows them to execute private work. Furthermore, Article 4.5.1 of the Authority’s *Collective Agreement* signed by the Government and the Parastatal Architects Union confirms this.

Architect Daniel Cordina (Key Expert 2), who was the only witness in this hearing, testified under cross examination by Drs Galea and Cordina respectively, that there was no conflict of interest between the different roles as Key Experts, as ADT employees and as tenderers. He said that they submitted the tender to act as consultants to provide quality assurance services in respect of trenching works carried out by contractors for the WSC. With regard the to difference between (a) ‘quality assurance’ and (b) ‘quality control’, the witness explained that,

- a. ‘quality assurance’ was carried out during the course of works to ensure that it was up to the required standard, whilst
- b. ‘quality control’ was done in a laboratory to test the quality of material.

Architect Cordina claimed that, as far as their tender was concerned, the quality assurance and quality control would be carried out by CSA (Inspection Body) and Carmel Vella Ltd Laboratory (Testing Body), respectively, in order to adhere to the terms of reference dealing with impartiality and independence.

Following this, Architect Cordina outlined the procedure that would be followed during the implementation of the contract which consisted of

- 1 regular site inspections during the course of works,
- 2 collecting material sampling and
- 3 enumerating sampled material to ensure anonymity before sending it for laboratory investigation.

The witnesses proceeded by claiming that the relevant test results would be issued by the above-mentioned laboratory which would then be evaluated and analysed by the key experts who subsequently issue the certificates. Also, all evaluations from field inspections and testing results would be referred to Dr Rueben Borg, Project Manager (Key Expert 1), who would then draw a report. According to Architect Cordina, following this procedure, were the WSC to remain unsatisfied with the findings of the report, they would refer the matter to the ADT for verification purposes. It was also pointed out that ADT would also be sending Field Officers to ensure that works were being carried out according to specifications and, in case that there would still be doubts cast on the relevance and validity of the procedure followed, observations made and conclusions reached to that stage, samples would then be taken for evaluation purposes at the ADT Testing Unit which was under the responsibility of Professor Müller. The witness argued by claiming that this showed that there could be no conflict of interest because the aims of the ADT and the WSC were the same.

With regard to ADT's structure, Architect Cordina remarked that it was a big organisation with different divisions/ units, such as, licensing, buses, roads, major projects, domestic projects, testing, trenching and maintenance. He pointed out that, in spite of the fact that three out of four Key Experts (Architects David Vassallo and Daniel Cordina – Assistant Managers Projects and Architect Gordon Zammit – Manager Projects) were employed with ADT, no conflict of interest should arise because they worked at the Domestic Projects Unit and the tender under reference fell under the responsibility of the Trenching Unit.

At this stage the PCAB questioned this reasoning claiming that an employee was part of the entire organisation and not part of a Division within the Organisation, in this case the ADT. Furthermore, the PCAB argued that an employee is paid by the Organisation and not the Division. Reacting to this claim, the same witness stated that they could not be assigned to carry out work in another unit unless they submitted a specific application for the post. As a matter of fact, he said that both Architect Vassallo and himself, did not apply for a managerial post in another unit being fully aware that this post would have given rise to a conflict of interest.

Answering a specific question by Architect Ellul, the witness said that C Vella Ltd was not a supplier of material. However, when asked by Dr Muscat Azzopardi to state whether they had any connection with one of the most influential suppliers on the island, the reply given was in the affirmative.

Then, the Chairman of the Adjudication Board presented two documents regarding permit numbers 1687/2005 and 0148/2007 respectively which showed that Architect Daniel Cordina was involved in the vetting of applications for permits submitted by contractors for reinstatement of roads after trenching works. The witness intervened quickly by stating that he was no longer responsible for such work and this was presently being carried out by Architect Edwin Micallef.

When asked by a member of the PCAB about the method of communication between the various Directorates such as management meetings, Architect Cordina said that only coordination meetings were held within the Roads Directorate.

Another member of the PCAB referred Architect Cordina to Clause 9.5. The witness confirmed that albeit he was an employee within a public agency, yet he maintained that according to Clause 9.2, if the Contracting Authority had any doubt, the Consultant could nominate other experts. Here, the PCAB drew his attention to the fact that that Clause 9.5 precluded the engagement of experts who were employed within a public agency. However, Dr Galea insisted that there would be no conflict of interest because their roles within the ADT and as tenderers would be in a different capacity.

The Chairman PCAB asked Architect Ellul whether there were other tenderers who have been disqualified and, if so, for what reasons. Mr Ellul reported that there were other tenderers who were also disqualified as they were also found in breach of Article 9.5. Mr Ellul commented that there were incidents where the WSC disagreed with the ADT. Mr Ellul claimed that whoever is being employed and paid by WSC has to be loyal to the Organisation.

Replying to another question by the PCAB's Chairman wherein he asked Architect Cordina whether he considers himself as a public servant, Mr Cordina quoted Article 9.2, namely

“... .. the Consultant shall replace, immediately and without compensation from the Contracting Authority, any member of its staff exposed to such a situation.”

A member of the PCAB remarked that it seems that albeit Mr Cordina was aware of Article 9.5, yet he ignored it. On the same subject the PCAB Chairman commented that the PCAB feels that Article 9.5 is very clear, i.e. irrespective from the fact that the Malta Transport Authority does not hinder its

officials from executing private work, yet Clause 9.5 clearly states that public servants shall not be recruited as experts.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

1. having noted that the appellants through their 'reasoned letter of objection' dated 26 April 2007, and also through their verbal submissions presented during the public hearing held on 11 July 2007, had objected to the decision taken by the General Contracts Committee;
2. having noted the fact that the appellants were *inter alia* contesting the decision because the Adjudication Board had confused the 'tenderers' with the 'key experts';
3. having reflected on Architect Ellul's comments regarding the appellants' claim in respect of the possibility of *Key Experts* being replaced after the award of contract. Of particular relevance were (i) the points raised by the Chairman of the Adjudication Board concerning the fact that any declaration by appellants should have been submitted in writing with the tender and should have also indicated alternative arrangements; (b) the pertinent remarks relating to the fact that the Adjudication Board were not in a position to grant points to unknown experts;
4. having also noted the Chairman of the Adjudication Board's comments regarding the fact that the appellants' tender was not considered eligible for award because three of the *architects* listed as 'key experts' were employed with the ADT which is the regulator and, as a consequence, this meant that their function was in breach of tender clauses dealing with independence, impartiality, conflict of interest and their employment within a public agency, particularly Clauses 9.1 and 9.5 of the Tender Document's *General Conditions for Service Contracts*.
5. having taken full cognizance of the appellants' claim that albeit the three experts are full time employees with the ADT, yet they can work privately, quoting Article 6 of their contract of service with the Malta Transport Authority which allows them to execute private work;
6. having also taken into consideration the procedure involved leading to the ultimate issue of official certificates;
7. having reflected on the appellants' perception of organisational structures and the connection between Divisions / Units and the Organisation as a whole;

8. having also considered the fact that according to the Chairman of the Adjudication Board there were other tenderers who were also disqualified as they were also found in breach of Article 9.5

concludes, that:

- a) the Tender Document, is evidently clear in its terms and conditions which *inter alia*, state that “the tenderer must not be affected by any potential conflict of interest and shall have no particular link with other tenderers or parties involved in the project” - terms and conditions which in the PCAB’s opinion have not been satisfied by appellants;
- b) it is immaterial whether the Malta Transport Authority (ADT) approves that its officials execute private work or not as the major issue in this particular tender seems to be more whether the condition imposed by the Contracting Authority in Article 9.5 of the Tender Document’s *General Conditions for Service Contracts* is satisfied or not, a condition which, as expressed, leaves no room for misinterpretation stating that public servants shall not be recruited as experts;
- c) the arguments raised by the appellants were not convincing and based on a timid attempt at justifying the evident unsuitability of appellants to participate in this particular tender as key experts in view of the potential conflict of interest and direct link with other tenderers or parties involved in the project;
- d) the PCAB is of the opinion that an employee is primarily employed and ultimately paid by the Organisation albeit his daily functions may relate to a particular Division within the Organisation, and, as a consequence, it is simply considered too much of a frivolous argument for anyone to try to distinguish between the two just for the sake of trying to modify what is highly perceived as normal and accepted by everyone to be as such.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 82, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

02 August 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 108 and Case No. 109

**Re: CT 2099/2006 – Advert No CT 166/2006 – MTA 005/2006:
Chauffeur Driven Transportation Services in Malta and Gozo for a period
of two (2) years**

This call for tenders was published in the Maltese Government Gazette on 09 May 2006 and was issued by the Contracts Department following a request transmitted to the latter by the Malta Tourism Authority on 14 February 2006.

Three (3) tenderers submitted their offers.

The closing date for this call for offers was 04 July 2006 and the original global estimated value of the total contract (covering two years) was Lm100,000.

Two Objections were filed separately in connection with this tender by (i) Zarb Coaches Ltd and (ii) Frank's Garage Ltd after it had come to their knowledge that it had been decided to cancel the tender in caption and to issue a fresh call for tenders.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 25 July 2007 to discuss this objection.

Also present for the hearing were:

Zarb Coaches Ltd

Dr Massimo Vella – Legal Advisor
Mr Emanuel Zarb

Frank's Garage Ltd

Dr Mario Scerri – Legal Advisor
Mr Frank Refalo

Malta Tourism Authority (MTA)

Mr Sam Mifsud – Chairman
Mr Patrick Attard – Procurement Manager

MTA's Tender Committee

Dr Joe Zammit Maempel – Chairman
Mr Carmel Portell – Member
Mr Anthony Cachia – Member
Mr Charles Visanich – Member

Contracts Department

Mr Francis Attard

– Director General (Contracts)

At the commencement of the public hearing the Chairman PCAB gave a brief introduction about the two objections which concerned the same tender. Both appellants were requested to explain separately the reasons that prompted them for filing their objections. The appellants' submissions were followed by MTA's response and the witnesses' testimonies.

Dr Massimo Vella, acting as legal representative to Zarb Coaches Ltd who tendered for the provision of chauffeur driven transportation services in Malta, said that his clients failed to understand why it was decided to issue a fresh call considering the fact that the appellants had satisfied all the requirements of the tender and their offer was cheaper than that of the other applicant, namely John's Garage.

Dr Vella explained that the tender documentation created contractual obligations between the contracting authority and the tenderer. The appellants' lawyer claimed that since the tender document did not provide anything about a fresh call then they should proceed with the award of contract. However, he maintained that, without prejudice to the above, no fresh call should be issued unless for justified reasons.

Dr Vella pointed out that the decision to issue a fresh call was only published on the Contracts Department's Notice Board on 21 February 2007 and that his clients were not provided with the precise reason/s for such a decision being taken by the pertinent authorities.

The appellants' lawyer also argued that his clients would be prejudiced by the decision to issue a fresh call because the rates quoted in their financial offer had already been published and exposed to prospective bidders.

Dr Mario Scerri, legal representative of Frank's Garage Ltd, the only tenderer who tendered for the provision of the same services in Gozo, concurred with the position taken by the other appellants due to the fact that their offer conformed also with all of the tender's conditions and, whilst appealing, yet it was surprising to them that, to date, they had not been made aware as to the real reason why their offer had been rejected.

Dr Scerri also remarked on the fact that his clients' prices had been made published and exposed to the scrutiny of existing as well as potential competition. He emphasised that, although Frank's Garage Ltd was the only tenderer, the rates offered were undoubtedly very competitive because, independently from this contract, MTA continued to make use of their services in Gozo.

Furthermore, Dr Scerri contended that there was no reason to invalidate the tender once their Guarantee continued to be extended.

Dr Joe Zammit Maempel, Chairman of the Tenders' Committee at the MTA, responded by stating that the appellants, namely, Zarb Coaches Ltd and Frank's Garage Ltd, were the current contractors for the provision of such services in Malta and Gozo respectively, and therefore, it was the Guarantee of this contract that was being renewed and not that of the tender under reference. It was established by those present that, once the tender in caption had not been awarded, it would be the Bid Bond that is being extended.

With regard to Frank's Garage Ltd's submission, Dr Zammit Maempel said that their tender had been rejected because the General Contracts Committee (GCC) had advised them, through one of the member of the Tenders' Committee, that once they did not quote for all items in the *Schedule of Prices* as requested in the tender document, their offer was to be considered invalid and therefore could not be awarded the contract. It was remarked that Clause 4.18 of the tender document specified that:

'Prospective bidders are invited to fill in whichever Schedule of Prices is of interest to their company. It is extremely important for bidders to note however that the Schedule of Prices they choose to tender for should be completed in full, and that bids will be automatically disqualified if any requested rates are omitted from the respective Schedule of Prices (ex. It is not possible to quote only for coaches and not for minivans or taxis in either Section A or B).'

At this point, Frank's Garage Ltd's representatives remarked that, unlike in Malta, the Gozo Bus Owners' Association (GBOA) did not operate night tours in Gozo but only half day tours, namely

- a. the *morning tours* which are held either between 09:00 hrs / 09:45 hrs and 16:30 hrs / 17:00 hrs,
- and
- b. the *afternoon tours* which are held between 15:30 hrs and 22:30 hrs, respectively.

The appellants emphasised that there was one rate for all the coaches' transportation services in Gozo and that, as a consequence, the GBOA did not offer a different rate for such tours. Frank's Garage Ltd's representatives added that last year the MTA made use of two coaches only.

Dr Zammit Maempel intervened to claim that Dr Scerri's client could have indicated a price for night tours, considering that the *Gozo Channel* now

operates even at night time. Once the item had been left blank, he argued, should the MTA request that service, the bidder could ask for any price for that service.

When the appellants' representatives claimed that the *Schedule of Prices* was not applicable for Gozo, the PCAB drew their attention that if the tender was anomalous for Gozo they should have requested a clarification *ab initio* so that in case it was established that their claim was justified, the competent authority would have been in a position to rectify the position by way of an 'addendum'. It was also pointed out that the *onus* of compliance fell on the tenderer and not on the contracting authority.

Continuing, Dr Zammit Maempel said that as regards Zarb Coaches Ltd's offer was concerned these were disqualified because the rates quoted in their offer were drastically high when compared with the adjusted rates of the previous contract. Here, it was clarified that, following a specific request received from the contractors, MTA had agreed to revise the contracted rates due to the increase in fuel prices. Dr Zammit Maempel said that the Tenders Committee advised the MTA Board not to award the tender for the provision of transportation services in Malta because the increase in the quoted rates was not justified as the surcharge had already been absorbed in the revised rates. It was stated that some items were increased by 137% and that, on average, the increase was 45.72%. Furthermore, it was pointed out that the MTA had to operate within a budget. Dr Zammit Maempel explained that they had recommended to issue of a fresh call and to allow prospective bidders to tender for each category separately.

With regard to contractual obligations, the Chairman Tenders' Committee remarked that Clause 4.26 specified that '*The Authority reserves the right to refuse even the most advantageous offer.*'

In reply to a specific question by the PCAB, Dr Zammit Maempel said that it was the competence of the Department of Contracts to inform the tenderers about the reasons for their disqualification.

During these proceedings Mr Francis Attard, Director General (Contracts), Mr Sam Mifsud, MTA Chairman and Mr Patrick Attard, MTA Procurement Manager, were called to take the witness stand. They gave their testimony under oath.

On cross examination by the PCAB, Mr Attard testified that it was an established procedure that at the opening sessions, tenders were scheduled and the names of bidders and relative prices were published on the Contracts Department's Notice Board. He emphasised that although the prices were published, the contract was not awarded to that tenderer who had submitted the

cheapest offer because it was also indispensable for all tenders to be compliant with the tender conditions and specifications.

Mr Attard explained that, in this particular case, the tenders were first evaluated by the MTA's adjudication board and, subsequently, their recommendations were referred to the General Contracts Committee. He said that none of the bidders satisfied the tender conditions in their entirety and therefore they had no alternative but to cancel the tendering process and to issue a fresh call in accordance with normal praxis. He added that although at one stage the MTA had recommended that the contract for transportation services in Malta and Gozo be awarded to Zarb Coaches Ltd and to Frank's Garage Ltd respectively, they still decided to reject such offers because both tenders were not compliant.

Here, the PCAB's Chairman drew Mr Attard's attention to the fact that this version was quite different from that given by Dr Zammit Maempel. In actual fact, after checking the relevant documentation in file, Mr Attard clarified that Zarb Coaches Ltd's tender was rejected not because their offer was not compliant as inadvertently stated earlier but due to the fact that the rates quoted were excessively high. He confirmed that in the case of Gozo, Frank's Garage Ltd's tender was not accepted because they did not fill in all the rates as requested in the tender conditions and therefore they could not accept such offer.

When asked to state whether the General Contracts Committee had analysed the rates submitted, Mr Attard replied in the affirmative and said that the issue was discussed during a meeting held on 23 January 2007. He said that the Committee requested more information about:

- a. the frequency of use of the outgoing contract
- b. the total value utilised on the outgoing contract *and*
- c. a comprehensive table showing comparisons between the rates of the outgoing contract and those submitted by Zarb Coaches for this tender.

However, while on 28 September 2006, MTA had recommended that none of the offers received were to be accepted, surprisingly, on 04 Jan 2007 it was declared that the rates were considered acceptable. Mr Attard said that in view of these two contradicting documents received from the contracting authority, they felt that these provided minimal comfort to give them a solid foundation upon which they could base their deliberation. Faced with such an anomalous scenario the Contracts Committee felt that it was not considered appropriate for them to award the contract.

Following this statement, the PCAB stated that it was of the opinion that, once these two documents were received from the same Authority, it appeared that there could have been a rethinking rather than a contradiction. As a consequence, in hindsight, one would be tempted to think that it would have been better had the Contracts Committee referred back to the MTA the issue for clarification since the latter could have had valid reasons to change its decision. Here, Mr Attard remarked that Minute 29 in CT 2099/2006 confirmed that the Contracts Committee had discussed the issue on 20 February 2007 and subsequently it was decided to cancel the tender and to issue a fresh call.

In reply to a specific question by the PCAB, Mr Attard said that there was no particular decision not to inform the appellants about the reasons as to why it was decided to issue a fresh call.

When asked by Dr Vella to state whether the Contracts Committee had compared quoted rates with the market rates, the Director of Contracts replied that under normal circumstances it was the Contracting Authority's responsibility to carry out such an exercise.

In reply to Mr Patrick Attard's question regarding the acceptance of his recommendations rather than those of the other three MTA high officials, the Director General (Contracts) said that they only took into consideration the fact that such documents were sent by the same organization.

When Mr Sam Mifsud, the MTA Chairman took the witness stand, he was cross-examination by the PCAB. He testified that the tender in question was issued before he was appointed as the MTA's Chairman, i.e. on 01 September 2006. He remarked also that, later on during the same month, the entire Board had resigned and the MTA was left without a Board for two whole months. Furthermore, Mr Jeffrey Cutajar's employment as Director (Marketing) with MTA was also terminated in the meantime. He said that at that time they gave priority to marketing Malta abroad rather than to tenders because their prime objective was to lure more tourists to our island. However, the witness claimed that when the new Board was appointed, it analysed the Tenders Committee's report and the offers submitted by Zarb Coaches Ltd and Frank's Garage Ltd. Mr Mifsud explained that in spite of the contents of the e-mail dated 28 September 2006, they still decided to issue the letter dated 04 January 2007 because the Tenders Committee had compared the tenderers' quoted rates with the previous revised contracted rates while the MTA Board had compared them with the 'market prices' being paid by operators in the private sector.

The witness said that he had discussed the matter with Mr Peter Portelli, Permanent Secretary – Ministry for Tourism, and Mr David Mifsud, the MTA's CEO at the time, in December 2006 and they issued the letter in January 2007. The Authority's Chairman contended that if they were asked by the

Contracts Committee about the alleged “u-turn”, they would have explained and clarified the matter and would have also stood by their decision as stated in their letter dated 04 January 2007. In reply to a specific question asked by the PCAB, the MTA’s Chairman said that he was in a position to make such comparisons because he had his own company and they used such services more than the same Authority.

The third and last witness to take the stand was Mr Patrick Attard, Procurement Manager at the MTA. On cross examination by the PCAB, Mr Attard testified that the information included in his e-mail of the 06 February 2007 was submitted following a request received from the Contracts Department. He said that the value of the outgoing contract was based on actual figures paid and that the comparison exercise was carried out between the rates of the outgoing contract and those submitted in Zarb Coaches Ltd’s tender. Furthermore, the witness confirmed that, at present, such transportation services were being given by both appellants and that, as far as he was aware, the rates that were being paid were the same rates proposed in the appellants’ respective offers. However, he maintained that the contract was awarded to them on the basis of price and, this, after they had asked for quotations from major transport service providers.

In his concluding remarks Dr Vella said that from the outcome of these proceedings it resulted that his client’s offer was compliant and that, on the basis of Mr Patrick Attard’s testimony, the recommendations included in his e-mail of the 28 September 2006 should not be taken into consideration because they did not base their decision on the market rates. He contended that it had been established that the MTA Board had confirmed that the rates quoted by his client were competitive and comparable with the market rates. The appellants’ lawyer also remarked that, in the *interim*, Zarb Coaches Ltd were still providing the service at the same rates proposed in the tender and these were still the cheapest on the market. Furthermore, Dr Vella said that from the testimony given by the Contracts Department’s representative it was established that when the Contracts Committee took the decision, they did not consider the market rates and also ignored the latest recommendation of the Contracting Authority.

Mr Patrick Attard clarified that his e-mail of the 28 September 2006 was sent after obtaining the recommendations of the Tenders Committee and the approval of the previous MTA Board.

Dr Scerri said that they interpreted Clause 4.18 to mean that bidders had to quote for all categories (coaches, minibuses and taxis) and did not need to quote for each item under all categories. He insisted that once the GBOA operated one service for coaches in Gozo, then the tariff quoted by his client should be considered applicable for all types of services.

Dr Zammit Maempel said that after the issue of the tenders by the Department of Contracts, the tenders received would be evaluated by the Committee he chairs and, subsequent to this, their recommendations would be forwarded to the MTA Board. Dr Zammit Maempel emphasised that from this stage onwards the Committee members would not know whether their recommendations would have been actually been accepted.

He acknowledged that the MTA Chairman was in a better position to decide because when he tried to obtain the market rates, all efforts made proved to no avail. As a consequence, during the evaluation process, the Tenders Committee could only compare the rates quoted by the bidders with the previous contract. Furthermore, Dr Zammit Maempel pointed out that he could not consult Mr Mifsud about the matter because during the evaluation process Mr Mifsud was not yet involved with the MTA. He proceeded by stating that when, at the time, he spoke to Mr Romwald Lungaro Mifsud, the previous Chairman of the Authority, it transpired that such information was not available. He claimed that the Tenders Committee recommended to the main Board to retain the current tenderer at the current rate and that if this was not acceptable the Board should ask for quotations from at least three service providers.

At this stage Mr Sam Mifsud intervened to state that every month, three operators are called for an update of the rates and, invariably, Messrs Zarb Coaches Ltd always end up the cheapest of the three.

Dr Zammit Maempel declared that during these proceedings he heard a lot of new developments which he was not aware of because he did not know what happened after the last discussion on 12 September 2006. With reference to the letter dated 04 January 2007 which was signed by the Permanent Secretary Ministry for Tourism, the MTA Chairman and the Authority's CEO, he believed that they had carried out their work with responsibility and that they were at an advantage because they were in possession of information which was not available to the Tenders' Committee. Dr Zammit Maempel reiterated that the Contracts Committee had advised that due to the fact that Zarb Coaches Ltd's offer was not compliant with Clause 4.18 the tender could not be awarded. He said that, as far as the Gozo contract was concerned, the issue was technical and legal.

Mr Francis Attard insisted that on the basis of what had been stated during this hearing, he believed that the Contract Committee's decision regarding the cancellation and re-issue of tender is still the most valid and credible option. He claimed that in his opinion there was lack of credibility on the part of the Contracting Authority because whilst, initially, it was declared that the rates were considered "drastically higher than the present ones", two months later the same rates were considered "both feasible and comparable to what is actually on the market now". The Director General (Contracts) maintained it

was still very difficult for the Contracts' Committee to accept the MTA's recommendations.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

2. having noted that the appellants through their 'reasoned letters of objection' dated 01 March 2007 (Zarb Coaches Ltd) and 06 March 2007 (Frank's Garage Ltd) respectively, and also through their verbal submissions presented during the public hearing held on 25 July 2007, had objected to the decision taken by the General Contracts Committee;
3. having noted the fact that both appellants contend that they have satisfied tender conditions and, as a consequence, there is no need for a fresh call;
4. having reflected on both the arguments raised by appellants as well as those brought to the attention of those present by the Chairman of the Tender Committee relating to contractual obligations;
5. having also noted the fact that, to date, both appellants were not given specific reasons why their respective offers were not found to be acceptable;
6. having taken full cognizance of the argument raised by both appellants as regards the fact that their prices had been made published and exposed to the scrutiny of existing as well as potential competition;
7. having also taken into consideration the fact that with regards to the situation currently prevailing in Gozo, wherein only one rate was applicable for all the coaches' transportation services and that, as a consequence, the GBOA did not offer a different rate for such tours;
8. having also considered the fact that the Tenders Committee had advised the MTA Board not to award the tender for the provision of transportation services in Malta because the increase in the quoted rates was not justified as the surcharge had already been absorbed in the revised rates, stating that whilst there were some items which increased by 137%, on average, the increase was 45.72%;
9. having also reflected on the testimony given by the DG Contracts who, *inter alia*, said that in spite of the fact that the prices were published, the contract was not awarded to that tenderer who had submitted the cheapest offer because it was also indispensable for all tenders to be

compliant with the tender conditions and specifications and, according to the Chairman of the Contracts Committee both appellants' offer fell short of full compliance either through excessive prices offered or due to the lack of full disclosure of prices for all transportation services as requested in the Tender document;

10. also noted the fact that whilst at one point, according to the Chairman of the Contracts Committee a proper analysis of the rates submitted was conducted, particularly in view of further clarifications sought after a meeting held with the contracting authority's representatives on 23 January 2007, yet when asked by Dr Vella to state whether the Contracts Committee had compared quoted rates with the market rates, the Director of Contracts replied that under normal circumstances it was the Contracting Authority's responsibility to carry out such an exercise;
11. having taken cognizance of the fact that whilst initially the MTA had recommended that none of the offers received were to be accepted, yet, subsequently, this decision was reversed and the same rates became acceptable;
12. having noted the claim made by the MTA's Chairman wherein it was stated that in spite of the contents of the e-mail dated 28 September 2006, senior MTA and Ministry officials still decided to issue the letter dated 04 January 2007 because they argued that the Tenders Committee had compared the tenderers' quoted rates with the previous revised contracted rates while the MTA Board had compared them with the 'market prices' being paid by operators in the private sector;
13. having taken note of the way regular market research is conducted by the MTA with regards to periodical checks on applicable rates, an exercise which is carried out by three operators being contacted by phone every month and following which, invariably, Messrs Zarb Coaches Ltd always end up the cheapest of the three;
14. having observed Mr Patrick Attard's change of position when he stated that the recommendations included in his e-mail of the 28 September 2006 should not be taken into consideration because they did not reflect the prevailing market rates;
15. having heard the Tenders' Committee's Chairman state that the Permanent Secretary Ministry for Tourism, the MTA Chairman and the Authority's CEO were in possession of information which was not available to the Tenders' Committee;

concludes, that:

re: appeal lodged by Zarb Coaches Ltd

- a. the Contracts Committee were procedurally amiss and this Board feels that the least such Committee could have done was to discuss the content and the relevance of the letter signed by the MTA's Chairman and CEO and the Ministry's Permanent Secretary respectively; this would have been a more credible exercise despite the fact that, following this clarification exercise, the Contracts Committee could have still maintained its previous stand;
- b. the procedure adopted by the MTA to obtain updated quotations is highly irregular. Such quotations should be obtained in a sealed envelope and opened, concurrently, on a particular date and at a particular time - proper audit trails and transparent praxis conducted in an equitable manner where no one could be assumed to have a potential advantage is very much the foundation, the basis, of public procurement;
- c. this Board is not satisfied that the Maltese taxpayer is getting the best value for money and, under these circumstances, one has to ensure that procedure, once meticulously followed, would provide a more transparent way of reaching the same conclusions.

As a result of the above mentioned points and prior to taking a final decision on this case, the PCAB directs that the Contracts Committee should first seek from the MTA officials the workings which formed the basis upon which a decision was made by the contracting authority.

This Board further decides that the deposit submitted by appellants should be kept on hold until a final decision by the PCAB is taken.

Furthermore,

re: appeal lodged by Frank's Garage Ltd

the PCAB concludes that:

- a. a tenderer is expected to strictly abide by a Tender document's specifications and that should such tenderer have any doubt, it is considered appropriate for one to seek clarification in regard before formally submitting an offer;
- b. appellants have erroneously assumed that the request made in the Tender document by the Contracting Authority for a full completion of details requested was being adhered to;

- c. in these circumstances, the Contracts Committee has simply followed normal praxis rightly giving due importance to Clause 4.18 of the Tender Document

As a result of the above-mentioned points, this Board decides against the appellants, Frank's Garage Ltd.

In terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should be refunded as this Board acknowledges that this objection was not filed in a frivolous manner.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

17 August 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 108 and Case No. 109

Re: CT 2099/2006; Advert Notice CT 166/2006; MTA 005/2006: Tender for Chauffeur Driven Transportation Services in Malta and Gozo for a period of two (2) years

Addendum

Appeal lodged by Zarb Coaches Ltd

Further to the decision dated 17 August 2007 which was referred to the Director General (Contracts) for publication, on the 25 October 2007 the PCAB has received a letter from the latter which, *inter alia*, specified that:

'The General Contracts Committee has invited the Adjudication Board which had recommended that the offer of Zarb Coaches in respect of the Malta contract can be accepted. Two members attended the meeting accompanied by Mr Patrick Attard, Procurement Manager at the Malta Tourism Authority.

The members of the Adjudication Board have confirmed that the rates of similar services in the local market were obtained through confidential/commercial information.'

In the circumstances, the Board feels that the decision taken by the Malta Tourism Authority to change the first decision not to recommend the award of the tender for the provision of chauffeur driven transportation services in Malta to Zarb Coaches Ltd into a recommendation to award the tender to the said company was not based on sufficiently transparent criteria and therefore this Board agrees with the General Contracts Committee's decision to cancel the tender and issue a fresh call.

As a result of the above and other points referred to in our above-mentioned decision, this Board feels that the appeal lodged by the company was not sufficiently well grounded and recommends that the deposit submitted by the appellants in terms of Regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

19 November 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 110

**Re: CT 2026/2007 – Advert No CT 164/2007 – WD 60/2006/41:
Supply, delivery and laying of natural paving materials for Merchants’
Street and St John’s Street, Valletta**

This call for tenders was published in the Maltese Government Gazette and the European Journal on 13 April 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Resources and Infrastructure (Works Division).

Five (5) tenderers submitted an offer.

The closing date for this call for offers was 05 June 2007 and the estimated value of the total contract was Lm593,109 (excl VAT).

Messrs A F Ellis (Home Décor) Ltd filed an objection on 16 July 2007 following the decision taken by the General Contracts Committee to cancel the call for tenders for the supply, delivery and laying of natural paving materials for Merchants’ Street and St John’s Street, Valletta on the ground that no offer was fully compliant in terms of Regulation 45 of the Public Contracts Regulations.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 17 August 2007 to discuss this objection.

Also present for the hearing were:

A F Ellis (Home Décor) Ltd

Dr Joseph Ellis
Architect Joe Zammit

Adjudication Board

Architect Ray Farrugia	Chairman
Architect J Zerafa Boffa	Member
Mr J Grech	Member
Mr M Ciantar	Secretary

Works Division

Mr J Spiteri	
Mr S Xerri	Geologist
Mr E Buttigieg	Director BED

Dr Franca Giordimaina Legal Officer, Works Department
Architect Robert Cachia

Department of Contracts

Mr Francis Attard	Director General (Contracts)
Mr Anthony Cachia	Director (Operations)
Mr Anthony Fava	Director (Compliance)
Mr Mario Borg	Procurement Manager

After the PCAB's Chairman's introduction, the appellants were invited to give a resume' of the motives behind the objection.

Prior to entering into the merit of this appeal, Dr Ellis drew the PCAB's attention that the procedure outlined under Article 83 of the Public Contracts Regulations was not followed. He explained that this was not a normal appeal where one tenderer is objecting against the General Contracts Committee's (GCC) decision to award the contract to a recommended tenderer; it is an appeal relating to the cancellation of a tender where it has been decided to discard the offers submitted by all five tenderers. Dr Ellis said that on 24 July 2007 the Works Division submitted a reply to their letter of objection dated 16 July 2007. The appellants' representative stated that he felt strongly about the fact that the written submissions should have ended after the communication of 24 July 2007 because the regulations stipulate that 'within five working days from the publication of the letter of objection, any tenderer who had registered an interest may send a reasoned reply to the letter of objection.' He remarked that although it is a tenderer who has to send a reply, given the abnormal circumstances of this appeal, it is acknowledged that the other party shall have the opportunity to give its opinion on the matter.

Furthermore, Dr Ellis said that according to Regulation 83 (g), the Director of Contracts or the Head of the Contracting Authority shall prepare an Analysis report within ten working days of the publication of the replies and, that it was at this stage that all the relevant documentation had to be forwarded to the PCAB and to proceed with the hearing of the appeal. However, he contended that this procedure was not followed because after the issue of an Analysis Report on 08 August 2007, the Works Division sent another letter dated 10 August 2007 wherein they made reference to various issues which were neither mentioned in their reasoned letter of reply of the 24 July 2007 nor in the report of the Evaluation Committee, on which the General Contracts Committee based its decision to cancel the tender.

He maintained that what the Evaluation Committee did after the Evaluation report was irrelevant because the necessary groundwork should have been done at evaluation stage and not after. Dr Ellis insisted that this was a serious shortcoming on the part of the Evaluation Committee. The appellants' representative contended that, in the prevailing circumstances, the letter dated

10 August 2007 and the 'Addendum' to the Analysis Report should not be taken into consideration for the purpose of this appeal.

The Chairman, PCAB responded by stating that albeit note was taken of what had been stated, yet, it was pointed out that as a Board they were more interested in establishing the reasons that led to the decision regarding the cancellation of the tender. He claimed that the PCAB's decision making procedure included (a) an analysis of the files, reports and documentation forwarded to it, (b) the submissions made by the parties concerned during the sittings and (c) the witnesses' testimonies. It was claimed that the Analysis Report 'per se' was only a detail within the context of the entire deliberation process.

In reply to Dr Ellis' comments, Dr Franca Giordimaina, Legal Advisor to the Works Division, said that according to Regulation 83 (g), the Analysis Report had to analyse both the letter of objection and replies thereto. She explained that the Works Division submitted their letter of 10 August 2007 because the Department of Contracts' original Analysis Report did not include the views of the Evaluation Committee. She sustained that the letter dated 10 August 2007 does not add anything to the one dated 24 July 2007 and that the Works Division simply wanted that Government's position be included in the Analysis Report so that the Appeals Board would have the views of both parties.

Although Dr Ellis accepted that the views of both parties had to be included in the Analysis Report; yet, he insisted that the appeals procedure was not followed.

Dr Ellis referred to the six points of the Evaluation Report handed to him by the Contracts Department on the 11 July 2007. Dr Ellis commented that point no. 6 in the same Evaluation Report states that "Financial Identification form not completed." He referred to Clause 11.3a) of the 'Instructions to Tenders' which requests that such forms had 'to be inserted ONLY in envelope number 3.'. Dr Ellis therefore insisted that, had his Company inserted this data in another envelope, it would have disqualified his tender. He claimed that this showed that the Evaluation Committee was not correct in its assessment.

Dr Ellis quoted the last paragraph where '*the major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials. With regards to the Hardstone material certificates submitted with the tender, the results meet tender specification requirements with the exception for the Mean Relative Density which was not submitted.*' He referred to page 77 of the Tender document which states that '*a laboratory certificate is required, showing the petrographic examination of the stone and stating Density, Compressive strength and Water absorption.*' According to the appellants' representative, there was no mention that the test certificates had to be an original document. At this stage those present for the hearing were told that

Messrs A F Ellis (Home Décor) Ltd brought the requested samples from their supplier in Albino, Trento. Dr Ellis exhibited *The Porphyry Manual* wherein it is stated that ‘These results are based on data from Turin’s Polytechnic’s ‘Dipartimento di Georisorse e Territorio’.

With regards to point number 3 of the Evaluation Report dated 11 July 2007, where ‘*no test certificates for Porfido were provided. The only documentation supplied in this regard were copies from standard textbook regarding such materials*’. Dr Ellis reiterated that the data was extracted from ‘Il Manuale del Porfido’.

The Chairman of the Adjudicating Board intervened and commented on the Interim Report dated 25 June 2007. He said that between this report and the next Evaluation Report dated 28 June 2007, there was the decision of the General Contracts Committee that none of the five bidders were technically compliant. In spite of this and the urgency of the project, it was decided to ask the permission of the General Contracts Committee to ask for further clarifications from the bidders. As already stated, the General Contracts Committee refused this and decided to cancel the tender.

The PCAB noted that the notion of urgency can be problematic. The Chairman of the Adjudicating Board was asked by the PCAB to explain why they needed to ask for further clarifications from the bidders. Furthermore he was asked to clarify what type of clarifications the Adjudicating Board had in mind.

The Chairman of the Adjudicating Board referred to the Interim Report dated 25 June 2007 where the Board listed 10 points that needed clarification on the tender submitted by A F Ellis (Home Décor) Ltd.

Mr Farrugia noted that in point number 3 of this Interim Report, the Adjudicating Board felt that it needed further clarification on ‘*Article 6.1, wherein in page 45 it was required that a “contractor provides a written agreement through which the contractor declares that he is entrusting part of the contract to a third party”. Furthermore, in view of the fact that the latter is a foreign source, it was suggested that” this sub-contractor provides a binding written statement that he would provide the necessary resources for the timely completion of this project, in the event that this tenderer is awarded this contract.*’

The Chairman of the Adjudicating Board then commented on point number 4 ‘*Test Certificates for the Hardstone paving date back to 2002*’. He claimed that the Board felt that ‘2002’ was unclear and old. The PCAB intervened to question whether the Tendering document specified a particular date for such a certificate as, if the tender document did not specify any date, one cannot rule that a particular specification was not complied with once it was not requested

'ab initio' and given that the nature of the material in question (*porfido*) cannot be expected to have changed much over the period.

The PCAB questioned the Chairman of the Adjudicating Board on point number 5, namely the one stating that the declaration '*regarding porfido source is not specific to this project and is undated.*' Again PCAB wanted to clarify what was actually requested in tender document.

At this point Dr Ellis objected to the fact that the Interim Report being referred to in the hearing lists 10 points whilst the document the appellants received from the Contracts Department included only 6 points.

Dr Ellis commented on point number 6, namely the one which states that '*No test certificates for porfido were provided. The only documentation supplied in this regard were copies from standard textbook regarding such materials.*'. He claimed that Lavorazione Porfido L P srl declared that '*il materiale in porfido proposto e di ESCLUSIVA provenienza da cave site in TRENTO – ALTO ADIGE (ITALIA)*'. He claimed that although the same certificate makes reference also to granite, this shall not render the certificate invalid. Dr Ellis informed those present that the certificates were received by fax from the supplier and at that stage they did not know that they were extracted from a book. The appellants' legal advisor proceeded by stating that on further request, the supplier sent an English version of the manual on porfido.

Dr Ellis argued that according to Clause 52 (2) of the Public Contracts Regulations, the '*Contracting authorities may invite the candidates or tenderers to supplement or clarify the certificates and documents submitted in terms of Sub-Regulation (1) and Regulation 49.*' He insisted that the regulations allowed the Adjudication Board to seek clarifications from bidders without the need to obtain prior authorisation from the General Contracts Committee. He sustained that Article 52(2) gave the Contracting Authority, being either the Works Division or the Contracts Department, the possibility to consult the bidders without the consent of the General Contracts Committee. Furthermore, the General Contracts Committee erred when it did not authorise this.

Mr Farrugia commented that the Works Division could not accept the photocopies of the laboratory certificates for *porfido* as they were not authenticated or signed by the competent authority. He agreed that the tender document did not specify that the certificates had to be signed, but according to Mr Farrugia, it is understood that any certificates have to be signed and authenticated. Irrespective of authentication, Mr Farrugia sustained that even if the Board were to accept these certificates, the results do not meet the specifications in the tender document.

The PCAB questioned Mr Farrugia on whether the 'Manuale del Porfido' is an authoritative book. Mr Farrugia replied that there are several books on *porfido*

and that this is one of them. The Works Division had downloaded a document from the internet ‘PORFIDO – THE NATURAL STONE’ on which basis they compiled the tender document.

Specific observations were made by the PCAB with regard to the fact that the level of the specifications listed in the commercial text downloaded from the internet was very high and that, as a result, none of the five bidders managed to attain these specifications. Mr Farrugia admitted that the Adjudicating Board decided to lower these specifications in the ‘negotiating procedure.’ However, the ‘negotiating procedure’ had to be halted because of this appeal.

Mr Farrugia was asked by the PCAB to state whether this is the first instance that the Works Division had to issue a tender for the provision of *porfido*. Mr Farrugia admitted that when Works Division had invited tenders for Republic Street, Valletta the specifications were lower. But this time around, the Division aimed at higher specifications to get the best on the market. He pointed out that there were other contractors whose specifications were very close and the test results for *porfido* material of one of the bidders was technically compliant for three out of the four categories, namely, bending strength, mean absorption and mean relative density – the only non compliant field was the compressive strength.

As far as the appellants’ tender is concerned, Mr Farrugia gave the following details when comparing the tender specifications with the data extracted from the book ‘Il Manuale del Porfido’:

	Compr. Strength (Dry) (N/mm ²) (MPa)	Bending Strength (N/mm ²) (MPa)	Mean Absorption (%)	Mean Relative Density (kg/m ³)
Tender Specs	≥ 280	> 24	≤ 0.8%	≥ 2,550
A F Ellis	221.5 MPa	22.5 MPa	6.53%	2,555

Mr Farrugia reiterated that none of the five bidders qualified for the tender and that this is the first time that the specifications were so high. The Adjudicating Board had even tested the samples submitted with tenders. Furthermore, Mr Farrugia said that the General Contracts Committee decided to cancel the tender and to adopt the ‘Negotiated Procedure’ with all eight bidders who collected the tender document (including those three who did not submit an offer).

The Chairman of the PCAB said that, in his personal opinion, he did not agree with such decision because if one were to resort to this ‘modus operandi’, one could erroneously give the wrong impression as to the real reason behind such a decision. He stressed that it was indispensable for the rules of the game to be

known beforehand because public officials deal with public funds and public procurement and that, in the circumstance, everybody had to abide by the tendering procedures. Also, he felt that it was a commercial decision of the bidders concerned not to tender.

Dr Giordimaina intervened to remark that it might be appropriate if reference is made to the Director General (Contracts)'s letter where he indicated the reasons why the negotiated procedure was initiated with all bidders who purchased the tender document.

Dr Ellis objects to the fact that the 'Negotiating Procedure' was issued and opened to those who did not even submit the tender. He claimed that if their appeal were to be withheld, the bidders concerned would be integrated in the negotiated procedure.

When specifically asked by the PCAB to state whether it was acceptable that the standards indicated in the manual of *porfido* fell short of the tender specifications, the reply given by Dr Ellis was in the negative. He remarked that, apart from the above stipulated four requirements, bidders were also requested to give the values of 'Impact resistance 61cm' which was not mentioned in their letter dated 10 August 2007. When pressed by the PCAB, Dr Ellis said that the only item that did not meet the specifications was the compressive strength. With regard to the water absorption, the appellant bidders alleged that the Evaluation Committee had misinterpreted the figures because theirs was 0.653% and not 6.53% and so it was less than 0.8% as requested in the specifications. With regard to Impact resistance, he said that their certificate result showed that it was 62cm whilst the tender required 61cm.

Dr Ellis presented the PCAB with papers on compressive strength of *porfido* mined in Argentina which showed that it was the same as that mined in Italy. He argued that if the Contracting Party included high specifications in the tender document, they should sustain it with data that such *porfido* can be found on the market. Dr Ellis argued that it is not ethical to draw up the specifications from material downloaded from the internet and then refuse extracts from the 'Manuale del Porfido' which was an authoritative book.

When Dr Ellis mentioned the fact that the evaluation report sent to them contained only six points and that it was stated that '*The major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials*', Mr Farrugia remarked that the appellants were furnished with an extract of the Evaluation Report and that in their report it was made clear that '*On close inspection of test certificates results in 'Ref. 1', it is evident that none of the submitted test certificates incorporate a satisfactory compressive strength value.*'

When, during the hearing, Dr Ellis was furnished with the ten-point Evaluation Report he pointed out that point 3, which referred to Article 6.1 where it was stated that a contractor was required to provide *'a written agreement through which the contractor declares that he is entrusting part of the contract to a third party'*. On this particular issue, Dr Ellis insisted that this article was not part of the tender but was part of the draft agreement that the successful tenderer had to sign with the Department of Contracts.

Mr Farrugia confirmed that the testing on the samples was carried out on the 21 June 2007 by Mr Azzopardi and Mr Montesin at the Building and Civil Engineering Department of the University of Malta. Mr Farrugia commented that they did not reach the average of 280 Compressive Strength. He presented a copy of the signed Laboratory Report.

The PCAB enquired on the new 'Negotiated Procedure'. Mr Farrugia explained that the Works Division had prepared a new tender document which included lower specifications. They included the 5 existing bidders (who were given the chance to retain the same samples) together with the other 3 bidders who collected tender document.

Architect Spiteri from the Works Division, explained that there may be a slight discrepancy between certificates submitted by foreign laboratories and those from the University of Malta because the latter only tests representative samples from a whole quarry. He said that testing is carried out just for indication purposes and that was the reason why bidders are required to submit authentic test certificates. He said that under normal circumstances they do not test samples, but this time tests were required to sustain the decision of the Adjudicating Board.

When Mr Francis Attard, Director General Contracts, was asked by the PCAB to explain what is implied by a 'Negotiated Procedure', he stated that the regulations permitted Contracting Authorities to request an offer from tenderers of their choice. He explained that in view of the fact that the specifications were revised, all prospective bidders were required to purchase the tender document.

Mr Attard claimed that although eight bidders had originally collected the tender documents, only five submitted their offer and these were all non-compliant with the specifications. The other three might have not tendered because they did not have a material that met the specifications. Therefore, once the required standards were not met, the General Contracts Committee felt that they should give the opportunity to all those who showed interest in supplying the material and carry out these works. At this stage Mr Attard confirmed that the five bidders could change their financial offer.

Dr Ellis intervened by stating that Regulation 71 of the Public Contracts Regulations specifies that a 'Negotiated Procedure' may be resorted to in the event of irregular tenders or unacceptability in terms of the pertinent regulations and '*in such cases a contracting authority may refrain from publishing an EU contract notice where it includes in the negotiated procedure all and only the tenderers who satisfy the criteria of Regulations 45 and 49 to 52*'. He argued that, once there was no prior publication of an EU contract notice, the GCC could not carry out the 'Negotiated Procedure' and include those contractors who had not submitted a tender. Such negotiated procedure should have been limited to those who had originally submitted their offer. He insisted that alternatively they should have issued a fresh call for tenders with new specifications.

Dr Ellis maintained that it was so impossible to meet the specifications of the compressive strength that in the Negotiated Procedure the Department itself decided to reduce it from 2,800 to 1,800, that is, 40% less. Mr Farrugia pointed out that none of the bidders had ever questioned the Contracting Authority on the specifications of the *porfido*. In reply to specific questions by the PCAB, the Chairman of the Adjudication Board said that they included such specifications because the Contracting Authority was aiming high and confirmed that in the past there were instances where *porfido* was imported from Argentina. The PCAB questioned whether this could be interpreted to mean that the Contracting Party is accepting the second best.

The PCAB agreed that the document may be either in book form, or either partially or fully downloaded from different sources on the internet. However, the crux of it all is that the document had to be accountable, coming from whatever source.

Dr Ellis reminded the PCAB that the appeal was made on the basis of the reasons behind the cancellation of the tender by the General Contracts Committee. Dr Ellis argued that after the 24 July 2007 the Works Division shifted the goal posts. He referred to certain inconsistencies including the fact that the documents downloaded from the internet were not authenticated. Their tender was 'inter alia' disqualified because it was not authenticated.

Dr Giordimaina quoted Article 25 in the Tender document where one can find the reasons for the cancellation of a tender, which, taken in the context of this tender, justify the cancellation as no bidder met the specifications.

When Mr Farrugia was asked by the PCAB to state whether they had ever been contacted by those bidders who had collected the tender document and explained to them why they did not submit their tender, the reply given was in the negative.

In reply to a specific request by Dr Ellis, the PCAB informed the parties concerned that there was no need to send written submissions because they had sufficient information to deliberate upon.

In his concluding remarks, Dr Ellis contended that during these proceeding he had proved that the Adjudication Board could seek clarification without prior authorisation from the GCC. He said that the appellants' assertion that they could not depart from the specifications was unfounded because Clause 20.1 of the *Instruction to Tenders* specifies that:

'A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them. Substantial departures or restrictions are those which affect the scope, quality or execution of the contract, differ widely from the terms of the tender dossier, limit the rights of the Contracting Authority or the tenderer's obligations under the contract or distort competition for tenderers whose tenders do comply. Decisions to the effect that a tender is not technically compliant must be duly justified in the evaluation report.'

He contended that in the evaluation report there is no justification that the tender is not technically compliant.

Dr Ellis said that point 1 of the Adjudication Board's ten point report gives the impression that the financial offer had already been opened. He claimed that the requirement mentioned under point 2 regarding the inclusion of original documentation in their bid was not requested in the tender document while the third point refers to a contract which still needs to be signed by subcontractor after award of the contract and not at this tendering stage. As far as point 4 is concerned, the appellants said that the fact that test certificates for the hard stone paving dates back to 2002, such an argument is irrelevant because the most important thing was that it was found according to specifications after testing. With regard to points 5 and 7 which state that the '*Declaration regarding porfido source is not specific to this project and is undated*' and '*Mean Relative density of Hardstone materials not given*' respectively, Dr Ellis said that the Adjudication Board could have asked for clarifications. On point 6 the appellants' representative failed to understand why the specifications were not based on the standard text book once this was available. He claimed that there was no problem on point No 8 once it was stated that '*Hardstone samples submitted as requested in tender specifications*'. With regard to point 9 which refers to the Porfido samples, Dr Ellis said that in view of the question '*Can tenderer confirm that they will be in a position to meet tender specification requirements in size and thickness considerations fully?*' it appears that this is not the final report of the Adjudication Board because it seems that the latter was still seeking a clarification. On point 10 '*Financial*

Identification form not completed’, Dr Ellis claimed that this specifically requested to be inserted in the Financial offer (Package Three).

Finally, Dr Ellis referred to the concluding statement of the so-called ten point report which states:

‘the major shortcoming in this offer is that tenderer failed to submit authentic test certificates for the porfido materials. With regards to the Hardstone material certificates submitted with the tender the results meet tender specification requirements with the exception for Mean Relative Density which was not submitted’

According to the appellants’ legal advisor, the appellants are of the opinion that the Adjudication Board should have sought the necessary clarifications ‘ab initio’.

Mr Farrugia said that the Adjudication Board could have lowered the level of the original specifications during the evaluation process. When asked by PCAB to state whether the new specifications were technically acceptable and good value for money, Mr Farrugia replied that the new specifications are similar to those which were issued for Republic Street, Valletta. Also, according to Mr Farrugia, the new specifications would not make the product inferior to the one requested in the previous tender.

Mr Farrugia and Mr Attard confirmed that the ‘Financial’ envelopes are still sealed at the Department of Contracts.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, first through their formal letter of objection dated 16 July 2007, and also through their verbal submissions presented during the public hearing held on 17 August 2007, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the appellants’ discord with the points referred to in the *Evaluation Report*;
- 3 having noted the wording of all documentation submitted, particularly the *Tender Document* and the *Evaluation Report* and subsequent recommendations made;
- 4 having also considered the issues raised and comments made by the Contracts Department’s representative;

- 5 having taken cognizance of the fact that the General Contracts Committee decided that none of the five bidders were technically compliant;
- 6 having considered the points raised by members of the Adjudication Board during the hearing and the points listed in the *Evaluation Report*;
- 7 having taken note of the questionable methodology adopted by the contracting authority which, to a great extent, relied on specific documentation downloaded from a particular site, to draft the contents of the tender *dossier*;
- 8 having considered that, during the hearing, the said specifications were referred to by key members of the Adjudication Board themselves as ‘perhaps’ being quite high, impeding bidders from being in a position to fulfil in their entirety requested terms and conditions;
- 9 having noted the fact that, the Adjudication Board, having realised that the levels aimed at in the original tender *dossier* were not reachable, decided to downscale the specifications in the ‘negotiated procedure’, which procedure was meant to apply to all the eight bidders who had collected the tender document (including those three who did not submit an offer);

concludes, that:

- a. recognising that public contracts are a serious issue in view of the utilisation of considerable amounts of public funds, the question of (1) value for money, (2) a highly transparent procedure and (3) a high degree of attention, given by all parties concerned, to detail during the drafting of the tender document as well as in the entire adjudication process is considered to be equally important as the extent of urgency of any particular tender.

This Board feels that a proper and more professional approach by a contracting authority’s public official/s is highly imperative as eventual delays in the final adjudication of tenders could turn out to be a costly exercise, a waste of human resources as well as, possibly, an inconvenience to the general public;

- b. this Board cannot favourably consider the option of a tender’s specifications being downscaled just because those specifications forming part of the original *dossier* were subsequently considered

to have been so high that no participant could possibly ever meet. Such a theory could send the wrong signal/s with regards to the holistic view of a total transparent and professional procedure in the adjudication of tenders. A ‘negotiated procedure’, whilst generally permissible, at this stage is deemed to be a potentially flawed solution for one to resort to. This line of reasoning becomes more intricate when one considers that, whilst it is true that it has been suggested that all the eight bidders who had originally collected the tender document would be called to participate in the ‘negotiated procedure’, yet one could question how fair would this be in view of the fact that three of these bidders had desisted, for their own reason, to proceed with an actual submission of offer, which, *per se*, could be considered as a commercial decision in its own right. Such a remedy could cast doubts on why should anyone be given a second chance to reconsider.

However, one could also argue that these bidders could have refrained from proceeding with the submission of offer having considered the original terms and conditions as unreachable.

Yet, what about other potential participants who could have simply decided not to collect the said document, let alone submitting the bid, following, say, possible verbal discussions with any other participant who, either simply collected the document, or went as far as to submit the bid?

- c. it would be wrong for this Board to give the impression that it is there to remedy awkward situations brought about by any of the interested parties, solely, by (1) a lack of attention to detail during the drafting of the tender document’s terms and conditions, as well as (2) erroneous assumptions as to potential repercussions one could come across in the future.

As a result of the above-mentioned points, this Board decides that, whilst urging the contracting authority to expedite procedure, as much as possible, in order to minimise the inconvenience to the public at large, the contracting authority should re-issue a fresh call for offers in order to ensure that there is complete transparency and fairness in the procedure. Needless to say that a thorough analysis should initially be conducted in order to ensure, *inter alia*, that potential participants would be able to meet the tender’s specifications and general terms and conditions. Furthermore, it is highly important that specifications should still reflect a high degree of value for money to the ultimate taxpayer as well as the prime beneficiary of the service – the public at large.

Furthermore in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of Regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

03 September 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 111

**Re: CT 2681/2006 – Advert No CT 454/2006 – DH 1665/2006:
Architectural Services for the Construction of a 280 Rehabilitation Facility
at Qormi Road, Luqa**

This call for tenders was published in the Maltese Government Gazette on 19 December 2006 and was issued by the Contracts Department following a request transmitted to the latter on 27 October 2006 by the Health Division.

The closing date for this call for offers was 15 February 2007 and the estimated contract value was Lm360,000.

Nine (9) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, Messrs *Design & Technical Resources Ltd* filed an objection on 10 August 2007 against the intended awarding of the tender in caption to *The Doric Studio*.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 14 September 2007 to discuss this objection.

Present for the hearing were:

Design & Technical Resources Ltd

Dr Norval Desira – Legal Representative
Architect Robert Sant
Mr Reuben Cauchi
Ms Vivienne Psaila

The Doric Studio

Dr Peter Fenech – Legal Representative
Architect Frank Muscat

Health Division – Evaluation Committee

Mr Joseph Micallef – Chairperson
Mr Joseph Degiorgio – Member

Department of Contracts

Mr Francis Attard – Director General (Contracts)

The Kamra tal-Periti

Architect David Felice – President

Following the Chairman's brief introduction, Design & Technical Services Ltd's legal representative was invited to explain the motive which gave rise to their objection.

Dr Norval Desira, the appellants' legal representative, started by stating that his client decided to file his objection because of the following reasons:

- 1) the recommended tenderer's offer should have been disqualified because the percentage rate quoted in the financial offer was excessively less than the established legal fee. Dr Desira explained that the fees payable to Architects were established by law under 'Tariff K' of *Schedule A* of the *Code of Organisation and Civil Procedure*. As a consequence, every architect was obliged to abide by these tariffs. He claimed that an architect had no right to charge more or less than the stipulated fees because the rates were fixed. The appellants' lawyer sustained that apart from the fact that the Contracting Authority was supposed to know what was required by law, it was duly notified by the *Kamra tal-Periti* on this specific tender not to accept offers that were not submitted in accordance with the said 'Tariff';
- 2) Dr Desira said that in spite of the fact that the conditions of tender specified that the financial offer could not have variant solutions, the recommended tenderer's financial offer contained three variant solutions, namely,
 - a. *Option A* which had a fixed rate which was less than that established in Tariff K,
 - b. *Option B* wherein it was indicated that the tenderer was ready to reduce the fee further if he was given the opportunity to charge 1% fee plus VAT for measurement, and
 - c. *Option C* wherein he had quoted a rate for design & tender preparation, a rate for supervision and project management and for measurement;
- 3) The same lawyer said that the third grievance dealt with the Adjudication Board's method of evaluating the financial offers because the appellants did not know whether or not the VAT element was taken into consideration. He contended that the applicable VAT should not have been included because this was not an integral part of the fee receivable by the architect for his services. Dr Desira

argued that, considering the fact that the margin of difference in the final points of the recommended tenderer and the appellants' was minimal, i.e. 0.16 points, such a computation would have undeniably prejudiced any higher financial offer if these were evaluated inclusive of VAT;

- 4) In their fourth and final grievance, the appellants argued that the recommended tenderer had an advantage over the other competing tenderers because he was the same architect who was awarded the initial contract for the design of the *Rehabilitation Facility*, which they understood that it was not awarded through a normal tendering procedure, and, also, because all relevant information that was available to him was not provided to them. He contended that this went against both the EU directives and the Public Contracts Regulations.

During the course of these proceedings, Dr Desira said that the most economical advantageous offer was not necessarily the cheapest tender (MEAT). He remarked that his clients had obtained much more weighting points than those given to the recommended tender for the quality of service, as reflected in the technical offer.

The appellants' lawyer explained there were items in the tender that fell under the 'Tariff' while others did not. He said that the recommended tenderer's offer of 2.45% fell below the applicable fixed tariff of 3% and that none of the other tenderers had submitted such a low rate. Dr Desira maintained that the Adjudicating Board should have put more emphasis on the *Tariff K* because the appellants had been severely prejudiced for having adhered to their Council's directives and the law. The Code of Professional Conduct contained in the First Schedule to the regulations, namely, Regulation 2, specified that it was the duty of an architect to uphold and apply the scale of professional charges payable to architects as per said *Tariff K* of Schedule A to the Code of Organisation and Civil Procedure. Dr Desira emphasised that the Contracting Authority was awarding a contract in violation of the law and that *Tariff K* was not a guideline but 'law'.

In his response to the appellants' remarks, Mr Joseph Micallef, Chairman of the Adjudicating Board, declared that in their evaluation they did not take into consideration *Tariff K* because they had to evaluate the offers according to the terms and conditions of the tender document and also because no reference was made to *Tariff K* on the 'Schedule of Prices'. Mr Micallef claimed that the *Kamra tal-Periti's* circular referred to by the appellants was not submitted to the Adjudicating Board but to all architects and this was sent a day before the closing date of tender, that is, on 14 February 2007. However, he pointed out that none of the offers received was in compliance with the rates stipulated in *Tariff K*.

On cross-examination by the PCAB, Mr Micallef said that the term '*the most economically advantageous offer*' was a combination between the quality (technical) and financial proposals. He said that according to the tender document, the MEAT had to be established by weighing quality against price on an 80/20 basis. When the PCAB drew his attention that it was the financial offer that changed the balance, Mr Micallef replied that although the price might seem to be the determining factor, it was only a part of the equation.

In reply to specific questions by Dr Desira, the Chairman of the Adjudication Board confirmed that they knew that:

- (i) Mr Frank Muscat was the same architect who was awarded the initial contract for the preparation of the design of the 'Rehabilitation Facility',
- (ii) the same architect had calculated the estimated cost of construction, which amounted to Lm4m, and,
- (iii) the estimated cost was not conveyed to the other competing tenderers. However, Mr Micallef added that, in spite of this, these did not affect the adjudication process because they based their decision on the quoted rates and not on the estimated cost of construction.

In reply to the PCAB's remark regarding the fact that there were various reports in the file that were endorsed by different officials, Mr Joseph Degiorgio, a member of the Adjudication Board, clarified that, after the opening of tenders, the offers were referred to the Adjudication Board which was composed of Mr Micallef as Chairman, and Messrs John Attard Kingswell, Lawrence Buttigieg and Joseph Degiorgio, respectively, as members. He explained that this Board evaluated the tenders according to the procedure outlined under Clause 2.13 – Evaluation of Tenders. Subsequently, they prepared a report in the form of the 'Evaluation Grid' wherein they gave points to each bidder accordingly. The report was then formally referred to the Director Corporate Services of the Health Division and after checking the points referred the said report to the Contracts Department.

With regard to the 'Evaluation Grid', the Chairman PCAB said that the weighting should be somewhat different because, in his opinion, the fact that tenderers were required to indicate their professional experience and proven track record and that extra points were given to those who had more experience, tended to stifle any chances of new architects ever being in a position to participate.

Mr Degiorgio confirmed that although the financial offers were adjudicated inclusive of VAT, yet, he said that after the appeal they worked out the rates

exclusive of VAT and the score obtained by each bidder remained the same. The Adjudication Board's member said that no tenderer took any advantage over the others because the set of plans was attached with the tender document. He was of the opinion that any contestation on *Tariff K* should have been presented within the tendering period and not after award stage. Furthermore, he said that the percentage rates quoted by tenderers were:

- a. 5.18%
- b. 5.95%
- c. 4.00%
- d. 3.65%
- e. 3.00%
- f. 10.90%
- g. 8.00%
- h. 9.00%
- i. 2.45%
- j. 2.95%
- k. 5.90%

When the PCAB remarked that the amount/s on which each percentage rate was based was/were unknown and therefore the MEAT could not be determined, Mr Degiorgio explained that according to the tender document '*rates quoted are to be on a percentage basis of certified works*' and therefore the percentages submitted referred to the same amount. Dr Fenech intervened by stating that the architects knew on what amount they based the quoted percentage rate. Dr Desira maintained that they only had the design and that tenderers did not know the estimated cost for the construction of this project. He proceeded to argue that for evaluation purposes it was essential to know the bottom line on which the tenderers had to base the quoted percentage rates.

In response to the other issues mentioned by the Adjudication Board, Dr Desira said that his client did not need to complain because the law stipulated that architects had to comply with the established fees and not with the tender conditions. With regard to the declaration that the directive was received a day before closing date of tender, the appellants' legal representative said this was still received before the adjudication of tenders. He also emphasised that although no reference was made to the 'Tariff' in the tender document, according to Regulation 11 of the Regulations made by the Chamber of Architects and Civil Engineers, included in the Chamber of Architects Regulations (S.L. 390.01), all persons holding a warrant to practice as architects and civil engineers had to comply with the 'Code of Professional Conduct' contained in the First Schedule to these regulations as well as the recognized 'Tariff of Fees' listed in *Tariff K* of Schedule A to the Code of Organisation and Civil Procedure.

Dr Peter Fenech, The Doric Studio's legal representative, maintained that the PCAB should not only focus on *Tariff K* but should also establish whether the

evaluation and adjudication of tenders was carried out in accordance with the conditions of tenders. He pointed out that *Tariff K* did not specify that such established rates were the minimum that an architect had to charge for the provision of architectural services because it was only meant to lay down guidelines for professional charges payable to architects. The recommended tenderer's representative argued that, if *Tariff K* were to be considered obligatory, then they were violating the established principles of the European Community legislation regarding freedom of provision of services.

He said that every adjudicated tender created a contractual relationship between the Contracting Authority and the recommended Tenderer. Dr Fenech claimed that the directive of the *Kamra tal-Periti* could not bind the Contracting Authority because

- (i) the latter was free to choose the most economically advantageous offer, and
- (ii) it was a commercial decision.

Furthermore, he said that in the past the Director of Contracts had awarded similar tenders that were not according to *Tariff K* and although the *Kamra tal-Periti* was aware of such instances it did not take any action.

Dr Fenech said that they did not agree with the weighting given to his clients in respect of their technical proposal and that if the results were published before the opening of the financial offer they would have filed an objection.

During these proceedings Architect David Felice, President of the *Kamra tal-Periti*, Mr Francis Attard, Director General (Contracts) and Architect Frank Muscat on behalf of The Doric Studio took the witness stand and gave their testimony under oath.

At the beginning of his testimony, Architect Felice gave some background information on the role of the *Kamra tal-Periti*. He stated that the Minister responsible for Works had the power to make regulations and that these formed part of the subsidiary law. He said that the Code of Professional Conduct was contained as a Schedule and formed part of the regulations. He declared that every architect, whether he/she was a member of the Chamber or not, was bound to apply the tariff of fees contained in *Tariff K*. Mr Felice claimed that the legislation governing the architects' professional activity assigned the Chamber of Architects to investigate any case of alleged abuse or breach of the Code of Ethics by any member of the profession and in case of serious matters the Minister responsible for Works was obliged to implement the Chamber of Architect's decision. However, he pointed out that the architect involved in such abuse or breach had a right to appeal against such decision.

On cross-examination by the PCAB, the President of the *Kamra tal-Periti* declared that the rates, contained in *Tariff K*, for services provided by architects were fixed and that these were not simply guidelines but were part of local legislation. Also, he remarked that certain works required ancillary services, such as project management, which, though provided by architects, were not included within the said tariff.

Mr Felice also testified that they were investigating every architect who submitted an offer for the tender under reference to explain how they computed the quoted rates and other matters concerning architectural services. He said that on 27 February 2007 they wrote to the Department of Contacts wherein they requested the latter '*to procure the names of the periti who submitted proposals for the tender under reference – CT 454/2006*' and other relevant information. The witness confirmed that, except for an acknowledgement, they did not receive any other reply even though they sent reminders on 16 March and 28 May 2007 respectively. The witness testified that the *Kamra* even held an informal meeting with OPM on various issues concerning the provision of architectural services.

When Dr Fenech asked Architect Felice to state whether the client could engage an architect up to MEPA stage and issue another tender for another architect for construction works, the reply given was in the affirmative. However, in reply to a specific question by Architect Robert Sant, the witness said that although *Tariff K* did not contemplate for an architect to be engaged for the submission of the application and another one to be responsible for the construction works, the spirit of the Tariff was intended to provide the service for the whole project.

During Architect Felice's evidence, it was established that, according to paragraph 10 – *Design and Erection of Buildings* of *Tariff K*, the fee payable to an architect '*for taking the client's instructions, preparing sketch designs, making approximate estimates of cost by cubic measurement or otherwise, submitting applications for building and/or other licences, preparing working drawings and specification, giving general supervision*', that is for the whole project, was 6% and that according to paragraph 11, an architect was entitled to 4% for the submission of an application to MEPA and 2% for the continuation of the project. However, if after the application stage a new architect was engaged the fee should amount to 3%.

On the explicit request of the PCAB, Architect Felice said that in his personal opinion the percentage rate that should have been quoted by tenderers for the provision of these architectural services was between 8% and 9% inclusive of VAT. This was arrived at after analysing the services indicated in the tender's terms of reference and the rates included in *Tariff K*, copies of which were presented to him for his guidance.

He explained that the payable fees for:

- 1) 'the supervision/monitoring of the whole project from the MEPA permit stage onwards' (para 3.1.2), which meant a "take-over" was 2% or 3% (Para 11);
- 2) the preparation of the 'tender dossier including specifications and bills of quantities' (para 3.2.2) (rate for 'specification' already included in the rate of (1) above) was 2% (para 5),
- 3) 'taking the necessary measurement of works and pricing' (para 3.2.8) was 2% (para 5) and
- 4) the structural design was 2% (para 14).

Both Architects Sant and Muscat respectively, contested Architect Felice's computation regarding the rates. Furthermore, in reply to a specific question by the PCAB, the first contended that, due to the fact that before the closing date of tender they received the *Kamra tal-Periti's* directive, prospective tenderers were obliged to comply with the contents of *Tariff K*. On the other hand the reply given by Architect Muscat was the opposite and the reason given was that in this case the tender document did not make any reference or even mentioned *Tariff K*. When asked by the PCAB to state whether the stipulated tariff was binding on the architect, the reply given by the first was in the affirmative while that given by the latter was in the negative. Also, Mr Muscat insisted that in various European countries the issue of fixed tariffs was contested in courts as they reduced competition.

The second witness to take the stand was the Director General (Contracts) who, on cross-examination by Dr Desira, declared that the name of the Architect indicated on the plans was Mr F Muscat and that the Health Division's 'commitment form' was signed by Mr Degiorgio. When asked to state whether he knew who had contributed to this tender document, the reply given was in the negative since this was prepared by the Health Division.

Finally it was the turn of Mr Muscat, acting on behalf of The Doric Studio, to give his testimony in these proceedings.

On being questioned by Dr Desira, the witness held that for the purpose of this tender he did not give any estimate. Mr Muscat said that he only gave a very preliminary indication of the estimated cost of project, which amounted to Lm12m (Lm4m for Construction + Lm4m for Finishes + Lm4m for Mechanical and Electrical) when asked to do so during a meeting held at OPM. The witness declared that he was only engaged in the preparation of the designs up to MEPA stage and for the submission of a set of plans to be annexed with the architectural services tender under reference.

Mr Muscat sustained that after the issue of this tender all contacts with the Health Division on this project were stopped and that he only remained in

contact with MEPA due to modifications that were being requested by ADT. The witness said that all correspondence sent to MEPA was faxed to the Health Department.

Architect Muscat said that his interpretation was that the minimum fee of 3% was applicable to those who did not submit the application to MEPA. However, he said that, once he was the same architect who had already provided this service, the minimum rate he could charge according to the 'Tariff' was 2%. Dr Fenech intervened to elucidate the fact that, although they were stating that they were not bound by the tariff, their offer was still within the legal requirement of *Tariff K*. At this point, Dr Desira remarked that while the recommended tenderer did not breach any regulation when 2.45% was quoted, the minimum rate his client could quote was 3% because he was not the abandoned architect.

In his concluding remarks Dr Desira maintained that the fact that

- (i) Mr Muscat was the Architect who had prepared the estimated cost of project (even though preliminary), and
- (ii) the estimated cost of construction was not forwarded to them;

the recommended tenderer had an advantage on the appellants, if not even on other tenderers.

He also sustained that the Tendering Authority or the Health Department was obliged to ascertain that all participants were treated in an equitable manner. The appellants' legal representative claimed that the Adjudication Board knew the amount on which Architect Muscat calculated his rate because the estimated amount was transmitted to them, however, they did not know on what the amounts of the other tenderers were calculated.

Dr Desira said that another advantage that transpired during the hearing in favour of The Doric Studio relating to the minimum rate that Architect Muscat could charge was 2% as he was the same architect who submitted the application to MEPA. However, the minimum rate that his client could quote was 3% because Architect Sant was not involved in the first contract. Dr Desira claimed that if they were to accept Mr Felice's argument that this was not an abandonment but a continuation, then they could not state that the minimum 3% was binding on the recommended tender. The appellants' lawyer sustained that this was definitely blatant unfair competition.

He claimed that in spite of the fact that the Adjudication Board received a copy of the *Kamra tal-Periti's* directive they did nothing to save the situation even though they knew that the tenderer had an advantage over the others. As a

consequence, he felt that the whole tendering process was carried out in the most unjust manner.

With regard to *Tariff K*, Dr Desira said that the application of the said tariff was binding on all architects and that it was not simply a guideline but a fixed rate.

Dr Fenech responded by stating that the estimated cost was irrelevant once the appellants were insisting that architects had to comply with the established rates in *Tariff K*.

The recommended tenderer's lawyer said that even though they did not agree that the tariffs were obligatory, The Doric Studio still worked within the parameter of the law because according to the established rates in *Tariff K* the minimum rate he could offer was 2%. Dr Fenech said that tenderers were not obliged to abide by the spirit of the law or the praxis but by what was actually written down in the 'tender document'. He insisted that *Tariff K* was meant to lay down guidelines for professional charges payable to architects and it did not specify that such established rates were the minimum. At this point Dr Desira clarified that he was not stating that what was in the tariff was the minimum because *Tariff K* neither referred to minimum nor to maximum and so the rates were fixed.

Continuing, Dr Fenech said that this tender created a legal relationship between the Director of Contracts and the Tenderer and therefore the former was free to choose the cheapest offer even if the proposed rate was below the established tariff. He argued that if his client's offer was in breach of the law he would face the consequences.

Dr Fenech also maintained that the *Tariff K* was not obligatory and that it violated the principles of European Community legislation regarding the freedom of provision of services. He claimed that once Malta was a member of the EU, then the latter's legislation superseded that of the former.

At this stage the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 21 August 2007, and also through their verbal submissions presented during the public hearing held on the 14 September 2007, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' claim that the recommended tenderer's offer should have been disqualified because the percentage rate quoted in the financial offer was excessively less than the fee which according to the

same appellants was established by law - and not to be regarded simply as a guideline - under 'Tariff K' of Schedule A of the Code of Organisation and Civil Procedure, with the appellants' legal advisor admitting that no reference was made to the *Tariff* in the Tender Document itself;

- having evaluated the fact that whilst, on one hand the PCAB had heard how, on this specific Tender, the Contracting Authority was notified by the *Kamra tal-Periti* not to accept offers that were not submitted in accordance with the said *Tariff*, it also noted (1) Dr Desira's claims that (a) he was not stating that what was in the *Tariff* was the minimum because *Tariff K* neither referred to a minimum nor to a maximum contending that the rates were fixed and (b) in spite of the fact that the Adjudication Board did receive a copy of the *Kamra tal-Periti*'s directive yet they did nothing to save the situation even though, in his opinion, the said Board members knew that the tenderer had an advantage over the others; (2) Dr Fenech's claim that the tender created a legal relationship between the Director of Contracts and the Tenderer and therefore the former was free to choose the cheapest offer even if the proposed rate was below the established tariff and (3) Mr Degiorgio's claim that he was of the opinion that any contestation on *Tariff K* should have been presented within the tendering period and not after award stage;
- having, meantime, also noted the claim made by the Chairman of the Adjudicating Board, who during the hearing stated that in their evaluation they did not take into consideration *Tariff K* because they had to evaluate the offers according to the terms and conditions of the tender document and also because no reference was made to *Tariff K* on the 'Schedule of Prices'
- having considered both (a) the appellants' concern relating to the fact as to whether the Adjudication Board's method of evaluating the financial offers was correct because the appellants did not know whether or not the VAT element was taken into consideration as well as (b) Mr Degiorgio's confirmation that, whilst during the adjudication stage the financial offers were adjudicated inclusive of VAT, yet, it was also a fact that after the appeal was lodged, the same Adjudication Board voluntarily worked out the rates exclusive of VAT with resulting scores obtained by each bidder remaining the same;
- having reflected on (a) the point raised by the appellants regarding the fact that in their opinion the recommended tenderer had an advantage over the other competing tenderers because he was the same architect who was awarded the initial contract for the design of the *Rehabilitation Facility*, (b) the Adjudication Board's counter-statement which whilst arguing that the estimated cost was not conveyed to the other tenderers, yet it also placed major emphasis on the fact that these costs did not affect the adjudication process because the said Board did not base its decision on estimated cost of

construction but on the quoted rates, (c) Dr Fenech's intervention on the same issue in which it was argued that the estimated cost was irrelevant once the appellants were insisting that architects had to comply with the established rates in *Tariff K*;

- having also considered Dr Fenech's remark that the PCAB should not only focus on *Tariff K* but should also establish whether the evaluation and adjudication of tenders was carried out in accordance with the conditions of tenders;
- having taken full cognizance of Mr Felice's testimony including and, especially, the fact that (a) he replied in the affirmative to a question asked by Dr Fenech confirming that a client can engage an Architect up to MEPA stage and issue another tender for another Architect for construction works and (b) in his personal opinion, the percentage rate that should have been quoted by tenderers for the provision of these architectural services was between 8% and 9% inclusive of VAT;
- having noted that both Architects Sant and Muscat respectively, contested Architect Felice's computation regarding the rates albeit both of them had different views as regards the binding element of the same *Tariff*, including Architect Muscat's claim that even though they did not agree that the tariffs were obligatory, *The Doric Studio* still worked within the parameter of the law because according to the established rates in *Tariff K* the minimum rate they could offer was 2%;

reached the following conclusions, namely

(A) Re the *Tariff K* issue

1. The Appeals Board, reflected on these issues and, initially, tried to establish whether this is an issue between the tenderer and the body representing the profession, in which case it would be up to the Chamber of Architects to take action against the tenderer if it feels that such action is necessary. In this context, if the PCAB were to agree that it should decide upon the issue, then it would have had to establish whether the fees mentioned in *Tariff K* are obligatory and if they are, whether those proposed by the recommended tenderer are in violation of *Tariff K*.
2. Following an exhaustive deliberation process with regards to the question of whether Architects may charge fees outside those laid down in *Tariff K*, the PCAB feels that, whilst an Architect has an obligation to abide by all rules regulating his / her profession as well as any rules of conduct, yet, it is also true that an Architect's client is entitled to expect him / her to abide by such rules at all times and is

not expected to verify that the Architect is in fact acting in accordance with the rules of conduct regulating his / her profession.

3. Further to 2 above, the PCAB also came to the conclusion that this does not, however, preclude the Chamber of Architects from taking any action against an Architect for breach of conduct if it feels that there is such breach.
4. Further analysis by the PCAB of the major issue being contended, namely the one relating to the application of fees as per *Tariff K*, once again suggests that, rationally speaking, one should not expect the Contracting Authority to verify that the fees quoted in proposals submitted by Architects are in fact in compliance with *Tariff K* or with any other law regulating their professional fees. One also notes that the Contracting Authority is entitled to assume that the fees quoted by an Architect (who at the end of the day is a warranted professional) are legally correct. If the Architect quotes fees in violation of the law, then he / she shall be liable to disciplinary action by the Chamber of Architects in terms of the code of conduct, not to mention that he / she can also be liable towards the Contracting Authority itself.
5. On the same issue (see 4 above), it appears that, whilst, prior to the award of the tender, the Contracting Authority was informed by the Chamber of Architects that the latter was investigating any potential breach of ethical conduct by Architects, yet, there was, meantime, no specific decision by the Chamber that any of the proposals were in fact in breach. This is important since any Architect who is found to be in breach by the Chamber has a right to challenge such decision through an appeal mechanism and through the Courts of Malta.
6. On this particular issue the PCAB feels that it is not the Contracting Authority's (or the PCAB's) competence to decide such matters, but, in similar instances, it should only act upon such decisions once they are taken by the competent authorities and in the proper forum.
7. Since, in this particular case, there was no such decision, this Board concludes that the grievance raised by the complainant with regards to the application of fees as stipulated in *Tariff K*, is not justifiable.

(B) Re all other issues raised by appellants

Regarding the possible advantage that *The Doric Studio* might have had over other tenderers, the PCAB concludes that this issue should have been raised at the pre-tender stage or immediately it became known that *The Doric Studio* submitted an offer i.e. at the time of opening of tender box and not following adjudication of contract. The PCAB feels that by

going ahead and tendering, the other bidders signified that they had no problems on this score

With regards to other issues, this Board is of the opinion that the arguments brought forward by appellants do not provide sufficient proof that the Adjudication Board has reached the wrong conclusion in recommending that the said tender be awarded to *The Doric Studio*.

In addition, all other pertinent testimony presented during the hearing, as well as the counter arguments brought forward by defendants, did nothing to alter the validity and the equitable manner with which the initial decision was taken, especially those relating to the *financial evaluation* and the possible *advantage given to recommended tenderer*.

In consequence to the above, the appellants' objection to the decision, reached by the General Contracts Committee, to award the Contract to *The Doric Studio*, cannot be upheld by this Board.

Finally, this Board recommends that the deposit submitted by the appellants in terms of the Public Contracts Regulations, 2005, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

31 December 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 112

Re: CT 2767/2006 – Advert No CT/A/2/2007:

Supply, Delivery, Installation and Commissioning of kitchen / restaurant equipment to ITS School, Qala, Gozo

This call for tenders was published in the Maltese Government Gazette and the Official Journal of the European Communities on 27 April 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Gozo.

The closing date for this call for offers was 12 June 2007 and the estimated contract value was Lm86,610 excluding VAT (2004 – 2006 budget).

Five (5) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee (GCC) to cancel the tender relating to the subject in the above-mentioned caption arguing, *inter alia*, that “no offer was fully compliant”, **Messrs E.C.B Hotel & Catering Equipment Limited** filed an objection on 18 September 2007 against the said decision.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened two public hearings on the 17 and 22 October 2007, respectively, to discuss this objection.

Present for the hearing were:

ECB Hotel & Catering Equipment Limited

Dr Richard Sladden	–	Legal Advisor
Mr Mario Cutajar	–	Director
Mr John Cutajar	–	Director

Ministry for Gozo

Mr Joseph Micallef	–	Permanent Secretary
Dr Tatiana Cassar	–	Legal Officer
Mr John Cassar	–	Technical Advisor

Adjudication Board

Mr John Cremona	–	Chairperson
Arch Peter Zammit	–	Member
Ms Daniela Sabino	–	Secretary

Department of Contracts

Mr Francis Attard – Director General (Contracts)
Mr Anthony Fava – Director (Compliance)

Planning and Priorities Co-ordination Division

Ms Gabby Mallia – Senior Programme Manager

After the Chairman PCAB's brief introduction regarding the case under review, the appellants' (Messrs *ECB Hotel & Catering Equipment*) legal representative, Dr Richard Sladden, was invited to explain the motive which led to his clients' objection.

Dr Sladden commenced his intervention by stating that his clients' offer had all the essential requirements of the tender and that any variations did not substantially depart or fundamentally change what was requested in the tender. The lawyer insisted that the presence of the technical person was indispensable in order to indicate and to explain where and why their offer was not compliant. Furthermore he remarked that his clients' offer was the cheapest of all the submitted bids by approximately Lm10,000. Dr Sladden claimed that in the instructions to tenderers it was specified that the tender had to be awarded to the cheapest technically compliant offer. The appellants' lawyer finally reiterated that his clients' bid was technically compliant and the cheapest.

In reply to the PCAB remark as to whether his clients' bid was essentially or fully compliant, Dr Sladden said that any variations were minimal and beneficial to the contracting authority. Also he said that as per minutes of the clarification meeting held on the 18 May 2007, it was confirmed in writing (answer to question 1.10 refers) that "*sizes specified in the BoQ must be respected to reasonable tolerances. Items such as sinks which come in standard sizes must exactly match specs*". Dr Sladden concluded his opening intervention by claiming that they were against the initiation of the negotiated procedure due to the fact that the financial element of their bid was known and therefore they were insisting that the financial offers should not be changed.

Dr Tatiana Cassar, Legal Advisor to the Contracting Party, referred to Clause 20 *Evaluation of tenders* of the tender document which stipulated that the Adjudication Board had to examine whether the tenders were administratively compliant or not. She said that, contrary to what was required under Sub-Article 4 of Clause 3.6, none of the appellants' documents/literature was original or signed. She claimed that in spite of the fact that during the adjudication stage the appellants were asked to submit a complete list of the requested documents, some of them were still missing, others were not original (J10) or did not match with the description (H1). The lawyer contended that *ECB Hotel & Catering Equipment Limited* failed also administratively in the Financial Capability since they did not submit '*a statement*

of the economic operator's overall turnover for the last three years, these being 2003 / 2004 / 2005' as stipulated under the same clause.

With regard to the appellants' claim that the variations were minimal and, therefore, did not substantially depart and did not fundamentally alter the said requirements, Dr Cassar claimed that in the appellants' offer there were considerable shortcomings when compared with the specifications indicated in the Bills of Quantity (BoQ) of the tender document. She maintained that whilst substantial variations were noticed in the measurements of some items (such as B8 - knee-operated wash-hand basin 500X500X350 and 'B1'- sink unit X 2 bowls 400X700X850 in the BoQ and the sizes of the appellants' items were 400X310X300 and 2,400X700X850 respectively), others did not even match with description (such as *square bowl* instead of *round bowl* – 'B5'). Also, other items were not even included in their offer (such as 'F1' - *Shelf* and 'F3' - *Swivel*). Furthermore, in the appellants' offer it was not specified whether the items were "brushed" as indicated against each item in the BoQ. She claimed that this feature was important because such items would not be easily scratched or dented.

The Contracting Authority's representative said that when all these items are considered as a whole, the 'kitchen' as requested in the tender document would have been drastically different from that being offered by the appellants.

With regard to the appellants' claim that they had the cheapest offer, Dr Cassar made reference to Clause 20 of the tender document, wherein it was stipulated that the financial evaluation would be carried out only in respect of those offers that were deemed to be administratively compliant and subsequently technically compliant. She claimed that the appellants' offer was neither administratively nor technically compliant and therefore in spite of the fact that they had the cheapest offer the tender could not be awarded to them.

Dr Sladden responded that this was the first time that his clients were hearing such shortcomings and it was for this reason that they requested a list of items showing where they were not compliant with the tender specifications. He claimed that in their opinion this tender was not cancelled on the basis of the procedure specified under *Clause 25 – Cancellation of the tender procedure*.

In reply to a specific question by the PCAB, Dr Cassar declared that all other offers were not compliant. The PCAB claimed that in the prevailing circumstances it had to be established where and why none of the offers was compliant with the tender requirements and whether the specifications were reasonable and attainable. At this point, Dr Sladden intervened to remark that all the bidders were companies that had extensive experience in this field.

Mr John Cremona, Chairman of the Adjudication Board, stated that the role of the Board was to evaluate the offers in accordance with the conditions as

stipulated in the tender document. He proceeded to explain that, after the submission of tenders and after obtaining permission from the General Contracts Committee, all bidders were approached to submit original literature that was signed by the manufacturers as stipulated under Clause 3.6 (4) of the *Instructions to Tenderers*. He declared that in spite of the fact that, in their majority, the tenderers satisfied this requirement, they still lacked to supply all the information requested.

When the PCAB asked Mr Cremona to state whether the Board had drawn up a comparative technical compliance grid that included all tenders and items in the BoQ, the reply given was in the negative. He explained that they evaluated each tender on its own merits and that the tender could not be awarded because none of them was administratively fully compliant with its requirements.

The Chairman of the Adjudication Board remarked that they did not recommend the re-issue of the tender but the opening of a negotiated procedure so that the bidders would be given a chance to adapt to the requirements set in the tender document.

Mr Cremona said that following the administrative evaluation it carried out a preliminary evaluation of the technical submissions and found that all three tenderers had several items which did not totally comply with the tender requirement particularly with regards to measurements and finish.

At this point the PCAB suspended the sitting to enable its members to discuss a few issues raised until then.

After resuming with the hearing, the PCAB ruled that the Adjudication Board should compile a comparative technical evaluation grid since this was considered indispensable for deliberation purposes. The PCAB requested the Board to include all bidders and the specification of all the items indicated in the BoQ and to indicate against each item submitted by the respective bidders which of them were compliant or not. This grid had to be completed and sent (in soft copy) to the Secretary, PCAB by 15.00 hrs of Friday, 19 October 2007. Meantime, the latter was directed to forward the same documentation to the Chairman and Members of the PCAB and the appellants.

Architect Peter Zammit, a member of the Adjudication Board, intervened by pointing out that the kitchen infrastructure was already completed and, due to the fact that the building had space limitations, the equipment had to fit within the space available. Furthermore, he said that as a consequence they were not in a position to alter specifications. At this point the PCAB asked the appellants' representatives to state whether at tender submission stage his Company had taken into consideration the building structure. Mr Mario Cutajar, Director ECB Hotel and Catering Equipment Limited replied that the items offered were in conformity with the measurements provided.

Continuing, Architect Zammit said that during the evaluation stage, in reply to a specific question by the Adjudication Board, the Department of Contracts said that the offers had to be fully compliant with all the requirements of the tender. He explained that, originally, the Adjudicating Board was in favour of initiating discussions with the tenderer who submitted the cheapest technically compliant offer but this was refused by the General Contracts Committee (GCC).

Mr Francis Attard, Director General (Contracts) was then called to take the witness stand. On cross-examination by the PCAB, he testified that whilst he could not recall whether a specific request was made to start discussions with the cheapest tenderer, yet, even if this were to be the case, such request could not be accepted because the regulations had specific provisions for such instances known as ‘negotiating procedures’. He explained that during the “negotiating procedures” all tenderers whose offers were deemed to be administratively and technically not compliant would be given another chance to rectify the deficiencies by adapting their submissions with the tender requirements. Mr Attard emphasised that the tender price was not negotiable. He said that when a negotiated procedure was resorted to, each bidder was still required to submit a fresh tender with new specifications in the Contracts Department’s tender box. The Director General (Contracts) remarked that, in those instances where the Adjudication Board reported that none of the offers was administratively and/or technically fully compliant with the tender requirements, the GCC would have no alternative but to cancel such tenders. He explained that in this particular case, they received a specific request from the Ministry for Gozo and they authorised the latter to initiate a negotiated procedure with all the bidders as stipulated in Regulation 65 of the Public Contracts Regulations and in accordance with EU Directives.

Mr Zammit intervened and remarked that this was the second time that this tender was being issued and this was being done so with the same specifications!

The PCAB remarked that it was no wonder that offers were also not compliant in the second issue! The PCAB further remarked that as things stood, it was very doubtful whether at planning stage any consideration would have been given to (i) the equipment that was available on the market and (ii) whether the building could technically house the required equipment. Furthermore, the PCAB declared that it failed to understand why the tender was issued with the same specifications considering the fact that none of the tenderers had complied with such specifications. The Chairman, PCAB said that in this particular case the scope of a ‘negotiated procedure’ was very doubtful and, in the prevailing circumstances, the technical compliance grid was even more necessary.

At this stage the hearing was adjourned to Monday 22 October 2007 at 16.30 hrs.

Following the resumption of proceedings as previously scheduled, the PCAB informed those present that the Chairman of the Adjudication Board had provided a 'technical evaluation' comparative grid of all the technical specifications in respect of all five tenders together with a covering letter. On taking the witness stand, Mr Cremona explained that they had indicated those items which either were not technically compliant or had slight variations with the original tender dossier. He confirmed that blank spaces meant that the items were fully compliant. He explained that the technical grid had only been compiled following the request of the PCAB because previously the adjudication had been carried out only up to and regarding the administrative details.

On cross-examination by the PCAB, Mr Cremona testified that against some of the items under the Tenderers' specifications they included the remark '*Description as per model financial offer not as per Technical Specifications*' because tenderers were requested to provide technical and financial submissions as per Annexes II and III respectively. He explained that the *Model Financial Offer* included all the items indicated in the technical specifications but with an abridged description and therefore this meant that if the tenderers submitted the items according to the Model Financial Offer and not according to the technical specifications then such offers were not considered acceptable.

Mr Cremona said that once the tenderers failed in the administrative stage, the Adjudication Board could not proceed to the technical evaluation. He said that this was the reason why the technical grid was not drawn up. The tenderers were required to submit the "audited accounts" and "a statement of the economic operator's overall turnover" for the years 2003 / 2004 / 2005, a list of related contracts and other pertinent information. He confirmed that all tenderers failed on the clause wherein they were required to submit original literature that was to be signed by the manufacturer of the equipment. The Chairman of the Adjudication Board said that although they requested the three tenderers that were within the budget to provide them with the literature as requested in the tender, yet, they still failed to submit all the required documentation. He said that in view of the tender's requirements photocopies of leaflets/ brochures could not be accepted and therefore the Board could not proceed with the evaluation process. Mr Cremona said that once they were not administratively fully compliant they requested the initiation of negotiated procedure to enable the three bidders to adapt with the requirements of Clause 3.6 (4).

Mr Cremona admitted that, during the evaluation of the first tender, the Board did not put a lot of weight on Clause 3.6 (4) namely that '*original data sheets issued by the manufacturer of the equipment, the authenticity of which must be certified by the manufacturer. Such data sheets must clearly show the particular item to be supplied, in accordance with the item requested in the*

technical specifications attached to this tender, such as but not limited to dimensions material, finishes etc.’. Here, Dr Sladden intervened and publicly noted why this time around the Board was insisting on this clause.

The PCAB referred the witness to *Clause 20 Evaluation of tenders* with regard to the concept of substantial compliance and asked Mr Cremona to state whether in his opinion those bidders who failed to submit original data sheets had “substantially departed from the tender requisites”. The Chairman of the Adjudication Board replied by quoting Clause 3.6 which specified that:

‘All contractors will be reviewed financially and technically to determine their capabilities in delivering the works. The bidder is to submit the relevant information required in this tender document including the following list in order to allow the panel to assess financially and technically his capabilities. The following criteria will be adopted for technical compliance and failure to comply with these criteria will result in rejection of the tender.’

At this point the Chairman of the Adjudication Board agreed with the PCAB’s view that the three bidders who were within budget were administratively almost fully compliant and that the only item that they failed to comply with was that they submitted photocopies of documentation that were not signed by the manufacturers.

The Director General (Contracts) emphasised that it was important to make a clear distinction between unclear information submitted by the tenderers and missing documentation that was specifically requested in the tender dossier. He said that the first was a question of clarification while in the latter case such offers could not be considered administratively compliant. The witness claimed that if the tender required an original document and tenderer/s submitted photocopies then such offer/s could not be considered as compliant and therefore this would be considered as “a substantial departure from the tender requisites”.

Dr Cassar intervened and agreed with Mr Attard that the appellants had substantially departed from the requirements of the tender dossier.

In reply to a specific question by the PCAB as to why they did not comply with the requirement of the tender as far as the original and signed documentation was concerned, Mr Cutajar, representing the appellants, said that some of their suppliers questioned why these were required and their main supplier did not even have a catalogue or leaflets. The appellant insisted that they should not be discriminated and lose a tender simply because they did not supply the original leaflets. He confirmed that they had provided photocopies of almost all items and that these were signed by the manufacturers. Here, the PCAB pointed out that it understood that such requirement was included to ensure their reliability

and that these were intended to assist the adjudicator during the evaluation process, however, it had to be determined also whether this was a substantial element to disqualify offers. Furthermore, the PCAB argued that on the basis of the fact that it was not always possible for suppliers to furnish tenderers with originally signed documentation, it seemed also logical for one to assume that such requisite would still not be complied with if negotiation procedures were to be opened with tenderers.

On further cross-examination by the PCAB, Mr Cremona explained that in spite of the fact that in the Administrative Compliance Grid they had indicated that three offers were acceptable, they were also drawing the attention of the Contracts Department that the relative bidders did not submit all the required documentation. Mr Cremona said that when they recommended the opening of negotiated procedure their intention was to proceed with an evaluation of tenders even if tenderers did not comply fully with the administrative requirements.

The PCAB remarked that they failed to understand why the Adjudication Board recommended the opening of a 'negotiated procedure' once three out of five tenders were considered substantially acceptable and in fact were clearly noted as such on the board's report. The PCAB was of the opinion that once the board clearly felt that the tenders could have been accepted they should have drawn this to the attention of the Contracts Committee and recommended that in spite of their shortcomings they could still accept such offers.

Mr Cremona agreed with the PCAB's views stating that, whilst the Evaluation Board was convinced that the offers submitted were substantially acceptable, they needed the comfort of the GCC. The Chairman of the Adjudication Board added that if they were told that photocopies would have been acceptable they would have considered such offers as being compliant albeit they would have still needed the official endorsement of the Department of Contracts.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 18 September 2007, and also through their verbal submissions presented during the public hearings held on the 17 and 22 October 2007 respectively, had objected to the decision taken by the General Contracts Committee;
- having considered that Dr Sladden stated that his clients' offer had all the essential requirements of the tender and that any variations did not substantially depart or fundamentally change what was requested in the

tender and that he also remarked that his clients' offer was the cheapest of all the submitted bids by approximately Lm10,000;

- having noted Dr Cassar's comments regarding the fact that in the offers submitted (a) substantial variations were noticed in the measurements of some items, (b) others did not even match with description, whilst (c) other items were not even included in the respective offers.
- having noted that Architect Zammit, a member of the Adjudication Board, pointed out that the kitchen infrastructure was already completed and, due to the fact that the building had space limitations, the equipment had to fit within the space available;
- having also taken into consideration that in reply to a specific question by the PCAB, Dr Cassar declared that all other offers were not compliant;
- having considered that when the PCAB asked Mr Cremona to state whether the Board had drawn up a comparative technical compliance grid that included all tenders and items in the BoQ, the reply given was in the negative;
- having heard the Chairman of the Adjudication Board state that the said Board did not recommend the re-issue of the tender but the opening of a 'negotiated procedure' so that the bidders would be given a chance to adapt to the requirements set in the tender document and this following Mr Zammit's own admission that this was the second time that this tender was being issued and always including the same specifications;
- having considered that the outcome of a negotiated procedure would most probably not have yielded any different result from the present situation;
- having considered that Mr Cremona admitted that, during the evaluation of the first tender, the Board did not put a lot of weight on Clause 3.6 (4) which required, *inter alia*, the need for a certificate of authenticity to be issued by the manufacturer in respect of the equipment's *original data sheets*;
- having noted that Architect Zammit explained that, originally, the Adjudicating Board was in favour of initiating discussions with the tenderer who submitted the cheapest technically compliant offer but this was refused by the General Contracts Committee (GCC);
- having thoroughly considered the explanation, the personal interpretation of legal parameters, the significance and potential implications of Mr Attard's testimony, including that relating to the distinction to be made between 'unclear information submitted by the tenderers' and 'missing

documentation’, as well as, the same witness’s viewpoint concerning the interpretation of “a substantial departure from the tender requisites”;

- having considered that the Chairman of the Adjudication Board agreed with the PCAB’s view that the three bidders who were within budget were, administratively, almost fully compliant and that the only item that they failed to comply with was when they submitted photocopies of unsigned documentation by the manufacturers;

reached the following conclusions, namely:

1. the Adjudication Board had to be pragmatic and should have insisted in obtaining any pertinent documentation that was necessary and useful by seeking simple clarifications rather than to complicate matters further by resorting to a ‘negotiated procedure’;
2. the PCAB feels that the GCC, prior to agreeing on a ‘negotiated procedure’, should have, at least, queried why, in spite of the fact that in the Administrative Compliance Grid the Adjudication Board had indicated that three offers were acceptable, yet, the same Board was concurrently, in a seemingly contradictory manner, drawing the attention of the GCC that the relative bidders did not submit all the required documentation. The PCAB also observes that the Adjudication Board should have specified in their report that in spite of their shortcomings in certain offers they could still accept them;

As a consequence of (1) to (2) above this Board finds in favour of appellants and recommends that the Adjudication Board continues the adjudication process by analysing the technical aspect of the three offers considered acceptable.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 November 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 113

**Re: CT 2218/2007 – Advert No TD/T/PC/3/90/2006:
Tender for the Supply of Galvanized Steel Poles**

This call for tenders was published in the Maltese Government Gazette and the European Communities' Official Journal on 23 March 2007 and was issued by the Contracts Department following a request transmitted to the latter on 05 September 2006 by Enemalta Corporation.

The closing date for this call for offers was 29 May 2007 and the estimated three-year contract value was Lm1,035,750.

Nine (9) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee (GCC) not to allow the appellants' offer to continue to be considered in the ensuing stages of the adjudication process in view of the fact that the former claimed that the said offer was "adjudicated as not complying with the tender specifications because the size of the compartment door is 400mm X 85mm instead of 400mm X 100mm as required", on 09 October 2007 Messrs J P Baldacchino & Co Ltd submitted an objection on behalf of their Turkish principals, namely MITAS, claiming that their submission for this tender was being disqualified for reasons which were not valid.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 31 October 2007 to discuss this objection.

Present for the hearing were:

J P Baldacchino & Co Ltd:

Mr Anthony Baldacchino	–	Representative
Dr Patrick J Galea	–	Lawyer

Adjudication Board:

Ing Mark Sciberras	–	Head, Adjudication Board
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Department of Contracts:

Mr Francis Attard	–	Director General (Contracts)
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The Chairman PCAB gave a brief introduction to those present relating to the objection under review following which he invited Mr Anthony Baldacchino, representing Messrs J P Baldacchino & Co Ltd, the appellants, to take the floor.

Mr Baldacchino explained that the service compartment in the poles is like a small window, about two metres above street level, through which the wires are inserted in the poles which are mainly used for street lighting.

He claimed that the disqualification has resulted from a typographical error, featuring on the drawings of the said type 'B' poles wherein these were shown on the drawing as 400mm X 85mm instead of 400mm X 100mm as requested.

The appellants claimed that this is a clear typographical error as the declaration by the suppliers on page 17 out of 23, paragraph 3.10.4 of *Schedule A: Technical Requirements*, clearly affirms that the size of the service compartment is 400mm high X 100mm wide.'

Mr Baldacchino stated that as soon as his Company received the letter from the Director General, Contracts Department, they wrote to Enemalta Corporation to verify that this is a typographical error as the signed declaration carries the correct specifications of the service compartment of poles 'B'.

At this point, those present were further informed by the appellants' representative that on the 08 October 2007, the Corporation's Chairman wrote to the appellant Company stating that:

“Two of the drawings refer to the type B 'single arm' and type B 'double arm' poles, and in both drawings the dimensions of the compartment are shown as 400mm X 85mm. These drawings are checked and approved by different persons to the person who actually made the drawing and if these dimensions were 'typographical' errors they would have had to pass through three stages (the draughtsman who made the drawing, the checker and the approver of the drawing.). It is thus not considered credible that this was a typographical error. A properly executed drawing is considered to be an accurate representation of the finished product, which was thus not to specification.”

Mr Baldacchino remarked that Enemalta Corporation seems to have overlooked the determining factor which is the binding document, namely *Schedule A – Technical Requirements Para. 3.10.4*, wherein there is the answer to the question 'dimensions of service compartment for type B – 400mm high X 100mm wide.' The answer to that question is 'Yes'.

On the assumption made by the Corporation's Chairman as stated in the same correspondence, Mr Baldacchino argued that the Corporation's Chairman's description regarding the checking procedures in connection with the drawings

adopted by MITAS, was highly arbitrary and a simple personal viewpoint which is based on an assumption solely made by the same Chairman.

Mr Baldacchino drew the attention of those present that apart from the fact that MITAS had, on two previous occasions, supplied galvanised steel poles to Enemalta Corporation, more recently, they had also delivered 60% of all the steel poles erected in the north of Malta.

Mr Baldacchino stated that MITAS had drawn up two documents. In the first submission they drew up drawings featuring poles 'B' with a service compartment measuring 400mm X 85mm. The appellants' representative admitted that these measurements were incorrect as these pertained to poles 'C'. However, he also stated that in the signed declaration in *Schedule A*, MITAS agreed to submit poles 'B' with the requested measurements and specifications, that is, 400mm X 100mm.

As a consequence, Mr Baldacchino argued that in the e-mail, previously referred to, which was sent by the Corporation's Chairman, it is clear that the latter is incorrect when stating that 'in both drawings the dimensions of the compartment are shown as 400 x 85mm.' as MITAS had signed a declaration, as found in *Schedule A*, wherein it is stated that they shall provide type 'B' poles whose compartment dimensions would be 400mm x 100mm.

According to the appellants' representative, all that was being discussed in the hearing could have easily been discussed during the adjudication stage in the form of a clarification as suggested in the first page of his Company's submitted tender document, wherein it is stated that:

'in the event that any data submitted is not clear or different from the data provided, kindly liaise with us since human error is always possible.'

At this point, Engineer Mark Sciberras, Head of the Adjudicating Board, was asked to elaborate further on issues considered pertinent to the said proceedings.

Mr Sciberras explained that the Corporation asks suppliers to fill in both *Schedules A* and *B* respectively. He commented that MITAS committed themselves to both Para 3.10.4 of *Schedule A* and to Para 5.4 of *Schedule B*. He remarked that in the appellants' main offer the drawing did not corroborate with signed declaration.

The PCAB intervened to ask Mr Sciberras why nobody from the Corporation decided to contact the appellant Company to clarify the discrepancy between the drawings and the signed declaration. The PCAB also remarked that, in not doing so, the Adjudicating Board could have lessened the extent of a potential

wider choice available to the Contracting Authority, when, as it seems to be the case, the said Board decided to eliminate a bidder without first getting clarifications on the offer submitted, noting that this could have resulted in a more cost effective and pragmatic option. Also, such a decision, namely not to seek clarification from appellant Company, tends to become a more erroneous one, especially when this was taken without at least seeking advice from the Contracts Department with regards to the appropriate 'modus operandi' to follow in similar circumstances wherein there were two official documents with contradictory information. Considering this anomalous scenario, the PCAB queried, how was it possible for the Adjudicating Board to choose to discard the tender before clarifying which version was correct?

At this point Mr Sciberras remarked that, had the Adjudicating Board contacted J P Baldacchino & Co Ltd, such action could have been interpreted as a negotiation with the bidder. The PCAB replied by stating that this is a 'clarification' and not a 'negotiation'.

Prior to bringing this hearing to a close, the PCAB asked the appellants' representative whether he was in a position to confirm if, in the event that MITAS were to be reinstated, will they be in a position to deliver poles 'B' with the requested compartment measurements, namely 400mm X 100mm. Mr Baldacchino replied affirmatively.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 10 October 2007, and also through their verbal submissions presented during the public hearing held on the 31 October 2007, had objected to the decision taken by the General Contracts Committee;
- having considered the fact that according to the appellant Company the disqualification had resulted from a typographical error;
- having noted the point raised by Enemalta Corporation's Chairman in his email to the appellant Company;
- having also noted that the appellants had, on two previous occasions, supplied galvanised steel poles to Enemalta Corporation;
- having reflected on the point raised by the appellant Company, namely that what was being discussed in the hearing could have easily been discussed during the adjudication stage in the form of a clarification process;

- having also re-considered its opinion already voiced during the same hearing;

reached the following conclusions, namely

3. the PCAB fails to understand why the Adjudicating Board decided to discard the appellants' offer before clarifying which version was correct given that each of the different versions carried more or less equivalent weight in terms of the Tender Document.

As a consequence of '1' above this Board finds in favour of appellants and recommends that the offer submitted by the appellant Company should be re-instated for further analysis along with the rest of the previously accepted offers.

Furthermore, in view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit paid by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26 November 2007

PUBLIC CONTRACTS APPEALS BOARD

Case No. 115

**Re: CT 2247/2007 – Advert No CT/WSC/T/10/2007 – WSCD 472/2006/1:
Rising Main for Sewage Pumping Station at Wied il-Mielah, l/o Gharb,
Gozo**

This call for tenders was published in the Maltese Government Gazette on 30 March 2007 and was issued by the Contracts Department following a request transmitted to the latter by the Water Services Corporation (WSC).

The closing date for this call for offers was 17 May 2007 and the estimated contract value was Lm330,407.

Three (3) different tenderers submitted their offers.

Following receipt of a letter dated 19 October 2007 and sent by the Department of Contracts to the appellants wherein the latter were notified that their bid was not among the selected ones since it was adjudicated as not complying with the tender specifications, Messrs Pius Attard and Joseph Attard (partnership) filed an objection on 25 October 2007.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 05 December 2007 to discuss this objection.

Present for the hearing were:

Mr Pius Attard & Mr Joseph Attard (Partnership):

Hon Dr Angelo Farrugia	–	Legal Advisor
Mr Pius Attard	–	Contractor
Mr Edward Scerri	–	Architect
Mr Joe Cordina	–	Accountant

Adjudication Board:

Ing Paul Gatt	–	Member
Perit Adin Bundic	–	Member
Mr Anthony Camilleri	–	Member

Water Services Corporation:

Mr Mark Perez	–	Engineer
Dr Neville Young	–	Legal Advisor

Contracts Department:

Mr Francis Attard	–	Director General (Contracts)
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Following the Chairman's brief introduction, the appellants' legal representative was invited to explain the motive which gave rise to their objection.

Dr Angelo Farrugia explained how he filed an objection on the 23 October 2007 in favour of his clients, Messrs Pius and Joseph Attard respectively, in which a reconsideration of the decision taken by the Adjudication Board was requested. The appellants were substantially contending that, contrary to what the Adjudication Board was claiming, their work force was capable of effecting the eventual contract subject to the tender since they have already had ample experience in doing rising mains similar to the tender in question with Water Services Corporation (WSC), the Drainage Department and the Malta Enterprise (ME).

Furthermore, Dr Farrugia sustained that with regards to their 'financial facilities', his clients "are in fact in good financial position to the extent that they have machinery of high level including trenching equipment, a quarry of their own with all the heavy planting facilities, trucks, hymac etc."

On the issue of work force, the appellants' legal representative argued that his clients "cannot have full time employees when they physically do not have a tender of work", claiming that it does not make sense to have extra employees engaged with the *partnership* if the latter does not have any pending works.

At this point, Dr Farrugia queried why his clients did not receive a reply to their objection. The PCAB informed the appellants' legal advisor that since the tender is still being processed, the Contracts Department is not bound to issue an Analysis Report as the latter is normally drawn up when the tender would have already been awarded.

Dr Farrugia claimed that his clients were being unfairly judged when, in his opinion, his clients are in a position to fulfil all the obligations requested by the tender document including (a) the facility to recruit pertinent skilled and experienced work force; (b) having enough financial credibility to carry out the necessary work and (c) having the necessary experience to carry out the works as they had done similar works with the WSC, the Drainage Department and ME.

Mr Edward Scerri, an architect appointed by the appellants, whilst confirming that, in the past, his clients had already executed similar sewage pumping stations, commented that, in this instance, it seems that the Contracting Authority is placing more emphasis on the value of the tender than on the technical merits.

The PCAB asked what financial documents were requested from the participating tenderers. Mr Joe Cordina, the partnership's Financial Controller,

whilst stating that his clients have enough liquidity and that their work is generally self-financed, yet, admitted that they do not have a considerable amount of credit balances deposited in Banks and this could have adversely affected the Adjudication Board's analysis of facts and content of documentation presented by participating tenderers.

The PCAB commented on the fact that whilst there is, intrinsically, nothing wrong with entity having limited or no debts at all, yet, cash balances deposited in a Bank would still reflect a positive business activity. Undoubtedly, proceeded the PCAB, it is always hard for any adjudicating panel to deliberate on facts and figures which are, knowingly or not, not made available to it.

Dr Young, legal advisor to the WSC commented that the Contracting Authority had asked bidders to submit apposite financial statements signed by their respective accountant/s. As a matter of fact, during the hearing, it transpired that in this particular case, according to Dr Young, the Corporation had requested, on more than one occasion, the appellants, both verbally and in writing, to submit pertinent financial statements.

The Corporation's legal advisor proceeded by stating that the total amount of this project was estimated to be in the region of Lm300,000 to Lm330,000. Considering this figure, Dr Young contended that it was inconceivable for any Contracting Authority to favourably consider submissions from entities which declare an annual turnover of Lm100,000 and whose Bank accounts were anything but comforting!

At this stage, the PCAB asked whether the tender document indicated the estimated total amount of the requested works. Mr Alan Bundic, a member of the Adjudication Board, replied in the affirmative, referring to the amount of Lm330,000 as the estimated figure in question.

The same Board member proceeded by stating that the tender document contained quite a few forms which had to be filled in by participating tenderers. These *Forms*, added Mr Bundic, are meant to enable the Adjudication Board to acquire enough information to make it easier for them to form a better opinion and reach a just conclusion.

According to Mr Bundic, the Adjudication Board took into consideration that despite the fact that the estimated tender value, in this instance was Lm330,000, thus implying a certain calibre of works involvement, yet, the appellants' declarations revealed only two projects the magnitude of which managed to reach a maximum of Lm28,000 worth on one occasion! Needless to say, reflected Mr Bundic, all this within a context wherein the appellants' financial standing remained dubious, adversely affected the Board's analysis of the suitability of the appellants' overall offer.

Mr Bundic concluded his intervention by stating that albeit the tender document contemplated a performance bond, yet the value of such bond would ultimately be a trivial amount when compared to the overall financial comfort that tenderers were expected to provide.

The partnership's Financial Controller was asked by the PCAB to explain the reason why the requested financial statements were never sent to the Contracting Authority. Mr Cordina explained that due to some misunderstanding between him and Architect Scerri, *Form 4.4* of the tender document was never filled. At this stage, Mr Cordina remarked that despite this oversight, yet his clients still presented a performance guarantee.

The PCAB intervened to remark that considering that the Adjudication Board claims to have had little financial comfort with regards to the appellants' financial standing, such performance guarantee would have had little impact on enhancing the overall declared financial credibility of the tenderer in question considering the magnitude of the tender.

Mr Cordina and the appellants' legal advisor remarked that if such parameters were to keep on governing public calls for offers, small sized operations are never going to be in a position to be successful and large entities will continue to grow whilst small operators will remain small or, simply be brought to an operational halt.

The PCAB asked members of the Adjudication Board whether their major concern was more related to the technical rather than the financial capabilities of the tenderers. Mr Bundic replied that the Adjudication Board had doubts on both factors.

At this stage Dr Young intervened and argued that one cannot compare the previous projects with the one in question as the others were more straightforward projects.

Mr Bundic proceeded by stating that the tender involved the digging of a 2,200 metres long trench from the pumping station at Wied il-Mielah to the village of Gharb. He also drew the attention of those present that in spite of the fact that certain stretches of the road are very narrow, yet, the contractor still had to ensure that the road was to remain open at all times including during trench works which had to be finalised within a stipulated timeframe.

When asked whether the Contracting Authority requested bidders to have permanent workers or not, Mr Bundic replied that the tender document did not specify any requirements so that bidders were allowed to engage workers specifically for this project, provided of course, that such workers had the required skills.

The PCAB remarked whether, once a contractor is able to dig a trench, would it make a difference if such trench is longer, as the basic principles would remain the same. Mr Bundic stated that this would entail a different scale of planning and financing.

Mr Scerri intervened and argued that following this line of thought, one had to raise a couple of significant points, namely that, in his opinion,

- from now onwards, tenders should specify that tenderers had to employ a certain amount of people and specify their minimum annual turnover;

and

- should the decision of the General Contracts Committee (GCC) be confirmed, small companies, similar to his clients, will stay away from submitting their bids and perhaps not even collecting the tender document.

Mr Bundic, when asked by the PCAB whether the Adjudication Board gave more weight to the technical over the financial aspect or vice versa replied that the Adjudication Board attributed the same importance to both areas.

At this stage, the PCAB observed that the appellants' undeclared liquidity does not provide comfort of its existence and no Adjudication Board could be expected to assume anything. Furthermore, the PCAB argued, what would happen if a contractor failed to complete a project, abandoning the works in the process ... wouldn't the Authority remain short of apposite finance?

Mr Cordina rebutted by stating that if the contractor does not finish the works, the contractors would have done certain expenses which could be regarded as a financial guarantee. On his part, Dr Farrugia drew the attention of those present that his clients had a quarry which could provide adequate financial security.

In his concluding remarks Dr Farrugia stressed that the fact that his clients did not have Bank overdraft facilities was proof enough of the appellants' financial stability. Whilst the appellants' lawyer contended that with regards to the previous projects mentioned by his clients this included trenching works across the entire road leading from Rabat to Munxar, as well as passing of cables through narrow streets, Mr Scerri agreed that albeit such works may not have been of the same importance, one had to acknowledge that his clients regularly carry out similar trenching works in narrow alleys as they have the adequate machinery. As a matter of fact, concluded Mr Scerri, his clients, being one of the few registered contractors with the Malta Transport Authority, have carried

out several resurfacing of roads, both with tarmac and concrete, in urban and rural areas.

Mr Mark Perez, also representing the Corporation, intervened to remind those present that there is a considerable difference between trenching 7 metres as compared to 100 metres.

At this stage the Chairman, on behalf of the PCAB, remarked that there is enough evidence for the Board to carry out the necessary deliberations and brought this hearing to a close.

This Board,

- having noted that the appellants, in terms of their ‘motivated letter of objection’ dated 23 October 2007, and also through their verbal submissions presented during the public hearing held on the 05 December 2007, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ non compliance with requests for submission of mandatory documentation such as Bank statements or financial declarations and that, in its opinion, it remains hard for any adjudicating panel to deliberate on facts and figures which are, knowingly or not, not made available to it;
- having also noted the fact that the tender document indicated the estimated total amount of the requested works as Lm330,000 with the appellants themselves providing little formal financial and technical comfort;
- having considered the fact that in spite of the fact that the tender document contemplated a bid bond, yet the value of such bond would ultimately be a trivial amount when compared to the overall financial comfort that tenderers were expected to provide;
- having clarified during the hearing that, since the tender document did not specify the minimum work force requirements, all was acceptable subject to those working on the job being skilled enough to do it;
- having also considered the extent of work required for a tenderer to fulfil all contractual obligations with regards to this particular tender vis-à-vis previous works carried out by appellants;
- having established that the Adjudication Board attributed equal importance to both technical and financial aspects of the tender document;

reached the following conclusions, namely:

1. the PCAB feels that one cannot rationally accept that small companies, with a limited (a) work force and, more important, (b) formally declared financial resources, could be operating on a scale far higher than their actual operational set-up;
2. any Adjudication Board has to (a) have some assurance on quality and some kind of financial guarantees to recommend the award *or* refrain from recommending the award of a contract and (b) be convinced that the tenderer is capable of finishing the project in time in an efficient and effective manner;
3. considering the declared financial standing of the partnership, works carried out in the past by appellants remain dubious as regards their comparability aspects between them and the extent of works and skill required to carry out this particular contract;
4. the lack of financial transparency is a commercial risk taken by business concerns in their own right and, whilst there may be other *fora* where such issues should be discussed and analysed further, yet, with regards to the adjudication of this tender, the Adjudication Board had to decide on facts submitted with the offer and not on facts and figures which were not made available to it.

As a consequence of (1) to (4) above, this Board decides against the appellants and recommends that the Adjudication Board proceeds with the adjudication of the said tender as previously decided.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

31 December 2007