Report on the Working of the General Contracts Committee, the Public Contracts Appeals Board and the Public Contracts Review Board During 2010

Department of Contracts

Ministry of Finance, the Economy and Investment
This report is submitted in terms of Regulation 13 of Part One of the Public Contracts Regulations, 2005, and of Regulation 14 of Part One, and of Regulation 85 of Part Fourteen of the Public Procurement Regulations, 2010
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Introduction

In terms of Regulation 13 of Part One of the Public Contracts Regulations, 2005 and of Regulation 14 of Part One of the Public Procurement Regulations, 2010, an annual report which gives an account of the proceedings of the General Contracts Committee and the Public Contracts Appeals Board has to be submitted to the Minister of Finance, the Economy and Investment for onward transmission to the House of Representatives.

In terms of Regulation 85 of Part Fourteen of the Public Procurement Regulations, 2010, the Public Contracts Review Board has also to make and submit to the Minister of Finance, the Economy and Investment an annual report dealing with the performance of the Board during the financial year being reported upon. In view of the transition from the Public Contracts Regulations, 2005, and the Public Procurement Regulations, 2010, the report on the workings of the Public Contracts Review Board is being included with the report on the workings of the Public Contracts Appeals Board that it is replacing.

General Contracts Committee

The composition of the General Contracts Committee during 2010 was as follows:

Mr Francis Attard – Director General, Chairman ex-officio
Mr Joseph Borg Grech B.Arch. BE & A, A & CE
Mr Carmel Gatt A.C.I.B.
Mr Joseph Mizzi B.Eng., A & CE
Ms Doris Aquilina
Mr Vincent Grech
Mr Vincent Camilleri
Mr Oliver Vassallo
Mr. Mario Vella

Mr. Vella substituted Mr. Gatt, who passed away on the 5 October 2010.

During the year the General Contracts Committee held meetings twice a week on Tuesdays and Thursdays for a total number of 94 sittings. During these sittings various contractual issues were discussed. These issues ranged from pre-contractual matters, such as approval of clarifications and rectifications to prospective bidders, to post-contractual ones involving approval of extra works/variations and recommendations for the award of tenders. Amongst the latter cases the Committee evaluated numerous reports and recommendations submitted by contracting authorities. This resulted in the issue of 211 contracts for locally funded contracts (amounting to €72,838,053) and 222 contracts (amounting to €267,208,175) financed through various European Union Programmes as well as the EEA Financial Mechanism and Norwegian Financial Mechanism. The total value of these contracts amounted to €340,046,228. The Committee also deliberated on 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 and website on the same day that the tenders are due for submission. Some 1,482 offers received in respect of 361 calls for tenders were scheduled during 2010.

The Public Contracts Regulations, 2005 provide that in tenders having an estimated value between €12,000 and €47,000 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 2010, the General Contracts Committee heard 23 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 was constituted as follows:-

Chairman: Mr Alfred R Trigance B.A. (Hons) (Accty)., FIA., CPA., DipM (UK)., FCIM (UK)., MIM
Members: Mr Anthony Pavia D.P.A. (passed away on the 8 September 2010)
          Mr Edwin Muscat
          Mr Carmel J Esposito
          Mr. John Buhagiar (substitute member)

Apart from the 14 objections which were brought forward from the preceding year, during 2010 the Public Contracts Appeals Board received 62 objections - of which 12 were carried forward to the following year (2011) - in terms of Regulations 82 and 83 of the Public Contracts Regulations, 2005.

Also, during the same period of time, the Public Contracts Appeals Board held 64 sittings and delivered 64 decisions, of which, 19 were upheld.

The text of the final decisions is published in Part 2 of this publication.

Public Contracts Review Board

The Public Procurement Regulations, 2010, which came into force from the 1 June 2010 (in lieu of the Public Contracts Regulations 2005) provide that the Public Contracts Review Board hears and determines complaints in respect of a tender issued by an Authority listed in Schedule 1 of the Regulations and whose value exceeds €12,000.

The Public Contracts Review Board which is appointed by the Prime Minister was constituted as follows:-
Chairman: Mr Alfred R Triganza B.A. (Hons) (Accty)., FIA., CPA., DipM (UK)., FCIM (UK)., MIM
Members: Mr Anthony Pavia D.P.A. (passed away on the 8 September 2010)
          Mr Edwin Muscat
          Mr Carmel J Esposito

During 2010 the Public Contracts Review Board received 17 objections - of which 12 were carried forward to the following year (2011) - in terms of Regulations 21 and 84 of the Public Procurement Regulations, 2010.

Also, during the same period of time, the Public Contracts Review Board held 5 sittings and delivered 5 decisions. The appellants’ objections were all rejected.

The text of the final decisions is also published in Part 2 of this publication.
PART 1

Complaints decided by the General Contracts Committee
Case Number 1

Meeting of the General Contracts Committee

18th January, 2010

DCS 25/2007 – Cleaning Services at the Veterinary Affairs and Fisheries Division.

Final Decision

M.C.C.S. Ltd objected to the recommended award of tender. It submitted that the prices offered by Gafa Saveway Ltd are untenable at law and also on a factual basis. This emerges since, the cheapest price quoted is definitely not in line with the minimum wage standards as regulated by law. The minimum labour cost per hour according to these regulations, including bonuses, national insurance contributions, leave and sick leave entitlement, lead the cost for the employee to be €4.77. This price coupled with the costs to be incurred by the tenderer such as provisions of cleaning materials and the overall imposition of Value Added Tax, necessarily surpasses the €5.

The General Contracts Committee convened to discuss and decide the objection raised by Dr Arthur Azzopardi on behalf of M.C.C.S Ltd after the published recommendation by Ministry for Resources and Rural Affairs (MRRA) for award of the above captioned tender to Gafa Saveway Ltd.

The following persons were present for the hearing:

- MRRA – Veterinary Services
  - Mr Marixei Callus
  - Mr Joseph John Vella

- M.C.C.S Ltd
  - Dr Arthur Azzopardi (Legal Advisor)
  - Mr Joseph Degiorgio

- Gafa Saveway Ltd
  - Ms Paulette Gafa
  - Ms Karen Muscat

Dr Azzopardi explained that the price of this tender is divided in two, namely, the cost of the employee and the cost of cleaning material to be used. With the legal amendments that took place the minimum wage of an employee is that of €5.03 and not €4.77. The requirement of this tender is that of two employees on a thirty hours per week basis. That means that these employees are considered as full-timers and are entitled to vacation leave, sick leave and bonuses.

The abattoir is a sensitive place that needs to be hygienic. Special cleaning materials need to be used since the cleaning of blood is involved. Employees also need specialized cleaning material to clean their hands and uniforms. The cleaning material offered by M.C.C.S Ltd who forms part of the Consortium Servizzi Malta is approved by the Health Division.
Gafa Saveway Ltd is being recommended for the award of this tender at the hourly rate of €4.65 per cleaner (Vat Inclusive), which is below the statutory limits. This means that either the cleaning material to be used is not up to the required standard or the wages are less than stipulated by law.

Mr Vella explained that they received five offers for this tender. The bidders were invited to visit the premises. The scope of this tender was the cleaning of the offices and the foyer but not the abattoir. The rate submitted by Gafa Saveway Ltd is higher than the minimum wage but the department did not know at what rate did the employees were being paid.

Dr Azzopardi reiterated that their preoccupation was that the building was divided into two parts, the administrative area and the abattoir. Since they are in the same compound the level of hygiene to be kept must be higher than normal for the benefit of the consumer and the employees. A case in point was Mater Dei Hospital. The costs per hour besides the minimum wage are that of €0.30 per employee per hour.

Mr Vella said that the tender’s requirement is that of twenty-four and not thirty hours weekly per employee (i.e. 8 hours x 3 times).

Ms Gafa stated that the minimum wage is that of €3.66 and their submitted rate was that of €4.65. The employees were part-timers as they were not going to work forty hours per week. Gafa Saveway Ltd is the current contractor and they never received any complaints.

Mr Vella explained that the building of the abattoir and the administration are not inter-connected. There was no request for samples of cleaning materials to be used, just bleach and ordinary cleaning materials. EU provisions do not specify the type of cleaning materials to be used when cleaning offices. The abattoir is cleaned according to the HACCP scheme.

Dr Azzopardi said that they did not believe that Veterinary Services did not follow the correct procedure in the evaluation of this tender but since none of the interested parties are agreeing on the rate of the minimum wage, a ruling by a competent authority should be given to establish the minimum wage. Once this has been established the evaluation should continue with only those bidders who were fully compliant.

When the Chairman of the General Contracts Committee asked whether the appellant was aware of any clause in the tender conditions that tied the submitted rates with the rates of payment for each employee, Dr Azzopardi said that when an entity had to adjudicate an offer it was obliged by natural justice to ensure that the Law was upheld. If there were doubts that the rights of employees could be breached the Evaluation Committee should clarify the submitted information with the bidders. M.C.C.S Ltd is saying that the employees for this tender are considered as full timers whilst Gafa Saveway Ltd is contending that they are part timers.

After deliberating on the submissions and from the evidence given the Committee agreed that the evaluation committee can only adjudicate the tenders received on the basis of the published tender conditions and specifications. The Committee cannot
enter into the merit as to whether the rate of the recommended tenderer is in line with the Maltese employment legislation or not. There are other competent authorities in this area of public administration. The Committee notes that appellant did not identify any tender condition which obliged bidders to quote in line with the established minimum wages. In this regard the Committee feels that the Veterinary Services were right in their recommendation to award the tender to Gafa Saveway Ltd.

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

Francis Attard  
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

J Mizzi  
Member

26th January, 2010
Case Number 2

Meeting of the General Contracts Committee

18th January, 2010

MRRA/W/68/2009/6 – Tender for the Supply and Laying of Tiles at the Pitkali Market Office.

Final Decision

Vella Falzon Building Supplies Ltd objected to the recommended award of the tender for the supply and laying of tiles at the Pitkali Market Office. Appellants claimed that their offer was the cheapest one.

The General Contracts Committee convened to discuss and decide the objection raised by Vella Falzon Building Supplies Ltd after the published recommendation by Ministry for Resources and Rural Affairs (MRRA) for award of Items 1, 2 and 3 of the above captioned tender to Pavin Ltd.

The following persons were present for the hearing:

MRRA – Works Division - Perit Nicholas Grech
Perit Adrian Schinas
Perit Paul Cini

Vella Falzon Building Supplies Ltd - Mr Alex Vella Falzon

Pavin Ltd - Mr Kevin C Fenech

Mr Vella Falzon stated that he was surprised when he received a letter from the Works Division informing him that his offer for Items 1 - 3 was disqualified. Although his submitted sample was of a different size than the one requested, he only submitted that sample so that the Evaluation Committee would test the type and quality of the product. It did not necessarily mean that the size was the one that was to be supplied.

Perit Grech explained that a list of samples was published. The size of the tiles was included in this list. The required measurement was that of 300mm x 300mm while the measurement of the submitted sample was that of 500mm x 500mm, therefore it was eliminated. The same procedure was followed for Item 4 for an offer submitted by another bidder. The Evaluation Committee recommended that this tender is to be split between two bidders who submitted the cheapest fully compliant offer.

Perit Cini stated that the Evaluation Committee evaluated the sample that was submitted by the closing date of the tender. This had to be exactly as the product that would be procured in the event of award. Samples cannot be changed after closing date otherwise the tendering conditions would not be adhered to.
Mr Vella Falzon stressed that there were various sizes and samples. The important thing was that the rectification, quality and finishing of the material was as requested. The difference in the size of the sample was not important especially since he did not declare that he was going to change the requested size. In order to submit a sample of the exact required size he would have had to order this tile by DHL which would have been expensive and the tile could still be damaged during transportation.

When asked by the Chairman of the General Contracts Committee whether he was aware of the samples’ specifications, Mr Vella Falzon said that the tender stated that alternative proposals can be submitted but he confirmed that his submitted sample was not of the required size. In case of award he would have submitted the requested size and colour even though he did not put that in writing when submitting his offer.

Perit Grech said that it was true that the tender document stated that alternative proposals can be submitted, but, provided that tiles are submitted to the requested specifications. Perit Grech also confirmed that for this particular item the appellant submitted the cheapest offer.

Perit Cini stressed that he refused to decide on something that was not available during the evaluation process. There were no guarantee that the tiles that were to be supplied in case of award were to be with the requested measurements.

After deliberating on the submissions and from the evidence given the Committee agreed that since the offer submitted by Vella Falzon Building Supplies Ltd for Items 1 - 3 did not satisfy the stipulated samples’ specifications, Ministry for Resources and Rural Affairs were right in their recommendation to award the tender for Items 1 – 3 to Pavin Ltd.

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

Francis Attard  
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

J Mizzi  
Member

26th January, 2010
Case Number 3

Meeting of the General Contracts Committee

18th January, 2010

PLC P2/04/09 – Tender for the Refurbishing of Playing Field at Triq Joe Gasan, Pieta’.

Final Decision

Messrs M Quip Co Ltd objected to the decision to award the tender for the refurbishing of playing field at Triq Joe Gasan Pieta. The company claimed that it did not follow the procedures laid down in the legislation. Appellants requested that the tender should be awarded to them.

The General Contracts Committee convened to discuss and decide the objection raised by M Quip Co Ltd after the published recommendation by Pieta Local Council for award of the above captioned tender to Homeworxs Plus Ltd.

The following persons were present for the hearing:

Pieta’ Local Council - Dr Malcolm Mifsud
Mr Joe Saliba
Perit Claude Mallia
Ms Josephine Fabri
Mr Michael Seychell

M Quip Co Ltd - Dr Albert Libreri (Legal Advisor)
Ms Roberta Schembri
Mr Vince Schembri

Homeworxc Plus Ltd - Mr Ivan Cutajar

Dr Libreri referred to his letter of objection, namely Article 40 (2a/b/c) Local Council’s Act (which addressed tenders over €17,000 and under €47,000) and LN 255 of 2009 (Local Council’s Tendering Regulations), namely that the Council is to submit a copy of the recommended offer, should inform interested parties of the date and place for the hearing of submissions, and should also publish the decision.

Two offers were submitted for this tender. The recommended offer amounted to €40,437.50 while the appellant’s offer was that of €43,612.94. Since the number of councilors was not as stipulated by Law, the offers were not opened on the closing date but were opened on another day. M Quip Co Ltd was not informed of the date and place that tenders were to be opened.

A copy of the submitted tenders was not given to the appellant and they were aware that the tender has been opened when they received an email by the Executive Secretary of Pieta’s Local Council informing them that they were not awarded the tender. Up till the 12th December, 2009 the recommendation for award had still not been published on the Local Council’s notice board.
The recommended bidder did not qualify for award as per Section 39 of the Local Councils Act wherein it is stated that no Council employee or any company in which such employee has a majority shareholding or controlling interest can tender or submit quotations for any works, goods or services for which a call for tenders or quotations has been issued by the Council. Mr Ivan Cutajar of Homeworxs Plus Ltd (reg no C47354) is the handyman of Pieta’s Local Council and is therefore ineligible to submit a quote for this tender.

Dr Mifsud explained that Mr Ivan Cutajar is not a Council’s employee. He is in possession of a contract of service to the Pieta Local Council. He could submit an offer for this call for tenders. In the Council’s minutes he is referred to as the handyman because he does various works. Pieta’s Council only has two employees. The Employment and Training Corporation can confirm that Mr Cutajar is not an employee.

The tenders were opened in public at the Local Council’s office on the 6th November, 2009 (the published closing date) in the presence of the Executive Secretary and two councilors. Another tender was opened on that same date and members of the public were present for these openings.

In their offer M Quip Co Ltd submitted a booklet with different shapes and sizes of playhouses but quoted for only two of them. The Evaluation Committee desired a playhouse in particular that was not marked by the appellant. The Committee asked the bidder to submit a brochure with further details. A clarification was also submitted regarding the height of the lamp-post. The appellant answered both queries. Therefore they were aware that the tenders had been opened and were being evaluated.

If the schedule was not published on the Notice Board it was simply an administrative error and should not lead to the annulment of this tender. The Regulations do not stipulate that if the schedule is not published the tender is to be annulled. Both bidders were informed of the decision taken.

Mr Saliba said that he was present with two councilors for the opening of this tender. M Quip Co Ltd was disqualified at the initial stages of the evaluation but the submitted offers were still forwarded to the technical evaluator. On the 3rd December, 2009, Mr Saliba called M Quip Co Ltd to inform them that their offer was disqualified because they did not submit the Tender Form and the Non-Collusive Certificate.

An email was also sent on the 10th December, 2009. The recommendation for award could also be seen online. On the 11th December, 2009, M Quip Co Ltd sent an email requesting the return of their submitted bank guarantee. The guarantee was not released once there was a formal letter of objection.

The meeting of Pieta’s Local Council took place on the 26th November, 2009. One of the items to be discussed was the award of this tender. This agenda was published on the Council’s Notice Board.

The appellant did not ask for a copy of the submitted offers. Had he done so he would have been asked for payment and would have been given a copy of the offer. Since
the Council had various Notice Boards, Mr Saliba was not sure whether the schedule with the recommendation was published on them. Notwithstanding this both bidders were treated in a fair and equitable manner.

Dr Libreri insisted that the tendering procedure was not followed in a transparent manner. M Quip Co Ltd went for the opening of the submitted offers on the closing date of the tender and was informed that since there weren’t enough councilors the tender was not going to be opened that day. Mr Schembri can also confirm that nothing was published on the main Notice Board of the Local Council.

An employee under CERA and an employee under the Council’s Act is still an employee and it was not right for the Council to try and define a person who was ineligible to submit an offer as eligible. It does not make sense that a person who is under contract with the Council is not an employee of the Council. The Council approved a payment of €19,009 for services rendered by Mr Ivan Cutajar between the 1st April and the 1st of June, 2009.

It was a bit difficult to believe that Mr Cutajar did not talk about this tender with the councilors. The appellant was not even sure that there was another offer in the tendering box because there is nothing official. They have not even been officially informed of the reasons why their offer was disqualified. All of this makes the whole procedure non-transparent and suspicious.

Mr Saliba did not inform Ms Schembri that he could give her a copy of the recommended offer against a remuneration. He just wrote down the reasons on an envelope. It was also difficult to understand the reason behind sending clarifications for an offer that had already been disqualified. Article 42 (b) of the Local Councils act stipulates that the Contracting Authority is to meet with the bidders in order to submit clarifications.

Dr Mifsud explained that Article 42 (b) allows either a meeting or written submissions. The Council opted for the written submissions with a stipulated deadline. M Quip Co Ltd answered the clarifications in the stipulated time. The bidder that was recommended for award is not an employee of the Council and there is no Article of Law under which he can be disqualified. There are other tenders in which present contractors submitted an offer. The recommended bidder had enough grounds to lodge an objection since the offer submitted by the appellant was disqualified and clarifications were still submitted.

The offers were opened at the Local Council in the presence of the public as well as the Executive Secretary and two councilors. The initial recommendation was by the Technical Consultant. It was minuted in the Council’s meeting since the deciding body is the Local Council. The evaluation process was transparent in every way and all that was being said by the other party were purely speculations.

Perit Mallia stated that he evaluated the administrative, financial and technical offers. He recommended that the appellant should be disqualified since he did not submit the Form of Tender and the Non-collusive Certificate. Furthermore, M Quip submitted a covering letter with certain conditions.

Mr Seychell said that he felt offended that his integrity was being questioned.
Mr Cutajar said that he was in possession of the contract that was awarded to him the previous year. The amount of €19,000 that was paid to him covered various works as well as employees’ salaries and the use of machinery. He submitted offers for other tenders but he was not recommended for award. He was recommended for this tender because he submitted an offer that was fully compliant with the required specifications and not because he was being given any preference.

Dr Mifsud explained that the process for a call for tenders was normally initiated by the Executive Secretary. The Technical Consultant took care of the specifications and the Council approved the tender as a whole. The request would then be published in the Government Gazette, the Malta Independent and other local newspapers.

The offers were opened on the published closing date and time at the Local Council’s office in the presence of the Executive Secretary and two councilors. The schedule is then rendered public on the council’s official notice board inside the council’s premises. If the evaluation is of a technical nature, the secretary, technical consultant and the mayor discuss the submission. The technical consultant will then submit the recommendation; the Council will discuss the clarifications to be submitted or the recommendation to be made. A motion will then be submitted and the councilors will then take a vote. The deciding body is the Council.

When asked by the Chairman of the General Contracts Committee the date when the tender box was opened and if the schedule was filled in and published, Mr Saliba said that he was ready to take an oath that the box was opened on the 6th November, 2009 at 10.00a.m. but he was not sure if the schedule was published on the Notice Board.

When Mr Schembri was asked at what time did he go for the opening of the offers he stated that he called the Local Council at 2.00p.m. and was informed that the offers had not been opened. He was not present at the Local Council’s office at 10.00a.m.

The Chairman then asked why was the amount of €40,437 being recommended for award when the offer submitted by Ivan Cutajar initially was that of €43,617.

Mr Saliba said that the Park Benches listed in the Bill of Quantities was to be omitted since they bought them beforehand. Before the closing date of the tender, bidders were instructed not to offer for the benches but Ivan Cutajar still submitted an offer. During evaluation the amount quoted for the benches was deducted from the Bill of Quantities. Both bidders applied for quotations of the park benches but they were not recommended.

After deliberating on the submission and from the evidence given the Committee agreed that the contracting procedure was not as transparent as it should be. A Local Council is considered as a Schedule 3 entity. These entities are obliged to carry out their procurement in accordance with the Public Contracts Regulations. Regulation 19 of these Regulations obliges contracting authorities to open the tenders in public and the prices quoted shall be made public. The General Contracts Committee has not been given the assurance that these procedures have been followed in full.

Hence, the General Contracts Committee resolved that the objection by M Quip Co Ltd should be upheld. The tender should be cancelled and if the Council would like to
proceed with this project it should publish a fresh call for tenders with updated specifications. The Committee also agreed that the deposit paid should be refunded.

Francis Attard  
Chairman

J Mizzi  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

28th January, 2010
Case Number 4

Meeting of the General Contracts Committee

22nd February, 2010


Final Decision

Mr Anthony Frendo objected to the decision taken by the St Paul’s Bay Local Council to award this tender to St Paul’s Band Club. Mr Frendo maintained that although his offer was one of the cheapest the tender was awarded to someone else. His offer amounted to €18,169 while the value of the recommended tender amounted to €33,000; almost twice as much. Furthermore he stated that he had vast experience in this type of work because he used to do it for more than three years.

The General Contracts Committee convened to discuss and decide the objection raised by Dr Martin Fenech LL.D on behalf of Mr Anthony Frendo after the published recommendation by St Paul’s Bay Local Council for award of the above captioned tender to St Paul’s Band Club.

The following persons were present for the hearing:

- The appellant: Mr Anthony Frendo
- Dr Martin Fenech (Legal Representative)

Dr Fenech explained that this tender was issued for the cleaning and attendance of five public conveniences at St Paul’s Bay. Mr Frendo has been taking care of these public conveniences for the last six years and his submitted offer of €18,691 was 40% cheaper than the recommended offer of €33,000. Furthermore, a band club is not an entity that can maintain toilets and could not be awarded a tender since it was a cultural organization.

Mr Frendo said that even though the call for tender was that of cleaning and attendance of public conveniences, he even fixed the toilets, flushings, water pipes and electricity out of his own free will. He also put an end to certain abuses even though at times he was threatened.

Dr Fenech argued that even though there were some minor transgressions from his client’s side, it was not enough to make him loose the contract. Even more so now that the public conveniences in question were in a disastrous state since the recommended bidder took over the contract. This was also in the news.

The difference of €15,000 in the recommended price was not to be forgotten since this was to be used from public funds. There was also another offer that was cheaper but since no breakdown of the Bill of Quantities was given, it was disqualified.

If the Local Council felt that there was some transgression from Mr Frendo’s part, they should have penalized him and not disqualified him, even more so, since he
never received any extra payment for maintaining the public conveniences but was only paid for the items that were procured in order to be replaced.

Mr Frendo said that the soap and toilet paper that he used to place in the public conveniences were usually stolen by the general public. The recommended bidder used air fresheners instead of cleaning these conveniences.

The Chairman of the General Contracts Committee explained that the Committee’s duty was to ensure that the contracting procedure was followed properly and not to decide as to who did the better job.

When asked about the period of time that was to be covered by the amount of €18,169, Dr Fenech confirmed that it covered the whole three years. In view of the fact that Mr Frendo submitted the cheapest compliant offer, Dr Fenech was requesting that this tender was to be awarded to his client.

When asked by the Chairperson if he was aware of any clause in the tender document that provided for the disqualification of bidders or black listing, Dr Fenech replied in the negative. He also said that his client was not informed that he was disqualified but he just received two warnings in writing.

The General Contracts Committee deplored the fact that there were no representatives from the St Paul’s Bay Local Council for this meeting.

After deliberating on the submissions and from the evidence given the Committee agreed that since there was no valid reason for the disqualification of Mr Frendo from the tendering process. The Committee feels that St Paul’s Bay Local Council was not right in its recommendation to award the tender to St Pauls’ Bay Band Club.

Hence, the General Contracts Committee resolved that the objection by Mr Anthony Frendo should be upheld. The Committee also agreed that the deposit paid should be refunded
Francis Attard  
Chairman  

J. Borg Grech  
Member  

M D Aquilina  
Member  

V. Grech  
Member  

C J Delicata  
Member  

O Vassallo  
Member  

V Camilleri  
Member  

J Mizzi  
Member  

C Gatt  
Member  

2\textsuperscript{nd} March 2010
Case Number 5

Meeting of the General Contracts Committee

22nd February, 2010


Final Decision

Mr Mark Tabone of Mark TLS Group objected to the decision of the Malta Transport Authority to award Item 3 – Provision of Storage Services to Messrs. Raymond Auto Dealer Ltd. He feels aggrieved by this decision which is presumably based on grounds which are extraneous to the tender specifications and since the recommended bidder did not appear on the schedule of tenderers.

The General Contracts Committee convened to discuss and decide the objection raised by Mark TLS Group after the published recommendation by the Malta Transport Authority (ADT) for award of Item 3 of the above captioned tender to Messrs Raymond Auto Dealer Ltd.

The following persons were present for the hearing:

Malta Transport Authority - Mr Joseph Caruana (Dir Corp Serv)
Mr Vince Micallef Pule (Dir Pub Transp)
Dr Ivan Gatt (Legal Representative)
Mr Mario Sant (Asst Manager)
Mr Roderick Parascandolo (Officer)

Mark TLS Group - Mr Mark Tabone
Dr Antoine Cremona

Raymond Auto Dealer Ltd - Dr David Camilleri Podesta
Mr James Zammit

Dr Cremona explained that his client, Mr Mark Tabone was only contesting the recommendation for award for Item 3 of this tender and that this complaint was based on two things.

Dr Cremona said that he believed that since the second point of contention was not the focus of the appeal, it would be best if it was addressed at the beginning of the hearing. This constituted of a judicial protest that was initiated by Raymond Auto Dealer in response to a declaration made by Mark TLS Group, namely that the preferred bidder was not the same entity that was listed on the schedule that was published on the department’s notice board.

Dr Gatt stated that this point of contention was completely unfounded. Raymond Auto Dealer Ltd was listed in the published schedule at opening stage. There were
persons that opened the offers at the meeting. These could be presented as witnesses in the course of the hearing.

Dr Cremona said that in the circumstances the second point of their contention would be dropped and they were going to focus on the main thrust of their objection, namely that the evaluation of the submitted offers was governed by the published specifications and conditions of the tender dossier. Clause 2, Page 4B of the tender dossier specified that “the towed vehicles will be transferred to a secure area/site comprising of open parking facilities for at least a hundred vehicles and a covered area for the garaging of at least ten vehicles. Sites that are equipped with CCTV systems and other security systems will be preferred.”

Mark TLS Group covered both these requirements. Their submitted offer of €4.64 was disqualified and an offer of €6.95 was recommended for award. The Evaluation Committee cannot base its evaluation on conditions that were not specified in the tender conditions. Therefore, since the offer submitted by Mark TLS Group satisfied all the published criteria and was also the cheapest offer, their offer should not have been rejected.

Dr Gatt agreed that the evaluation of the submitted offers was to be based on the tender conditions. The offer submitted by the appellant was not fully compliant. Clause 2, Page 4B of the tender dossier also specified that “Both areas must provide sufficient space for vehicles to be moved individually without moving other vehicles in the compound.” Mark TLS Group did not satisfy this requirement since the vehicles could not be moved without moving other vehicles. Therefore, the price was not taken into consideration. Site visits on all offered premises were done by the Evaluation Committee.

Dr Cremona explained that after the site visit by the Evaluation Committee took place Mr Tabone offered an alternative site that caters for 500 cars. The submission of the alternative site rendered his offer more than compliant. They believed that since the contracting authority accepted this document, the problem identified with the first site was solved. Mark TLS Group did not know which site had been evaluated.

When the Chairman of the Evaluation Committee asked if in his opinion his submitted offer was fully compliant, Mr Tabone replied in the affirmative.

Dr Gatt stated that the site that was submitted with the tender dossier was not technically compliant. The alternative site could not be accepted since it was submitted after the closing date of tender. The submittal of the alternative site proved that the appellant was aware that the site submitted in his first submission was not compliant.

The Chairman then asked the appellant if he was aware of the clause that stated that the offered site must accommodate 100 cars that can be moved individually. He was also asked how many sites were offered with the original tender document before the closing date.

Mr Tabone said that only one site was offered in his original submission. This site housed more than 100 vehicles since it was used for a similar tender with another contractor. He confirmed that he was aware of that clause but since he had the
necessary machinery, he was convinced that the vehicles could be moved. At the moment the site was clear since the previous vehicles were moved to ADT’s compound.

Dr Cremona asked if it was possible to see a copy of the Evaluation Report explaining how the decision that the site was not compliant was reached.

Mr Caruana read an extract from the Evaluation Report regarding the site offered by the appellant.

When the Chairman of the General Contracts Committee enquired about the number of cars that could be individually moved after the site visit took place, Mr Caruana said that the site covered about 50 to 60 vehicles. He also confirmed that at the closing date of the tender, the offer submitted by the recommended bidder was fully compliant. An extract from the Evaluation Report regarding the site offered by the recommended bidder was read.

Dr Gatt argued that just because the site submitted by Raymond Auto Dealer Ltd was not furnished with a lift at the closing date of the tender did not make the site inaccessible. He also questioned whether the focus of this appeal was the recommendation for award or why was the appellant’s offer rejected.

When the Chairman asked about the number of vehicles that could be garaged at that point in time by the recommended bidder, Mr Caruana said that 30 vehicles can be garaged in the basement and another 30 in the first floor garage.

Dr Gatt said that the tender refers to space. The alternative site by the appellant was submitted after the closing date of the tender. The recommended bidder was to install a lift after the closing date of the tender.

Dr Camilleri Podesta explained that the tender document did not stipulate that individual access to 100 vehicles was to be available at the closing date of the tender. The important thing was that it could be available when needed. Mark TLS Group amended their offer after the closing date while Raymond Auto Dealer Ltd indicated the addition of the lift before the closing date.

The Chairman asked representatives of Raymond Auto Dealer Ltd if at the closing date of the tender only 60 cars had direct access to the site. He also asked whether the lift was to be installed in the event of winning the award of this tender. Dr Camilleri Podesta replied in the affirmative.

When asked if a parking plan was published with the tender document, Dr Gatt said that a parking plan was not possible since they did not know what sites were to be offered.

After deliberating on the submissions and from the evidence given the Committee agreed that since none of the offers satisfied the stipulated requirements for Item 3, Malta Transport Authority were not right in their recommendation to award the tender for Item 3 to Raymond Auto Dealer Ltd. The contracting authority should continue to evaluate the offers received and recommend for award only those tenders which were fully compliant by the closing date of the call for tenders.
Hence, the General Contracts Committee resolved that the objection raised by Mark TLS Group should be upheld. The Committee also agreed that the deposit paid should be refunded.

Francis Attard  
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

O Vassallo  
Member

V Camilleri  
Member

J Mizzi  
Member

C Gatt  
Member

2nd March, 2010
Case Number 6

Meeting of the General Contracts Committee

3rd May, 2010


Final Decision

Master Group objected to Notice No 112/09 published in the Government Gazette on the 13th October 2009. The tender for light squashes has been rewarded at a price of €0.80 per litre when their tender was submitted at €0.79 per litre. Considering Master Group has been producing squashes since 1947 and the quality of their products has never been placed into dispute (in fact numerous tenders have been previously rewarded to Master Group), the company feels that a better price of €0.01 is enough for Master Group to be rewarded this tender.

The General Contracts Committee convened to discuss and decide the objection raised by Master Group after the published recommendation by the Department of Health for the award of the above captioned tender to Paolo Bonnici Ltd.

The following persons were present for the hearing:

Mater Dei Hospital - Mr Karl Farrugia (Director)
Mr Joe Sammut (Chairperson)
Ms Rita Tirchett (Member)
Mr Marnol Sultana (Member)
Ms Phyllis Mercieca (Member)
Mr Geoffrey Axiak (Member)
Mr Anthony Cohen (Supplies)
Mr Louis Briffa (Supplies)
Ms Marlene Gauci (Purchasing)

Master Group - Mr Louis Camilleri

Paolo Bonnici Ltd - Mr Joseph Sammut

Mr Camilleri stated that the basis of their appeal was the price. Master Distributors Ltd should have been awarded this tender since their submitted offer of €0.79 per litre was cheaper than the recommended offer of €0.80 per litre. In the Schedule of Prices they were requested to submit a rate per litre.

Mr Farrugia explained that the tender’s specifications stated that the price was to be given per litre while the volume should be approximately two litres. The Department of Health was willing to accept a variation of 5% to 10%. The offer submitted by the appellant had a 100% variation.
Mr Camilleri said that the specifications of similar tenders issued in the last five to six years the volume was either that of one litre or it was not specified. This was the first time that Health Department specified a two litre volume.

When the Chairman of the General Contracts Committee asked Mr Farrugia what were the exact specifications for the volume included in this call for tenders, he replied that the department needed two litre bottles. The published specifications were that of approximately two litres.

The Chairman then asked the appellant if he was aware of the clause that stated that the squashes should be bottled in bottles of approximately two litres.

Mr Camilleri said that he was informed that the specifications were not clear and was not sure if they had to offer two litre bottles. They did not clarify the matter with the Health Department.

When the Chairman read Clause 6 of the tender’s specifications and conditions and asked him for his interpretation, Mr Camilleri stated that the required volume was that of two litres. He could understand why the offer submitted by Master Distributors Ltd was not acceptable.

When asked by the Chairman why Health Department did not specify the required volume, Mr Farrugia said that they wanted to leave it more open so that more bidders could offer. If the variation was that of +10% or –10% they would have accepted it.

After deliberating on the submission and from the evidence given the Committee agreed that since the submitted volume varied by 100%, the Health Department were right in their recommendation to disqualify the tender by Master Group and to award the tender to Paolo Bonnici Ltd. However, the Committee feels that the Health Department should have been more clear in their specifications. The tender specifications should not include arbitrary terminology such as ‘approximately’ but should establish the minimum or maximum volumes being requested.

Hence, the General Contracts Committee resolved that the objection raised by Master Group should not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Case Number 7

Meeting of the General Contracts Committee

14th May, 2010


Final Decision

BTI Uniforms objected to the recommended award of both tenders. It stated that the quality of the material offered is in compliance with the tender specifications. Therefore it expected that it should be awarded the tenders.

The General Contracts Committee convened to discuss and decide the objections raised by BTI Uniforms Ltd after the published recommendations by the Police Department to:-

- Award Lots 1 & 2 of Advt 14/2009 (Summer Shirts) to JBC Mfg & Import and to cancel Lot 3;
- Award Items A & B of Advt 13/2009 (Summer Trousers and Skirts) to Astor Co Ltd.

The following persons were present for the hearing:

Police Department - S/Insp Anthony Cassar (Chairman)
PS Andy Bellia
SM Mario Agius
Mr Martin Debono

BTI Uniforms - Mr Vincent Farrugia
Dr Massimo Vella (Legal Advisor)
Ms Caroline Buhagair
Mr Godfrey Calleja

JBC Mfg & Import - Ms Amy Cassar

Astor Co Ltd - Mr Jeffrey Calleja

Dr Vella stated that BTI Uniforms Ltd submitted the cheapest offer for both tenders. They also believed that the material that they offered was up to the required specifications but their submitted offers were disqualified and they were not aware of the reason for disqualification.

Insp Cassar said that one of the requested specifications was that a cloth attachment, made of the same material of the shirt was to be sewn onto the left shoulder side of the shirt so that it could hold a radio speaker microphone. This was of the utmost
importance to the Police Force since they used this microphone to call for help. The appellant did not offer this cloth attachment. The colour of the material offered for the epaulettes and trousers was darker than the requested colour. Looking at them from a distance the colour of the epaulettes seem almost black.

PS Bellia explained that in the tender dossier they asked for a sample shirt and trouser so that the Evaluation Committee would see the end product. Tests were not done on those samples whose colour did not conform with the specified colour since it was something that could be clearly seen.

Mr Farrugia argued that the colour of the epaulettes had to match the colour of the trousers. They believed that the colour of the trousers and the epaulettes had to be of the same colour. Notwithstanding this in their submitted offer they stated that they would conform to all the published specifications.

They submitted the sample of the cloth so that the texture of the material could be tested. Once the texture of the material was as requested the offer could not be disqualified because the usual procedure was that a thread dye sample would then be sent to the manufacturer and they will be supplied with the requested colour of material.

Dr Vella stated that the colour of the material cannot be the factor why the offer was disqualified. The sample was submitted so that it could be tested for its weight and thickness. The cloth attachment could also be submitted. The important factor was that the end product would be as requested.

Ms Buhagiar said that the shirt that was submitted was of the actual material. Two square metres of the actual material was also submitted with the offer. A dip chart with three colours as well as a guarantee to offer the requested colour was also given. When they bought the tender document only a sample of the shirt’s material was attached. They had to go to the Office of the Quartermaster in order to see the colour of the epaulettes.

PS Bellia explained that the shirt’s colour was compliant. The cloth attachment was a requirement and the colour of the epaulettes was not acceptable. No changes could be made after the sample was submitted otherwise there would be no sense in asking for a sample. Dip charts cannot be sent to the laboratory for testing due to the size of the material.

When the Chairman of the General Contracts Committee asked if BTI sent samples of ready made trousers and skirts, Ms Buhagiar replied that they submitted all the required samples as well as 2 metres material and different dips so that the Evaluation Committee could choose the required colour.

Mr Debono stated that the specifications required samples to conform to the specimen that could be viewed at the office of the Quartermaster. The specimen was easily accessible and bidders could easily have brought samples to match the colour.

PS Bellia explained that they ask for an actual sample because once they accept that offer and the Letter of Acceptance is issued, they forward the required sizes to the contractor so that they will be supplied with the necessary items.
Mr Calleja said that the Special Conditions of the Tender Dossier stated in bold and underline that the actual sample had to be of the exact colour and material to be used. BTI should have addressed their queries before the closing date of the submission of offers. They did not submit any clarifications. If the submitted sample did not conform to the specifications, their offer should not be considered.

When the Chairman referred to BTI’s statement that it was difficult to determine the colour of the epaulettes since no sample was given with the tender document, PS Bellia explained that the emphasis of the epaulettes was made on the colour. That is why they could go and physically check the specimen that was displayed at the Quartermaster’s Office up till the closing date of the tender.

After deliberating on the submission and from the evidence given the Committee agreed that the Police Department was right in the recommendation to award the tender for Advt 14/2009 (Summer Shirts) to JBC Mfg & Import Ltd and the tender for Advt 13/2009 (Summer Trousers and Skirts) to Astor Co Ltd.

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

Francis Attard  
Chairman  

J. Borg Grech  
Member  

M D Aquilina  
Member  

V. Grech  
Member  

C J Delicata  
Member  

O Vassallo  
Member  

V Camilleri  
Member  

J Mizzi  
Member  

C Gatt  
Member  

25th May, 2010
Case Number 8

Meeting of the General Contracts Committee

21st May, 2010


Final Decision

Strand Electronics objected to the recommended award of the tender to SG Solutions. Appellants contended that they had quoted rates of maintenance as per Clause 11e. On the other hand SG Solutions quoted an hourly rate instead of a yearly rate. Such hourly rates cannot be capped and this may lead to abuse. Furthermore the recommended tenderer did not indicate whether this is per printer or otherwise.

Strand Electronics also stated that they were only given 24 hours to file an objection. Besides appellant feels that there is a contradiction between Clause 11 (f) and Clause 12 on the submission of a sample.

The General Contracts Committee convened to discuss and decide the objection raised by Aequitas Legal on behalf of Strand Electronics Ltd after the published recommendation by the Department of Financial Management, Ministry for Social Policy for award of the above captioned tender to Messrs SG Solutions Ltd.

The following persons were present for the hearing:

Ministry for Social Policy - Mr Joseph Deguara - Chairperson
Mr Godwin Borg
Ms Therese Mamo

Strand Electronics Ltd - Mr Franco Mizzi – Director
Dr Nikita Scicluna – Legal Advisor
Mr Ray Azzopardi – Sales Manager

SG Solutions Ltd - Mr Antoine Galea Salomone - Director
Dr Chris Borg – Legal Advisor
Mr Hector D’Ugo – Sales Consultant

Dr Scicluna explained that they were basing their objection on two points. Clause 11e of the tender document specifies that ‘A three year Maintenance Agreement including preventive and corrective maintenance and repairs and replacement, if necessary…”

The offer submitted by SG Solutions specified a cost of maintenance agreement of €33 per hour and not the yearly maintenance cost for each printer. With that quote it was difficult to arrive to the pre-determined value. If for the first year 60 man hours were needed for the required maintenance, it did not necessarily mean that the same number of hours were needed for the following year. The offer submitted by SG
Solutions did not specify a fixed price as required in the tender dossier and this could lead to abuse.

The offer submitted by Strand Electronics was quite clear at €25 per printer per year. Therefore since it was a fixed price, it was easier to arrive to the final price. The annual price was €25 by 120 printers for three years, that is, €3,000 inclusive of all the required spare parts.

Strand Electronics were informed that their offer was discarded but they were not given the reasons why. Furthermore they were only informed of their disqualification twenty-four hours before the objection period elapsed. They received a reasoned letter dated 5th February, 2010 informing them that they did not submit a sample.

Clause 11f stated that a unit for compliance testing should be submitted with the tender document but Clause 12 stated that the contract should be considered as having been abandoned if the contractor after the date indicated on the Letter of Acceptance/request submitted by DFM fails to provide the necessary Monochrome A4 Network Laser Printer after two consecutive times when requested to do so.

Her clients did not submit a sample printer because they did not understand that they had to submit the sample with the offer. They believed that the sample was to be submitted when the Evaluation Committee asked them to and that they would only be disqualified if they did not submit the sample after they were asked two times as indicated in Clause 12 of the tender dossier. No-one asked them for the sample so they did not submit it.

Mr Mizzi said that they did not submit the printer at the closing date of the tender because they did not know where they were supposed to leave it.

Mr Deguara explained that although the cost of maintenance submitted by SG Solutions on the schedule of prices specified €33 per hour, after the offer was evaluated the Evaluation Committee noted that the maintenance was free/nil. The cost of €33 only applied in the case of misuse. The amount of €54,000 also covered the regular maintenance.

If the appellant had any doubts regarding the submission of the sample a clarification could have been submitted before the closing date of the tender. Clause 11f clearly stated that that a sample 'MUST' be submitted.

Clause 12 referred to the quantities that were to be submitted after the award of the contract. Deliveries could be requested in lots. The words 'contract' and 'contractor' were used in clause 12. These were usually used after the Letter of Acceptance was issued. Samples were a must in this call for tenders. There was the chance that most of these printers were going to be used by Mater Dei Hospital, therefore, compliance testing was to be carried out by MITA.

Mr Borg stated that there were available personnel to receive the sample and a receipt would also have been given if the sample was submitted.

Dr Scicluna reiterated that clause 11e specified that a three year maintenance agreement was a MUST. If SG Solutions specified NIL then the submitted offer was
not compliant. The Schedule of Prices in Annex 1 specified that prices quoted should be inclusive of maintenance agreement, therefore it had to be a definite rate and not all inclusive.

Clause 12 was a misleading clause since it specified “printer” and not printers. This implied that only one printer was required and not 120.

Mr Deguara stated that SG Solutions was going to provide the maintenance agreement at no extra cost. Clause 12 was not misleading. The tender stipulates Lots. One printer could also be considered as a Lot.

Mr Borg said that in order for an offer to be administratively compliant a sample printer had to be submitted. The appellant did not submit the sample, therefore the offer was disqualified.

Dr Borg explained that in clause 11, six mandatory conditions were specified. If the appellant did not understand these conditions, they did not even have the right to appeal. Unless there was an agreement on the price and sample, one could not be contracted to supply the required goods. The appellant was stretching the meaning of Clause 12 so that they would have an excuse for appeal.

Annex 1 specified that price should be inclusive of the maintenance agreement. SG Solutions quoted one price that was inclusive of the maintenance agreement. A warranty was also given. The rate of €33 was only to be applied in case of misuse.

When the Chairman of the General Contracts Committee asked what was the difference between the maintenance agreement and the warranty, Mr Deguara replied that the three year warranty was requested on labour, parts and maintenance agreement. The warranty does not cover the checking of the printers. The tender specified that every six months the printers were to be inspected, a report was to be drawn up and the user was to sign this report. The printer had to be reviewed every six months. The recommended bidder offered a maintenance agreement free of charge.

The Chairman then asked the recommended bidder if the Maintenance Agreement as listed in the submitted Schedule of Prices was free of charge.

Mr D’Ugo confirmed that they were offering the maintenance agreement free of charge for all the three years of the contract. The rate of €33 per hour was only to be charged in case of misuse. Fair wear and tear was free of charge.

When the Chairman asked if the published list of spare parts classified charges for misuse and charges for normal use, Mr Deguara replied that they did not expect bidders to quote charges for misuse as it was taken for granted that once a printer was damaged due to misuse, parts could not be changed free of charge. Only a quotation for normal use was expected.

Dr Scicluna reiterated that the Maintenance Agreement had to be paid on a yearly basis and if the recommended bidder did not submit a price for it he could not be paid. Her clients could have done the same thing but they adhered to the Schedule of Prices and filled in all that was requested in each individual box.
After deliberating on the submissions and from the evidence given the Committee agreed that the Information Management Unit, Ministry for Social Policy were right in their recommendation to award the tender to S G Solutions Ltd.

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

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

C Gatt
Member

8th June, 2010
Case Number 9

Meeting of the General Contracts Committee

21st May, 2010


Final Decision

The General Contracts Committee convened to discuss and decide the objection raised by Bartholomeo Micallef after the published recommendation by MSD, Ministry for Resources and Rural Affairs (MRRA) for award of the above captioned tender to Vella Group Ltd.

The following persons were present for the hearing:

Manufacturing & Services Department (MRRA) - Mr Raymond Bugeja (Asst Dir)
Ms Margaret Zammit, (Sen Eng)
Mr Ernest Johnson (SPO)

Bartholomeo Micallef - Mr Robert Micallef

Mr Micallef stated that when they submitted their offer they erroneously submitted the size of the back bucket instead of the front bucket.

When the Chairman of the General Contracts Committee asked whether he believed that the Evaluation Committee erroneously evaluated his submitted offer, Mr Micallef replied that the error was from his side since they usually submit the size of the back bucket.

Eng Zammit explained that the tender dossier specified that the front bucket should be 1.5 cubic metres. The appellant offered a bucket of 0.5 cubic metres. Since this was not the first time that the appellant worked with MSD and they knew that he had the necessary machinery, the Evaluation Committee forwarded another schedule in order to correct their mistake, if this was the case.

Mr Micallef submitted the second schedule with the wrong measurements. That is, 0.2 cubic metres for the Rear Bucket and 0.5 cubic metres for the Front Bucket. Therefore, even though he submitted the cheapest offer, his offer could not be recommended for award. Another schedule, this time with the correct sizes was submitted with the Letter of Objection.

After deliberating on the submissions and from the evidence given the Committee agreed that MSD, MRRA were right in their recommendation to award the above-mentioned contract to Vella Group Ltd. However, the General Contracts Committee deplores the initiative taken by the evaluation committee when it requested one of the bidders to change his offer after the closing date of the call for tenders.
Hence, the General Contracts Committee resolved that the objection by Bartholomeo Micallef should not be upheld. The Committee also agreed that the deposit paid should be forfeited.

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

C Gatt
Member

1st June, 2010
Case Number 10

Meeting of the General Contracts Committee

25th June, 2010

GPS 07.084.D10.BB – Beta Interferon 1B Injections. – MST 341/2010

Final Decision

V J Salomone objected to the recommended award of this call for tenders. It claimed that its offer was cheaper than the recommended tender. Besides, a sample of this product is already available at the Government Health Procurement Services. In the past there were MST awards without the submission of a sample. Novartis gained the rights to seek approval for its own branded version of interferon beta-1b.

The General Contracts Committee convened to discuss and decide the objection raised by VJ Salomone Ltd after the published recommendation by the Government Health Procurement Services (GHPS) for the award of the above captioned tender to Alfred Gera & Sons.

The following persons were present for the hearing:

| GHPS                      | - Ms Anna Debattista, Director  |
|                          | - Ms Sonia Bonnici              |
| V J Salomone Ltd         | - Ms Jackie Mangion, Operations Manager  |
|                          | Dr Jonathan De Maria, Legal Advisior |
| Alfred Gera & Sons Ltd  | - Ms Anne Curmi                 |
|                          | Mr Simon Delicata               |

Dr De Maria stated that on the 4th May, 2010 his clients, VJ Salomone Pharma Ltd appealed against the decision taken by GHPS to award this tender to Alfred Gera & Sons Ltd. The offer submitted by the appellant was a lot cheaper than the recommended offer. A sample of this product was also available at GHPS since this was supplied against receipt no 0002489 for CT 179/2009.

This is not a simple product that can be bought at any pharmacy. The unit price for one dose is more than 2000 Swiss Frank and its availability is not easy. It can be available after months. The call for tenders was published on the 1st April, 2010. The closing date was the 19th April, 2010. It was physically impossible to obtain a sample, unless it was already in hand.

The tender document did not specify that the submission of the sample was a MUST but that it “may not be considered”. Since this product is not readily available the adjudicating body has to accept that it was not physically possible to submit sample. It is not the first time that tenders were awarded without the submission of a sample. GHPS cannot adjudicate tenders by using two weights and two measures because it would be discriminatory against VJ Salomone Ltd.
The product that is going to be supplied and the product offered by the appellant are the same since the composition of the product submitted is the same as the recommended product. Only the brand name is different. It is manufactured in the same place. Following the production of this medicine some are packed under the name Betaferon as the registered trademark of Bayer Schering Pharma AG and the other under the name of Extavia as the registered trademark of Novartis.

The chemical composition and the EU Registration Number was submitted in the offer. If GHPS had any further queries they could have asked for further information. GHPS would have gotten more value for money if they bought the product offered by the appellant since they would have obtained more doses with the same capped amount. The only difference in the product is the colour on the packaging.

Ms Debattista explained that three offers were submitted for this tender. The cheapest offer was that of V J Salomone Ltd at €52.65 per vial. The offer submitted by Alfred Gera & Sons was at €56.92 per vial. The estimated cost of this tender was €47,000 with an estimated quantity of 585 injections. The difference between the recommended offer and the cheapest offer is a little less than €3000.

The offer submitted by the appellant was disqualified because no sample was submitted. Clause 7 of the Tender Dossier stipulates the submission of samples. Only the current tenderer may not supply a sample. The appellant was not the present supplier. Alfred Gera & Sons Ltd is the current supplier. A copy of the insert and package in English was also not submitted.

The receipt that Dr De Maria referred to pertained to CT 179/09. The submission of offers for this tender closed on the 30th June, 2009 and it was cancelled in January 2010. Tenders are evaluated on the submitted offers and not on the samples submitted for other offers. In this offer the appellant did not imply that they wanted to make use of the other submitted sample. The Department can only evaluate on what is indicated on the submitted offer.

The objection is based on the submission of the sample. It is being claimed that it was difficult to obtain a sample in the allotted time. The delivery period for this product is that of six to eight weeks. Deliveries are being effected in the stipulated time, at times even before. Contrary to what was stated this product is easily available. The offer submitted by the appellant is up to specifications and is also registered but they did not supply a sample and they were not the current suppliers.

Dr De Maria reiterated that they did not agree that the delivery period of six to eight weeks was reasonable. Furthermore, they believed that GHPS was discriminating against V J Salomone since they knew that Alfred Gera & Sons Ltd was the current supplier and had no need to submit a sample. The tender dossier did not cater for the possibility to write any comments. All it showed was a box in which one had to tick yes or no for the submission of the sample. There were no clauses in the tender dossier stating that the tender would not be awarded if a sample was not submitted.

Ms Debattista stated that both bidders stated that they would supply the product within the required time if they were awarded this tender. She does not agree with the theory that the sample could not be brought in less than six to eight weeks. The award
criterion for this tender is not just the price but also full compliance with the published conditions and specifications.

When referred to Clause 5 of the tender dossier namely that if tenderer does not submit samples as well as Literature/Documentation/Package insert and labeling offers may not be considered, Ms Debattista stated that the respective clause is coherent with their interpretation since EU guidelines requires that when evaluation is taking place, one is required to have a sample.

One has to be sure that the labeled product is the same product that is going to be offered and not something else. If the supplier is the current supplier and he refers to the current tender in the new offer, it is not contradictory.

Ms Debattista quoted from Clause 7 of the Technical Conditions, namely that a sample, a true copy of the outer packaging and immediate packaging labeled on one of the official languages of Malta as well as a true copy of the package insert. Only the present supplier need not submit them.

The Chairman of the General Contracts Committee stated that when the Contracting Authority uses the word ‘may’ in the tender dossier, they are reserving the right to ask for the sample or to seek sample with another tender.

Ms Debattista said that if the bidder does not refer to another sample the Evaluation Committee cannot extrapolate. V J Salomone Ltd never supplied this product.

When the Chairman asked if they were aware of Clause 7, Dr De Maria replied that they knew of that clause. With hindsight they could have referred to the sample submitted with the other tender but the tender dossier did not give that facility. They ticked in the NO box in regards to the submission of sample. Nineteen days for the submission of a sample was rather a short period, especially since only eleven of them were working days.

The Chairman asked if they were going to submit a sample.

Dr De Maria said that they would have submitted a sample when asked to. They could not tick in the YES box since they did not supply a sample. If GHPS clarified with them, they could have gone to the Medical Stores and asked for the return of the sample and presented it again. They would have seen the packaging and literature. This is not a ready available product. VJ Salomone Ltd was discriminated against since someone who is not the current supplier needs more time to bring the sample.

When the Chairman asked if VJ Salomone Ltd could deliver the product in the stipulated timeframe if awarded the tender, Ms Mangion replied that when they signed their offer they specified that they would deliver the product in the stipulated period.

When asked if the sample in question was compliant to the published specifications, Ms Debattista replied that since the bidder did not refer to this sample, the Evaluation Committee could not confirm that it was the same sample. There is another tender for this item that is being currently adjudicated. This product has been used since 1997 and it is a standard product in the treatment of this area.
After deliberating on the submissions and from the evidence given the Committee agreed that since both Clause 5 and Clause 7 are indicating that offers MAY be disqualified in the lack of the submission of the sample, package insert and labeling, Government Health Procurement Services could have asked for a sample from bidders after the closing date of the tender. The clauses of the tender document do not indicate that the samples must be submitted with the tender by interested bidders. In the circumstances, the Committee feels that the Contracting Authority is to ask for a sample from V J Salomone and re-evaluate offers received.

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

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

C Gatt
Member

29th July, 2010
Case Number 11

Meeting of the General Contracts Committee

25th June, 2010

ERDF/Ph2/01/10 - Supply of Audio/Visual Equipment, Computers, Furniture Items and Vertical Blinds.

Final Decision

Jos. Vincenti & Co. objected to the decision published by the Employment and Training Corporation regarding the award of this call for tenders. The company claimed that the interactive whiteboards offered by Klikk Ltd do not have a customizable pen tray for four (or three) pens and an eraser while the user is required to select a tool from the pushbutton strip.

The General Contracts Committee convened to discuss and decide the objection raised by Jos Vincenti & Co (1911) Ltd after the published recommendation by the Employment and Training Corporation (ETC) for the award of Lot 4 of the above captioned tender to Messrs Klikk Ltd.

The following persons were present for the hearing:

ETC  -  Mr Felix Borg, Chairperson
       -  Mr Martin Casha, Secretary
       -  Mr Joseph Galea, Member
       -  Mr Charles Cassar, Member

Jos Vincenti & Co Ltd  -  Mr Alfred Vassallo, Managing Director
                       -  Mr David Buttigieg Depiro, Consultant

Klikk Ltd  -  Mr Jason Cutajar, Manager

Mr Buttigieg Depiro stated that their submitted offer meets with more requirements than the recommended offer. They are basing their objection on the assumption that the recommended offer does not meet two of the technical specifications namely, “Must have a customizable pen tray complete with at least four pens of different colours and an eraser.” And the user “must be able to write in digital ink by picking up a pen from the pen tray and using a finger or the pen to write without selecting a tool from an icon strip, toolbar or remote control.”

Mr Vassallo said that although clarification no 7 specified that the three pen technology was acceptable, a customized pen tray to hold the eraser was not given.
Mr Borg stated that the Evaluation Committee was convinced of their decision. Apart from the published tender’s specifications, a set of clarifications was also issued and was sent to all bidders. These clarifications formed an integral part of the tender dossier.

The offer submitted by Jos Vincenti & Co Ltd was disqualified because it specified a two pen technology and these pens were battery operated not battery free as requested in the tender specifications. Clarification No 8 informed all bidders that ETC was going to accept more sophisticated technology and the recommended bidder was fully compliant under that clarification, which formed part of the tender dossier but it seems that the appellant is ignoring this clarification.

Mr Buttigieg Depiro stated that they offered two options. They were discussing Model SB680 while the Evaluation Committee was talking about their other submitted model. Model SB680 meets all the requirements.

They were not ignoring the clarifications but the submitted offer is a one pack technology since you have to choose the required colour. It did not have a pen tray and the eraser and customized pen tray was not removed. Clarification no 8 stated that an alternative technology was accepted which was different from all previous requirements.

Mr Casha explained that the award criteria for this tender was the cheapest fully compliant offer. The Evaluation Committee was obliged to evaluate all options. The cheapest overall offer was the one submitted by the appellant and was disqualified since it only offered a two pen technology. Their other offer was compliant but it was not the cheapest compliant offer.

The offer submitted by Klikk Ltd was €75 cheaper. Klikk Ltd offered a technology that was different to the original published specifications but in line with clarifications 7 and 8. Both offers submitted by Klikk Ltd and the appellant (2\textsuperscript{nd} option) were fully compliant. One was compliant with the tender’s specifications and the other with the clarification. The Evaluation Committee recommended the cheapest compliant offer.

Mr Cutajar said that the board size offered by the appellant was not according to the published specifications but in line with a clarification. The Whiteboard offered by Klikk Ltd was not an interactive board but still had a tray to hold the pens and eraser if so required.

On this board one could write with the same pen and change colour by pushing a button on the same board. Various tools and applications could also be found on the board. There was also another bidder who offered the same technology. Out of about ten suppliers only Jos Vincenti & Co Ltd supplied a SmartBoard. This type of board did not have the same tools and applications as the recommended one. The argument raised by the appellant was invalidated by clarifications 7 and 8.

When the Chairman of the General Contracts Committee asked if they were aware of and confirm the amount of €895.03 published on the Schedule of Prices for Lot 4, Mr Vassallo said that in principle they accept that their offer is higher than the recommended one but they were not basing their objection on the price.
Mr Casha confirmed that the offer submitted by Klikk Ltd was satisfactory and acceptable in regards to the clarification. Therefore, since it was the cheapest fully compliant technical offer it was recommended for award. When they issued the tender they did not go into the nitty gritty of how the interactive whiteboard should work. They knew that after they evaluated the offers. They specified what they wanted and some of the specifications were altered when the clarifications were issued. The Evaluation Committee does not feel that they discriminated with any bidder.

When the Chairman asked why they felt that the recommended offer was technically non-compliant, Mr Buttigieg Depiro replied that ETC wanted more convenient technology and their offer was just that. In regards to Clarification No 8, ETC already knew about that type of technology because they specifically said in the tender dossier that they did not want it. ‘….without selecting a tool from an icon strip, toolbar or remote control…’ is not new technology but it’s a one pen technology.

The Chairman then asked if the Evaluation Committee felt that through the reference to alternative technology it was expected that the contracting authority was expecting specifications different from those published.

Mr Casha said that they were not experts in the field so they evaluated all offers. The recommended offer was fully compliant.

When the Chairman asked if the Evaluation Committee would accept an offer that complied with the requested specifications and also comprised extra specifications, Mr Casha replied that they asked for the minimum requirements. They were aware of what was in the market but did not know what type of technology the bidders were going to submit.

Mr Casha also stated that the board offered by the appellant was smaller than what was requested in the tender document but it complied with one of the clarifications that were issued. After the clarifications were submitted none of the bidders asked for other clarifications.

After deliberating on the submission and from the evidence given the Committee agreed that the Employment and Training Corporation were right in their recommendation to award the tender for Lot 4 to Klikk Ltd.

Hence, the General Contracts Committee resolved that the objection by Jos Vincenti & Co (1911) Ltd should be not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

C. Gatt
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

30th June, 2010
Case Number 12

Meeting of the General Contracts Committee

25th June, 2010

L 244/94 – Cleaning Services at Valletta Market. – GPS 1/2010

Final Decision

Gafa Saveway Cleaners Ltd objected to the recommendation for award of this tender since no reason was given why it was an unsuccessful bidder.

The General Contracts Committee convened to discuss and decide the objection raised by Gafa Saveway Cleaners Ltd after the published recommendation by the Department of Lands for award of the above captioned tender to VSV Cleaning Ltd.

The following persons were present for the hearing:

Department of Lands - Mr Aldo Cutajar, Senior Principal
Gafa Saveway Cleaners Ltd - Mr Dominic Gafa
Dr Edward Gatt (Legal Consultant)
VSV Cleaning Ltd - Mr Derek Spiteri
Ms Maria Bouchema Spiteri

Dr Gatt stated that on the 6th April, 2010, Lands Department informed his clients Gafa Saveway Cleaners Ltd that their submitted proposal was not successful. The reason of non-compliance was not given. They are now contending that this decision should become null since the department should have identified the reason why the submitted offer was non-compliant.

The lack of submitted information created a problem in the submission of appeal since no justifications could be brought forward. This decision has to be reviewed.

Mr Cutajar said that the reason for disqualification was not given since there was no obligation in the tender dossier to do so. It definitely was not due to lack of transparency. The Evaluation Committee felt that the letter was sufficient.

Dr Gatt argued that it was not a question of someone’s oversight but this decision is null. Lands Department should re-issue this decision even if his client’s offer has been disqualified.

Mr Cutajar stated that the department did not find any problem in divulging the reason of disqualification.
Dr Gatt insisted that he did not want to know the reason during the hearing. Lands Department should re-issue the decision with a reasoned letter with a new appeals period.

Mr Spiteri said that almost all departments sent letters without the reason of disqualification.

When the Chairman asked if there was any legal obligation in the tender dossier to inform bidders of their disqualification, Dr Gatt said that the tender’s conditions does not bind the department to send a reasoned letter but it is a known secret that the reason for disqualification is referred to the bidder.

On the same point the Chairman then asked if there was any legal obligation in the Public Contracts Regulations and if the appellant asked Lands Department to give them the reason for disqualification.

Dr Gatt replied that there was not, but it was incorrect for the department not to divulge the reason for disqualification. He also confirmed that they asked for the reason but did not receive any reply.

Mr Cutajar confirmed that they did not give the reason for disqualification to the bidders.

After deliberating on the submission and from the evidence given the Committee agreed that the Lands Department was right in its recommendation to award the tender to VSV Cleaning Ltd. However, once there was a specific request by one of the bidders for the reason for its disqualification, the Lands Department should provide the necessary information. Any aggrieved bidder can protect its rights in accordance with the Laws of Malta.

Hence, the General Contracts Committee resolved that the objection by Gafa Saveway Cleaners Ltd should be not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Francis Attard  
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

C. Gatt  
Member

C J Delicata  
Member

O Vassallo  
Member

V Camilleri  
Member

J Mizzi  
Member

30th June, 2010
Case Number 13

Meeting of the General Contracts Committee

25th June, 2010

UM 1432 – Supply & Delivery of Office Furniture for the Reading Hall at the Library of the University of Malta

Final Decision

FXB Ltd objected to recommended award of this tender. It contended that its offer was the most financially advantageous from the ten bids submitted. Besides, its offer included the supplier’s original catalogue. The furniture to be submitted by FXB Ltd was to be to the exact dimensions and specifications requested.

The General Contracts Committee convened to discuss and decide the objection raised by FXB Ltd after the published recommendation by the University of Malta for the award of the above captioned tender to C Fino & Sons Ltd.

The following persons were present for the hearing:

University of Malta
- Mr Tonio Mallia, Director Procurement
- Dr Oriella De Giovanni, Legal Rep.
- Mr Kevin Ellul, Director Library Services
- Mr Elton Baldacchino

FXB Ltd
- Ms Jenny Cassar
- Mr Ivan Caruana

C Fino & Sons Ltd
- Ms Josianne Gatt
- Mr Dino Fino

Ms Cassar stated that although their submitted offer was the cheapest offer they received a letter from the University of Malta informing them that their offer was disqualified because their submitted catalogue did not specify the measurements.

Page 18, Clause H of the Tender Dossier stated that bidders had to submit an original suppliers’ catalogue and certification of standards with their offer. They also signed a declaration stating that they were binding themselves to supply the requested furniture with the requested specifications and measurements at the submitted price. It would have been a coincidence if the original catalogue included the same measurements as was requested in the Tender Dossier.

Dr De Giovanni confirmed that the appellant submitted the cheapest offer, but the award criterion was the cheapest offer that conformed to the tender’s specifications and conditions. Their offer was technically non-compliant because the worktops, shelving units, desks and tables were not offered in the size or material that was requested.
The appellant did not quote Clause G of the Tender Dossier which stated that “Apart from the prices, suppliers must present detailed descriptions of the items including original catalogues with pictures and dimensions and certification of required standards.” This was mandatory, appellant was not compliant with this clause therefore the offer was disqualified.

Ms Cassar reiterated that they signed a declaration stating that they will supply the specific dimensions that were requested in the tender dossier. It was obvious that once they were binding themselves to supply the furniture according to the specified measurements and specifications they would supply as required. They would have been defacing the original catalogue if they adjusted the measurements or material.

Their supplier is big enough to submit the measurements and material that was requested. In their submitted offer FXB Ltd clearly stated that they were going to supply all that was requested and if they were to default, the University has the right to refuse the supplies.

Dr De Giovanni argued that in a tender one can never take anything for granted but had to abide by the published specifications and conditions.

Mr Mallia stated that they cannot work on an assumption. The appellant could have at least stated that they were going to submit the furniture as shown in the catalogue with the necessary adjustments.

Mr Fino explained that they tendered with all the specified requirements. Where the model in the catalogue was different they sought out the permission of their supplier so that they could change the sizes as required. They also drafted each item in the required size. Besides the request for the original document, Clause G of the Tender Dossier also specified that a description of each product is to be submitted.

The Chairman of the General Contracts Committee asked the appellant whether a clarification was sought since there seems to have been a problem with the sizes of the original catalogue.

Mr Caruana said that they did not do so. Since they submitted the sizes that were required they did not believe that there was any difficulty.

When asked if any clarifications were sought out by any of the bidders prior to the closing date of the tender, Mr Mallia confirmed that no clarifications were submitted.

Mr Mallia quoted again Clauses G and H in which it was specified that a detailed description inclusive of the measurements were to be submitted.

Ms Cassar amplified that the catalogue showed a detailed description of the product while they attached to the offer the sizes in which they were to supply the product.

Mr Ellul said that in one instance the appellant specified page 18 of the catalogue which had different sizes. They took into consideration the adjustments on catalogue. They evaluated the submitted offer but did not find any notes that referred them to the catalogue except for page 18.
Mr Mallia explained that they based their evaluation on all the submitted literature. The catalogue was presenting what the bidder was offering. All other bidders substantiated their offer while the appellant did not specify that FXB Ltd was going to supply the required models according to the required specifications and measurements.

Ms Cassar reiterated that they submitted the technical drawings as required and that they specified page 18 of the catalogue because there was more than one partition in the catalogue.

After deliberating on the submission and from the evidence given the Committee feels that it is very difficult for any bidder to submit a catalogue with exactly the same specifications as detailed in the tender document. On the other hand the Committee notes that FXB Ltd has signed a declaration by which the company committed itself to supply the furniture in accordance with the tender specifications. Consequently the Committee agreed that the University of Malta was not correct in their recommendation to award the above-mentioned contract to C Fino & Sons Ltd.

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

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

C Gatt
Member

20th July, 2010
Case Number 14

Meeting of the General Contracts Committee

12th July, 2010

MCAST T. 02/10 – Supply, Delivery, Installation and Commissioning of Renewable Energy Source (Wind Turbine Generator System) for Electrical Power Generation at the MCAST Main Campus, Corradino Hill, Paola.

Final Decision

Econetique objected to the recommendation by the Malta College of Arts, Science and Technology for the award of the tender to Solar Solutions Ltd. Appellants stated that it will be keeping in stock a number of items (list of spare parts) in response to MCAST’s requirement. Besides, the company has committed itself that the systems would be maintenance free with an extended warranty, post the 5 years standard warranty period. Econetique could not submit full audited accounts for the three years as requested in the tender since it has been established in 2009. A list of similar installations can be submitted by the supplier of the systems. Corrosion standards of the supporting structure have been indicated in the tender.

The General Contracts Committee convened to discuss and decide the objection raised by Econetique Ltd after the published recommendation by the Malta College of Arts, Science and Technology (MCAST) for the award of the above captioned tender to Solar Solutions Ltd.

The following persons were present for the hearing:

MCAST
- Mr Vince Maoine, Chairman Ev Comm
- Dr Peter Caruana Galizia, Legal Advisor
- Mr Ronald Curmi, Secretary Ev Comm
- Mr Jurgen Zammit, Secretary Ev Comm

Econetique Ltd
- Mr Joseph Borg, Director
  Mr Ryan Xuereb, Managing Director

Solar Solutions Ltd
- Mr David Zammit
  Mr Jesmond Farrugia

Mr Xuereb stated that they are basing their objection on the various points that were specified in their Letter of Objection as follows:-

1. List of Manufacturer’s recommended spare parts and consumables,

Econetique submitted a declaration stating that even though it was highly unlikely that these should be needed they will be keeping in stock a number of items. The list of consumables that could be needed by MCAST in the future was also submitted.
2. Proposal for after-sales service over a period of 5 years.

In their offer they submitted a declaration stating that all systems should be maintenance free and an extended warranty after the five years standard warranty period is available if MCAST felt that it was necessary. Normally it is the client who determines whether he wants a maintenance agreement or not. Econetique gives its recommendations but it’s up to the client to decide.

3. Proof of operator’s economic and financial standing.

Econetique Ltd has been established in 2009, therefore the audited financial statements of the last three years could not be submitted since they do not exist. Since Econetique is a subsidiary of FXB Holding Ltd of which Mr Joseph Borg was the Director, they could submit the audited accounts of FXB Holding Ltd upon request.

4. List of similar supplies delivered and installed, accompanied by certificates of satisfactory execution.

Econetique is in the process of installing a similar system at Xewkija Industrial Estate that was to be commissioned in two weeks time. This is the first of its kind in the Maltese Islands. Another system is to be executed in September. They did not imagine that they would be excluded from this tender because of this. The only Wind Turbine Generator System that they installed and executed was in the United Kingdom but since the tender dossier specified local installations they had none to produce.

This is a new technology and since MCAST was an institute of science and technology they should have promoted this initiative. This is a fast growing niche. This turbine is purposely designed for green procurement. It is a new product that can be used as an example for other suppliers to follow.

5. Original manufacturer’s declaration and guarantee against corrosion to supporting structures.

The General Warranty covers corrosion and all defects. This declaration falls within the General Warranty scheme. The actual certification from the actual supplier is not normally requested but if MCAST requires it, Econetique can supply it.

The Manufacturer’s drawings which specify the corrosions standards of the supporting structure have been submitted with the offer. If there is a legal document that MCAST requires the appellant will supply it.

6. Offer included a wind turbine that is underrated and does not produce the power requested.

The tender dossier specified a minimum power of 4KWp at 12m per second. Econetique submitted a power of 4KWp at 12m per second (power output at a certain speed). Therefore, their wind turbine generator system was within the required specifications.
7. Offer did not provide enough information on the mast and the tilt-up specifications could not be verified.

Drawings of installation have been submitted. The turbine is to be mounted on a mast. This mast works on a tilt mechanism so that it could be pulled down when maintenance was due. The mast is not part of the turbine. It is the property of the appellant. Drawings for mast in both tilted and final stage were submitted together with the hydraulic plan and the span that would be taken by the mast.

Dr Galizia explained that the offer submitted by the appellant was disqualified because it was administratively and technically non-compliant. In their submitted offer Econetique only said that their turbine was maintenance free and that they could provide a list of parts and consumables. They waived off the proposal for after-sales service over a period of five years since they stated that there was no need of this service. There were other bidders that were disqualified for this reason.

Since Econetique is a new but also a subsidiary company, the appellant could have submitted the proof of economic and financial standing of the mother company with their offer. MCAST would have then decided whether to accept them or not. This information cannot be supplied at this point in time.

The appellant could also have tried submitting a list of similar outside installations accompanied by certificates of satisfactory execution. Conditions are to be followed and funds cannot be jeopardized. The funds for this tender are based on a two year period.

It was true that the appellant submitted drawings that stated that the wind turbine was galvanized but MCAST requested the warranty from the manufacturer and not the supplier. Drawings only showed the tilt facility. No information/specifications of the mast were submitted. The requested power of the wind turbine had to be greater than and not a minimum of 4KWp at 12m per second.

Mr Borg said that a letter from the bank satisfied the proof of economic standing criteria. The shareholding of the group was also clear.

Mr Xuereb reiterated that the list of Consumables, namely the turbine, inverter and wiring were submitted with the offer. The proposal of after sales was also submitted. With regards to the corrosion resistance, they stated that they were to supply everything up to the requested standards as shown in the drawings submitted by the manufacturer. They declared that they will supply according to the specifications. They are guarantors for their suppliers.

The power of their turbine is above the 4KWp at 12m per second. The tilting mechanism is showed in the submitted drawings even though it is not part of the turbine and they could have not submitted it.

Dr Galizia emphasized that when the tender dossier specified accounts, they expected accounts and not a letter from the bank. When they asked for a list of manufacturer’s recommended parts, they expected a declaration by the manufacturer. With regards to the corrosion, the drawings were not enough, a declaration by the manufacturer was also required.
Mr Maione said that the power had to be greater than 4K at a wind speed of less than 12m per second. The offer of the appellant is on the limit but outside the specification.

Mr Zammit said that the specifications of the Wind Turbine Generator System that is being offered by Econetique Ltd can be found on the website of Urban Green Energy, the manufacturer. The cut in wind spin of this turbine is less than the one requested in the tender dossier since it is 3.5 and not 4Kwp.

When the Chairman of the General Contracts Committee asked whether they considered the submission of the last three years audited accounts difficult, Mr Borg replied in the affirmative but since there were valid reasons for lack of submission they did not imagine that their offer would be rejected.

The Chairman then asked whether they submitted a clarification in this regard and if they had previously installed this type of Wind Turbine Generator System.

Mr Xuereb confirmed that they did not submit a clarification and that categorically speaking it is being said that a company that has been established for less than three years cannot offer for this tender.

Mr Xuereb also confirmed that they installed and executed this system in England jointly with Urban Green Energy who is the suppliers of the wind turbine.

The Chairman asked if the appellant submitted a declaration of spare parts.

Mr Curmi said that a list of spare parts that can be needed after the first five years was submitted.

When the Chairman asked if this was enough for MCAST, Mr Maione replied that they wanted a list from the manufacturer with each and every part as well as the serial number in the event that they would need to procure these parts themselves. They wanted to ensure that the parts were correct and available. This requirement was also specified in the tender’s specifications.

Mr Xuereb said that Econetique was part of the manufacturing entity.

Dr Caruana Galizia stated that the bidder is a supplier and cannot say that he is the manufacturer.

When the Chairman asked if an After Sales Service Declaration was submitted, Mr Maione replied that MCAST is contending that the appellant did not submit this declaration.

Mr Xuereb referred Mr Maione to their submitted declaration. Mr Maione said that he had no recollection of this document but it was still not acceptable since this had to be discussed at the commissioning stage.

Dr Caruana Galizia said that they wanted something more concrete than what was submitted.
After deliberating on the submissions and from the evidence given the Committee agreed that although there were some doubts on the submission of the List of Spare Parts and the After Sales Service Declaration, the bidder accepted the lack of compliance with regards to the submission of the three years audited accounts and confirmation of past installation and execution of the Wind Turbine Generator System. Therefore, the Committee feels that the Malta College of Arts, Science and Technology was correct in its recommendation to award the above-mentioned contract to disqualify Econetique Ltd and award it to Solar Solutions Ltd.

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

Francis Attard  
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

O Vassallo  
Member

C Gatt  
Member

J Mizzi  
Member

5th August, 2010
Case Number 15

Meeting of the General Contracts Committee

12th July, 2010

WSM 164/2010 – Contract for the Collection and Management of WEE (TV’s and Monitors) Stored at Marsa Stores. – Advt WSM 78/2010

Final Decision

The General Contracts Committee convened to discuss and decide the objection raised by PT Matic Environmental Ltd and Tar-Robba Recycling Care Centre Ltd after the published recommendation by WasteServ Malta Ltd for award of the above captioned tender to Electronic Products Ltd.

The following persons were present for the hearing:

WasteServ Malta Ltd (WSM) - Ms Daniela Grech, Chairperson
Dr Victor Xerri, Legal Advisor
Mr Peter Vella

PT Matic Environmental Ltd - Dr Christian Farrugia, Legal Advisor
Ms Carla Camilleri
Mr Oliver Fenech

Tar-Robba Recycling Care Centre Ltd - Mr John Ghigo
Mr Brian Cardona

Electronic Products Ltd - Mr Mike Borg
Mr Andrew Lamb
Mr Charles Galea

Dr Farrugia said that the basis of PT Matic Ltd's appeal was the complexity of the technical non-compliance of the recommended bidder with Clause 2.9 of the Tender Dossier, namely “…... (v) The full document for the Waste Broker Registration for the management of WEEE waste……...”

The appeal is based on the interpretation of these clauses especially since Clause 2.3.2 specified the essentiality of full technical compliance. Electronic Products Ltd quoted EWC codes that are not appropriate for this type of material. Televisions and Monitors are composed of hazardous material. MEPA confirmed that the EWC codes submitted by PT Matic Ltd are applicable.

In this call for tenders the EWC Codes were not specified, the request was for “appropriate” codes. In a second tender that was published at a later date, WSM specified the EWC Codes that were submitted by PT Matic Ltd for this tender.
Electronic Products Ltd updated its Broker Details so that they would be according to the Tender’s Specifications. At the closing date of submission, the recommended offer did not conform to the published specifications.

Mr Cardona explained that at the closing date of submission the recommended bidder did not have the Dismantling and Waste Treatment Permits. MEPA specified Dismantling Permit only but in the Tender Dossier specified treatment, that is, the tube had to be cut open and the phosphate had to be sucked out. Tar-Robba’s Permit specified both Treatment and Dismantling.

Dr Xerri stated that these two appeals referred to this tender and not to any other tenders that were published by WSM. In this tender no EWC Codes were specified. When the Evaluation Committee was reviewing the four submitted offers, WSM contracted MEPA and asked them to specify whether these bidders had the required permits.

MEPA confirmed that all four bidders were compliant and could submit an offer. The Evaluation Committee then proceeded with the evaluation of the submitted offers.

Ms Grech explained that when this call for tenders was issued, no other tender was in place. They did not specify the EWC Codes because they wanted to see what was available. The Evaluation Committee went through the submitted Waste Management Permits but since MEPA was the authority on that issue, the permits were referred to this authority for confirmation. MEPA confirmed that they were in order. Treatment involves packaging.

Before the closing date of the tender a query in which WSM were asked whether the tube had to be treated locally or overseas was received.

WSM issued a clarification in which it was stated that the dismantling may be carried overseas.

A Broker Permit was not required. WSM wanted a Code for the disposal of the end product which emerged after the dismantling process. The permit submitted by PT Matic covered all these requirements. The recommended bidder had a permit covering the material that was to be exported. Nowadays, MEPA is issuing permits that cover the management of waste for all waste stream, hazardous or non-hazardous.

Dr Farrugia amplified that they did not refer to the second tender because there is any connection to this tender but because they wanted to see why there was a specific reference to the codes that they submitted in this tender. WSM automatically confirmed that the codes submitted by PT Matic were the correct codes when they specified them in the second tender.

The material to be disposed off in both tenders is the same since WSM 113/2010 specifies TVs and Monitors. The handling is done in a certain methodology. If the codes submitted by the recommended bidder were acceptable in this tender but were not those specified in the second tender, they could not be correct. Appropriate means the correct code to handle this material, to indicate handling of hazardous material. The recommended bidder is not in possession of this permit.
Mr Cardona said that MEPA does not specify the type of permits that cover the management of waste for all waste stream only when asked to do so by those who apply for the permit. Dismantling also incorporates treatment. He had to amend his permit in order to be able to submit his offer.

Ms Grech explained that dismantling is a process of Waste Management. At the beginning there is a type of waste stream, at the end there is another one. You end up with both hazardous and non-hazardous material.

This tender deals with the dismantling process, which is more complicated than the actual export and therefore there is the need of different EWC codes. The second tender deals with the actual export of the material. TVs and Monitors falls under EWC codes 1 and 2. Since the waste is to be exported a Waste Broker Permit is required.

Tar-Robba Ltd did not have a full document as Waste Management Certification. They only had a declaration.

Mr Galea said that they deal in IT Equipment. Their current permit was due to expire so MEPA issued a permit that covered all the requirements. All recycling of the material was to be effected in the United Kingdom.

Ms Grech amplified that Clause 3 of the Tender Dossier specified that this call for tenders was for the collection and management of waste. One had to collect, store and treat waste through dismantling locally. In a clarification it was specified that CRT tubes can be dismantled either locally or overseas.

Clause 2.2.9 of the Tender Dossier does not specify that lack of submission of documents would lead to disqualification. These documents were asked because WSM had to ensure that the recommended bidder was capable of carrying out the works satisfactorily.

Prior approval from MEPA is required every time that hazardous waste is to be consigned.

When asked whether they submitted a Waste Management Permit with their offer Mr Cardona replied that they submitted a copy of the Broker’s Permit Application. They had the number of the Broker’s Application so they submitted it with their offer. The recommended bidder was not in possession of the required permit at the closing date of submission but they were not disqualified.

Ms Grech said that MEPA did not confirm if Tar-Robba Ltd had a Broker’s Permit since WSM were told to look for this information online.

Mr Vella stated that Tar-Robba Ltd was not recommended for award not just because they were not in possession of this permit but because their offer was also by far higher than the recommended offer.

When the Chairman of the General Contracts Committee asked whether Electronic Products Ltd were in possession of the required permits, Ms Grech replied that MEPA confirmed that they were in possession of the Waste Management Permit and could
carry out the required works. WSM was only referred to MEPA’s website in order to check the availability of the Waste Broker Permit.

After deliberating on the submission and from the evidence given the Committee agreed that WasteServ Malta Ltd were right in their recommendation to award the tender to Electronic Products Ltd.

Hence, the General Contracts Committee resolved that the objections by PT Matic Environmental Ltd and Tar-Robba Recycling Care Centre Ltd should not be upheld. The Committee also agreed that the deposits paid should be forfeited.

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

J Mizzi
Member

C Gatt
Member

29th July, 2010
Case Number 16

Meeting of the General Contracts Committee

6th August, 2010

MRRA/W/104/2009 – Tender for the Supply and Installation of Play Equipment (Seinor Including Swings) at Qui Si Sana Garden and Play Area. – Advt 83/2010

Final Decision

OPAL Ltd objected to the recommended award of this tender. The company stated that as price seems to be the determining factor when awarding a tender, its offer is €6,500 cheaper than its competitor who seems to have secured the bulk of the equipment. Adverts 82/2010, 83/2010 and 84/2010 are basically one tender split into three sections. Appellant’s offer for the three sections combined is also cheaper by €3,705. Out of a total of 15 bids for various pieces of equipment in the three tenders, the company was cheaper in seven and almost at par with another.

The General Contracts Committee convened to discuss and decide the objection raised by Outdoor Play and Leisure (OPAL) Ltd after the published recommendation by the Ministry for Resources and Rural Affairs (MRRA) for the award of the above captioned tender to Messrs JGC Ltd.

The following persons were present for the hearing:

MRRA
   - Perit Anne Casha - Chairperson
     Perit Joseph Grech

OPAL Ltd
   - Mr Tony Bonello

JGC Ltd
   - Mr Pierre Cuschieri

Mr Bonello stated that as he mentioned in his Letter of Appeal his submitted offer for all issued tenders that had to do with the supply and installation of play equipment at Qui-Si-Sana garden and play area was €6,500 cheaper than the recommended offers.

The Chairman of the General Contracts Committee said that since this appeal was based on the recommendation for award for Advert 83/2010, Mr Bonello should limit himself to that tender.

Mr Bonello argued that since the award criterion was based on the cheapest offer his company should have been recommended for the award of the tender.

Perit Casha explained that bidders submitted their offers with different options. None of the options were technically compliant as a whole. The Evaluation Committee decided to evaluate each item separately, always basing their evaluation on the cheapest compliant offer. Point 5 of Clause 4.2.3 specified that the equipment for seniors shall be fixed on top of reservoirs roofed over with pre-stressed precast concrete slabs. Therefore this equipment shall all be surface mounted. In a reply to a clarification, the appellant stated that it was not surface mounted. No information has
been given as regards the width and surfacing area of the swings. This was required because the specific area rubber matting had to be fitted in the safe area.

Mr Bonello reiterated that his submitted offer was technically compliant and that Perit Casha was the one who was saying that the offered equipment was not surface mounted. He had thirty years experience in playing equipment and he knew that every piece of equipment had to either be dug into the ground or surface mounted. In his letter dated 13th July, 2010 he quoted that all his offered equipment was surface mounted.

Perit Casha stated that she was referring to the email dated 17th June, 2010 in which Mr Bonello stated that the equipment was not surface mounted. This was not acceptable since they were tight in space since this playing field was being built on 3 reservoirs. The evaluation report was finalised on the 6th July, 2010.

When Mr Bonello referred to the statements made by OPAL in the letter of 13th July, 2010, the Chairman of the General Contracts Committee informed him that this letter was the letter of objection. That came after the evaluation report was finalised.

The Chairman asked if the options submitted by the appellant were technically non-compliant. He also asked if the Evaluation Committee evaluated the submitted offers by evaluating each item separately and if after clarifications were sent, the appellant confirmed that the design was not surface mounted.

Perit Grech confirmed this statement and also confirmed that all recommended offers were fully compliant and they were taken from separate options.

After deliberating on the submissions and from the evidence given the Committee agreed that the Ministry for Resources and Rural Affairs was right in its recommendation to award the tender to JGC Ltd.

Hence, the General Contracts Committee resolved that the objection by Outdoor Play and Leisure (OPAL) Ltd should be not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

2nd September, 2010
Case Number 17

Meeting of the General Contracts Committee

6th August, 2010

ETC/A/01A/10 – Provision of Legal Services

Final Decision

Gatt Tufigno Gauci Advocates objected to the recommendation of award of this tender to Giglio Spiteri Bailey Advocates. Appellants stated that it cannot accept a low score on Rationale since this is tantamount to them being interpreted as not understanding the contract.

The General Contracts Committee convened to discuss and decide the objection raised by Gatt Tufignio Gauci Advocates (GTGA) after the published recommendation by the Employment and Training Corporation (ETC) for the award of the above captioned tender to Giglio Spiteri Bailey Advocates.

The following persons were present for the hearing:

ETC
- Mr Felix Borg, Chairperson
- Dr Paul Gonzi, Legal Advisor
- Mr Martin Casha, Secretary
- Mr Charles De Ferito, Member
- Mr Matthia Gauci, Member
- Ms Nicola Cini, Member
- Ms Josephine Farrugia, Member

Gatt Tufignio Gauci Advocates
- Dr Ivan Gatt

Giglio Spiteri Bailey Advocates
- Dr Ian Spiteri Bailey
- Dr Joe Giglio

Dr Gatt said that as they already pointed out in their Letter of Appeal this tender was for legal services and not marketing or consultancy. Therefore there was no particular rationale.

Their complaint was simple since it was based on two points of the Evaluation Criteria, namely, the Rationale that carried a maximum score of 30 and the Strategy that carried a maximum score of 50.

GTGA were given a score of 12.33 for their submitted rationale, which is a lot less than the allotted score. This meant that they did not understand the rationale of ETC’s workings.

In their submitted rationale they stated that one of the persons that were being recommended for this contract was Dr Robert Tufigno who had more than twenty-
seven years experience, while Dr Gatt himself had more than twenty-six years experience.

Dr Tufignio also held the position of Chairman, ETC between 1999 and 2006. Therefore it was unconceivable how the Evaluation Committee said that he did not have experience in this line of work.

On the other hand GTGA were given 94% in strategy (42 out of 50) which is brilliant although it did not make much sense since strategy follows rationale. If rationale came after strategy it would have made some sense because one can understand the rationale of the entity but did not implement it as desired. It did not make sense that one could implement something in the desired manner without understanding what they had to implement.

Dr Gatt stated that if the Committee felt that the arguments that he put forward were sustainable and made sense to them, they should return the documents to ETC to re-evaluate their offer. He was not saying that their submitted offer was compliant while the recommended offer was not, but it did not make sense that their strategy was very good and their rationale was hopeless.

Dr Gonzi said that the main point of this appeal was whether the three evaluators kept to the items that had to be given marks. The evaluators do not know these lawyers and could not give marks on assumptions but had to keep to the published requirements and marks.

During an evaluation one cannot assume that the bidder had experience even though no marks were given for experience since this was dealt with in the first stage of evaluation. Marks were given in the second stage and experience was not part of it.

Rationale and Strategy are not equivalent. One specifies the achievement of continuous objectives and the other specifies the approach to be taken by the bidder. The bidder must clearly show what he was planning. One cannot tell the Evaluation Committee to assume that the appellant knew the goals that were to be reached just because he was the Chairman of the Corporation for seven years. They should have explained what they achieved and what they knew.

The procedure with which points were given was a regular one. The members of the Evaluation Committee evaluated the offers individually and then worked out the average score. No one can tell them to assume and give more points.

Dr Gatt said that as they already specified in their Letter of Objection the rationale was based on three points, the degree of understanding, an opinion on the key issues related to the achievement of the contract objectives and expected results and an explanation of the risks and assumptions affecting the execution of the contract.

They satisfied these criteria. These are professional services, purely legal, not experience. They worked with ETC in all aspects that they face such as legislation drafting, employment and judiciary procedures. Their experience is in the ETC field. Rationale and strategy are attached together.
Dr Gonzi reiterated that experience was evaluated in a different stage of the tender and it was not mentioned in the rationale or strategy. Experience was not given any marks. The fact that a person had previous experience with ETC did not affect the rationale.

The appellant did not mention any risks and assumptions in his offer. In the legal aspect there are always risks and assumptions but if the appellant believed that there weren’t any he should have explained why he believed that.

Mr Casha stated that Article 4.2 of the Instruction to Tenderers specified “Bidders are encouraged to submit as detailed an Organization and Methodology as possible, on the basis of the information detailed in Annex III, and any other technical requirements as may be requested in the Terms of Reference.”

The submitted rationale was not detailed enough and the evaluators could not give more marks. No one said that the appellant did not understand what was required of them but marks were given on what was offered. They did not give a lot of information in the rationale. Their strategy was detailed that is why they were given more marks.

Dr Gatt stated that the tender conditions are the general conditions.

Dr Spiteri Bailey said that this tender was for the provision of legal services. In legal services it is of the utmost importance that the contracting authority feels confident in the company that it has to work with. Evaluators have the right to give marks at their own discretion according to the published specifications.

One can appreciate that one of the appellant’s key experts acted as chairman to ETC. However, as for himself, he is the only lawyer in Malta who has a Masters from the University of Leicester in European Union (Employment and Social Policy) Law.

For the last fifteen years he has been practicing law and has gained experience in most legal fields, particularly in commercial, civil, corporate, criminal and employment law. A lot of information was given in their rationale.

The Chairman of the General Contracts Committee referred Dr Gatt to his letter of objection in which it was stating that the objection was based on two points, namely the rationale and that the appeal procedure was not correct.

Dr Gatt said that when they submitted their letter of objection they were in doubt whether the procedure was correct because of the contract value, therefore they wanted to keep the right of appeal.

The Chairman then asked if the appellant had any information that led him to believe that the estimated contract value exceeded the amount of €47,000 net of VAT. If not he could confirm that the procedure is correct and is according to the legal terms.

When asked what were the failing points, Ms Farrugia said that the marks were given individually according to the information that was given by the bidders. Experience was part of the Selection and not the Evaluation Criteria.
Mr Borg said that the scope of the rationale was to see if the bidder who submitted the offer understood what was being expected from him and if the bidder is foreseeing any risks. The recommended bidder elaborated on this aspect. The appellant did not mention anything in regards to risk and assumptions. The Evaluation Committee could not assume that the appellant did not see any risk.

Mr Casha said that in the tender document bidders were requested to state any assumptions from a professional point of view. For example if they believed that they could go to court on Saturday and Sunday but it was not specified in the tender document. The bidder had to draw the attention of the Contracting Authority.

With regards to ‘risks’, bidders had to indicate if they were foreseeing any risks. For example, if the contract was for three years, what will happen if that agreement was terminated.

Dr Giglio said that in their offer they anticipated another scenario, a conflict of interest situation, as a professional person and in the services that they had to give to ETC.

Dr Gatt said that they addressed the question of risks under the policy cover. This policy covers the appellant as a professional person and the entity that they were offering their services to. They could not comment on a conflict of interest situation since it did not apply to their circumstances.

When the Chairman asked if an element of discretion was used, Dr Gonzi replied that if there was an element of discretion it was within the parameters stated in the tender document. In fact the Evaluators did not and could not assume anything. If the requested information was not written they could not give marks for something that did not exist black on white. There were certain aspects in which the appellant obtained good marks and others in which they did not.

The Rationale was broken down in three points with 4.33, 5.00 and 3.00 (12.33) for the appellant and 9.33, 9.67 and 6.33 for the recommended bidder.

After deliberating on the submissions and from the evidence given the Committee agreed that the Employment and Training Corporation were correct in their recommendation to award the above-mentioned contract to Giglio Spiteri Bailey Advocates.

Hence, the General Contracts Committee resolved that the objection raised by Gatt Tufignio Gauci Advocates should not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

V Camilleri
Member

C Gatt
Member

2nd September, 2010
Case Number 18

Meeting of the General Contracts Committee

1st September, 2010

MCAST T. 03/10 – Supply, Delivery and Installation of Furniture at the MCAST Institute of Mechanical Engineering, Corradino Hill, Paola.

Final Decision

C Fino & Sons Ltd objected to the published recommendation of award of tender. Appellant claimed that it had provided all the necessary technical literature of all the products required by the tender. Furthermore, upon its signing and submission of the tender it agreed and bound itself to supply to MCAST all the products, under all conditions imposed by the tender document, for the comprehensive price listed in the bid.

Messrs Omni Stat Ltd also objected to the published recommendation of award of tender. It claimed that all items offered were compliant with the specifications laid down in the tender.

The General Contracts Committee convened to discuss and decide the objections raised by C Fino & Sons Ltd and Omni Stat Ltd after the published recommendation by MCAST for award of the above-captioned tender to Krea (Malta) Ltd for Items 1.02, 1.03, 1.05, 1.06, 1.08, 1.09, 1.10, 1.11; Alfa Co Ltd for Items 1.01, 1.04, 1.15, 1.15.1, 1.15.2, 1.15.3, 1.15.4; Omni Stat Ltd for Items 1.07, 1.13 and the cancellation of Item 1.12.

The following persons were present for the hearing:

MCAST - Perit Deborah Borg, Chairperson
Dr Peter Caruana Galizia, Legal Advisor
Dr Mikaela Spiteri, Legal Advisor
Ms Crissiana Gatt, Secretary
Mr Trevor Caruana, Member
Mr Charles Mangani, Member
Mr Charles Zammit, Member

C Fino & Sons Ltd (CFS) - Mr Dino Fino, Director
Dr Ivan Gatt, Legal Advisor
Dr Ian Gauci, Legal Advisor
Mr Stefan Deguara

Omni Stat Ltd (OS) - Mr Mark Schembri, Director
Dr Carlo Vigna, Legal Advisor

Krea (Malta) Ltd - Mr Chris Gauci, General Manager
Ms Marthese Aquilina, Design Consultant

Ms Emma Gauci Cefai
Dr Ivan Gatt said that C Fino & Sons Ltd received a letter by MCAST informing them that their bid was “not fully successful”. He said that the Evaluation Committee should define this statement since an offer had to either be successful or not. There was no way in between. They were not informed whether their offer was disqualified or if it was not competitive enough. It was also stated that the tender document was incomplete since no technical literature was submitted with the offer except for that of the vertical blinds. CFS did not agree with this statement since they submitted all the required technical literature of which they had a copy. Together with the technical literature they also submitted samples for blinds.

In the letter MCAST also said that the technical capacity was not fully substantiated since CFS did not submit certification of satisfactory execution. His clients did not submit this certification because in their opinion this could not be done since these are not services to be satisfied but delivery of goods. Delivery of goods cannot be satisfactorily executed. It was not normal for their company to have certificates stating that they executed works in a satisfactory way.

Dr Gatt also stated that if the other bidders submitted these type of certificates he was doubtful about the authenticity of such certificates. Furthermore, the award criterion for this tender was the cheapest compliant offer. Therefore if CFS was compliant with the specifications they should have been awarded the tender.

Dr Gatt referred to a decision taken by the General Contracts Committee with regards to UM 1432 which dealt with the Supply and Delivery of Furniture to the University of Malta.

Dr Vigna who was representing Omni Stat Ltd said that the letter that was received from MCAST indicated that Krea (Malta) Ltd whose submitted price was amongst the highest, was being recommended for the award of various items. His clients were not given the reasons why their offer was technically non-compliant. Although the furniture that Omni Stat was offering was in their showroom they did not receive any request by the Evaluation Committee to go and see the offered furniture. Omni Stat Ltd is also a previous supplier.

Dr Caruana Galizia stated that the tender document specified the submission of the technical literature and the certification of satisfactory execution. It was not the first time that MCAST specified these requirements since they considered the past history of their potential suppliers of the utmost importance.

Although the offer submitted by one of the appellants, namely C Fino & Sons Ltd was the cheapest offer, it was not administratively compliant, thus, no technical evaluation was effected. This tender was awarded in separate items since none of the submitted offers were fully compliant for all items. The evaluation committee chose the cheapest fully compliant offer for each separate item.

In their letter of objection, CFS stated that since they made a name for themselves there was no need for them to submit the certification of satisfactory execution. They
submitted a list of past clients but did not submit certification of satisfactory execution. The other bidders submitted these certifications.

Dr Caruana Galizia explained that the offer submitted by Omni Stat Ltd was administratively compliant but they were technically non-compliant in most of the requested items. Items 1.15.1 to 1.15.4 were a group item which was erroneously listed under item 1.14. Their offer for Items 1.07 and 1.13 was the cheapest fully compliant offer and was being recommended for award. The following items were technically non-compliant as follows:-

1.01 Student’s Desk Top is 20mm thick and not a minimum of 25mm.
1.02 Seat and back of Student’s Chair is beech plywood and not plastic.
1.03 Lecturer’s Desk offered a length of 1300mm and not 1700mm; thickness submitted is 20mm and not 25mm.
1.04 Lecturer’s Chair did not have hand rests and the seat and back are in beech plywood not black fabric padded.
1.05 / 1.06 / 1.08 - Description and picture do not match in information.
1.11 Material of Printer / Scanner table not substantiated. Table that should be complete with lockable paper storage space was also not substantiated.

Dr Gatt on behalf of the appellant CFS stated that their submitted technical literature was complete. Furthermore they submitted a signed declaration stating that they were binding themselves to supply goods as requested in the tender’s conditions and specifications. This was supposed to be acceptable as per decision taken by the General Contracts Committee ref. UM 1432.

Dr Gatt asked whether it was possible to see a certificate of satisfactory execution to ensure that it referred to the delivery of goods and not delivery of services. Other objectors were informed that some of their items were technically non-compliant. His client was not informed if his offer was disqualified for all items. They submitted technical literature and samples for the vertical blinds but they still were not informed if it was technically compliant.

Mr Fino stated that they submitted the cheapest offer for Items 1.01, 1.03, 1.05 and 1.11. They submitted all the required certificates. Certificates were in Italian but MCAST requested a product that was produced under European Regulations. It was not the first time that his company supplied MCAST with furniture and they never encountered any problems. The Evaluation Committee should have asked for samples or went to the showroom to check the offered items instead of relying only on what was stated in the offer.

Mr Fino asked if MCAST effected check tests to ensure that the submitted items were produced in the EU.

Mr Schembri explained that although in the offer they stated that the desk top was 20mm thick due to a typing error, the technical literature and list of contents that showed the picture of the product and the technical specifications showed a thickness of 25mm. Pictures and technical literature also specified High Density Chipboard, chairs with arms and although the chairs were offered in plywood they wrote that they can change the plywood with propylene.
Omni Stat also has a showroom and the Evaluation Committee could have gone to verify that the offered items were up to the requested specifications.

Dr Caruana Galizia reiterated that bidders were asked to submit technical literature and samples because it is unethical for the Evaluation Committee to meet with the bidders.

Omni Stat did not specify that the thickness of the desk top was 25mm. When the Evaluation Committee asked for a clarification they still said that the thickness was 20mm since they reproduced the same item.

Perit Borg said that they even queried about the price of an item that was abnormally low but Omni Stat did not reply.

Dr Caruana Galizia said that it did not fall in the competence of Dr Gatt to tell MCAST what to ask for in the tender document. Clause 3.6 clearly specified the documents that had to be submitted.

Perit Borg explained that MCAST issued Works, Supplies and Services tenders. In order to effect payments especially in EU Funded tenders a Provisional Acceptance and then a Final Acceptance Certificate was issued. These certified that the supplies were delivered as specified in the tender dossier. It was important for the Evaluation Committee to know that the bidder delivered within the specified timeframe. She was sure that one of these certificates was issued to C Fino & Sons Ltd but the other evaluators were not aware of this. This certificate was issued round about 2004/2005.

Perit Borg emphasized that CFS did not submit any technical literature except for test certificates of three items. These test certificates were submitted in Italian. The tender was issued for 14 items. Once no technical literature was submitted no technical evaluation was possible. Bidder could not be asked to submit the technical literature after the closing date of the tender since that would be asking for missing/additional information and not a request to clarify the submitted information.

Mr Gauci said that the certificates that they submitted with their offer were given to them by their previous clients. He also confirmed that his offered product was produced in the EU and that his submitted certificates could be shown to Dr Gatt.

When the Chairman of the General Contracts Committee asked MCAST what they expected when they asked for the Certificates of Satisfactory Execution, Perit Borg explained that this was needed so that the tenderer would be able to prove his technical capacity as specified in Clause 3.6 of the Instructions to Tenderers, namely “A list of similar supplies delivered and installed, accompanied by certificates of satisfactory execution.”

C Fino & Sons Ltd submitted the names of companies/entities that they supplied with furniture. These clients are to give them certificates that they were satisfied with the deliveries and installation. Sometimes MCAST deals with suppliers who promise to deliver on time but do not do so. Therefore this time they wanted to ensure that the delivery would be affected on time.
The Chairman then instructed MCAST to show one of the certificates submitted by Krea Ltd since the latter found no problem in exhibiting their certificates of execution.

One of the submitted certificates was showed to the members of the General Contracts Committee, Mr Fino and Dr Gatt.

Perit Borg stated that the Evaluation Committee checks that all the requested documentation was submitted. The offer submitted by CFS was not disqualified because the certificates were not submitted but because they did not submit the technical literature. In her capacity as a Chairperson she could not ask him to submit missing information.

The Chairman then asked Mr Fino if he submitted the technical literature for Item 1.01.

Mr Fino said that the certificates that they submitted also contained technical specifications. Once they signed the tender document they were confirming that they were going to abide with the published specifications. They also submitted photos of the items that were being offered. The measurements, weight, picture from all angles and supplier were specified in the test certificates. CFS is currently furnishing Foundation for Tomorrow’s Schools with this furniture. The picture of this product is also attached to the offer.

When requested to confirm this statement Perit Borg said no brochure with the technical specifications was submitted although there was a test certificate in Italian. CFS did not declare that the desk top was 25mm thick. This was requested in the tender document.

Dr Gatt argued that MCAST did not ask for thickness of the product but for the specifications.

When the Chairman asked if specifications such as thickness, scratch resistance, powder coating and foot rest were listed in the test certificate, Mr Fino replied that only the dimensions and weight of the product were listed in the test certificate but since they signed the tender it could be taken for granted that they were going to abide to the tender’s specifications and conditions.

Dr Gatt asked what held more weight, the technical specifications or the declaration of the bidder binding himself to supply all items as requested in the tender dossier.

When asked about his submitted offer for Item 1.03, Mr Schembri (Omni Stat) confirmed that the submitted dimensions varied by 5% but in the published specifications the request was for “approximate dimensions”. He also confirmed that for Item 1.02 his submitted literature specified that the back and seat of the student’s chair were in beech plywood but it could have been submitted in propylene on special request. Even though he did not submit this information in writing the Evaluation Committee should have gone to his showroom to view the submitted items.

The Chairman informed the appellants that it was their responsibility to supply all the information requested in the published specifications and conditions. It is
unacceptable for the Evaluation Committee to meet with the bidders. The Evaluation Committee can only contact the bidders through written communication.

After deliberating on the submissions and from the evidence given the Committee agreed that MCAST were right in their recommendations.

Hence, the General Contracts Committee resolved that the objections by C Fino & Sons Ltd and Omni Stat Ltd should not be upheld. The Committee also agreed that the deposits paid should be forfeited.

Francis Attard
Chairman

J. Borg Grech  
Member

M D Aquilina  
Member

V. Grech  
Member

C J Delicata  
Member

O Vassallo  
Member

C Gatt  
Member

20th September, 2010
Case Number 19

Meeting of the General Contracts Committee

24th September, 2010

WSM 73/2010 – Tender for the Collection and Management of WEE (TV’s and Monitors) stored at Gozo, Tal-Kus Civic Amenity Sites.

WSM 74/2010 – Tender for the Collection and Management of WEE (TV’s and Monitors) stored at Hal Far Civic Amenity Sites.

WSM 76/2010 – Tender for the Collection and Management of WEE (TV’s and Monitors) stored at Luqa Civic Amenity Sites.

WSM 77/2010 – Tender for the Collection and Management of WEE (TV’s and Monitors) stored at Maghtab Civic Amenity Sites.

Final Decision

PT Matic Environmental Services Ltd objected to the recommended award of these tenders. It claimed that the recommended awardee does not have the necessary MEPA permit to carry out the requested services.

The General Contracts Committee convened to discuss and decide the objections raised by PT Matic Ltd after the published recommendations by WasteServ (Malta) Ltd for the award of the above captioned tenders to Electronic Products Ltd.

The following persons were present for the hearing:

WasteServ (Malta) Ltd - Ms Daniela Grech, Chairperson
Dr Victor Scerri, Legal Advisor
Mr Peter Vella

PT Matic Ltd - Mr Derek Broadley, Project Director
Dr Carla Camilleri, Legal Advisor
Dr Tonio Fenech, Legal Advisor
Ms Miguela Fenech

Electronic Products Ltd - Mr Charles Galea

Dr Fenech referred to the Letters of Objection sent by PT Matic Ltd in which their basis of objection was specified, namely that on the 1st April, 2010, the closing date of the submission of tenders, the recommended bidder was not in possession of the required MEPA’s Permit for the Collection and Management of TV’s and Monitors. The main issue of their appeals was that page 15 of the tender document specified ‘Cathode Ray Tubes: The fluorescent coating has to be removed.’

In April no facility in Malta was duly licensed to do this work on these tubes. The offers submitted by PT Matic Ltd were higher than the recommended offers because they had to take into account the shipment to Sicily for the cleaning to be done. The
recommended bidder was going to do the cleaning locally therefore his offers were cheaper. PT Matic complied fully with the published specifications and conditions by shipping the material outside of Malta.

MEPA only licensed Inspectra by amending their current license to be able to do this type of work in August. Dr Fenech asked on what basis was the tender considered.

Ms Grech said that she was the chairperson of the Evaluation Committee and was also the person who drafted the specifications. The recommended contractor does not propose to do the work in Malta. The cathode ray tubes are going to be loaded in a container with the fluorescent coating still attached. In Malta there is one facility that has the necessary permit. This tender is for the cleaning of the CRT’s. In a clarification that was issued it was specified that the cleaning could take place either locally or overseas. Both bidders are going to do the dismantling locally and then ship the material abroad for treatment.

The Evaluation Committee went through the process of checking the offer and the different permits that were submitted. These permits were also checked with MEPA. The recommended bidder has the appropriate permits and is also the cheapest compliant offer.

Mr Vella said the Terms of Reference specified the submission of a Waste Broker’s Permit. This was submitted by the recommended bidder and was valid as confirmed by MEPA.

Dr Fenech explained that in order to ship this material, beyond the Broker’s Permit a notification is required. At the closing date of the submission of offers no license was existent in Malta. On the 5th August, 2010, Inspectra informed MEPA that they had been contracted by Electronic Products Ltd, therefore if the recommended bidder wanted to contract Inspectra, they were not in possession of the required permit in April. In the meantime the treatment of the CRT’s is being done locally in premises that are not the ones licensed for Inspectra but in a facility at Marsa that is used or controlled by Inspectra.

Mr Broadley referred to a specific condition in the permit, namely:-

‘Condition 14.8 is to be added to Section 14 which states – NO treatment of CRT monitors is to be carried out apart from dismantling of the outer case, as described in approved document EP/004/09/05.’

Mr Vella stressed that it is not the responsibility of WasteServ to determine as to whether the contractors have the necessary permits or if any contractors are carrying out illegal activities. The Evaluation Committee will adjudicate what was submitted as compared to the published tender conditions and specifications. If something goes wrong after the tender has been awarded, WasteServ will check the conditions of the contract and inflict the specified penalties.

Ms Grech explained that the treatment/dismantling of CRT’s is the actual cleaning of the CRT’s. Both bidders are not allowed to treat the fluorescent from the CRT’s. MEPA have a licensed facility that dismantles CRT’s which is not in the name of the appellant or the recommended bidder. Both bidders offered to ship the material
abroad for cleaning. WasteServ has no objection to this. A notification is required prior to the export of the material.

The Waste Broker’s Permit specifically states that they can apply for Waste Export Permit. This procedure satisfies WasteServ. A third party cannot tell WasteServ what to ask for when publishing a tender document.

Mr Vella said that the Waste Broker’s Permit submitted by the recommended bidder allows him to keep and manage the waste. Therefore they are compliant with the published specifications and conditions.

Mr Galea stated that Electronic Products Ltd was in possession of the required export permit in line with MEPA Regulations. Inspectra did supply quotes to offer their services. Therefore when Electronic Products were recommended for award they indicated that they would untilise Inspectra’s services. The premises were different because his company stressed that they required larger premises. His company’s premises is also licensed but they are smaller than those of Inspectra. Electronic Products Ltd submitted both their permit as well as those of Inspectra.

Mr Vella amplified that no sub-contracting was mentioned in the tender document. They just asked prospective bidders to submit a licensed place for working in which the material was “put and dismantled”. The Waste Broker’s Permit was also requested.

Dr Scerri said that both the appellant and the recommended bidder chose Inspectra for the dismantling up to CRT.

When asked if the recommended bidder was compliant with the specifications and requirements at Clause 3.1, Ms Grech said that bidder was compliant. They had the facility to apply for the necessary consignment permits for the collection and transport of the TV and Monitor Waste once they had the job in hand (by winning the tender). The application should be submitted three days before you move the goods otherwise you cannot move them. In order to do that the Waste Broker’s Permit had to be in place. MEPA also confirmed that Inspectra con hold the material until it is dismantled.

When asked by the Chairman of the General Contracts Committee if he was of the opinion that Inspectra is not in possession of a Storage Permit, Mr Broadley confirmed that Inspectra does not have a Storage Permit.

The Chairman then asked if this was also confirmed with MEPA. Mr Broadley said that he confirmed what he was stating with MEPA.

Mr Galea explained that in this case the word ‘storage’ meant that the material is to be kept for the time that the work is in process. The license is only valid for one year.

Dr Fenech reiterated that the clause ‘Store the waste at a MEPA licensed facility for the storage of WEEE waste, in accordance to LN 63 of 2007’ was a clear and specific requirement and it was requested apart from the dismantling which incurs work in program.
Ms Grech specified that the recommended company and Inspectra have the required environmental permits from MEPA.

Dr Fenech said that the permits had to be with the appropriate EWC Codes for WEE but Ms Grech stated that she did not specify any codes.

Mr Broadley argued that the Waste Broker’s Regulation is specific in regards of EWC codes. They should have been 16.02.13 and/or 20.01.35.

Ms Grech reiterated that WasteServ never specified any codes. They only asked for a Waste Broker Registration so that the recommended bidder could apply for the necessary Export Permit. The EWC codes in question should have been 16.02.15 and 16.02.16. If MEPA have a problem with the premises it is not WasteServ’s responsibility. WasteServ is just the operator and not the regulatory body and they only evaluate what is being offered.

Mr Broadley once again confirmed that Electronic Products Ltd did not have the necessary permit.

Mr Galea asked whether WasteServ can confirm that in their submitted offer Electronic Products Ltd specified that they were going to export the material.

Dr Scerri said that WasteServ does not specify the codes because companies arrive to different stages so the resultant waste of dismantling is not always the same.

Ms Grech explained that every tender has its own requirements. In this tender the recommended bidder satisfied the specified requirements.

The Chairman of the General Contracts Committee said that WasteServ was to forward a copy of the email that was sent by MEPA in which they confirmed that Electronic Products Ltd had the necessary permits in two days time.

After deliberating on the submission and from the evidence given the Committee agreed that WasteServ Malta Ltd were right in their recommendation to award the above-mentioned contracts to Electronic Products Ltd. The documentation was eventually submitted.

Hence, the General Contracts Committee resolved that the objections raised by PT Matic Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Francis Attard
Chairman

O Vassallo
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

12th October, 2010
Case Number 20

Meeting of the General Contracts Committee

25th October, 2010

GF 59/2010 – Air Dispersion Modules NO2, PM10, PM2.5 Metals and Benzo-A-Pyrene from Delimara Power Station. – Advt T03/2010

Final Decision

The General Contracts Committee convened to discuss and decide the objection raised by Dr John Gauci on behalf of Messrs Adi-Associates (Adi) after the published recommendation by the Malta Environment and Planning Authority (MEPA) for the award of the above captioned tender to Eco-Serv.

The following persons were present for the hearing:

MEPA - Ms Rachel Decelis, Environmental Officer
- Dr Ian Stafrace, Legal Advisor
- Mr Mark Scerri
- Mr Malcolm Borg
- Mr Alan Borg
- Mr Michael Sant

Adi-Associates - Ms Rachel Xuereb, Director
- Dr John Gauci, Legal Advisor
- Mr Adrian Mallia

EcoServ - Ms Sarah Debono, Project Manager

Dr Gauci stated that on the 31st August, 2010, his client received the notification that his bid was unsuccessful. The reason for disqualification was not given. Therefore a request was made to MEPA to submit an extract from the Evaluation Report to see why the offer submitted by Adi-Associates was disqualified since their submitted offer was cheaper than the recommended offer.

This appeal is based on two points, namely the unjustifiably low mark given for the “Dispersion Model” as well as the erroneous calculations of the allotted marks.

The tender dossier stipulates software that indicates aerial emissions. A list of acceptable models was also published. Adi offered one of the indicated models but only obtained 6 out of 25 marks. Besides offering one of the “acceptable dispersion models” Adi also offered an extra model which was a more sensitive model.

The after marks/calculations were not given in an objective way. When the weighting of the submitted offer was worked out, more marks should have been given. The total technical score of the appellant should have been 41 and not 40. The weighting of this tender was that of 70 for the technical and 30 for the price. 40 (appellant’s mark) out of 70 (maximum mark) results in 57% which should have read 59% had 41 points
were taken into consideration. The 30 marks for the price were not converted into a percentage. The submitted offer of the appellant was cheaper than the recommended. If the 30 marks obtained by appellant was converted as a percentage out of 30 (financial score), the end result would have been 159% and not 87%.

Ms Decelis explained that the Dispersion Model was assessed according to the tender requirements. This was based on 5 parameters as specified in Clause 12, namely (i) Technical Specifications; (ii) Achievable spatial resolution; (iii) Emissions averaging periods; (iv) Accuracy and reliability of output data; and (v) Quality Assurance Procedures. This carried a weighting of 25%.

The appellant did not submit all the necessary information. The total of 40 marks was given because the Evaluation Committee rounded the numbers. The original mark was 40.33 which were rounded down to 40. The same method of conversion used for the technical score was also used for the financial score. The marks were converted to 70, being the maximum mark and not as a %. The highest mark for the price was 30.

Dr Gauci said that while the tender dossier specified 5 points under Clause 11, Submission Requirements, (A) – “Details regarding the dispersion model to be used.”, the offer submitted by his client was only given 5 marks on the technical specifications and 1 mark for the model name (point a or 12i). No marks were given for points b to e (or 12 ii to v).

In page 40 of their submitted offer Adi gave a detailed technical review of the way that the software for the required achievable spatial resolution (point b or 12ii) was to function. This software had to be amended in order to be able to read in a more detailed manner the emissions that are not very relevant. To be able to do this Adi had to enlarge the software’s resolutions. No marks were given for this.

In regards of points c and d (or 12 iii, iv) Emissions averaging periods, Adi gave an explanation on how the hourly methodological data is going to be used. If MEPA were not happy with this, they should have asked for a clarification and not give a 0 mark, especially since this model was the same model that they requested.

Paragraph 8 of Adi’s offer clearly indicated that they were certified by the Malta Standards Authority. They are also a corporate member of the Institute of Environmental Management and Assessment for the UK and also operates its own internal quality management.

The rounding up was not mentioned in the tender dossier. Therefore the Evaluation Committee should have rounded up the allotted marks. Although it is being stated that the workings were not done as a % the marks in the report indicate differently. The offer submitted by Adi obtained 40 marks out of 70 and it is being stated that this amounts to 57%.

Ms Decelis explained that for the model name and technical specifications the appellant was given 5 marks out of 5. Although the submitted type of model was one of those specified by MEPA it does not mean that it was necessary standard.
When asking for the achievable spatial resolution MEPA was requesting specific data. The appellant did not give a clear indication of the possible zooming. The recommended bidder gave the exact resolution that is going to be used.

With regards to the emissions averaging periods, MEPA wanted information on the output data. Adi gave information of the input data so they were given 1 mark. No information on accuracy and reliability of output data, including margin of error was given.

Adi stated that they were affluent with environmental management procedures and they have an internal quality management system. The latter is not accredited and no further detail was given.

The Technical score is not worked out of 100. The recommended bidder was given 49 marks which translate into 70. The appellant was given 40 marks which translate to 57. If the appellant was given 41 marks, he would still have obtained a total score of 59 which is way below the score obtained by the recommended bidder. As a final average score for the technical evaluation, the recommended bid obtained 9 marks more than the bid submitted by the appellant and 1 mark less for the financial evaluation.

The criteria for the evaluation of offers and the relative marks were published in Clause 12 of the tender document. The normalisation (the way arithmetical workings were done) was not published since it is an internal procedure.

Dr Gauci reiterated that 57 is the percentage. The published marks were 70 for the technical and 30 for the price so MEPA cannot say that the way workings were done was an internal procedure.

Ms Xuereb asked how the limit of detection of two models could be incorrect and also stated that the methodology and accreditation were not eliminatory factors.

The Chairman of the General Contracts Committee referred Adi to the explanation given by MEPA regarding the 6 marks given for the dispersion model and asked for their opinion on the requirements that according to MEPA were missing from Adi’s submitted offer.

Ms Xuereb explained that they were going to use two models to verify the accuracy of one model to the other. The spatial resolution depends on the data input and is not a limiting factor. They did not consider the spatial resolution as an issue since the model that was being offered was very sensitive.

When Ms Xuereb was asked if they were not very factual in the resolution documentation because they were not sure of what they had to submit, she replied that the resolution was not a limiting issue and they were also going to use another model.

The Chairman then asked Adi if they satisfied the tender’s requirements. Ms Xuereb confirmed that they did.
Ms Decelis said that MEPA required the actual value so that they would be sure of the achievable spatial resolution. Spatial resolution is a measurement/figure which is limited by the inputted data.

Ms Xuereb reiterated that Adi is stating that their submitted spatial resolution is unlimited and has the facility to arrive anywhere, in the locality and in the street. They could not give a value because it depends on the data input.

Ms Decelis said that the model is unlimited but the spatial resolution is limited by the input data.

When the Chairman said that MEPA required output data for the calculation of emissions, Ms Xuereb replied that Adi gave the data input because MEPA had to supply the output data.

The Chairman said that it appears that technically speaking, Adi did not submit what was requested by MEPA.

Ms Xuereb said that they submitted hourly data.

The Chairman then referred MEPA to the Quality Assurance Procedures submitted by the appellant.

Ms Decelis said that MEPA did not feel that the submitted quality procedure in relation to the dispersion model was clearly explained. No explanations were given on how one model was to check the other model.

Ms Xuereb said that in their offer they stated that they were going to use a software over and above the tender requirements in order to check the impact of traffic emissions. The two models had the capacity to register the emissions from the Power Station.

When the Chairman asked MEPA what was missing in the offer submitted by the appellant, Ms Decelis stated that they required a quality assurance and not a sensitivity analysis. Quality assurance means that one can verify that the data submitted was correct, that is, when the data is rechecked, the prior result remains the same. This was not given by the appellant and it is reflected in the marks given in the technical evaluation.

The Evaluation Committee also drew a list of strengths and weaknesses on the offer submitted by both bidders. A clarification with regards to the submitted quality assurance was also sent to Adi but no comment from Adi’s side was received.

Dr Gauci said that the clarification on quality assurance was written in between the clarification on the submitted sample. The detail of measurement for the spatial resolution was not mentioned in the tender dossier. The Evaluation Committee was not right in its decision to give 0 marks on something that could have been clarified.

A member of the General Contracts Committee asked the representatives of MEPA whether they can confirm that there was missing information or whether there was information but was not clear enough to determine that it was addressing the
requirements of the tender. Ms Decelis confirmed that the position was as per latter statement.

After deliberating on the submissions and from the evidence given the Committee agreed that Malta Environment and Planning Authority should ask Adi Associates to clarify issues that were not clear and to re-evaluate the offer. As regards the scoring, once the total number of points for each component of the technical criteria is 70 points, which is exactly the same number as is being allocated for the technical evaluation of this tender, then there is no need to make any conversions into percentages.

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

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

J Mizzi
Member

28th October, 2010
Case Number 21

Meeting of the General Contracts Committee

25th October, 2010

MRRA/W/220/2010 – Solar Water Heating for Martin Luther King Hall (ITS), St Andrews. – Advt 88/2009

Final Decision

Solar Engineering Ltd objected to the decision to award this tender to Alberta Ltd. It stated that it is obvious that the price for Item 9 was erroneously quoted. Moreover, appellant claimed that the Evaluation Committee is procedurally incorrect as the objection was made after the letter of acceptance and not before.

The General Contracts Committee convened to discuss and decide the objection raised by Dr Angele Formosa on behalf of Solar Engineering Ltd after the published recommendation by the Ministry for Resources and Rural Affairs (MRRA) for the award of the above captioned tender to Alberta Ltd.

The following persons were present for the hearing:

MRRA - Ing Brian Cauchi  
- Perit John Valentino

Solar Engineering Ltd - Mr Anthony Saliba  
- Dr Angele Formosa, Legal Advisor

Dr Formosa stated that when submitting their offer Solar Engineering Ltd quoted the rates in the Bill of Quantities together with the total for each item. They wrote down down the grand total and copied this figure in the Tender Form. This offer was recommended for award and MRRA issued the Letter of Intent.

Solar Engineering were then informed that due to a miscalculation their offer was not the cheapest submitted offer. It happened that €10 per metre was erroneously quoted for Item 9 for Options 1 and 2. This should have read €1 per metre. This was a genuine error since the total for the same item still read €300 and not €3,000 (i.e. €1 x 300 and not €10 x 300). The amount of €8,580 was shown in the grand total of the BOQ which was replicated in the Tender Form. The amount of €8,580 was worked on the amount of €300 and not €3,000 for Item 9.

Ing Cauchi explained that he was the person who checked the workings of the submitted Bill of Quantities and it was due to an oversight that he did not immediately realize that the rate of €10 for item 9 should have added up to €3,000 and not €300. When the evaluation process was finalised, the Evaluation Committee submitted its recommendations to the Central Procurement Section. A notice to this effect was published with no appeals being received.

When the Letter of Acceptance was being drafted it came to light that there was an error in Item 9. The Assistant Director, Finance sought the advice of the Department
of Contracts who in turn advised MRRA to inform all bidders that for the time being the recommendation for award was being retracted and to re-evaluate the submitted offers. The recommendation for award was based on the cheapest fully compliant offer.

Dr Formosa said that the Bill of Quantities was filled by her client. His mistake was that he wrote €10 per metre instead of €1 per metre for Item 9. This is clearly indicated in the total. Item 9 was for the painting of exposed pipe which was surely not to be charged at €10 per metre. If they were in doubt, the Evaluation Committee should have clarified the rate and not adjusted the amount to €3,000.

Ing Cauchi stressed that the Evaluation Committee did not have the authority to ask the bidder to change his submitted offer. This was considered as an arithmetical error.

The Chairman of the General Contracts Committee quoted from the Form of Tender submitted by Solar Engineering Ltd, namely “We Solar Engineering Ltd offer and bind ourselves to carry out the work set out in the Notice aforesaid in conformity with the Specifications and Conditions relating thereto for the sum of Option 1 – Eight Thousand Five hundred and Eight Euros, €8580; Option 2 – Eight Thousand Eight hundred and Eighty Euros, €8880.”

When asked by the Chairman if after works were finished MRRA affected payment on the amount quoted in the Form of Tender or on the rates quoted in the Bill of Quantities, Ing Cauchi replied that payments were effected on the basis of measurement, per metre run at the rates indicated in the Bill of Quantities. If the Evaluation Committee accepted the rate of €10 per metre the payments would have to be made at €10 per metre. The amount on the Form of Tender was based on an arithmetical error.

Dr Formosa reiterated that the total on the Bill of Quantities matched the total on the Form of Tender. The total in Item 9 was €300. The grand total was €8580. The rate of €10 was only shown in Item 9 and was not reflected anywhere else.

When asked for a briefing in regards of this solar water heating system, Ing Cauchi explained that this is a whole system comprising of a lot of components. It was not a single item. It is made up of a number of Solar Panels that heats the water which is circulated in the building, thus avoiding the electricity consumption for the heating of the water.

Certain items, like the number of solar panels to be used could be quantified. The required pipe work and insulation would have to be measured since one can only have an estimate of the quantity required.

Ing Cauchi made it clear that MRRA does not object to Solar Engineering being awarded this tender and they did not assume that the appellant had erroneously quoted €10 instead of €1 for Item 9. The Evaluation Committee cannot change the submitted rate. Page 4, Clause 2.1.3 (ii) of the Tender Document states that “where there is a discrepancy between the unit rate and the total amount derived from the multiplication of the unit and the quantity, the unit rate as tendered will prevail.”
Dr Formosa referred to Clause 2.1.3 (i) that states “where there is a discrepancy between amounts in figures and in words, the amount in words will prevail;” this is also stipulated from the legal aspect.

Ing Cauchi said that in the Bill of Quantities the only amounts are shown in figures and not in words.

After deliberating on the submissions and from the evidence given, the General Contracts Committee notes that the appellant company admitted that a mistake was carried out when it quoted €10 for Item 9. It also noted the content of clause 2.1.3 which states that in case of discrepancies between the unit rate and the total amount derived from the multiplication of the unit and the quantity, the unit rate as tendered will prevail. It is a standard public procurement procedure that rates cannot be adjusted after the closing date of a call for tenders. In the circumstances the Ministry for Resources and Rural Affairs were correct when they corrected the computation of the offer submitted by Solar Engineering Ltd. This resulted that their offer did not remain the cheapest compliant tender. However, the Committee insists that prior to publishing any notices on the award of tenders, the respective evaluation committees should check the documentation very carefully to avoid incidents as happened in this tendering procedure.

The General Contracts Committee feels that the contracting procedure was correct. The letter issued by the Ministry for Resources and Rural Affairs states very clearly that it is a letter of intent. It further states that the Government ‘shall be placing a contract with your company’. This shows that at that point in time there was not yet any contractual relationship between the Ministry and Solar Engineering Ltd.

Hence, the General Contracts Committee resolved that the objection raised by Solar Engineering Ltd should not be upheld. The Committee also agreed that the deposit paid should be forfeited.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

J Mizzi
Member

26th October, 2010
Case Number 22

Meeting of the General Contracts Committee

8th November, 2010


Final Decision

Datanet Security Systems Ltd objected to the recommended award of this tender. It stated that it had submitted a cheaper offer.

The General Contracts Committee convened to discuss and decide the objection raised by Datanet Security Systems Ltd after the published recommendation by MRRA for the award of the above captioned tender to Loqus Services Ltd.

The following persons were present for the hearing:

MRRA, MSD Works - Mr Raymond Bugeja, Chairman
Mr Charles Debattista, Member
Mr Antoine Farrugia, Member

Datanet Security Services Ltd - Mr Martin Zerafa, Managing Director

Loqus Services Ltd - Dr Marthese Portelli

Mr Zerafa stated that he believed that his submitted offer was fully compliant with the published specifications and since it was cheaper than the recommended bid he needed to know the reason why the offer submitted by Datanet Security Services Ltd was not recommended for award.

Mr Bugeja explained that all submitted offers were fully compliant with the published specifications. The offer submitted by Datanet was not the cheapest offer. This tender was issued to cover a two year and not a one year period.

The tender required a rate for the provision, installation, commissioning, subscription fee, airtime fee and a full maintenance support of automatic vehicle location system on each vehicle (per annum) for Item 1. Item 5 covered the Installation/Transfer of AVL System from one vehicle to another. Loqus Services Ltd submitted a cheaper rate for the units to be installed in respect of Item 1. Datanet offered the same rate as for the first 100 units.

When asked by the Chairman of the General Contracts Committee, Mr Bugeja confirmed that the offer submitted by Datanet Security Services Ltd was fully compliant but was not the cheapest offer.

Mr Zerafa argued that his submitted offer was that of €246.62 per unit for Item 1 and €47.20 per unit for Item 5. Item 5 specified the Installation and Transfer from one
vehicle to another and not the Provision, Installation, Commissioning, Subscription Fee, Airtime Fee and a Full Maintenance Support of Automatic Vehicle Location System on each vehicle specified in Item 1.

The amount of €246.62 was to cover the new equipment specified in Item 1 and the amount of €47.20 was to cover the transfer of equipment from one vehicle to another.

Mr Bugeja said that Loqus split up Item 1 in two quotations; Item 1a covering the provision, installation, commissioning, subscription fee, airtime fee and a full maintenance support of automatic vehicle location system on each vehicle it quoted €196.20 for the first year while it quoted €90 for the subsequent annual yearly fee. Loqus offered €29.50 for Item 5 covering the installation/transfer of AVL System from one vehicle to another. The offer submitted by the appellant for Item 1 €246.62 yearly while it quoted €47.20 for Item 5.

Dr Portelli explained that Loqus Services Ltd submitted two options for this tender. Option 2 was being recommended for award. They divided Item 1 in two parts, for the first twelve months the rate of €196.20 was submitted for the 100 units for Item 1a while the rate of €90 for each unit was submitted for Item 1b. The rate of €29.50 was submitted for Item 5.

The Chairman then referred to the Schedule of Opening of Tenders. On the Schedule the total amount for the offer submitted by the appellant was €29,382 but in the Evaluation Report the total amount was that of €54,044.

Mr Bugeja stated that the tender was issued for two years and not for one year.

The Chairman then asked Mr Zerafa if the amount of €24,662 quoted by his company in respect of Item 1 covered 100 vehicles per annum.

Mr Zerafa replied that €24,662 covered only one year and that he could not give a rate for the airtime since it was not requested.

When the Chairman asked if MSD were expecting a rate for each year, Mr Bugeja replied that they wanted a rate per year for each vehicle and that the appellant could have given an option as was the case of the recommended bidder.

Mr Zerafa quoted the requirements for Item 1 and asked why the rate for airtime was not listed as one of the requirements.

The Chairman asked the rate that Datanet were charging for airtime and where it was specified.

Mr Zerafa said that they were charging €60 for airtime and that it was incorporated in the submitted rate of €246.62.

The Chairman told Mr Zerafa that he is giving a different interpretation and if he was seeing an ambiguity.

Mr Zerafa stated that he did not see any ambiguities. Airtime and support maintenance should be scheduled as a separate item. This tender should be cancelled.
since he has been misled. It was difficult to believe that that MSD were going to install a new system every year. There is a difference between airtime and installation.

The Chairman then asked the Evaluation Committee if they multiplied the amount of €24,662 by 2 which resulted in the amount of €49,324 for Item 1 and then added the amount of €4,720 for Item 5, with the total amount being €54,044 for the offer submitted by Datanet Security Services Ltd.

The total amount of €31,570 for the offer submitted by Loqus Services Ltd was arrived to by adding the amount of €19,620 for Item 1a and €9,000 for Item 1b as well as the amount of €2,950 for Item 5.

Mr Bugeja confirmed these workings and also stated that the rate for Item 5 was only for 100 units.

Mr Zerafa objected to these workings because the tender document did not specify that the Evaluation Committee had to multiply the rate at Item 1 by 2.

When asked if there was a provision in the Bill of Quantities that specified that bidders can give a different rate for the second year, Mr Bugeja replied that he cannot answer unless he checked the tender dossier.

When asked if he had any doubts in regards of the requirements of the Bill of Quantities, Mr Zerafa stated that he did not question the set-up of the Bill of Quantities, he offered only for the first year because the second year was not listed. He emphasized that he was misguided.

After deliberating on the submission and from the evidence given the Committee agreed that MRR were right in their recommendations to award this contract to Loqus Services Ltd. Even if the evaluation is carried out in respect of one year only, the offer submitted by Loqus Services remains the cheapest. Nonetheless, the Committee feels that the Bill of Quantities should have been drafted in a clearer manner. If it is obvious that the provision and installation of this equipment will only occur once on each vehicle, then Item 1 should have been split up in two different items. Besides, once the tender document has clearly indicated that the service was required for two years, the BOQ should have requested the bidders to indicate clearly their offer for this period of time. This would have avoided speculations as to how the evaluation committee was recommending an award at a total price that did not appear in the schedule of offers received.

Hence, the General Contracts Committee resolved that the objection raised by Datanet Security Services Ltd should not be upheld. The Committee also agreed that the deposits paid should be forfeited.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Francis Attard
Chairman

V Camilleri
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

J Mizzi
Member

25th November, 2010
Case Number 23

Meeting of the General Contracts Committee

8th November, 2010

WSM 129/2010 – Analysis and Reporting of Surface water as Part of the Ghallis non-hazardous waste IPPC permit IP 0001/06

Final Decision

AIS Environmental Ltd objected to the decision by WasteServ Malta Ltd to the disqualification of their offer and the cancellation of the tender. They contended that their offer was administratively compliant.

The General Contracts Committee convened to discuss and decide the objection raised by AIS Environmental Ltd after the published recommendation by WasteServ Malta Ltd for the cancellation of the above captioned tender.

The following persons were present for the hearing:

WasteServ Malta Ltd (WSM) - Ms Daniela Grech, Chairperson
Dr Victor Scerri, Legal Advisor
Mr Peter Vella, Chief Operations

AIS Environmental Ltd (AIS) - Mr Mario Schembri
Mr Mark Zammit

Mr Schembri stated that this tender was for the collection of samples by WSM. These samples would then be forwarded to the contractor so that they would be analysed in the laboratory. Four offers were submitted for this call for tenders, of which three of them were adjudicated as technically non-compliant. The offer submitted by AIS Ltd was adjudicated as administratively non-compliant.

Mr Schembri then referred to the clause in the Schedule of Rates namely, “This form must be filled in and submitted with the tender document. Failure to fill in the form, or a form with incomplete information, or form containing ambiguous financial information (e.g. rates, totals etc) shall disqualify the tendered submission.” This meant that bidders could change the contents of the Schedule of Rates.

When replicating the Schedule of Rates, AIS did not feel the need to copy the clause in question. On the 26th May, 2010, WSM issued a clarification stating that those bidders who wanted to offer for Item 2 could do so. However, Item 2 was not part of the award criteria. Therefore, AIS did not submit an offer for Item 2. AIS also specified the quantity so as not to be ambiguous. Item 1 referred to the number of tests on water samples from an accredited laboratory.

In page 9 of the submitted offer, AIS explained what was to be meant by the word sample, that is, quantity/components that make up a sample. Sample means all these components. That is what was modified. If they did not do that the offer would have
been ambiguous. The charge was per sample as 1 litre, 1 ½ and 2 litres of 40ml for the price of €500.

Dr Scerri explained that the offer submitted by AIS was disqualified because it was administratively non-compliant. Although Mr Schembri is referring to the clause on the Schedule of Tenders to justify the change in the submitted Schedule of Prices, Clause 2.1.2 of the tender document states that “No account shall be taken of any reservation in the Tender as regards the Tender Document; any disagreement, contradiction, alteration or deviation shall lead to the Tender offer not being considered further.”

In view of Clause 2.1.2, the Evaluation Committee had no option other then to disqualify the offer submitted by AIS. This clause specifies disqualification. The Schedule of Prices should have remained as published with Item 2 remaining as an option in view of the submitted clarification.

Ms Grech said that once the Schedule of Rates was varied the offer had to be disqualified. Additions were accepted but changes could not be accepted. The Evaluation Committee had to abide to the published condition.

Mr Schembri explained that in their Letter of Objection their lawyer stated that the first part of Clause 2.1.2 is irrelevant in the given circumstances. The clause in the Schedule of Rates specifies “the form or a form”. That means that the submission of the Schedule of Rates as published was not mandatory, it could be changed.

When asked if the composition of tests was specified in the tender document, Ms Grech replied that they asked for the accreditation of the laboratory that is going to perform the testing to ensure that the standard required for analysis was being given.

Mr Vella said that the offer submitted by AIS was technically compliant but the Evaluation Committee had to adhere to the tender’s conditions.

When asked if they considered the Schedule of Prices submitted by AIS as a form of incomplete information, Ms Grech replied that the submitted information was sufficient. AIS removed Item 2. In a clarification WSM said that they were not going to evaluate Item 2 at that point in time.

Dr Scerri specified that Clause 2.1.2 was specifically used so that the Evaluation Committee would have clear instructions on the way forward. The Evaluators cannot be subjective during the evaluation process. Therefore they have to rely on the published clauses and conditions.

Mr Vella said that if the Evaluation Committee did not adhere to the published clauses, a bidder could tell them that it was not the first time that they accepted modifications.

Dr Scerri said that not only did AIS submit additional information but they also removed the published clause and Item 2.
The Chairman of the General Contracts Committee observed that it seemed as if the changes to the Schedule of Prices were cosmetic and asked about Item 2 – List 1 screen.

Ms Grech explained that WSM received a lot of clarifications with regards to Item 2. The Evaluation Committee was not sure with regards to Item 2 due to its complexity. Neither were the bidders. Therefore WSM issued a clarification stating that bidders could offer for Item 2 if they wanted to do so but the evaluation was going to be based solely on Item 1.

The Chairman then asked if the contract would be issued for both items if the recommended bidder submitted an offer for both Items and was adjudicated as fully compliant.

Ms Grech answered that the contract would only be issued for Item 1. The technical evaluation of this tender was not going to be based on Item 2.

When asked if the non-submission for Item 2 by AIS affected the Evaluation Committee’s recommendation, Ms Grech replied that the administrative evaluation was dealt with before the technical evaluation. Once the offer submitted by the appellant was found to be administratively non-compliant, its evaluation stopped there. Mr Vella said that the offer submitted by AIS was technically compliant because they checked it as they were preparing for this hearing.

When the Chairman asked the main reason as to why the offer submitted by the appellant was adjudicated as administratively non-compliant, Ms Grech stated that Row 2 was removed from the Schedule of Rates.

After deliberating on the submission and from the evidence given the Committee agreed that WasteServ Malta Ltd were not right in their recommendations to cancel this call for tenders. The Evaluation Committee is to evaluate the technical offer submitted by the appellant.

Hence, the General Contracts Committee resolved that the objection raised by AIS Environmental Ltd should be upheld. The Committee also agreed that the deposit paid should be refunded.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Francis Attard
Chairman

J. Borg Grech
Member

M D Aquilina
Member

V. Grech
Member

C J Delicata
Member

O Vassallo
Member

J Mizzi
Member

V Camilleri
Member

2nd December, 2010
PART 2

Complaints decided by the Public Contracts Appeals Board and the Public Contracts Review Board
PUBLIC CONTRACTS APPEALS BOARD

Case No. 180

Advert No CT 232/2009 - CT 2628/2008
Tender for the Supply, Delivery, Installation and Commissioning of Medical Equipment for the Radiology and Operating Theatre Departments at the Gozo General Hospital – Lot 1

The closing date for this call for tenders which, was for a contracted estimated value of € 2,163,000, was 11.08.2009. Seven (7) different tenderers submitted their offers.

On 12.11.2009 Messrs Charles de Giorgio Ltd filed an objection against the decision by the Contracts Department after being informed by the latter that their tender ‘for Lot 1 was not successful as your offer was not administratively compliant.’

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 20.01.2010 to discuss this objection.

Present for the hearing were:

Charles de Giorgio Ltd.
Dr Antoine Cremona Legal Representative
Dr Stefan Frendo Legal Representative
Mr David Stellini Managing Director
Mr Gunter Barthel Siemens Area Manager
Mr John Sammut Technician
Mr Adriano Spiteri Technician
Mr John Mallia Sales Manager Medical Equipment
Mr Austin Magro Sales Consultant Siemens
Mr Ivan Laferla Operations Manager

Triomed Ltd
Dr Damian Fiott Legal Representative
Mr Brian Farrugia
Mr Alex Vella
Mr Ian Vella
Mr Charles Cascun

Ministry for Gozo
Dr Titiane Scicluna Cassar Legal Representative

Evaluation Board
Mr John Cremona Chairman
Mr Nazzareno Grecch Secretary
Ing Chris Attard Montalto Evaluator
Mr Rosario Attard Evaluator
Dr Mark Borg Evaluator
Mr Mario Caruana Evaluator

Department of Contracts
Mr Francis Attard Director General (Contracts)
After a brief introduction about this case, the Chairman, Public Contracts Appeals Board (PCAB) invited the appellant’s legal representatives to explain the motives which led to the objection.

The appellant’s legal representatives asked the PCAB to consider the holding of the proceedings in English as one of their representatives was a foreigner. However, Dr Titiane Scicluna Cassar, the Ministry for Gozo’s legal representative, said that once she had prepared her submissions in Maltese, she preferred if the proceedings were to be conducted in Maltese. Albeit, as a result, the PCAB decided to conduct the proceedings in Maltese, yet, it was also stated that, if and when the need arose, it would allow participants to communicate in English.

Dr Antoine Cremona, legal representative of Charles de Giorgio Ltd, started by stating that this was an appeal from a decision taken by the Department of Contracts on 11 November 2009 which could be dealt with on purely factual basis. These were facts that were exactly the same as those of other cases previously decided upon by the Public Contracts Appeals Board. At this point he made specific reference to two sentences in respect of appeals filed by:

- Central Power Installations (CPI) Ltd regarding Advert No. CT2520/2007 - UM 1229  - Tender for the Supply and Installation of Electrical, Mechanical and Extra Low Voltage Services for the Extension of the Rector’s Office at the Administration Building, University of Malta. (PCAB Case No. 140)

Dr Cremona said that they were appealing from the two reasons listed in the above mentioned letter which led to the exclusion of his client’s bid, namely:

No documents regarding, and/or evidence of:

- Financial and Economic Standing (Article 3.6.4)
- No Technical Training Proposal (Article 11.2)

With regard to the first reason of exclusion, the appellant’s lawyer quoted from page 9 of the tender document which stated that:

‘It has to be emphasised that financial proposals are to be submitted \textbf{ONLY} in Package 3.’

Dr Cremona said that this was the same clause that was included in the tender regarding the above-mentioned Case No 158, this being a template used for ERDF tenders.

The appellant’s lawyer explained that this was the reason why the Evaluation Board, on opening Package 2 of Charles de Giorgio Ltd’s offer, did not find any proof of
their financial and economic standing. He sustained that the Contracting Authority included this clause to ensure that no financial and economic data was included in Package 2, otherwise they would be excluded. Dr Cremona claimed that if his client had sought legal advice before submitting the tender he would have certainly advised not to insert any financial information in Package 2 because of the high risk of being excluded. It was stated that his client was being excluded because of complying with Instructions to Tenderers (ITT).

Dr Cremona maintained also that, under the Three Package Procedure, there has always been exclusion in case of submitting any financial information in Package 2. The appellant’s lawyer said that a tenderer was not expected to interpret such a clause differently, in that they could not include any financial and economic information in Package 2. He said that the PCAB has consistently acknowledged that all financial information had to be included in Package 3.

At this point, the PCAB explained that the financial considerations in Case No 158 were related to the running costs and maintenance cost of the aircraft while in this case these were related to the financial information on the company. Dr Cremona’s reply to this observation was that the word ‘financial’ could only be interpreted to refer to all financial and economic information that related to the entity submitting the bid and the tender itself.

Furthermore, Dr Cremona said that there were the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt. He argued that the ambiguity in this case was in the sense that tenderers were expected to insert financial information in Package No 2 (considering the fact that they were being excluded for not including such information in the said package) and, on the other hand, there was a clear provision in the tender whereby it was specifically stipulated that a tenderer was prohibited from submitting financial information in Package 2. He insisted that once it was the Contracting Authority itself that requested tenderers to submit such data in Package 3 his client, the appellant, should not be excluded for not finding this information in Package 2. Dr Cremona said that, at this point in time, they could not prove that such data had been included in Package 3 because this package had not yet been opened for evaluation.

In reply to a specific question by the PCAB, the appellant’s lawyer said that his clients were stating that, once they were in doubt where to put such data, the safe option was to include it in Package 3. He reiterated that if, prior to doing so, they had sought his advice he would have gone for the secure option so that afterwards they would not be excluded for including such data in Package 2.

With regard to the second ground of exclusion, Dr Antoine Cremona claimed that there was no requirement for a Technical Training Proposal as indicated in the letter of exclusion because Article 11.2 (c) of the ITT requested:

‘A technical training proposal for the proper and safe operation of the equipment and first hand maintenance interventions, where applicable.’
The appellant’s lawyer sustained that Messrs Charles de Giorgio Ltd had to be excluded on what was requested of them in the said clause because there was no request for the technical training proposal but a technical training proposal that was qualified for the proper and safe operation of the equipment, who were the Radiographers. Dr Cremona said that, contrary to what was stated in the Department of Contracts’ letter, his clients had given clear details of the training proposal of their bid as follows:

‘Siemens Medical application specialists will be brought over to Gozo General Hospital to train the Diagnostc Radiographers in a clinical environment as follows:

- 5 days will be devoted to training on the Axiom Iconos R200 and Axiom Aristos MX 80 Kw. Training will be completed in 5 days.
- 5 days will be devoted to training on the Acuson X300 Ultrasound system and the Mammomat Inspiration
- 5 days will be devoted to training on the Somatom Sensation 64 CT
- 3 days will be devoted to training on the Agfa CR 35 – X Digitizer.
- Drager Medical application specialists will provide 5 days technical training for the users in all the equipment being offered.

Following these trainings participants would be able to use all the features of the systems offered. Training material will be given to each participant either in the form of printed notes or else in digital format during or after training.’

Dr Cremona said that, for the sake of the argument, he would have conceded that, for example, the training proposal of other bidders was a superior solution but, on the other hand, he could never accept the claim that his client did not submit any technical training proposal, which was the only reason given for exclusion on this particular issue.

At this point the lawyer quoted from page 89 of the ITT in the tender document wherein there was the following description of the training proposal for Lot 1 which was complementary to what was written under clause 11.2 (c):

“Bidders are to submit a training proposal indicating adequate training to all Diagnostic Radiographers working at the Gozo General Hospital...”

Dr Cremona also said that, according to the European Court of Justice, it was a legal obligation on the Contracting Authority to seek clarifications. He maintained that the Evaluation Board should have sought clarifications on their training proposal if they
did not understand it exactly or if they felt that it was an inferior proposal to their requirement. He also questioned whether the clarification exercise was excluded from the evaluation process or whether any clarifications were sought from other bidders considering the fact that no clarifications were sought from the appellant.

Dr Titiane Scicluna Cassar, legal representative for the Ministry for Gozo, emphasised that the appellant Company was excluded on administrative non-compliance and not on technical non-compliance.

With regard to her colleague’s statement that their complaint, more than anything else, was factual and that the principal decisions in the cases quoted above were that any financial data had to be submitted in the Third Envelope, she contended that such an argument would defeat the scope of the Three Envelope Procedure. Dr Scicluna Cassar sustained that in the Tender Dossier it was clearly specified that all financial data had to be included in Package 2. Here, she quoted Article 11.2 (e) which stipulated that:

‘Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers’

She added that at the end of Clause 11.2 it was stated that:

‘All the above information is to be inserted in Package 2.’

while under Article 3.6.4 it was stipulated that:

‘Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for 2006, 2007, 2008 verified by a certified accountant.’

She claimed that the scope of opening this administrative requirement in Package 2 was that Evaluation Board would be in a position to evaluate the financial standing of the company. The Ministry for Gozo’s legal representative maintained that the requirement to include such data in Package 2 was clearly specified in the tender and therefore it could not be argued that they had doubt in which Package they had to submit such information and that if they had sought their advice they would have told them to include such information in Package 3. Furthermore, she pointed out that by their own submission, the appellants were admitting that such information was not included in Package 2.

With regard to what was stated in their letter of objection regarding the claim that their turnover was much more than that of Triomed Ltd, Dr Scicluna Cassar said that Article 3.6.4 did not refer to turnover but to adequate liquid assets and access to credit facilities. She sustained that it was left to the discretion of the Evaluation Board to decide what was adequate.

As regards the appellant’s argument that Triomed Ltd’s 2008 audited accounts did not appear on the Malta Financial Services Authority’s (MFSA) website, the Ministry for Gozo’s legal representative pointed out that she was informed that the documents in respect of financial statements had to be submitted to MFSA till the end of September
and, as the tender closed at an earlier date, such documents could have been submitted afterwards. However, she insisted that the most important thing was that Article 3.6.4 dealt with financial statements that had to be verified by a certified accountant and not audited. She maintained that, whilst those of Triomed Ltd were actually verified by a certified accountant, the other party did not even have any financial statements in the first and second envelope.

On this issue she concluded by stating that the fact that the Evaluation Board did not find such documents in Package 2, it was not in a position to know the financial standing of the appellant company and, therefore, it had no alternative but to consider such an offer as administratively not compliant.

With regard to the Training Proposal, Dr Scicluna Cassar emphasised that under Article 11.2 (c) bidders were requested to submit ‘A technical training proposal for the proper and safe operation of the equipment and first hand maintenance interventions, where applicable.’

The lawyer maintained that they were not contesting the appellants’ training proposal, which was considered valid, but the fact that they did not include first hand maintenance interventions in their offer. She said that the appellant company submitted a training proposal for Radiographers who were the operators of the equipment but did not submit a training proposal for the technicians who were the persons responsible for the maintenance of the equipment. Dr Scicluna Cassar said that this was the other reason why their offer was considered not administratively compliant and therefore it was not a question of whether their training proposal was valid or not, or that they should have sought clarification.

At this point, the PCAB intervened to cross-examine Mr John Cremona, Chairman of the Evaluation Board, on the issue of the training proposals.

In his response to a PCAB’s member’s question, Mr Cremona declared that in their report they wrote that it (the appellant’s offer) did “not include technical first line training”.

When the PCAB’s Chairman asked him to comment on the last paragraph 3.6.3 of page 3 of 3 of Messrs Charles de Giorgio Ltd’s bid, which stated that the “technicians have been trained by the manufacturers and have carried out service and maintenance on the current installed base, some of which is listed in item 3.6.2”, Mr Cremona (aided by other members of the Evaluation Board present for the hearing) took some time to find this document. At this point, Mr Cremona pointed out that in their report they commented about how tenders were being submitted because this was causing problems for the Evaluation Board to check documents. The Chairman of the Evaluation Board said that, in the case of the appellant’s offer, they had received a package of small spiral files without an index and he had to come over from Gozo to personally check whether the copy of the tenders that was kept at the Department of Contracts contained the financial statements because such documents were missing from the original offer. In actual fact it resulted that these were not found in the appellant’s Package 2. Here, Dr Antoine Cremona intervened by stating that their copy was indexed.
When the document was eventually found, Mr Cremona was referred again to the above mentioned paragraph and was asked to explain what this implied. He replied that in the front page of the Training Proposal they did not indicate a training proposal for their technicians but for the Diagnostic Radiographers and, in the quoted paragraph, although they were indicating that their technicians were going to provide training, they did not indicate whom they would train. The Chairman of the Evaluation Board also said that they did not understand that this referred to the technicians that were going to be trained at the Gozo General Hospital but to the company’s technicians. His attention was drawn, however, by the PCAB that this was an interpretation.

It was pointed out by the PCAB that once there was “where applicable”, the Evaluation Board could not recommend that a tenderer should be disqualified for submitting a training proposal for Radiographers only or for not submitting a training proposal at all because this was not a mandatory requirement. It was also stated that the words “where applicable” were misleading.

With regard to the Chairman Evaluation Board’s remark that Messrs Charles de Giorgio Ltd were excluded because they did not submit “first line training”, Dr Cremona emphasised that, in the letter communicated to them, the appellants were not excluded because they did not submit “first hand maintenance” but because they did not submit a ‘technical training proposal’, which was actually provided. He explained that they had provided the training proposal for Radiographers as required on page 89 of the tender dossier. He also submitted that, for the purpose of his client’s bid, the training proposal for the technicians was not applicable because technical maintenance was going to be covered by a service agreement and operated remotely which meant that problems would be solved remotely. Dr Cremona said that the words “where applicable” were included purposely because they were giving bidders the chance to give a solution to the technical training.

Dr Scicluna Cassar sustained that bidders had to provide a training proposal both for the Radiographers and also for technicians and that both were applicable. She reiterated that this bid was excluded because it was administratively not compliant and this was mainly due to the fact that there were no financial statements. She said that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue.

Dr Cremona insisted that the two reasons given for exclusion were equivalent.

In reply to a specific question by Dr Stefan Frendo, another legal representative acting on behalf of the appellant Company, as to whether any clarifications were sought from the other party, the Chairman of the Evaluation Board said these were sought on technical and not administrative issues.

During one of his interventions, Mr Cremona said that it was better for them to have as many tenderers as possible in the running because there would be more competition.

During these proceedings Mr John Sammut (Technician, Charles de Giorgio Ltd) took the witness stand and gave his testimony under oath.
The witness testified that in this package they offered a service agreement and remote
diagnostics. He said that with this package they were demonstrating what they
defined as important at first hand which meant that which the users could do. Mr
Sammut explained that, with the service and equipment offered, no first hand
maintenance was required because this would be covered by the services agreement as
requested in the tender and also offered by remote diagnostics. They would only need
to show the Radiographers how to grant them access to equipment to carry out the
necessary checks.

On cross-examination by the PCAB regarding reliability and maintenance of
equipment, the witness said that the most sophisticated equipment of this tender was
the CT Scan. He went on to explain that they had supplied / installed a similar CT
Scan at Boffa Hospital in November 2007 and it had never stopped since then. He
also said that they had two fully trained engineers and the only delay he could
envisage was the time they would take to cross over to Gozo.

The Chairman, PCAB was of the opinion that it had to deliberate on the element of
what was implied by financial standing since this was not necessarily a commercial
standing. He said that the standing was a snap shot of a company at that moment in
time but not divulging, for example, prices because this was the commercial
perspective of a bid. It was stated that if the MFSA’s records were up to-date, anyone
could have access to the financial standing of companies because these were public
documents. He sustained that it was the price offer that delineated the commercial
entity and corresponding sensitivity of any bid.

Dr Cremona clarified that under clause 3.6.4 it was not the audited accounts (in the
public domain) that were requested but that ‘access to credit facilities are adequate
for this contract’.

Continuing, the Chairman PCAB said that they had to deliberate also on whether the
Evaluation Board had assessed the standing of the tenderers against supporting
documentation and not solely on what was claimed by bidders. Another point to be
considered was that no tenderer was free to arbitrarily decide not to submit something
simply because it might have reservations on a particular clause.

At this point, Dr Cremona intervened by stating that their financial statements were
actually submitted because these were in Package 3 as stipulated in Clause 10.1 (c).
However, Dr Scicluna Cassar also intervened to say that they had no proof of this
because Package 3 was still closed.

When the Chairman PCAB asked the parties to confirm where the required
information under Clause 3.6.4 had to be submitted, Dr Cremona replied that the
financial standing cannot be submitted in Package 2. Here, the PCAB quoted Clause
10.1 (c) of the ITT:

*Package Three: completed price schedules and, or bills of quantities,
form of tender, payment terms or other financial arrangements; any
covering letter which may provide other pertinent details of a
commercial nature.*

The PCAB claimed that the above were all related to the bid and not to the entities.
Here, Dr Cremona insisted that other financial arrangements included access to credit facilities while Dr Scicluna Cassar sustained that these referred to financial arrangement in respect of payments.

The PCAB’s Chairman said that the PCAB needed to deliberate on this particular issue rigorously.

At this point, Dr Cremona referred to PCAB Case No. 140 wherein the appellants, Central Power Installations Ltd, were re-instated even though the audited accounts for 2004 were not submitted and not included in any of their packages.

The PCAB (Mr Triganza) said that they needed to check the said Case on its own merit in order to establish what led the same Board to arrive at that decision.

Dr Cremona maintained that irrespective of what the Evaluation Board stated:

1. no financial information had to be submitted in Package 2;
2. ambiguity in tenders should always militate in favour of bidders and not in favour of the Contracting Authority, so the benefit of doubt was always in favour of bidder; and
3. the provisions in the tender were clear in that financial proposals had to be submitted ONLY in Package 3

Here, the PCAB drew his attention that a ‘financial proposal’ was not a ‘financial standing’.

However, Dr Cremona remarked that this clause was purposely included to ensure that the bidder would complete the contract successfully. He said that from the public information available which was submitted with their appeal they had reservations on the preferred bidder.

The PCAB’s Chairman said that the PCAB agreed with the Chairman Evaluation Board that whilst, as in similar situations, whenever a Contracting Authority ended up with only one bidder, it was never ‘healthy’ in so far as competition is concerned, yet contracting authorities also needed to abide by the regulations.

Dr Scicluna Cassar insisted that it did not make sense to compare this case with other sentences because they had to take into consideration what was stipulated in this particular tender, wherein it was specifically stated that the financial standing of the bidders had to be submitted in Package 2.

The PCAB said that its guidelines were the regulations and not the tender’s specifications. There were fixed rules in the law that specified what was to be incorporated in Package 1, 2 and 3.

Dr Frendo intervened by making reference to Central Power Installations Ltd’s appeal (PCAB Case No.140) which was decided in their favour. He said that the facts were as follows:
“He failed to submit the 2004 audited accounts and this must have happened through an oversight. Yet, there were only minor shortcomings committed by the appellants which should not have led to elimination. The omission committed was irrelevant in the light of these provisions and it, therefore, followed that appellant’s bid was compliant and that the Adjudication Board did not act correctly when it rejected the latter’s offer.”

Dr Frendo proceeded by saying that, whilst in that case the 2004 audited accounts were not submitted, in their case they were stating that the requested financial information was submitted in Package 3. He also argued that considering the fact that there were divergent views on what had to be included in Package 2 and in Package 3 there was no alternative other than to give the benefit of doubt in favour of re-inclusion of his client’s bid. He questioned whether it was justified for one to exclude a bidder from the process simply because they played safe and included such information in Package 3 instead of Package 2. He also asked the PCAB to consider if other bidders were prejudiced once these were in Package 3. Dr Frendo concluded by stating that the purpose of the appeal was not to cancel the tender but, at least, to re-instate them in the process and adjudicate the offer on its own merits.

The PCAB’s Chairman ensured that in their deliberation the Board members

- would analyse (i) what were the terms of Cases 140 and 158 and in which context such decisions were taken and (ii) the purpose why certain documentation and information was to be submitted at stage 1, 2 and 3, and

- would not allow deviations if these were going to wrongly impinge on the evaluation process

When Dr Scicluna Cassar requested a copy of these cases, the Chairman PCAB remarked that the decisions used to be uploaded on the Department of Contracts’ website. However, proceeded the PCAB’s Chairman, these were subsequently removed and therefore were no longer accessible online. Yet, he continued, that he wanted to draw the attention of all those present that the PCAB’s decisions are included in a report which is laid annually on the Table of the House of Parliament.

At this point, Mr David Stellini, representing Charles de Giorgio Ltd, intervened by stating that they had similar equipment at Sir Paul Boffa Hospital and another two in private hospitals. He ascertained that they had submitted their accounts and was of the opinion that the fact that such information was submitted in Packages 2 or 3 should not prejudice the case. Mr Stellini pointed out that they had a turnover of €14.6 million and this tender had a budget price of about €2.5 million.

In reply to a specific question by the PCAB as to whether in previous tenders they submitted such financial statements in Package 2 or whether there were instances when these were submitted in Package 3, Mr Stellini said that, with the exception of Mater Dei Hospital tender, there were no other tenders that requested bidders to submit such statements.
The Chairman PCAB said that their role was to ensure that the *modus operandi* was correct and fair with all bidders and, as a consequence, they wanted to clarify the financial standing of the only bidder recommended for the opening of the financial package, that is, Triomed Ltd.

He pointed out that in their reasoned letter of objection the appellants implied that the financial standing of the bidder in question was not strong enough to shoulder such financial burden. On cross examination by the PCAB on this issue, the Chairman of the Evaluation Board declared that they had already taken into consideration this aspect in their evaluation and that it was decided that the financial standing of the said company was acceptable. He said that they had evaluated the bids in accordance with the criteria requested by the tender and were satisfied that they had complied with the requirements of clause 3.6.4 already referred to at an earlier stage.

When asked by the PCAB to explain what was implied by the word “adequate”, Mr Cremona said that the fact that the tender did not specify an amount for turnover posed a huge problem for them. He declared that they arrived at their decision after analysing the financial statements covering the years requested in the tender and also a letter from their bank which confirmed that all necessary amounts would be available. He said that the tenderer submitted an agreement with the bank and the principal supplier’s Company overseas which could be signed once the contract was awarded. At this point his attention was drawn by the PCAB’s Chairman that the financial aspect had to be dealt with through the bank and not with the supplier’s principal company.

The Chairman Evaluation Board proceeded by furnishing the PCAB with the following documents:

1. a letter dated 11 August 2009 bearing the corporate details of Alliance Trust and signed by Mr Brian Farrugia, Director Interlink Corporate Services Ltd
2. a letter from Triomed Ltd to Bank of Valletta plc
3. a letter from Bank of Valletta plc to Philips Medical Systems BV
4. e-mails exchanged between Bank of Valletta plc, Triomed and Philips Medical Systems BV

The PCAB analysed these documents and noted that the document at 3 above was not endorsed by the Bank. After reading the contents of document no. 1, the Chairman PCAB asked Mr Cremona to state whether this provided them with comfort as regards the financial standing of the tenderer because this covered only the performance bond, which was 10% of the contract value. Mr Cremona replied that this was considered acceptable in the absence of those who did not submit anything.

Dr Damian Fiott, the legal representative of Triomed Ltd, intervened by stating that this was only part of the evidence submitted by his client aimed at showing that it had the pertinent financial and economic standing. Dr Fiott contended that, apart from the requirements under Article 50 of LN 177/2005, they also submitted as evidence the right to gain access to credit facilities. Dr Fiott argued that the evidence submitted showing Philips Medical Systems BV’s willingness to support their local representatives was not all the company’s evidence as to whether it had the necessary financial standing for the execution of this tender but it was only part of the evidence.
showing that Triomed Ltd had the comfort from Philips Medical Systems BV, the principal Company, with the latter agreeing to be paid upon receipt of such proceeds by Triomed Ltd from the Government of Malta.

Mr Brian Farrugia, also representing Triomed Ltd, said that there were irrevocable instructions enclosed with that letter which showed that Philips Medical Systems BV gave unconditional credit facilities.

Dr Scicluna Cassar sustained that the financial statements showed that the company was profitable and that it had adequate financial standing for this tender. Mr Cremona added that the certified accounts submitted showed that the company was making profit and so they felt that the documents submitted were adequate to reach a decision. However, his attention was drawn by the Chairman PCAB that some time earlier it was stated that they had a problem in identifying what was “adequate”.

The Chairman, PCAB placed emphasis on the fact that they were only interested in ascertaining that the \textit{modus operandi} of the adjudication board was fair and that the benchmarking was carried out correctly. It was also stated that in view of the submissions made it had to be ascertained that those who adjudicated on the financial standing knew what they were saying.

At one stage Dr Frendo intervened to point out that there was no relationship between the Contracting Authority and the supplier who was guaranteeing credit facilities. He said that the Company with whom the contract would be entered into had a turnover of less than €500,000 for a contract of €2.5m. Dr Fiott interjected to reply that Philips Medical Systems BV were not unconnected with this contract because there was an undertaking in regard to credit facilities.

Dr Fiott concluded by stating that in the tender document there was a requirement that such evidence had to be included in Package No 2 in accordance with Article 50 of LN 177/2005 and this provision explained clearly what had to be included. In the definition there is evidence of liquidity and access to credit facilities and that was why they decided to include backup evidence of Philips Medical Systems BV because it was an essential requirement of the Legal Notice (LN).

With regard to access to credit facilities, Mr Farrugia, Triomed Ltd, explained that they included the ‘comfort letter’ of Philips Medical Systems BV (wherein they were granting unconditional credit terms) together with the correspondence exchanged between Triomed, Philips Medical Systems BV and BOV. Furthermore, he said that BOV was unequivocally accepting the credit terms.

At this point the PCAB intervened to draw Mr Farrugia’s attention to the fact that BOV was not accepting anything, as yet, considering the fact that such document was not signed. Mr Farrugia responded by stating that, as a lending officer, there was no bank that issued a sanction letter before a tender was concluded. The Chairman PCAB rebutted by questioning what comfort an adjudication panel would have if this were the case. However, Mr Farrugia insisted that the Bank was already showing its consent. The PCAB’s Chairman said that the time line was important because, all things being equal, the consent was given at that moment in time and nothing was official.
On seeing that there were no further comments from the floor, the PCAB brought the public hearing to a close by stating that it was imperative for it to ascertain that at deliberation stage the adjudicating panel had treated all bidders equally.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 13.11.2009 and also through their verbal submissions presented during the public hearing held on the 20.01.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the fact that the appellant Company made reference to two previous PCAB cases (Cases 140 and 158 respectively) which, in its legal representative’s opinion, dealt with the same type of objection;

- having also taken note of the fact that the appeal concerned two reasons which led to the exclusion of the appellant’s bid, namely, no documents regarding, and/or evidence of (a) ‘Financial and Economic Standing’ (Article 3.6.4) and ‘No Technical Training Proposal (Article 11.2)’;

- having heard the appellant’s legal advisor claim that since the tender document stated that ‘financial proposals are to be submitted ONLY in Package 3’ his client did not include any information of a financial nature in package 2;

- having also heard Dr Cremona state that there are the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt;

- having also noted that the appellant Company was claiming that there was no request for the technical training proposal but a technical training proposal that was qualified for the proper and safe operation of the equipment, who were the Radiographers and that they had given clear details of the training proposal of their bid;

- having considered Dr Frendo’s claim as to whether it was justified for one to exclude a bidder from the process simply because they played safe and included such information in Package 3 instead of Package 2;

- having also taken note of points raised by appellant Company regarding the need for clarifications to be sought by the contracting authority;

- having taken into consideration the points raised by the contracting authority namely :-

  a) the emphasis placed on the fact that the appellant Company was excluded on administrative non-compliance and not on technical non-compliance,

  (b) the suggestion (as claimed by appellant Company) that any financial data had to be submitted in the ‘Third Envelope’ would defeat the scope of the Three Envelope
Procedure and was totally untrue within the context of this same tender, stating that in the tender dossier it was clearly specified that all financial data had to be included in Package 2 (vide Clause 11.2 and Article 3.6.4 respectively),

(c) that the scope of opening this administrative requirement in Package 2 was that the Evaluation Board would be in a position to evaluate the financial standing of the company,

(d) that, whilst Triomed Ltd’s (the recommended tenderer) financial statements were actually verified by a certified accountant, the other party (the appellant Company) did not even have any financial statements in the first and second envelope,

(e) the fact that the Evaluation Board did not find such documents in Package 2, it was not in a position to know the financial standing of the appellant company and, therefore, it had no alternative but to consider such an offer as administratively not compliant,

(f) that the contracting authority was not contesting the appellants’ training proposal, which was considered valid, but the fact that that they did not include first hand maintenance interventions in their offer, claiming that, whilst the appellant company had submitted a training proposal for Radiographers (who were the operators of the equipment) yet they did not submit a training proposal for the technicians (who were the persons responsible for the maintenance of the equipment);

• having taken note of Mr Cremona’s statement wherein he claimed that in the front page of the Training Proposal the appellant Company did not indicate a training proposal for their technicians but for the Diagnostic Radiographers and, in the quoted paragraph, although they were indicating that their technicians were going to provide training, they did not indicate whom they (the appellant Company) would train;

• having deliberated on –

(a) the use of the term “where applicable”, which, the appellants’ legal advisor tried to justify with those present by stating that these words were purposely included because the contracting authority was giving bidders the chance to give a solution to the technical training, something that his clients were doing and

(b) the training proposal for the technicians, which, as suggested by appellants, was not applicable because technical maintenance was going to be covered by a service agreement and operated remotely which meant that problems would be solved remotely, a point corroborated by Mr Sammut’s testimony;

• having also deliberated on the fact as pointed out by the appellants, namely that they were not excluded because they did not submit “first hand maintenance” but because they did not submit a ‘technical training proposal’, which, according to the same appellants was actually provided;

• having thoroughly considered the significance of Dr Scicluna Cassar’s concluding statement wherein, inter alia, she stated that the appellant
Company’s bid was mainly rejected due to the fact that there were no financial statements and that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue;

- having taken full cognizance of the fact that by their own submission, the appellants were admitting that such information was not included in Package 2;

- having considered whether the Evaluation Board had assessed the standing of the tenderers against supporting documentation and not solely on what was claimed by bidders;

- having analysed the ancillary documentation referred to during the hearing relating to the recommended tenderer’s financial standing and Mr Cremona’s statement that the Evaluation Board maintained that these provided them with comfort even though this only covered the performance bond, which was 10% of the contract value, which was more when compared to all those others who did not submit anything;

- having considered the points raised by Dr Fiott and Mr Farrugia, particularly the fact that, according to them, the evidence submitted showing Philips Medical Systems BV’s willingness to support their local representatives was not all the company’s evidence as to whether it had the necessary financial standing for the execution of this tender;

- having duly analysed the implications of the argument brought to the fore by Dr Frendo wherein he stated that (a) there was no relationship between the Contracting Authority and the supplier who was guaranteeing credit facilities and (b) the Company with whom the contract would be entered into had a turnover of less than €500,000 for a contract of €2.5m,

reached the following conclusions, namely:

1. The PCAB maintains that conclusions reached by the same Board in previous PCAB cases (nos. 140 and 158) were taken out of context by appellant company in view of the fact that the areas of contention are totally unrelated to the objections made in this particular instance. As a consequence, this Board fails to understand the attempt made by the appellants to try to draw any similarity between the said cases and the present one.

2. The PCAB also feels that, whilst agreeing with the appellants’ legal advisor with regards to the fact that there were the general principles of the public procurement derived from the directives and sentences of the European Courts of Justice which stated that, in case of doubt or ambiguity, the tenderer must be given the benefit of doubt, yet the PCAB fails to comprehend where one can find any traces of ambiguity in this particular instance.

3. The PCAB opines that, in view of the inclusion of the phrase “where applicable”, the Evaluation Board could not recommend that a tenderer should be disqualified for submitting a training proposal for Radiographers only or for not submitting a training proposal at all because this was not a mandatory
requirement as implied by the phrase “where applicable”. Furthermore, the fact that the contracting authority’s own legal advisor stated that the appellant Company’s bid was mainly rejected due to the fact that there were no financial statements and that the other reason for exclusion, namely that no technical training proposal was submitted, was considered as an ancillary issue, corroborated the futility of such ground for rejection.

4. Whilst not entirely agreeing with the analytical approach adopted by the Evaluation Board to ensure that the recommended tenderer’s financial standing is sufficient to sustain the financial responsibilities that the dimension of a tender such as this necessitates, yet, this Board would suggest a more thorough investigation in regard to ensure that the contracting authority is alleviated from potential future problems. It is also a fact, however, that, at this point, the PCAB has no sufficient ground to decide against the conclusions reached in regard by the Evaluation Board.

5. The PCAB cannot agree with the arguments brought forward by the appellant Company in so far as the interpretation of terms like “financial proposal” and “financial standing” are concerned. The PCAB holds the opinion that a “financial standing” (balance sheet, profit and loss, etc.) is a snap shot of a company at a particular moment in time (very often accessible to the general public via, for example, the MFSA’s website) but which falls short from presenting, for example, prices, payment terms and so forth (considered to contain commercially sensitive information not otherwise accessible to one and sundry).

The 3 package procedure distinguishes between these two scenarios. The opening of package no. 2 enables an Evaluation Board to establish the financial solidity of a participating tenderer, regardless of the commercial nature of the bid. Package no.3 is directly linked with the commercial application of the tenderer’s bid ‘per se’.

The PCAB is sceptic about the fact that the appellant Company is still oblivious of the fact that, whilst one is expected to include Company information such as balance sheets, profit and loss statements, etc. in Envelope 2, yet it is likewise expected to include details of a commercial nature in Envelope 3.

The PCAB contends that the interpretation of Section 10.1 (c) is unequivocal and any other interpretation given to such Clause is unacceptable. Moreover, these requirements are mandatory.

6. The PCAB argues that no tenderer is free to arbitrarily decide not to submit something simply because the same tenderer might have reservations on a particular clause.

As a consequence of the above, particularly, (5) and (6), this Board finds against the appellant Company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

09 February 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 181 and Case No. 182

Case No. 181 - Objection 1

Call for the Supply of ISPAGHULA HUSK

Objection filed by Charles de Giorgio Ltd

Case No. 182 - Objection 2

Call for the Supply of ISPAGHULA HUSK

Objections filed by Pemix Ltd

The closing date for this call for tenders which, was for a contracted estimated value of € 87,125.55, was 22.01.2009.

Three (3) different tenderers submitted their offers.

Following the publication of the ‘Notification of Recommended Tenderers’, Messrs Charles de Giorgio Ltd and Pemix Ltd, respectively and, separately, filed a formal objection (Ref. 181 – notice of objection dated 13.11.2009 and Ref. 182 – notice of objection dated 17.11.2009) against the award of the tender in caption to Messrs Clinipharm Co Ltd

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on the 20 January 2010 to discuss these objections.

Present for the hearing were:

Charles de Giorgio Ltd.
Mr David Stellini
Managing Director

Pemix Ltd.
Mr Joe Camilleri
Managing Director
Ms Maria Gatt
Medical Field Manager

Clinipharm Co Ltd
Mr Kevin Farrugia
Managing Director
Dr Patrick Valentino
Legal Representative
At the beginning of the public hearing, the Chairman, Public Contracts Appeals Board (PCAB) made a declaration wherein he stated that until about eight (8) years ago he was employed with Pemix Ltd, one of the appellant companies. Yet, continued the PCAB Chairman, since then, he did not have any connections whatsoever with this company. At this point the PCAB Chairman asked all those interested parties present at the said hearing to state whether they had any objection for him to chair these proceedings as, should they have had any reservations he was willing to step aside. All those present replied in the negative. At this point the PCAB Chairman thanked all those present for their confidence.

At the commencement of proceedings, the PCAB Chairman explained that since these two objections concerned the same call for tenders it was decided that a joint hearing should be held. Notwithstanding, elaborated the Chairman, the parties concerned were also informed that in spite of this, the two cases would be dealt with and decided upon separately.

The Chairman, PCAB then invited the representative of Messrs Charles de Giorgio Ltd and Pemix Ltd to explain the motive which led them to lodge their respective objections.

**Objection raised by Charles de Giorgio Ltd**

Mr David Stellini, General Manager, Charles de Giorgio Ltd, explained that their offer was disqualified because they offered a product with a shelf-life of 18 months.

With regard to the recommended tenderer’s offer, namely that of Clinipharm Co Ltd, he maintained that the 3% discount granted on deliveries of 9,000 packs should not have been taken into consideration in the computation of their financial offer because such a quantity was equivalent to the estimated yearly consumption and Government Health Procurement Services (GHPS) did not purchase full year quantities at one go. Furthermore, Mr Stellini said that their offer was cheaper than that of the proposed bidder because the latter’s offer was the third most expensive offer.

Apart from the above, he alleged that, as already explained in their motivated letter of objection dated 13 November 2009, the offer of the recommended tenderer was deficient/ incomplete for the following reasons, namely,
• the tenderer did not indicate the pack size which according to the technical specifications had to be between 3.5g and 5.0g;

• the tenderer did not include the Total CIF Price for 3 years and the Total delivered to stores price for 3 years;

• the tenderer did not submit any sample;

• the three years shelf-life of the Clinipharm Co Ltd’s product was dubious because this was equivalent to the total shelf life of the product and this was not 5/6th remaining at the time of delivery as requested in the tender; and

• no Customs Tariff Number was indicated.

Mr Stellini said that the procedure being followed by the GHPS in the award of contracts was different from that being adopted by the Contracts Department. He claimed that, in case of Departmental Tenders, if the delivery period and the shelf life was not in accordance with the specifications, bidders were asked whether they could meet the delivery period or the 5/6th shelf life, and if the reply given was in the affirmative, they would be awarded the tender. However, in the case of tenders administered by the Contracts Department, it was a fact that whenever tenderers are not 100% compliant with the specifications, they are immediately being disqualified. He elaborated that, until very recently, the praxis was that tenderers could deviate from specifications and were still awarded the contracts. Yet, recently, the Department of Contracts decided that tenders had to be 100% compliant otherwise they would be rejected. He was of the opinion that, once this tender was filled in accordance with the previous praxis, it should qualify.

In reply to a specific question by the PCAB, Messrs Charles de Giorgio Ltd’s representative, declared that they had access to Clinipharm Co Ltd’s offer because when an offer was not straightforward and/or clear, in this case it had the discount element, it was scanned and uploaded on the Department of Contracts’ website, and therefore it was in the public domain.

**Objection raised by Pemix Ltd**

Mr Joe Camilleri, Managing Director, Pemix Ltd, concurred with almost all the points mentioned by Mr Stellini. He said that, considering the fact that their product was Spanish and the packaging had to be produced, specifically, for Malta’s product, they sought advice from their Spanish principals regarding the delivery period. Mr Camilleri stated that his firm was advised to increase the delivery period as suggested in the tender specifications by two weeks. Yet, Mr Camilleri continued, despite the fact that they drew their principals’ attention that this would render their offer non-compliant with the specifications, the same principals advised Ms Maria Gatt, Pemix Ltd’s Medical Field Manager, to write whatever they thought it was relevant and suitable for their offer.
Mr Camilleri said that none of the tenderers was 100% compliant and they could not understand how a tender could be awarded to a tenderer whose offer was about €10,000 more expensive than theirs.

In reply to a specific question by the PCAB, Ms Gatt confirmed that there were several other occasions where the delivery periods did not match those specified in the tender and yet they were awarded the tender. She claimed that there were instances where they were asked whether they agreed to extend the binding period even though this was different from that requested in the tender document.

Government Health Procurement Services (GHPS)

Ms Anne Debattista, Director GHPS, sustained that not all tenders had the same requirements and conditions. She said that, in this particular instance, the tender document under Clause 11 Shelf Life of the Special Conditions under the Technical Conditions it was specified that:

“The shelf life of the product must be clearly indicated in the Tender documents submitted. Goods received at the Government Health Procurement Services must not have their shelf-life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services.

When five-sixths of the total shelf-life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf-life will be given preference.

The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.”

Ms Debattista said that Charles de Giorgio Ltd’s offer was disqualified because they offered a shelf-life of a minimum of 18 months, which was half the shelf life of the product.

As regard Pemix Ltd’s offer, the Director GHPS confirmed that they had the cheapest offer. However, she said that their offer was not recommended for award because in the Evaluation Board’s report it was stated that the ‘Status of product (medicine or food supplement) has not been determined yet’ and that delivery period indicated in their offer was 12 – 14 weeks which was not as specified in the tender document, that is, 8 – 12 weeks.

The PCAB intervened and drew Ms Debattista’s attention that the only reason given by the Department of Contracts in their letter dated 11 November 2009 as to why the appellant Company’s offer was not recommended was that “the tender submitted by them “was not successful as it was technically non-compliant since the submitted delivery period was not as requested in the tender dossier”.

Continuing, Ms Debattista stated that, on the basis of the same arguments that the offer of the recommended tenderer was incomplete, Pemix Ltd’s offer could not,
therefore, be classified as being fully compliant because it also had missing information in respect of Customs Tariff Number and % (rate) of Customs Duty and VAT.

The PCAB said that this was irrelevant to the case because the only reason for exclusion that was communicated to Pemix Ltd was that concerning the delivery period.

When the PCAB asked Ms Debattista to elaborate on the issue regarding the status of the product, she explained that in the tender there were two forms: one for medicinal products (ANNEX IV) and the other for non medicinal products (ANNEX V). She said that in case of the latter, Clause 5.2 Medical Devices, Food Supplements, Chemicals and Disinfectants under A. Technical Conditions of ANNEX VI TENDER TECHNICAL AND SPECIAL CONDITIONS stipulated that:

_The necessary documentation as determined by the competent authority in Malta is to be submitted by the tenderer._

She said that once Pemix Ltd’s product was offered as a food supplement, they had to abide by this requirement.

At this point, Ms Gatt intervened to explain that when in September 2009 they contacted the Malta Standards Authority (MSA) about the matter, the latter informed them that they could not declare it as a food product unless the Medicines Authority certified it as a non-medicinal product. Ms Debattista remarked that, when MSA were approached by Pemix Ltd, the Evaluation Board’s report had already been drawn up. Ms Gatt replied by stating that they received a declaration from the Medicines Authority confirming that this product was non medicinal on the same day they received the letter from the Contracts Department regarding the delivery period.

With regard to delivery period, Ms Debattista said that in this particular tender Annex II: Item Description stipulated that:

_“DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores_  
_In instances when the delivery period of the recommended offer is in excess of that indicated above, GHPS reserves the right to request prospective tenderer to reduce delivery period. It is at the discretion of GHPS to accept deliveries in excess of 12 weeks._  
_Minimum order quantities are not acceptable to GHPS. It is at the discretion of GHPS to accept or reject offer.”_

She confirmed that in this case they did not ask Pemix Ltd whether the product could be delivered within the period stipulated in the tender because they did not submit the necessary documentation regarding the classification of their product as a non medicinal product. Ms Debattista pointed out that she always exercised her discretion or sought clarification after obtaining necessary approval from the Director General (Contracts).
As regards the allegation made by appellant Company, namely that the Clinipharm Co Ltd’s tender was not fully compliant, Ms Debattista clarified that:

- the shelf life indicated was 3 years;
- the recommended tenderer, being the current supplier, did not need to submit a sample with their offer because para (i) of Clause 7.1 Medicinal Products under Samples and Literature stipulated that ‘Only present supplier at the time of offer need not submit a representative sample’;
- with regards to
  - the prices, the recommended tenderer wrote the amount of Unit C.I.F. Price under 1st Year, 2nd Year and 3rd Year and under Unit Price delivered to stores/site they wrote A/B (As Above)
  
  - pack Size - on Annex IV - Declaration Sheet for Medicinal Products they clearly indicated 3.5g / sachet per 4.31g sachet
  
  - delivery period of 8 – 12 weeks was compliant
  
  - the product ‘per se’ it was registered as a medicinal product

Ms Debattista also stated that nobody was contesting the fact that the offer by Clinipharm Co Ltd was more expensive than that of Pemix Ltd or that of Charles de Giorgio Ltd. She explained that central Government placed orders for similar stock depending on consumption and that Clinipharm Co Ltd gave a 3% discount on deliveries of 9,000 packs of 30 sachets. At this point, the PCAB drew Ms Debattista’s attention to the fact that if GHPS ordered less than 9,000 packs the discount would not be applicable.

The Director GHPS said that the local regulatory authorities, namely the Medicines Authority and Malta Standards Authority, registered this product as medicinal or food supplement on the basis of manufacturers’ documentation because, although the active ingredient was the same, this could be presented by manufacturers either under the medicines regulations or food regulations. She maintained that such approval would not be issued if part of the analysis carried out by the local regulatory authorities showed a discrepancy somewhere.

When asked to state whether they were after a medicinal product or a food product, she replied that they wanted Ispaghula Husk, which was fibre preparation for constipation.

In reply to a specific question by the PCAB, Ms Debattista said that in this case the customs tariff had no relevance because if the product (medicinal or food) was imported from an EU country it was zero rated (0%) and if it was imported from outside the EU it was liable to Customs Duty. Mr Stellini intervened by stating that this was the reason why, in their opinion, Clinipharm Co Ltd should have written down the % rate in their offer.
Ms Debattista said that although the Total CIF Price for 3 years was not indicated, it was sufficient for bidders to indicate the unit price because orders were made according to requirements and since in Annex III – Financial offer it was specified that ‘Prices must be worked out as requested, otherwise offer may not be considered’.

On Mr Stellini’s request, Ms Debattista said that the total annual consumption was 271,200 sachets and the proposed bidder quoted a price of €2.89 whilst Messrs Charles de Giorgio Ltd quoted a price of €2.48 per pack (1 pack = 30 sachets of 3.5g each). Mr Stellini said that, in their offer, Clinipharm Co Ltd did not indicate whether the €2.89 referred to one sachet or one pack and that was the reason why they were stating that their offer was incomplete.

**Clinipharm Co Ltd**

Dr Patrick Valentino, legal representative of Clinipharm Co Ltd, said that he was preoccupied because

(i) their tender was uploaded on the website and
(ii) Messrs Charles de Giorgio Ltd did not appeal against not being awarded the tender but because his client’s offer was allegedly deficient/ incomplete.

As regards the global price, the lawyer said that in the tender document it was stated that, if the prices were not worked out, the offer ‘may not be considered’ (not “shall not be considered”). He contended that the GHPS was interested in the unit price and not the global price because the amount of orders varied according to requirements. The PCAB intervened to draw the recommended tenderer’s legal advisor’s attention to the fact that the discount factor was also subject to deliveries of 9,000 packs of 30 sachets.

When Dr Valentino stated that if they took into consideration the discount their offer would be the cheapest, Ms Debattista clarified that the offer of the recommended bidder would still not be the cheapest because the prices were worked out according to the Central Bank of Malta’s middle rate of exchange at the closing date of tender. However, their offer was considered fully compliant.

With regard to the shelf life, Dr Valentino said that this was one of the factors that were taken into consideration during the evaluation process because whenever the product is delivered to GHPS the tender specifications demanded that it should still have 5/6th of the total shelf life of three years remaining.

Mr Kevin Farrugia, Managing Director of Clinipharm Co Ltd, said that the MA Registration Number indicated in their offer confirmed that this product qualified as a medicinal. He explained that there had to be a rigorous process for a product to be classified as such because the Medicines Authority had to analyse various dossiers and documentation submitted by foreign principals / suppliers before issuing the MA registration number. On the other hand, if the product was a food supplement, the tenderer had to submit supporting documentation from the MSA confirming such classification.
Ms Gatt intervened to state that when Pemix Ltd passed on the product to MSA they were informed that they had to submit a declaration from the Medicines Authority that it was considered as a non-medicinal product. She said that, subsequently, MSA issued a certificate that the product was classified as a food supplement.

Continuing, Mr Farrugia said that Annex II: Item Description specified that

“A complete and detailed quality control analysis report showing that the consignment/s being supplied comply with the B.P./B.P.C./E.P./U.S.P. standards (or a quality control analysis report acceptable to the Director of Public Health, if the former is not available) is to be submitted with each consignment”

Therefore, proceeded Mr Farrugia, if the product was ‘medicinal’ it had to comply with the above Pharmacopoeia standards and if it was not medicinal, tenderers had to provide a certificate from MSA that it satisfied Public Health requirements. Yet, regardless of all this, argued the recommended tenderer’s representative, in this particular instance, the necessary documentation was not submitted by the tenderer.

Mr Farrugia said that, once his Company’s offer was fully compliant, he could not understand why their offer should not be accepted.

Mr Stellini reiterated that for many years there had been the praxis that if the shelf life and delivery periods were not according to those specified in the tender document they were not disqualified. He said that during a meeting held at the Department of Contracts, towards the end of last year, those present were informed that if a tender document was not filled in completely and accurately (including delivery periods and shelf life) such offers would be considered as not compliant and, as a consequence, disqualified.

Witnesses

At this point Mr Francis Attard, Director General (Contracts) was asked to take the witness stand. He gave his testimony under oath.

On cross examination by Mr Stellini, Mr Attard confirmed that a meeting was held in November or December 2009. Elaborating on the type and scope of meeting, Mr Attard declared that this information meeting was not held, specifically, for ‘medicinal’ tenders only but it was a general meeting wherein they explained to all interested parties how tender forms had to be filled in because it was being noted that a number of bidders were not abiding by the tender conditions. The Director General (Contracts) contended that it was illegal to ask bidders to amend tenders at evaluation stage.

In reply to specific questions by the representatives of Clinipharm Co Ltd, the Director General (Contracts) confirmed that no new regulations were issued and that the scope of holding this information meeting was to address the deficiencies being noted in the tenders submitted. It was emphasised that this was an informative meeting wherein it was explained how tenderers should fill in the tender documents and that it had nothing to do with the selection process.
When asked by the PCAB to confirm or otherwise, the Director General (Contracts) did not exclude the possibility that in previous tenders the conditions were not mandatory as regards delivery periods and so, in such circumstances, it was possible to accept amendments.

When Mr Attard was asked by the PCAB to state whether the financial offer of Clinipharm Co Ltd, as submitted at Annex III, was acceptable, the reply given was that the most important was the unit price. Mr Stellini intervened to remark that, in accepting this situation, a precedent was being created because it was being implied that a tender would not be disqualified if the total price or customs tariff was not filled in. Mr Attard said that only those tenderers who did not abide by the delivery conditions were disqualified. Furthermore, in reply to a specific question by the PCAB, the Director General (Contracts) said that if there was no specific condition in the tenders that specifically stated that in those instances where such information was not filled in a tender would be disqualified, such tenders would not be disqualified.

With regard to the reason why the recommended tenderer’s financial offer was uploaded on the Department of Contracts’ website, Mr Attard testified that there were certain instances where the bidder’s financial offer was so complicated, even to record it on the schedule that they had to scan the relevant document and upload it on their website. This was done for transparency’s sake and to avoid arbitrary interpretations.

At this point Ms Anna Debattista, Director GHPS was asked by the PCAB to take the stand.

Mr Stellini asked Ms Debattista to confirm whether, in the past, various Contracts Department’s tenders were awarded to them even though the delivery period and shelf life were different from those stipulated in the tender conditions. Under oath, the Director GHPS replied by stating that the Department had always adjudicated tenders within the parameters of the relative published tender conditions. It was explained that clauses with the words ‘may be considered’ or ‘reserves the right’ permitted them to request prospective tenderers to amend offers. She emphasised that such line of action was always taken after obtaining the Director General (Contracts)’s approval.

In reply to Mr Stellini’s statement that the procedure adopted for Departmental Tenders was different from that of the Contracts Department’s tenders, Ms Debattista said that any question was asked within the parameters of the tender conditions.

During Ms Debattista’s testimony Dr Valentino stated that the delivery period was not the decisive factor because there were other elements which were more important, such as, the price and the quality of the product. In reply to a specific question by the recommended tenderer’s lawyer, Ms Debattista said that, in their evaluation, they took into consideration (a) the Department’s requirements, (b) the tender conditions and, particularly, (c) the patients’ needs because these would suffer most if tenders were not awarded.

Mr Camilleri said that the fact that on 10 August 2009 they were requested to submit a certification from MSA gave one to understand that they were considering their offer. The PCAB commented that if such supporting documentation was not submitted with the tender as stipulated in the tender conditions, no Evaluation Board
had a right to ask for mandatory documentation that was missing or to amend offers after closing date of tender.

Referring to the question of submission of the said certificate, Ms Debattista clarified that GHPS wrote to Pemix Ltd in August 2009 because the file was received at GHPS for adjudication in July. Furthermore, she explained that they contacted the tenderer after the closing date because there was a clause in the tender which stated that they had a 6-week period from the closing date of the respective tender or from the date of request from the Director General of Contracts / Director GPS within which they could obtain certain information.

Mr Camilleri said that it was impossible for them to submit the requested certification within such a short period because the procedure was lengthy.

Dr Valentino pointed out that, according to the tender requirements, the product had to be in conformity with the tender specifications.

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 letters of objection’ dated 13.11.2009 (Case No. 181) and 17.11.2009 (Case No. 182) respectively, and also through their verbal submissions presented during the public hearing held on the 20.01.2010, had objected to the decision taken by the General Contracts Committee;

- having noted that the appellant tenderer (Case No. 181) was claiming that the procedure being followed by the GHPS in the award of contracts was different from that being adopted by the Contracts Department with the former being more lenient than the latter, wherein tenderers whose bid is not 100 % compliant with the specifications are immediately being disqualified;

- having also noted that the appellant Company (Case No. 182) claimed that, despite its manifested concern that their offer could be rendered as non-compliant, yet these were convinced by their foreign suppliers to extend the term of the delivery period by two weeks;

- having considered the fact that both appellants claimed that, in other similar instances, where the delivery periods as presented by various tenderers did not match those specified in the tender yet they were awarded the tender;

- having also thoroughly considered the content of Clause 11 paying particular attention to the phrases (a) “Goods received at the Government Health Procurement Services must not have their shelf-life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services”, (b) “When five-sixths of the total shelf-life is less than 2 years, the
tenderer must clearly state this on the tender documents. Products with a longer shelf-life will be given preference” and (c) “The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.”, especially within the context of the Director GHPS’s own admission wherein she stated that Charles de Giorgio Ltd’s offer was disqualified because they offered a shelf-life of a minimum of 18 months, which was half the shelf life of the product;

- having noted that, albeit Pemix Ltd’s offer was the cheapest, yet according to the Ms Debattista’s claim, the delivery period indicated in their offer was 12 – 14 weeks which was not as specified in the tender document, that is, 8 – 12 weeks;

- having also heard that, in spite of the fact that it was not an official reason for Pemix Ltd’s offer to be declined, yet, internally, the Evaluation Board’s report had submitted that the said tenderer’s offer also failed to state the status of the product, namely whether the latter was a medicine or food supplement, which rendered the appellant Company’s offer (Case No. 182) incomplete;

- having also considered the fact that, subsequent to the submission of their offer, and, following a specific request made by the GHPS to Pemix Ltd, the latter had sought a clarification from local authorities in order to provide pertinent clarification as to whether their product was to be classified as a medicine rather than a food supplement or vice versa, a declaration they eventually received from the Medicines Authority confirming that this product was non medicinal, ironically, on the same day they received the letter from the Contracts Department regarding the delivery period;

- having heard Ms Debattista claim that, in this particular tender, Annex II : Item Description stipulated that ... “DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores” ... “In instances when the delivery period of the recommended offer is in excess of that indicated above, GHPS reserves the right to request prospective tenderer to reduce delivery period. It is at the discretion of GHPS to accept deliveries in excess of 12 weeks”, giving particular attention to the phrases (a) DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores, (b) GHPS reserves the right to request prospective tenderer to reduce delivery period and (c) It is at the discretion of GHPS to accept deliveries in excess of 12 weeks;

- having heard Director GHPS explain that clauses with the words ‘may be considered’ or ‘reserves the right’ permitted the GHPS to request prospective tenderers to amend offers;

- having also noted Director GHPS state that the Department did not ask Pemix Ltd whether the product could be delivered within the period stipulated in the tender because they did not submit the necessary documentation regarding the classification of their product as a non medicinal product;

- having taken full cognizance of the claim made by GPHS’s representative with regard to the recommended tenderer’s offer;
having taken note of the Director GHPS’s reply wherein, when asked to state whether they were after a medicinal product or a food product, she replied that they wanted *Ispaghula Husk*, which was fibre preparation for constipation;

having reflected on the points raised by Dr Valentino and Mr Farrugia in defence of the recommended tenderer’s offer, as well as, the comments and arguments made by both the appellant Companies and the GHPS;

having taken particular note of the recommended tenderer’s reference to “*A complete and detailed quality control analysis report showing that the consignment/s being supplied comply with the B.P./B.P.C./E.P./U.S.P. standards (or a quality control analysis report acceptable to the Director of Public Health, if the former is not available) is to be submitted with each consignment*”, which, according to the said tenderer implied that, if the product was ‘medicinal’ it had to comply with the above *Pharmacopoeia* standards and if it was not medicinal, tenderers had to provide a certificate from MSA that it satisfied Public Health requirements;

having also heard comments relating to the content of a meeting held at the Director General (Contracts) wherein, whilst the appellant Company (Case Ref. 181) claimed those present were informed that if a tender document was not filled in completely and accurately (including delivery periods and shelf life) such offers would be considered as not compliant and, as a consequence, disqualified, yet the DG (Contracts), under oath, albeit confirming that a meeting was held in November or December 2009, yet also declared that this information meeting was not held (a) as a result of some new regulations being issued and (b) for ‘medicinal’ tenders only, but it was a general meeting wherein they explained to all interested parties how tender forms had to be filled in because it was being noticed that a number of bidders were not abiding by the tender conditions;

having reflected on Dr Valentino’s statement wherein he stated that the delivery period was not the decisive factor because there were other elements which were more important, such as, the price and the quality of the product;

having also noted Mr Camilleri’s claim that it was impossible for them to submit the requested certification within such a short period because the procedure was lengthy,

reached the following conclusions, namely:

1. The PCAB acknowledges that, whilst the conditions of the tender specifications reflect the requirements and parameters as desired by the contracting authority, yet these should be stated in a way as to render such specifications unequivocal. Furthermore, content should not be essentially contradictory with contracting authorities using terms like “shall”, “may” and so forth and then having Evaluation Boards ending up applying such instances with forced rigidity. This is tantamount to utter incongruence in ‘modus operandi’ as well as utter confusion amongst participating tenderers.
2. The PCAB is not convinced that the GHPS was fully in tune as to whether to follow previously acknowledged praxis in similar tenders or abide by stringent observance of conditions as observed in this particular instance. The PCAB cannot comprehend how, in one instance, a contracting authority claims that a particular document is considered mandatory, so much so that, eventually, the non-submission of same by a participating tenderer is enough reason for the latter to be excluded from the adjudication process, when, at the same time, prior to formally doing so, the same contracting authority goes as far as to request the same tenderer to submit a certification from MSA.

The Board reiterates the stand taken during the same hearing wherein it adversely commented against such ‘modus operandi’ placing major emphasis on the fact that, if such supporting documentation was not submitted with the tender as stipulated in the tender conditions, no Evaluation Board had a right to ask for mandatory documentation that was missing or to amend offers after closing date of tender. It is the PCAB’s opinion that all this reflects that the GHPS was confused as to which adjudication methodology to follow, namely, the one said to have been observed previously which used to be more flexible or the one being observed now which ‘seems’ to be more stringent giving leeway solely to the contracting authority depending on its own circumstances, such as, not previously anticipated depletion or slow movement of stock levels.

3. The PCAB finds the content of Clause 11 as, somewhat, contradictory. Tender specifications should clearly reflect what is acceptable or not, but not evidence contradictory phrases such as “must not have their shelf-life expired by more than one-sixth of their total declared shelf-life” ... followed by “when five-sixths of the total shelf-life is less than 2 years, the tenderer must clearly state this on the tender documents” ... and, this duly followed by “The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions”. In the PCAB’s opinion, such phrases could create confusion as to whether the application of parameters are to be abided by 100% by a participating tenderer and, possibly, face exclusion should the latter refrain from doing so, whilst the contracting authority could, possibly, become flexible with its own declared parameters in case where it suits itself, e.g. sudden depletion of stock levels.

4. Regardless of (3) above, the PCAB cannot agree with both appellants’ arbitrary way of deciding when and how one should deliver or submit formal supporting documentation. Praxis should not preclude observance of tender specifications and conditions.

5. The PCAB, whilst agreeing in principle with appellant Company (Case Ref. No. 182) that the taxpayer should not pay unduly for something which one could buy cheaper, yet also acknowledges that the lowest price principle in public procurement is not to be taken as the only guidance, e.g. in similar circumstances, the most economically advantageous tender principle often applies.

6. The PCAB considers the fact that, albeit not officially stated as a non-compliant issue, yet the fact that an Evaluation Board, during the adjudication process, could not trace whether the product being offered by appellant Company (Pemix
Ltd) was a medicine or food supplement, as pivotal within the context of the tender specifications in question. The non-submission of the said document is considered by this Board as a clear oversight by appellant Company.

7. This Board is of the opinion that one could say that, in this instance, the GHPS’s Evaluation Board’s ‘modus operandi’ left to be desired and, through its inconsistent approach, namely confusing (a) praxis resorted to until recently with (b) rigid observation of tender specifications as demanded by the Contracts Department, has given rise to an anomalous scenario. Yet, this Board has always maintained that tenders should be governed by tender documents’ specifications and not praxis. As a result, considering that during the hearing nothing convinced the PCAB against the recommended tenderer’s suitability to be awarded the tender, this Board finds no reason to overturn the Evaluation Board’s award recommendation.

As a consequence of (1) to (7) above, this Board:

1. cannot uphold the objection (Case No. 181) as lodged by appellants

2. cannot uphold the objection (Case No. 182) as lodged by appellants

Albeit this Board finds against appellants, yet it is also fully cognizant of the fact that both appellants could have been somewhat misguided as to which ‘modus operandi’ one should follow even though this Board acknowledges only one specific ‘modus operandi’, namely that based on observation of tender specifications and not praxis. As a consequence, in view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit paid by both Messrs Charles de Giorgio Ltd (Case No. 181) and Messrs Pemix Ltd (Case No. 182) should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

9 February 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 183

Advert No. CT/WSC/T/22/99; WSC/1119/2008

Tender for the Supply of DN 15 Class 2 Meters for Potable Cold Water to Water Services Corporation

The closing date for this call for tenders which, was for a contracted estimated value of € 6,270,000 was 26.05.2009.

Six (6) different tenderers submitted their offers.

On 29.10.2009 Messrs Itron France (previously Actaris SAS) filed an objection against the decision by the Contracts Department after being informed by the latter that their offer was disqualified for being found technically non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 27.01.2010 to discuss this objection.

Present for the hearing were:

**Itron France (previously Actaris SAS)**
- Mr Mathias Martin General Manager
- Ms Muriel Dressen Legal Counsel
- Mr Corrado Casorzo Product Manager
- Mr Amirouche Bouhkari Director of Sales Mediterranean

**Attard Farm Supplies Ltd**
- Mr Joseph P Attard Managing Director
- Mr Ricardo Guerra de Lanca Cordeiro

**Water Services Corporation (WSC)**
- Ing Mark Perez

**Adjudication Board**
- Ing Stephen Galea St John Chairman
- Mr Anthony Camilleri Board Secretary
- Ing Ronald Pace Evaluator
- Ing Saviour Cini Evaluator

**Department of Contracts**
- Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection. The parties agreed that the hearing will be held in English so that the foreigners who attended the hearing would be able to follow the proceedings.

Mr Mathias Martin, General Manager of Itron France, the appellant Company, explained that the Department of Contracts had informed them that their bid was considered technically non-compliant because the technical specifications of the water meter offered by Itron had 

\[ Q_3 = 2.5 \text{ cubic metres/hr and } R = 400 \text{ or } Q_3 = 1.6 \text{ cubic metre/hr and } R = 250 \]

when Clause 2.1 of the tender specified that ... the meter shall have a Permanent Flow Rate \((Q_3) = 1.0 \text{ cubic metre per hr} \) ... and, thus, it followed that the meter offered was not up to the requested tender technical specifications.

Mr Martin added that, on receipt of this explanation, his firm submitted full technical documentation to the Department of Contracts which demonstrated that the meter offered by his firm in fact had a permanent flow rate of 1 cubic metre per hr and since that was the only reason for disqualification it was reasonable for one to expect to be reinstated in the tendering process.

Mr Martin further explained that in their original submission they had furnished a metrological certificate, which was internationally referred to as the ‘MID’, which showed that the meter could function permanently at 1 cubic metre per hr.

Eng. Stephen Galea St John, Chairman of the Evaluation Board, quoted the following from clause 2.1 of the tender specifications and conditions:

“The meter shall have at least OIML R49-1:2006 Class ‘2’ operational performance. The meter shall have a Permanent Flow Rate \((Q_3) = 1.0 \text{m}^3/\text{hr.} \) Moreover WSC is particularly interested in meters having a very low \(Q_1\), and also a very low starting flow. In fact, meters having a starting flow greater than 1.2 litres / hour and a \(Q_3/Q_1\) ratio less than 250 shall not be considered”

Mr Galea St John added that, in the original submission made by Itron France, it was indicated that the meter had a permanent flow rate \((Q_3)\) of 1.6 or 2.5 cubic meters per hour and that, for that reason only, the offer could not be considered compliant. He explained that:

(i) since consumers in Malta stored water in a roof tank, the WSC was interested in a minimum flow rate \((Q_1)\) because such meters were accurate and

(ii) to achieve that level of accuracy, WSC specified a particular permanent flow rate of \(Q_3=1\) wherein it made it clear that the WSC was not interested in higher flows as that would have meant problems at lower flows.

Mr Martin stated that, whereas the contracting authority specified the permanent flow rate, it did not give the minimum flow rate. He explained that, in terms of metrology, the European standard was the MID certificate and in that certificate there was the permanent flow rate \((Q_3)\) and the minimum flow rate \((Q_1)\) and that if one had a \(Q_3=1.6 \text{ cubic metre per hr or 2.5 cubic metres per hr} \) then it followed that the meter was capable to work at 1 cubic metre per hour as requested in the tender specifications. To illustrate his point Mr Martin explained that it was like having a
car which could be driven at 100km/h and which therefore could also be driven at 50 km/h.

Regarding the minimum flow rate, Mr Martin remarked that his firm had offered a meter which had a minimum flow rate (Q1) of 6.25 litres per hr and, as a result, it was compliant with the technical specifications because in Clarification 1, dated 30th April 2009, the WSC had indicated a permanent flow rate (Q3) of 1.0 cubic metre /h but in Reply 2 it was indicated that “... meters having a Q3/Q1 ratio of 250 or more shall be preferred...” which represented a minimum flow rate of 4 litres/hr but which was not obligatory but “preferred”. Mr Martin further submitted that in clause 2.1 it was indicated that “… meters having a start flow greater that 1.2 litres/hr shall not be considered...” and claimed that the meter presented by Itron France had a start flow below 1.2 litres / hr and, as a consequence, it met that obligatory condition too.

Mr Galea St John, explained that the WSC wanted a permanent flow rate of Q3=1 cubic metre/hr and that there was only one permanent flow rate, no more and no less. He added that a higher permanent flow rate could jeopardise the minimum flow rate which was defined as the ratio between the permanent flow rate and the minimum flow rate or PR value. Mr Galea St John stated that it was true that Itron France submitted a meter having a permanent flow rate of 1.6 cubic metres/hr or Q3=1.6 with a ratio of 250 and which would equate to Q1=6.25 which, in turn, meant better performance and more accurate minimum flow.

Mr Galea St John remarked that, at the objection stage, Itron France had submitted some declarations, including a graph, which were very useful, so much so that had that graph been submitted with the original submission the Evaluation Board would have considered the offer because it, actually, pointed out that although the meter had a Q3 which was greater than 1 cubic metre/hr it actually had a ratio (between the Q3 and the Q1) that could go down to a figure that was acceptable to the WSC.

The Chairman PCAB remarked that the admission that the explanation given by Itron France rendered its bid admissible seemed prima facie, an indication that the original submission was technically compliant after all.

Mr Galea St John explained that, in the absence of the document submitted at the objection stage, the Evaluation Board could not safely assume that the meter complied with the given permanent flow rate.

Mr Martin intervened to remark that the contracting authority specified the minimum flow rate at 4 lites/hr in the tender document but then in the clarification (Reply 2) stated that it would ‘prefer’ that rate thus not making it compulsory and hence that was not a criterion to be eliminated on. He added that that amounted to a change in the criteria. Mr Martin claimed that the MID certificate submitted by his firm in respect of its product indicated a minimum flow rate of 6.25 litres and a permanent flow rate of 1.6 cubic metres/hr which meant that the meter could have a permanent flow rate of 1 cubic metre/hr and a minimum flow rate of 6.25 litres and so it was compliant with tender specifications.

The Chairman PCAB remarked that it appeared to him that the documentation submitted by Itron France at objection stage, i.e. after the closing date of tender, made
reference to established standards or recognised certificates which did not amount to clarifications as such.

Mr Galea St John explained that MID specified a range of Q3s or permanent flow rates, ie 1.0, 1.6 and 2.5, but Itron France submitted only the 1.6 and the 2.5 while omitting the 1.0.

Mr. Galea St John was asked by the PCAB whether at this stage the appellant company were proposing any changes to the meter as originally submitted in their tender or whether they were merely submitting explanations in the form of clarifications to which the witness replied that no changes were being contemplated to the meter as originally offered.

Mr Martin opined that, since no meter producer could meet the 1.0 cubic metres/hr and the 4 litres/hr requirement, then WSC changed the specifications in the clarification by inserting the term ‘preferred’ and thus did not insist on the specifications which originally specified Q3/Q1 ratio.

At this point Mr Martin queried whether the compliant tenderer had submitted an MID certificate with his product indicating Q3=1 cubic metre/hr and Q1=4 litre/hr or if it simply submitted a declaration from the manufacturer.

Eng. Ronald Pace, member of the Evaluation Board, referred to the tender declaration of conformity and added that, besides the permanent flow rate (Q3), the contracting authority was very much interested in the minimum flow rate (Q1) because of the local plumbing system. The Chairman PCAB intervened and made a general remark in the sense that contracting authorities should not rest solely on declarations in the event that something went wrong but in the first place one had to seek comfort by asking for technical standards - possibly internationally recognised - to corroborate declarations made.

Mr Galea St John declared that the meter presented by the compliant tenderer did not have an MID certificate.

Mr Joseph Attard, Managing Director of AFS Ltd, remarked that

(i) although his supplier could provide meters with a Q3 of 1.0, 1.6 and 2.5 he submitted a meter with a Q3=1.0 as requested

(ii) the clarification did not alter the specifications with regard to Q3 but only clarified Q1 and

(iii) the meter had a chamber inside and the smaller the chamber the more accurate it was at low flows and that was why WSC was after Q3=1.0 and not 1.6 or 2.5.

Mr Attard acknowledged that his firm had been supplying meters to the WSC in recent years but pointed out that Actaris, which was taken over by Itron France, had also supplied meters to the WSC for a number of years and so both suppliers were known to the WSC, the contracting authority.
Mr Ricardo Guerra de Lanca Cordeiro, also acting on behalf of AFS Ltd, agreed with Mr Martin that the durability of a product with a Q3=1.6 would cover the durability of a product with a Q3=1.0 but added that, as indicated by MID, the Q3 did not influence only the durability of the product but it also had a bearing on the accuracy of the product. He also agreed that the current standard in Europe was the MID, which came into force in 2006, but added that the certificates already issued by British Standards were still valid to bill water up to 2016. Mr Guerra de Lanca Cordeiro remarked that, after being manufactured, meters had to undergo certain tests and, in the case of Itron France, the tests were carried out on a meter with Q3=1.6. He argued that, if there was an approval for a product with Q3=2.5, then why was it necessary to have an approval for a meter with Q3=1.6? He proceeded by bringing forth the same argument in the case of a meter with Q3=1.

Mr Guerra de Lanca Cordeiro observed that the WSC had issued previous tenders for meters with Q3=1.0 which had attracted a number of compliant tenderers whereas in this case only one tenderer complied with Q3=1.

Mr Galea St John reiterated that with the information submitted, following the lodgement of the objection, he had no problem to consider further the product submitted by Itron France. However, on the information initially submitted, he would have had to make certain dangerous assumptions with which he would have felt uncomfortable. He declared that the meter presented by appellant Company remained the same throughout the whole process and that only additional information was supplied after the closing date of tender.

Mr Martin maintained that the clarifications submitted at a later stage did not alter the MID certificate provided in the original submission. Mr Martin agreed that the British Standard certificate was still valid to bill water but noted that the one provided by AFS Ltd showed that the meter had a Q1 of 7.5 litres / hr and a Q3 of 1.0 cubic metres/hr which rendered the Itron France meter more compliant. Mr Martin concluded that the metrological performance of the meter had to be permanently marked on it and that, in the case of the compliant meter, the markings would read Q3=1.0 and Q1=7.5 and not Q1=4.0 as per declaration.

Mr Galea St John, under oath, gave the following evidence:

- over the years the WSC has been testing various types of meters and that the brands presented by the appellant Company and by the compliant tenderer had been found to perform well; and

- in this case, the compliant tenderer had submitted all the information required in the original submission whereas the appellant Company did not give all the information in the initial submission but submitted additional information at objection stage.

Referring to Clause 1.1, Mr Martin alleged that the meter presented by AFS Ltd was not compliant and called for the rejection of the relative bid whereas, on the other hand, Mr Guerra de Lanca Cordeiro argued that there was no conflict with the standards mentioned at clause 1.1.
Mr Marco Perez, an engineer representing the WSC, assured the PCAB that the tender specifications were designed to attract as many bidders as possible and that it was surprising that there was only one compliant tenderer. Mr Perez remarked that the Evaluation Board was justified in discarding Itron France’s offer on the information initially submitted, adding that other aspects had to be taken into account, such as the endurance test – which did not form part of the objection – because the results of the endurance test on a meter with a Q3=1.6 could not be transposed to a meter with a Q3=1.0.

Mr Martin concluded that during the meeting he had been making reference only to official documents, such as the MID certificate issued by a third party and recognised throughout the EU.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 05.11.2009 and also through their verbal submissions presented during the public hearing held on the 27.01.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the fact that the appellant Company’s bid was considered technically non-compliant because the technical specifications of the water meter offered by Itron had Q3=2.5 cubic metres/hr and R=400 or Q3=1.6 cubic metre/hr and R=250 when Clause 2.1 of the tender specified that ... the meter shall have a Permanent Flow Rate (Q3) = 1.0 cubic metre per hr ... and, thus, it followed that the meter offered was considered by the Evaluation Board not up to the requested tender technical specifications;

- having also taken note of the fact that the appellant Company argued that (a) the meter offered by Itron France, in fact, had a permanent flow rate of 1 cubic metre per hr, (b) in their original submission they had furnished a metrological certificate, which was internationally referred to as the ‘MID’, which showed that the meter could function permanently at 1 cubic metre per hr, (c) whereas the contracting authority specified the permanent flow rate, it did not give the minimum flow rate, (d) in terms of metrology, the European standard was the MID certificate and in that certificate there was the permanent flow rate (Q3) and the minimum flow rate (Q1) and that if one had a Q3=1.6 cubic metre per hr or 2.5 cubic metres per hr then it followed that the meter was capable to work at 1 cubic metre per hour as requested in the tender specifications, (e) in Clarification 1, dated 30th April 2009, the WSC had indicated a permanent flow rate (Q3) of 1.0 cubic metre /h but in Reply 2 it was indicated that “... meters having a Q3/Q1 ratio of 250 or more shall be preferred....” which represented a minimum flow rate of 4 litres/hr but which was not obligatory but “preferred”, (f) in clause 2.1 it was indicated that “... meters having a start flow greater that 1.2 litres/hr shall not be considered...” and claimed that the meter presented by Itron France had a start flow below 1.2 litres / hr and, as a consequence, it met that obligatory condition too and (g) the clarifications submitted at a later stage did not alter the MID certificate provided in the original submission;
having heard the Chairman of the Evaluation Board state that (a) in their original submission the appellant Company had indicated that the meter had a permanent flow rate (Q3) of 1.6 or 2.5 cubic meters per hour and that (b) for the reason mentioned in (a) only, the offer could not be considered compliant and that the WSC was not interested in higher flows as that would have meant problems at lower flows, (c) the WSC wanted a permanent flow rate of Q3=1 cubic metre/hr and that there was only one permanent flow rate, no more and no less, (d) MID specified a range of Q3s or permanent flow rates, ie 1.0, 1.6 and 2.5, but Itron France submitted only the 1.6 and the 2.5 while omitting the 1.0 and (e) over the years, the WSC has been testing various types of meters and that the brands presented by the appellant Company and by the compliant tenderer had been found to perform well;

having also heard Mr Galea Saint John state that it was true that Itron France submitted a meter having a permanent flow rate of 1.6 cubic metres/hr or Q3=1.6 with a ratio of 250 and which would equate to Q1=6.25 which, in turn, meant better performance and more accurate minimum flow;

having also heard the Chairman of the Evaluation Board remark that, at the objection stage, Itron France had submitted some declarations, including a graph, which were very useful, so much so that had that graph been submitted with the original submission the Evaluation Board would have considered the offer because it pointed out that although the meter had a Q3 which was greater than 1 cubic metre/hr, actually it had a ratio (between the Q3 and the Q1) that could go down to a figure that was acceptable to the WSC;

having deliberated on the fact that, through the Evaluation Board’s Chairman’s own admission, in the absence of the document submitted at the objection stage, the Evaluation Board could not safely assume that the meter complied with the given permanent flow rate;

having taken cognizance of Mr Martin’s query as to whether the compliant tenderer had submitted an MID certificate with its product indicating Q3=1 cubic metre/hr and Q1=4 litre/hr or if it had simply submitted a declaration from the manufacturer;

having heard Mr Galea St John declare that the meter presented by the compliant tenderer did not have an MID certificate;

having considered Mr Attard’s (AFS Ltd) remarks, declarations and observations;

having also deliberated on Mr Guerra de Lanca Cordiero’s intervention during the public hearing;

having reflected on (a) the appellant Company’s representative’s allegation that the meter presented by AFS Ltd was not compliant, calling for the rejection of the relative bid;
• having also reflected on a doubt cast as a result of statements made during the hearing as regards the possibility that the tender submitted by Messrs AFS Ltd might have not included all the certificates that were requested as mandatory in the tender specifications;

• having also taken note of Ing Perez’s remark wherein he assured the PCAB that the tender specifications were designed to attract as many bidders as possible and that it was surprising that there was only one compliant tenderer

reached the following conclusions, namely:

1. The PCAB feels that, in the light of the admission made by the Chairman of the Evaluation Board that the explanation given by Itron France subsequent to the submission of its offer rendered the said Company’s bid admissible, all seemed to be, *prima facie*, an indication that the original submission was not technically non-compliant after all.

This Board cannot ignore the fact that, in his concluding remarks during the hearing, the Chairman of the Evaluation Board

   a. reiterated that, as a result of the information submitted to the said Board, by the now the appellant Company, following the lodgement of the objection, he, personally, had no problem to consider further the product submitted by Itron France

   b. declared that the meter presented by the appellant Company remained the same throughout the whole process and that only additional information was supplied after the closing date of tender

This Board considers that (a) and (b) mentioned in the previous paragraph render the conclusions reached by the Evaluation Board as having been reached in a considerable hasty manner.

2. The PCAB opines that the fact that (i) the clarifications submitted by the appellants at a later stage did not alter the *MID* certificate - an internationally approved standard - provided in the original submission, is proof enough that the appellants’ intentions were the same throughout the tendering / adjudication process *and* (ii) the Chairman of the Evaluation Board claimed that he has no objection with stating that, following receipt of these supporting documents, he would have had no qualms in accepting the appellants’ offer, provides this Board with sufficient proof that the appellant Company’s claim was justified.

3. The PCAB feels that the appellant Company’s representative was more convincing in his argument when, during the hearing, the issue of submission of the *MID* certificate arose.

4. The PCAB feels that, for fairness sake, the Evaluation Board should re-examine the tender as originally submitted by Messrs AFS Ltd in order to
establish whether the certificates which were listed as mandatory in the tender specifications were actually submitted by the said tenderer.

As a consequence of (1) to (4) above this Board finds in favour of the appellant Company and decides that the appellant Company’s offer should be reintegrated in the process and analysed further.

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 reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

11 February 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 184

Advert No. CT A/037/2009; CT/2036/2009
Tender for Construction Works in conjunction with the Embellishment of Promenade and Creation of a Panoramic Coastal Walkway, St Paul’s Bay

The closing date for this call for tenders which was for a contracted estimated value of €1,593,000 was 20.10.2009

Four (4) different tenderers submitted their offers.

On 30.11.2009 Messrs Bonnici Bros Ltd filed an objection against the decision taken by the Contracts Department to disqualify its offer on being found technically non-compliant.

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 12.01.2010 to discuss this objection.

Present for the hearing were:

Messrs Bonnici Bros. Ltd
Dr John L. Gauci Legal Representative
Mr Emanuel Bonnici Representative
Mr David Bonnici Architect/engineer

paveCON Joint Venture
Dr Kenneth Grima Legal Representative
Mr Paul Magro Representative
Ms Sandra Magro Architect
Ms Itiana Schembri Representative
Mr Anton Schembri Representative

Malta Tourism Authority (MTA)
Dr Frank Testa Legal Representative

Adjudication Board
Mr Kevin Fsadni Architect and Member
Mr Francis Albani Member

Department of Contracts
Mr Francis Attard Director General (Contracts)

After the Chairman’s brief introduction the appellant was invited to explain the motives of the objection.
Dr John Gauci, representing Messrs Bonnici Bros. Ltd, the appellant Company, explained that his client’s objection concerned its exclusion from the tendering process by the Contracts Department for being not technically compliant.

He then proceeded to quote from Department of Contracts’ letter dated 25th November 2009:

“Although having the technical capacity and the quality to undertake the works, you have decided not to accept the proposed design for the cantilevered balcony and, on your own admission (page 551), you proposed a variant solution (an alternative).”

Dr Gauci contended that Bonnici Bros Ltd did not propose any variant solution because it was aware that such alternatives were not allowed. He then quoted article 71 (1) of the tender document, viz:

“The detailing and method of erection of the projecting balcony indicated in the drawings shall be respected by the contractor. All details and drawings are to be submitted with the tender – pages 881 to 890 of the tender submission referred to his client’s drawings.”

Dr Gauci maintained that one could not depart from certain aspects of the tender, e.g. with regard to the loads that the balcony should sustain, as those would amount to variants and went on to declare that the design submitted by his client respected all the load factors.

Dr Gauci then referred also to Clarification No. 3 dated 12th October 2009 which, inter alia, stated that:

“(6) … It was highlighted that although the overall appearance of the Panoramic Coastal Walkway should be as shown on the provided drawings, the dimensions provided are not binding. However, prospective bidders should provide a complete erection methodology of this Panoramic Coastal Walkway including a structural design from a structural engineer. No variant solutions are allowed.”

Dr Gauci argued that a lot of aspects of the tender were left up to the bidders to address in an arbitrary manner so long as they respected the overall appearance. He then referred back to article 71.1 which stated that:

“The design, dimensions, sections, materials and components specified in the drawings shall be respected.”

Dr Gauci remarked that in his client’s submission it was stated that:

“… This is being done keeping the general appearance and functionality of the structure as proposed in the tender document.”

Dr Gauci’s interpretation of ‘variant solutions’ that were not allowed as per article 71.1 concerned the loads and the wind force that the structure should sustain, which factors were being catered for in the design submitted by his client.
Mr Kevin Fsadni an architect by profession, apart from being a member of the Evaluation Board, explained that the contracting authority received two administratively compliant bids including that of the appellant which was found technically valid but was found non-compliant with regard to the projecting balcony. He referred to article 71.1 - already quoted above - and observed that tenderers were required to submit the details of how this structure was to be erected. Mr Fsadni remarked that the contracting authority had furnished the design with the tender dossier and requested the bidders to submit the detailing of that design and to confirm things through calculations. Mr Fsadni then quoted from the appellant Company’s submission:

“Upon reviewing and studying the designs of the cantilevered balcony as supplied with the tender document, it was decided that an alternative approach would be taken in our proposal for a design of this structure. This is being done keeping the general appearance and functionality of the structure as proposed in the tender document. All finishing; including railing, wood decking and seating will be kept as similar as possible to those in the tender document drawings in order to keep with the overall design of the works. As part of this document we are attaching preliminary sketches of our design, showing elements to be used, method of construction and assembly procedure.”

Mr Fsadni remarked that the design involved the structure, the materials, the sections and so forth. He added that the design in the tender document depicted steel sections projecting outwards whereas the design submitted by the appellants referred to steel sections filled with concrete which altered the very nature of the sections.

Dr Frank Testa, MTA’s legal representative intervened to explain that article 71.1 clearly stated that “the design dimensions, sections, materials and components specified in the drawings shall be respected”, whereas, in its tender submission, the appellant Company stated that “it was decided that an alternative approach would be taken in” its “proposal for a design of this structure”. He contended that the bidders were requested to provide the detailing but not the design.

Eng. David Bonnici, also representing the appellant Company, remarked that in the appellant’s submission (page 551) it was stated that “...This is being done keeping the general appearance and functionality of the structure as proposed.....and ... to keep with the overall design of the works. Eng. Bonnici maintained that Bonnici Bros Ltd had submitted what was requested in the tender and claimed that a structure could be erected in various ways and that was the reason why the detailing was left in the hands on the bidders.

Mr Fsadni informed the PCAB that, according to the architects of the contracting authority, the steel sections were totally different from those provided in the tender dossier because the appellant Company proposed a corbel (Definition: ... a stone or timber projection from a wall to support something) made of a steel profile filled in with concrete whereas the tender requested steel sections. He added that this altered also the overall appearance of the structure.
Dr Gauci kept on insisting that, according to the Clarification No. 3, the detailing and the dimensions were left up to the bidder and, at this point, the appellants’ legal advisor queried if and where the tenderer was specifically asked not to alter the corbel or certain steel sections.

Mr Fsadni explained that the contracting authority was going to tolerate certain departures from the dimensions given in the tender dossier provided that the overall design was respected. He argued that it would have been a different scenario had the appellants confirmed the design provided by the contacting authority and added its option as an alternative. However, Mr Fsadni continued by stating that that was not the case since the appellant Company only proposed its alternative which represented a clear departure from the requested design.

At this point Mr Fsadni invited the PCAB to visually compare the design provided with the tender document with the design submitted by the appellant Company. The PCAB noted that what the appellants were proposing differed from what the contracting authority was requesting.

Dr Gauci referred to sub-articles 71.3, 71.4 and 71.5 which indicated that the calculations and drawings were to be submitted by the contractor to the supervisor, that is, after the award of the tender. Dr Gauci explained that his client’s proposal offered an improved product vis-à-vis that presented in the tender dossier as stated in the submission (para. 2 of pg 551) – “This design has been adopted in order to improve deflection, frequency response (due to the large cantilever) and corrosion design.”

Dr Testa did not contest the argument as to whether the appellant Company’s proposal could have been superior to that provided by the contracting authority but reiterated that the fact remained that the proposed design was different from the one requested.

Dr Kenneth Grima, representing paveCOM Joint Venture, an interested party, remarked that an alternative and a variant were one and the same thing and that the appellant Company took it upon itself to propose its own design, irrespective of what the contracting authority requested in the tender dossier.

Dr Grima contended that (i) an alternative design was not permitted according to the tender conditions and (ii) the appellant Company’s proposal involved the use of iron and concrete which was definitely much cheaper than the design requested by the contracting authority which consisted of steel sections only and he, therefore, argued that should the appellants’ alternative design be accepted, then a bidder who faithfully provided what the tender dossier requested would be penalised as its offer would certainly be more expensive than the appellants’. Dr Grima reminded the PCAB that the tenderer was not at liberty to change the materials. He conceded that the contracting authority would have settled for something quasi-similar with limited variations but it would certainly not settle for an alternative design. Dr Grima remarked that the alternative proposed by the appellant Company could be cheaper and just as good or even better but one could not allow the goal posts to be shifted after the closing date of the tender as that would be detrimental to the other bidders.

Dr Gauci rebutted that
(i) the financial offers were not yet known

(ii) the leeway granted to the bidders had not been quantified in the tender document but stressed that the detailing was left entirely up to the bidders so long as the structure would withstand the loads indicated in the tender

and

(iii) what his client proposed did not amount to an alternative

Mr Fsadni explained that the requested detailing required the bidder to confirm the sections and their mounting together according to the design specifications given and then the contracting authority would examine that detailing with a certain degree of tolerance. He added that what the appellant Company proposed did not involve detailing but it amounted to a change in sections and materials which, in turn, affected the design itself.

On his part Dr Gauci remarked that the tender document specified at Article 71 that certain details were left up to the bidder at tendering stage whereas, other aspects, such as calculations, were left up to the contractor, in consultation with the supervisor, after the award of the tender. He contended that what his client submitted was in line with the tender specifications and with the subsequent clarifications and that the overall appearance of the structure had been respected claiming that only the approach was changed and not the design. Dr Gauci suggested that, perhaps, the tender document should have specified the extent up to which changes would be permitted.

Dr Testa argued that the tender dossier was quite clear in the sense that the details were left up to the bidder provided that the design, materials, sections, dimensions and components shall be respected and that no variations were allowed. He stressed that the parameters were there and that the appellants chose to go beyond the established limits.

Dr Grima reiterated that the appellants did not change the details but the design and, once again, quoted what the appellant Company had stated in its submissions, namely:

“Upon reviewing and studying the designs of the cantilevered balcony as supplied with the tender document, it was decided that an alternative approach would be taken in our proposal for a design of the structure.”

He added that the appellants changed the materials, the sections and, consequently, the design and, in so doing, would come up with a cheaper product.

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 ‘reasoned letter of objection’ dated 30.11.2009 and also through their verbal submissions presented during the public hearing held on the 12.02.2010, had objected to the decision taken by the General Contracts Committee;
having taken note of the appellants’ legal representative’s claims that (a) despite what the Director of Contracts had stated in his letter dated 25th November 2009, his clients, Bonnici Bros Ltd did not propose any variant solution because it was aware that such alternatives were not allowed, (b) one could not depart from certain aspects of the tender, e.g. with regard to the loads that the balcony should sustain, as those would amount to variants, (c) a lot of aspects of the tender were left up to the bidders to address in an arbitrary manner so long as they respected the overall appearance, (d) whilst the tender document stated in 71.1 that “The design, dimensions, sections, materials and components specified in the drawings shall be respected” his client’s submission stated that “... This is being done keeping the general appearance and functionality of the structure as proposed in the tender document.”, (e) nowhere were the tenderers specifically asked not to alter the corbel or certain steel sections, (f) his client’s proposal offered an improved product vis-à-vis that presented in the tender dossier as stated in the submission and (g) only the approach was changed and not the design

having also taken note of Mr Fsadni’s - an architect by profession and a member of the Evaluation Board - intervention wherein, inter alia, he (a) stated that whilst the appellant’s bid was found technically valid, yet was found non-compliant with regard to the projecting balcony in view of the fact that, whereas the tender document depicted steel sections projecting outwards, the design submitted by the appellants referred to steel sections filled with concrete which altered the very nature of the sections, (b) contended that the contracting authority was going to tolerate certain departures from the dimensions given in the tender dossier provided that the overall design was respected, (c) claimed that, according to the architects of the contracting authority, the steel sections were totally different from those provided in the tender dossier because the appellant Company proposed a corbel - a stone or timber projection from a wall to support something - made of a steel profile filled in with concrete whereas the tender requested steel sections, an issue which also altered the overall appearance of the structure and (d) argued that the requested detailing required the bidder to confirm the sections and their mounting together according to the design specifications given and then the contracting authority would examine that detailing with a certain degree of tolerance, adding that what the appellant Company proposed did not involve detailing but it amounted to a change in sections and materials which, in turn, affected the design itself;

having, during the hearing, the members of this Board personally examined and compared the design as included in the tender document with the design as submitted by the appellant Company;

having heard Dr Testa, MTA’s legal representative, (a) contend that the bidders were requested to provide the detailing but not the design, (b) argue that he did not contest whether the appellant Company’s proposal could have been superior to that provided by the contracting authority whilst reiterating that the fact remained that the proposed design was different from the one requested and (c) argue that the tender dossier was quite clear in the sense that the details were left up to the bidder provided that the design, materials, sections, dimensions and
components shall be respected and that no variations were allowed placing emphasis on the fact that the parameters were there and that the appellants chose to go beyond the established limits;

• having also heard Dr Grima, legal representative of an interested party, paveCOM Joint Venture, contend that (a) an alternative design was not permitted according to the tender conditions and (b) the appellant Company’s proposal involved the use of iron and concrete which was definitely much cheaper than the design requested by the contracting authority which only consisted of steel sections;

reached the following conclusions, namely:

1. The PCAB notes that the appellant Company only proposed its alternative which represented a clear departure from the requested design;

2. The PCAB agrees with the argument that the issue could have been different had the appellants confirmed the design provided by the contacting authority adding its option as an alternative;

3. The PCAB acknowledges that, upon inspection during the said hearing of designs as requested by contracting authority compared with those submitted by the appellant Company, the PCAB noted that what the appellants were proposing differed from what the contracting authority was requesting, in that steel sections were proposed to be replaced by iron casings filled with concrete;

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

11 March 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 185

M- 454/2009

Tender for the Supply and Maintenance of an Uninterrupted Power Supply (UPS) System

The closing date for this call for tenders, which was published on 03.06.2009 for a contracted estimated value of € 85,000 was 14.07.2009

Six (6) different tenderers submitted their offers.

On 21.10.2009 Messrs Constant Power Solutions filed an objection against the Department of Contracts’ decision to award the above-mentioned tender to Messrs Lexcorp 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 12.02.2010 to discuss this objection.

Constant Power Solutions
Mr Alexander German Representative
Dr Stephen Thake Legal Representative

Lexcorp Ltd
Mr George Gatt Managing Director

Malta Information Technology Agency (MITA)
Dr Pauline Debono Legal Representative

Adjudication Board
Mr Wayne Valentine Chairman
Ms Rosalyn Muscat Member
Eng. Martin Pizzuto Member

Department of Contracts
Mr Francis Attard Director General (Contracts)

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

Dr Stephen Thake, legal advisor to Constant Power Solutions, the appellant Company, explained that his client felt discriminated against in the way points were awarded, as had been indicated in the reasoned letter of objection dated 26th October 2009, especially with regard to the following two aspects, namely that his client

(i) did not get points for providing extra goods/equipment, when it did provide a sensor and batteries; and
(ii) lost points with regard to the set up of its business organisation

Dr Thake argued that, albeit his client was the only full-time employee, he was supported by two part-time employees who have been rendering him service for the past ten years. Dr Thake remarked that the size of the organisation did not necessarily matter in this case because larger organisations of, say, 40 employees, had a larger number of clients which used up all their resources, if not overstretched them too, whereas a small set up with a few clients meant that the owner could give his personal attention to all of his clients’ needs. The appellant Company’s legal advisor submitted that his client, with the support of two part-time employees, was in a position to offer the service required in the tender.

Dr Pauline Debono, representing MITA, observed that:

(a) the appellant was objecting on 7 out of 51 criteria that the tender was adjudicated upon. As a consequence, she urged the PCAB to look at the overall picture of the adjudication process, including the fact that six bidders had participated in this call, so as to avoid having a distorted picture of the process; and

(b) the PCAB could not get into the whole adjudication process with the expertise, know-how and detail that that entailed, that is, the PCAB could not substitute the adjudication board but it could only consider whether (1) all the bidders participated on the same level playing field and (2) the process was conducted in a fair and transparent manner. Yet, proceeded Dr Debono, the PCAB could not go into how the points were awarded to each item since it was not in a position to appreciate all the details, technical or otherwise, of the entire process.

The Chairman PCAB intervened and begged to differ on certain aspects raised by Dr Debono at (b) above.

Dr Debono remarked that the evaluation criteria were published in the call for tenders and that the tender was being evaluated on the lines of the ‘Most Economically Advantageous Tender’ (MEAT) where the price element was allocated 45% of the points and the other 55% were allocated to the capacity of the tenderer to provide the level of service requested and so forth. Dr Debono stressed that MITA requested preventive maintenance on a 24x7 basis and that urgent repairs had to be solved within 8 hours. She referred to page 5 of the adjudication report and drew the attention of the PCAB that the appellant scored low with regard to his capacity to deliver the service requested - 82 points as against the 145 of the recommended tenderer - because of the following concerns:

(i) in terms of human resources the appellant offered himself as the only full-timer backed up by two employees already in full-time employment elsewhere (one with Enemalta Corporation). Dr Debono argued that the adjudication board was concerned as to whether the appellant could provide the level of service requested in the tender having only one full-time technician;
(ii) the lack of experience on the part of the appellant in providing and supporting similar systems; and

(iii) the financial position of the appellant.

Dr Debono pointed out that, given that this was a tender which was being evaluated on the ‘MEAT’ concept, the appellant was awarded high marks for quoting the lowest price, i.e. 437.62 points or 70 points more than Lexcorp Ltd (368.01 points), the recommended tenderer, and pointed out that with that high score the appellant ranked second at the end of the adjudication process. Dr Debono explained that the table ‘Resume’ of Marks’ incorporated the standing of the bidder at Part 2, the service requirements at Part 3 and the financial offer at Part 4, and that the table displaying the distribution of marks was published in the tender dossier at page 17.

Mr Alexander German, representing Constant Power Solutions, confirmed that he was the only full-time technical person available round the clock whereas the other two employees were part-timers.

The Chairman PCAB remarked that given that the estimated value of the tender was c. €96,000 over a five year period, from the balance sheet and the profit and loss account presented by the appellant, it appeared to him that the appellant could handle this contract. He also observed that under Part 2, which included financial stability, the appellant scored 82 whereas the recommended bidder scored 145 and asked for an explanation.

Mr Wayne Valentine, Chairman of the Evaluation Board, under oath, gave the following evidence:

- the estimated value of the tender was €96,000 and represented the one-time purchase of equipment worth €64,000 with the rest covering the maintenance of the system;

- the appellant made a declaration in his submission that he had no security with regard to his overdraft, provided his house by way of security and by way of performance guarantee provided his parents’ company as a joint signatory. Mr Valentine added that the tender document requested, though not listed as one of the mandatory requirements (technical) at page 27 (3.3) of the tender document, the submission of the audited accounts for the past 3 years whereas the appellant submitted his accounts under his own signature (unaudited). The adjudication board did not disqualify bidders for not submitting audited accounts but only reduced marks accordingly, in this case 2 points were deducted, which issue was not contested by the appellant;

- the difference of 63 points under Part 2 between the appellant and the recommended tenderer resulted from a number of aspects as detailed in the five-page document titled ‘Other Requirements’ attached to the adjudication report. As an example Mr Valentine referred to the fact that the appellant lost 20 points out of the 40 allocated for providing reference sites for the following reasons: (a) appellant indicated only 3 sites where he provided and supported similar equipment, i.e to Enemalta Corporation
(DHR (administration) system not the core system of the same entity), Betfair Ltd and a bank even though he supplied - but not supported - such equipment to various other sites. On the other hand the other tenderers provided 8 or 10 such sites. Mr Valentine and Eng. Mark Pizzuto, member of the adjudication board, although conceding that the tender dossier did not specify the number of reference sites requested, yet, they argued that it was in the interest of the tenderers to demonstrate their experience in this field as that would surely be to their advantage in a competitive process. They added that the adjudication board did not evaluate the references only in terms of the number submitted but also in terms of quality/capacity because the tender specified that, besides being supported, the system had to be greater than 25 KVA;

- he himself had collaborated on other projects with the appellant, e.g. he was the Chairman of the adjudication board when Mr German was awarded the Enemalta Corporation tender, a claim that Mr German confirmed during the same public hearing.

The Chairman PCAB remarked that the main concern of the PCAB was to ensure that the tendering process was fair and transparent. He continued that, whilst the contracting authority had every right to demand additional comfort in terms of financial standing and/or experience on the part of the bidders, yet, it would have been better for the same authority to clearly specify such requirements in the tender document rather than making open-ended requests and to publish in the tender document any ‘internal’ guidelines that would be used at adjudication stage. The Chairman PCAB argued that contractors needed to know exactly what the contracting authority was after so as to determine if they had the capacity to deliver the service at the level required and thus avoid unnecessary loss of time and resources.

The Chairman PCAB then referred Mr Valentine to page 4 of the adjudication report which, inter alia, read “... More importantly, Lexcorp has offered MITA an excellent and efficient service over the past years” and asked whether that statement represented a conditioning on the part of the adjudication board since the recommended tenderer was well-known to the contracting authority. Mr Valentine stated that there was no such conditioning on the part of the adjudication board and added that:

a. the fact that Lexcorp Ltd provided a good service to MITA was to its advantage as much as it would have been to its disadvantage had it provided a poor service to MITA;

b. Lexcorp Ltd had 14 UPS systems with MITA together with other systems, e.g. at Public Health and Civil Aviation departments; and

c. apart from Lexcorp Ltd, MITA had also contracted the services of other firms like Sirap Ltd and Elektra Ltd (at Mater Dei) both of them taking part in this same tender being the subject of the same appeal.

Mr Valentine explained the ‘modus operandi’ of the adjudication board in the sense that
a. two members made their assessment individually and then these individual assessments were thoroughly discussed with the third board member, Ing Martin Pizzuto, an external engineer contracted by MITA, to arrive at the final marks agreed upon by all three board members and

b. the adjudication board did not evaluate a bidder throughout and then moved on to the next bidder but it evaluated all the tenderers on each and every item at the same time and so all bidders were accumulating marks progressively with each and every item on the evaluation grid.

Mr Valentine remarked that the adjudication board carried out a lengthy process as shown in the detailed tables attached to the report.

Dr Thake observed that the difference between the recommended tenderer and his client was of 7 marks and that, as a result, every point counted.

Mr Valentine explained that the adjudication board was of the opinion that one full-time person could not – and did not provide comfort - maintain a system of 3 UPSs with a preventive maintenance schedule and urgent repairs considering that a

i. person would inevitably be sick at some time or other and, perhaps, even go abroad and

ii. fault could take up to 12 hours of work to rectify and that there were instances when it took 3 persons to repair faults on such large systems

Mr Valentine stated that the configuration requested provided for 3 UPSs, 2 in operation and the other one as a sort of stand-by, and that, apart from standing in cases of power failure, this equipment also functioned as a voltage and frequency regulator.

The Chairman of the adjudication board added that the benchmark for resources was 10 points and that the appellant’s claim of having lost 9 points by being awarded 1 point was incorrect because the highest mark given in this regard was 5 and that mark was awarded to 3 bidders, among them Lexcorp Ltd that offered 3 to 5 personnel.

Mr Valentine further explained that the appellant scored 70 points more than the recommended tenderer because he quoted the price of € 64,000 whereas the average price quoted by the other bidders ranged between € 89,000 and € 96,000, which meant that the points difference between the appellant and the recommended tenderer in terms of the other tender requirements, apart from the price, amounted to 77 points.

Following a question made by the PCAB, Mr Valentine informed those present that he, together with Eng. Mark Pizzuto, was also involved in the drawing up of the tender document. The PCAB expressed general disapproval that the officers who compiled the tender document were the same officers who were entrusted with the adjudication of the tenders. The Chairman PCAB remarked that this adjudication board appeared to have acted professionally and in good faith but having a situation where one acted as judge and jury at the same time was not ideal at all.
Dr Debono emphasised that since this was a competitive tender it was up to the bidders to present the best picture with regard to their resources and capacity because the adjudication board had the responsibility and the duty to award more points to those tenderers that provided the required or, even exceeded, the peace of mind that they could deliver the service up to the standard requested.

On his part, Dr Thake remarked that the situation was such that the contracting authority was adjudicating, by way of references, a firm which was already providing it with its services. He added that one had to also take into account that his client was a small entity with a small workload - according to the references provided – and, hence, it could cope adequately with its customers whereas a larger entity with, say, 6 employees, but having a larger number of references could find it hard to cope with its workload, it could in fact be overstretched.

Mr German remarked that, through experience, he could say that one person would cope with the maintenance of such UPSs.

Ing Pizzuto informed the hearing that the contracting authority had put a lot of emphasis in the tender dossier that these UPSs were required for extremely critical government departments and for the hospital and, as a consequence, the contracting authority was after a high level of comfort. He added that when one took into consideration the maintenance of such UPSs from the corrective point of view – not from a preventive point of view – he was of the opinion that one person could not cope with any kind of fault that could develop. Mr Pizzuto declared that he had a working relationship with both the appellant and the recommended tenderer and that if he were asked he would have advised the appellant not to participate in this tender. Mr Pizzuto remarked that the adjudication board had looked into the tendering process in a holistic manner and not at any item in particular. Dr Thake intervened to observe that, in spite of all the stress laid on how critical this service was, the adjudication board had allocated to it 10 points out of 1000 points. Mr Valentine continued by explaining that in spite of the fact that in case these UPSs failed MITA had another back up, yet, it was also a fact that, during such instances, it would be running at considerable risk.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26.10.2009 and also through their verbal submissions presented during the public hearing held on the 12.02.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the fact that Constant Power Solutions, the appellant Company (a) felt discriminated against in the way points were awarded, (b) did not get points for providing extra goods/equipment, when it did provide a sensor and batteries, (c) lost points with regard to the set up of its business organisation arguing that larger organisations cannot provide the same personal service and (d) claimed that with the support of two part-time employees, was in a position to offer the service required in the tender;
• having also considered the fact that Mr German was the only full-time employee supported by two part-time employees who have been rendering him service for the past ten years;

• having also taken note of Dr Debono’s intervention, which, inter alia, highlighted the fact that (a) the appellant was objecting on 7 out of 51 criteria that the tender was adjudicated upon, (b) six bidders had participated in this call, (c) MITA requested preventive maintenance on a 24x7 basis and that urgent repairs had to be solved within 8 hours, (d) in terms of human resources the appellant offered himself as the only full-timer backed up by two employees already in full-time employment elsewhere (one with Enemalta Corporation), an issue which caused concern to the adjudication board, (e) the appellant Company demonstrated lack of expertise in providing and supporting similar systems and (f) the appellant’s financial position posed a problem;

• having heard Mr Valentine, Chairman of the Evaluation Board (a) state that the appellant made a declaration in his submission that he had no security with regard to his overdraft, provided his house by way of security and by way of performance guarantee provided his parents’ company as a joint signatory, (b) contend that the difference of 63 points under Part 2 between the appellant and the recommended tenderer resulted from e.g. forfeiting 20 points out of the 40 allocated for providing inferior reference sites, not just in amount of such size but also in terms of quality/capacity because the tender specified that, besides being supported, the system had to be greater than 25 KVA, (c) state that he himself had collaborated on other projects with the appellant, e.g. he was the Chairman of the adjudication board when Mr German was awarded the Enemalta Corporation tender, a claim that Mr German confirmed during the same public hearing, (d) explain the modus operandi adopted by the adjudication board, (e) argue that the adjudication board was of the opinion that one full-time person could not maintain a system of 3 UPSs with a preventive maintenance schedule and urgent repairs considering that a person would inevitably be sick at some time or other and, perhaps, even go abroad and a fault could take up to 12 hours of work to rectify and that there were instances when it took 3 persons to repair faults on such large systems, (f) also argue that, with regards to resources, the appellant’s claim of having lost 9 points by being awarded 1 point was incorrect and (g) explain that the appellant scored 70 points more than the recommended tenderer because he quoted the price of € 64,000 whereas the average price quoted by the other bidders ranged between € 89,000 and € 96,000, which meant that the points difference between the appellant and the recommended tenderer in terms of the other tender requirements, apart from the price, amounted to 77 points;

• having considered the fact that page 4 of the adjudication report, inter alia, read “... More importantly, Lexcorp has offered MITA an excellent and efficient service over the past years” as well as the explanation given by Mr Valentine in regard;

• having also heard Ing Pizzuto (a) state that the contracting authority had put a lot of emphasis in the tender dossier that these UPSs were required for extremely critical government departments and for the hospital and, as a
consequence, the contracting authority was after a high level of comfort, (b) also state that when it took into consideration the maintenance of such UPSs from the corrective point of view – not from a preventive point of view – he was of the opinion that one person could not cope with any kind of fault that could develop and (c) declare that if he were asked he would have advised the appellant not to participate in this tender,

reached the following conclusions, namely:

1. The PCAB feels that officers who compile tender documents should not be the same officers who are entrusted with the adjudication of the tenders;

2. The PCAB also feels that, especially within a MEAT context, it is up to the bidder to present the best picture with regard to one’s own resources and capacity;

3. The PCAB opines that UPSs were required for extremely critical government departments and for the hospital and, as a consequence, the contracting authority was after a high level of comfort and, given the circumstances, this Board feels that the adjudication board was correct in maintaining that one person with the back up support of two part-timers will not be able to cope with any kind of fault that may develop.

4. The PCAB, whilst it argues that, albeit it is true that the contracting authority had every right to demand additional comfort in terms of financial standing and/or experience on the part of the bidders, yet, it would have been better for the same authority to clearly specify such requirements in the tender document;

5. The PCAB feels that tenderers needed to know exactly what the contracting authority was after so as to determine if they had the capacity to deliver the service at the level required and thus avoid unnecessary loss of time and resources;

As a consequence of (1) to (5) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board feels that since the objection filed by appellant Company was not lodged capriciously, as a consequence, it recommends that the deposit submitted by the appellants should be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

11 March 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 186 and Case No. 187

Tender for Restoration Works to Birgu Land front Fortifications – BRG 06

The closing date for this call for tenders, which was published on 01.09.2009, for a contracted estimated value of € 645,000 (excluding VAT) was 22.10.2009.

Five (5) different tenderers submitted their offers.

On 28.10.2009 both Messrs Joint Venture Confirma and Messrs C.A.V.V.ALLIERI Joint Venture filed two separate objections after they were informed that their respective offers were considered to be administratively non-compliant in view of the fact that, following the opening of the respective offers, it was found that the Tender Guarantee (Bid Bond) were not issued for the correct value as requested by Clarification 4.

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 15.02.2010 to discuss this objection.

Present for the hearing were:

**Joint Venture Confirma**
- Dr John L. Gauci
- Mr Paul Muscat

**C.A.V.V.ALLIERI Joint Venture**
- Dr Franco Galea
- Dr Michael Sciriha
- Mr Neville Calleja
- Mr Ivan Farrugia
- Mr Nyal Xuereb
- Mr Brian Miller

**Polidano Brothers Ltd**
- Dr Jesmond Manicaro

**Schembri Barbros Ltd**
- Dr Kenneth Grima
- Mr Anton Schembri

**Ministry for Resources and Rural Affairs (MRRA)**
- Mr Raymond Farrugia
- Dr Albert Caruana

**Department of Contracts**
- Mr Francis Attard
- Dr Franco Agius
At the beginning of this public hearing, the Chairman, Public Contracts Appeals Board (PCAB) explained that, since these two objections concerned the same call for tenders, it was decided to hold a joint hearing. However, the parties concerned were also informed that, in spite of this, the two cases would be dealt with and decided upon separately.

The Chairman, PCAB then invited the representative of Joint Venture Confirma and C.A.V.V.ALLIERI Joint Venture to explain the motive of their objections. This was followed by the response of the representatives of the Department of Contracts, Polidano Brothers Ltd and Schembri Barbros Ltd.

Mr John L Gauci, legal representative of Joint Venture Confirma, explained that both appeals were similar and that both offers were excluded for the same reason.

He said that in the Department of Contracts’ letter of exclusion dated 22 October 2009 it was stated that:

“...when opening your offer it was found that the Tender Guarantee (Bid-Bond) was not issued for the correct value as requested by Clarification 4”

He explained that in Clarification Number 4 a third party asked the following question:

“Question 3: Can you confirm that bid bonds issued by U.K bank (RBS) for the amount of 6450 euros would be accepted by the regulatory body.”

and the reply given was:

“Answer 3: Bid bonds issued by Bank or financial Institution regularly licensed in the UK will be acceptable

Bidders are hereby being notified that the bid-bond for this tender is 6500 euro and is to remain valid on the 22nd March 2010”

Dr Gauci contended that, although the difference was of €50 only, his clients had submitted their Bid Bond with the amount specified in the Tender Document itself, that is, €6,450, which was confirmed in various parts of the tender document. He explained that the cover of the tender document itself indicated the following notification:

‘Please note that the mandatory bid-bond of 6,450 euro is to remain valid up to 22nd March 2010’

Furthermore, clause 14.3.1 (page 13 of the tender document) indicated also the amount of €6,450. Apart from this, Dr Gauci claimed that the PCAB had, repeatedly, argued that a tenderer could not amend or depart from the amount indicated on the Tender Guarantee Form which in this case was at page 35 of 346 of the Tender Document. He maintained that the amount of €6,450, which was in bold and highlighted, could not be altered and that was what his clients had done.
Joint Venture Confirma’s lawyer also said that, under normal circumstances, the value of Bid Bond was 1% of the value of tender, and, in this case, the figure of €6,450 tallied with budget available for this tender, that is, €645,000 (excluding VAT).

Dr Gauci sustained that the only instance where the figure of €6,500 was indicated was under Clause 18.1 (page 17 of 346 of the tender document) which, evidently, was a mistake because this did not tally with the 1% of the tender value.

He pointed out that the reason given by the Department of Contracts for the exclusion of his client was that the Bid Bond submitted was not issued for the correct value as requested by Clarification 4. At this point Dr Gauci sustained that a clarification could not be used to change the terms and conditions of the tender. Apart from this, it was maintained that the question was not related to the value of the Bid-Bond but whether a Bid-Bond issued by a UK bank (RBS) would be admissible. However, he contended that the most important thing was that his client had submitted the Bid Bond with the amount of €6,450 as established in the Tender Guarantee Form. As a subsidiary argument they insisted that the difference of a mere €50 should never warrant the exclusion of a bidder especially in the light of the fact that there was a mistake by the drafter/s of the tender document.

He concluded his introductory verbal submission by insisting that, on the basis of the above reasons, the tenderer, Joint Venture Confirma, should be reinstated in the tender procedure.

Dr Franco Galea, legal representative of C.A.V.V.ALLIERI Joint Venture, concurred that both appeals were identical. He pointed out that the reason for exclusion given by the Director of Contracts was not Clause 18 Tender Guarantee (Bid Bond) but had chosen ‘Clarification Number 4’ to inform them that they were administratively non-compliant. He contended that if the Director of Contracts wanted to amend the tender he could have submitted an addendum and not a clarification. He claimed that they did not have enough time to query the validity of this clarification because Clarification 4 was received after the date allowed for the submission of questions.

Dr Galea maintained that the 1% of the value of tender used for the calculation of the value of the Bid Bond was not only a praxis since on the Contracts Department’s electronic site there was a template with guidelines to help tenderers in the preparation of their bids and the footnote under Clause 18 Tender Guarantee (Bid Bond) specified that:

‘During the vetting stage of tender documents and as a general rule it is to be ensured that tender guarantees (bid bonds) are to be requested from prospective economic operators for those tenders whose estimated cost/allocated budget is over the threshold of €133,000. The value of the Bid Bond is to be set at 1% of the estimated cost. The minimum amount should not be less than €1,300 and the maximum set at €60,000. However, this maximum may be exceeded in exceptional circumstances.’

At this point Dr Galea presented the PCAB with a copy of the relevant printout.
He insisted that the directive issued by the Department of Contracts to those who were preparing the tenders was that the value of the bid bond was to be set at 1% which, in this case, was 1% of €645,000, that is, €6,450. Dr Galea said that this amount was equivalent to that deposited by their clients.

The same lawyer maintained that the principle should be to have as many bidders as possible in order to obtain the most favourable offer. He emphasised that it was better for the country to have more tenders in the adjudication process and evaluate all offers rather than excluding two tenderers for a mere €50.

In reply to a specific question by the PCAB, the appellants’ legal representatives confirmed that these clarifications were not sought by their clients.

At this point, Mr Francis Attard, Director General (Contracts), intervened and started by stating that the scope of a tender was not to attract as many offers as possible but the main purpose of every call for tenders was to ensure that the tendering process was carried out in a fair and transparent manner and that there was no discrimination amongst economic operators.

He confirmed that when the tender was published it had two amounts for the bid bond but this was rectified by means of Clarification Number 4 whereby they established the amount of €6,500. In reply to a specific question by the PCAB, the Director General (Contracts) said that the reason that they chose the amount of €6,500 and not €6,450 was to retain the figure indicated in the specific clause that referred to the tender guarantee. He also said that the amount for the guarantee was not the law but it was the prerogative of the Department of Contracts, so much so, that certain tenders requested a bank guarantee whilst others did not.

Mr Attard explained that they had communicated this clarification to everybody, uploaded it on the Department’s website and sent it also to all those who had already purchased the tenders, including the two appellants. He also said that they had documents that showed that the appellants had received this clarification and, as a result, they should have known that the value of bid bond was €6,500.

Dr Franco Agius, legal representative of the Department of Contracts, intervened by stating that there was no need for another clarification because the Department of Contracts was clear in the clarification issued. He contended that the clarification issued by the Department of Contracts formed an integral part of the tender document, so much so that the document itself, where reference was made to clarifications, requested tenderers to sign them and submit same with their offer. Dr Agius also pointed out that the dates on the Bank guarantees (including the appellant Company’s) and Clarification 4 showed that the former were issued after the latter and this was an indication that the appellants did not take heed of the contents of this clarification when they submitted their offer.

With regard to the appellants’ argument that the difference in the value of their bid bond was a mere €50, the Contracts Department’s legal representative insisted that this was an issue of principle where tenderers had to be regulated by the law and the tender document since, otherwise, they would arrive at a situation where anything would be acceptable.
As regards the issue raised in the Joint Venture Confirma’s reasoned letter of objection wherein reference was made to the PCAB’s Case No 87 to support its argument that the Department of Contracts had no right to modify the tender document by means of a clarification, Dr Agius underlined that the facts of that case were completely different from the case being discussed during the said hearing. He said that, in the former case, there was a situation where the Evaluation Committee requested various clarifications in order to give tenderers the opportunity to modify their offers in order to be in conformity with the technical specifications.

Dr Galea replied by stating that, in that case, the PCAB argued that a clarification could not be requested to amend a tender but to clarify a tender. He reiterated that the reason given by the Department of Contracts for their exclusion from the tender procedure was not Clause 18.1 but Clarification 4, which, he insisted that a clarification could not alter a tender. Dr Galea maintained that once the praxis was that the amount for the bid bond was calculated on the basis of 1% of the value of tender, then the correct value of the bid bond should have been €6,450. C.A.V.V.ALLIERI Joint Venture’s lawyer said that he agreed with the Director of Contracts’ statement that the tendering procedures had to be transparent but he did not think that the latter was correct when he said that the purpose of the tendering process was not to attract as many offers as possible to make the best selection. He acknowledged that they could not accept everything but the amount involved was a mere €50.

Subsequently, replying to various question by the PCAB, Dr Agius said that 1% of the estimated value of tender was a praxis used by the Department of Contracts to calculate the value of a bid bond, however, he said that this could fluctuate as it was not cast in stone. He explained that they chose the €6,500 and not the €6,450 because in the Tender Document the appropriate section that regulated the bid bond specified that amount. He said that considering the fact that in the tender document there were two figures for the bid bond, the Department of Contracts had exercised its right by issuing a clarification to clear this ambiguity and notified bidders with the actual amount. Dr Agius confirmed that none of the bidders queried the fact that the tender indicated two different amounts for the bid bond.

The PCAB argued that the manner in which the issue regarding the value of a bid bond was written was a statement and not a clarification. Furthermore, it was stated that since none of the tenderers had sought a clarification about this anomaly their attention should have been drawn about the correct amount under separate cover. It was noted that the amount of €6,500 was included in the clarification incidentally because the question asked by a third party was whether bid bonds issued by a U.K. bank would be accepted. The PCAB did not feel that this was a professional way of conducting matters.

Dr Kenneth Grima, legal representative of Schembri Barbros Ltd, said that, by their arguments, the appellants were implying that the amount for the bid bond was €6,450 and that this was changed to €6,500 after the publication of Clarification 4. He maintained that, if this were the case, he would not have attended these proceedings because it would have been unfair on the appellants. Dr Grima said that the tender dossier was the tender law and that everybody had to abide by that law. He said that, while his clients had complied with the tender conditions, others paid less attention. Dr Grima claimed that mistakes in tenders had always led to their rejection. He
sustained that the PCAB was always consistent in such instances and, as an example, he mentioned Case No 138 which dealt with an appeal in respect of the reconstruction of the M’Scala Bypass that was decided on 29 December 2008. It was explained that, in spite of the fact that the preferred bidder’s offer was about €1 million higher than that submitted by his clients, namely SSJV Joint Venture, their appeal was rejected because one particular document out of hundreds of documents was not submitted. He argued that the parameters within which tenderers had to submit their offers could not be extended because otherwise they would not know where to stop and would also create precedents. Dr Grima argued that SSJV had paid the price for the mistake committed because their offer was disqualified.

He claimed that, in the tender under reference, two out of five tenderers understood that there was a mistake in the tender document because there were two different amounts (€6,450 and €6,500), however, they were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the amount of €6,500.

Replying to a comment by the PCAB, Dr Grima said that if the clarification was not clear all the participating five tenderers would have submitted a bid bond for €6,450 but he did not think that it was ambiguous because two of the tenderers had complied with the tender requirement. He maintained that it was dangerous if one were to start accepting everything in the tendering evaluation process because it appeared that the appellants were giving the impression that, once the amount of €50 was trivial they should be allowed to amend the bid bond in order to proceed. Dr Grima said that previous decisions taken by the PCAB showed that it was very strict in its interpretation and he felt that it should remain rigorous. However, he thought that the PCAB was not empowered to effect changes - if any - because otherwise these had to be amended from above.

The Chairman, PCAB pointed out that they were always consistent and that they did not have any intentions to change anything. He said that the PCAB had to keep an open mind in its deliberation on the fact that they had a situation where three out of five tenderers were rejected for the same reason.

On the other hand, Dr Galea responded to Dr Grima’s arguments by stating that the issues in Case No 138 were different from the case under reference because in that case the appellants were not excluded because of a mistake - if any - in one of the documents but because one of the documents was missing. He explained that in this case the appellants were arguing that the Bid Bond was submitted exactly as specified in Tender Guarantee Form attached to the tender dossier.

Dr Jesmond Manicaro, legal representative of Polidano Brothers Ltd, said that if they were to analyse the tender procedure it was acknowledged that there was a discrepancy between two figures. He said that it was established, in front of this Board and also in accordance with Department of Contracts’ procedures, that, once there was a clarification, that clarification would become a tender law. Dr Manicaro argued that, in actual fact, the Department of Contracts’ legal representative stated that a tender would not be accepted if these clarifications were not signed and submitted with the tender and this meant that, in doing so, a tenderer would be accepting the conditions and specifications in each and every clarification. He insisted that a clarification would become part and parcel of the tender document.
The PCAB Chairman said that they agreed with what was being stated, however, they had to deliberate on whether the clarification under reference, as worded, necessitated another clarification from the tenderers because it might not have been clear and, as a result, it may have been interpreted rather vaguely.

Dr Manicaro responded by stating that if there was enough time to seek another clarification the whole argument would be meaningless.

Dr Gauci intervened by stating that there was nothing that showed that the Department of Contracts had issued this clarification after noticing the discrepancy in the tender document because the question asked dealt with a different issue, namely, whether bid bonds issued by a U.K. bank (RBS) for the amount of €6,450 would be acceptable by the regulatory body. He contended that the Director of Contracts should have issued a separate and specific clarification regarding the correct amount of the bid bond.

At this point, the PCAB Chairman remarked that the Board had to deliberate also on whether this clarification was technically correct because, under normal circumstances, a clarification was issued with an answer to a question from a third party. He said that they were taking note of the fact that the comment or statement was not part of the question that was asked by a third party. The Chairman, PCAB insisted that the issue of the value of bid bond was not a clarification but a statement because a clarification was made to clarify something that was not clear and also considering the fact that no one had sought any clarification about the actual value of the bid bond. He was of the opinion that, as a consequence, this should not have been part of a clarification exercise once no one had asked anything about this discrepancy. It was reiterated that it should have been issued separately as an ‘addendum’.

He said that the PCAB had to deliberate also on whether the appellants could have been misled. However, the Chairman PCAB emphasised that, by what was being stated, they did not want to give the impression that they were deciding towards a particular direction because their intention was solely to raise issues for discussion with the interested parties in order to hear their reactions to facilitate their deliberation.

Dr Grima said that although they agreed that the clarification could have been worded better, he wanted to draw the attention of those present that, in the most important and relevant part of the tender document, that is, Clause 18, it was clear that the tender guarantee was set at €6,500. He failed to understand why the appellants did not choose the highest figure if they had doubt about the correct amount and considering the fact that the difference was only €50. Dr Grima alleged that this happened because the appellant did not read the tender properly and therefore, once they made a mistake, they had to bear the consequences.

At this point the PCAB pointed out that the fact that it was established that the clarification was sent on 8 October 2009 and the closing date of tender was 22 October 2009, it seemed quite evident that the tenderers had enough time to seek clarification on the value of the bid bond. Reacting to this comment, Dr Gauci explained that in their case it was technically impossible to issue another bid bond within one week because when a bid bond was issued by a foreign bank another bid
bond had to be issued back to back from Malta. Here, his attention was drawn by the PCAB Chairman, that they could have informed the Department of Contracts explaining the reasons why it was impossible to comply with such requirement. Dr Manicaro said that the issue of time had to be evaluated in the sense that questions on the tender documents could only be accepted up to a specific date. However, the argument would have made sense if the reply to a clarification was submitted, say, one day before the closing date and, in such instance, tenderers would not have had enough time to seek another clarification.

In reply to a specific question by the PCAB as to why none of the bidders queried this discrepancy, Dr Gauci insisted that the Tender Guarantee Form could not be altered.

With regard to the importance given to the value of the bid bond in the tender dossier, Dr Galea explained that this was included in the front page to attract one’s eyes and, under Clause 14.3.1, the amount was repeated twice because it specifically mentioned €6,450 and also referred to the amount of €6,450 in the Tender Guarantee Form which could not be changed because otherwise a tenderer could be excluded. He said that the impression given that Clause 18 appeared to have more weighting than Clause 14 was not correct because, in his opinion, the fact that it was repeated twice it was hammering in a point that the value of the bid bond was €6,450. Dr Galea insisted that their argument was not that the appellants had decided to submit a bid bond for €6,450 capriciously to save €50 but their argument was that the manner in which the tender was drafted was misleading. He maintained that they did not believe that it was the Department of Contracts that noticed such discrepancies because it was only after a request for clarification that tenderers were notified that the bid bond for this tender was €6,500. It was also stated that the reason for exclusion did not refer to the tender dossier but to the clarification and they would maintain that a clarification could not alter the terms and conditions of tender but to clarify that was being questioned. He argued that, to ensure that no one was misled, the Department of Contracts should have issued a separate addendum but not in a clarification. He insisted that they were so misled that the bid bond was €6,450. Dr Galea also said that although they acknowledged that the Director of Contracts had the discretion on the bid bond, yet the tender dossier was drafted by another person on the basis of the template wherein it was stated that the value of the bid bond was to be set at 1% of the estimated cost.

Dr Agius drew the attention of the PCAB that, considering the fact that there were two different figures the clarification was issued to ensure that tenderers would not be misled. As far as the wording was concerned, he pointed out that the clarification was not addressed to one person only because it was stated that ‘Bidders are hereby being notified ….’ Dr Agius insisted that it was not addressed to that person who asked the question but it was addressed to the prospective bidders, including those who had already submitted their bid. Apart from this, when they submitted their bid they had to sign the tender form which stated that they were accepting without any reservations the tender document in its entirety, including the clarification/s. He made reference to clause 20.4 of the tender document wherein it was clearly specified that ‘The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority.’. He claimed that the amount of the appellants’ bid bonds was different from that indicated in clarification 4 which, he reiterated, was an integral part of the tender document.
Dr Galea made reference to the provisions of Article 9 Explanations Concerning Tender Documents whereby at clause 9.1 it was specified that:

‘Tenderers may submit question in writing up to 16 calendar days before the deadline for submission of tenders. The Central Government Authority must reply to all tenderers’ questions at least 6 calendar days before the deadline for receipt of tenders.’

He maintained that, once clarification 4 was sent on 8 October 2009, they had no chance or possibility to seek another clarification.

Mr Attard intervened by saying that the appellants had to explain to the Board whether they understood that clarification.

Dr Agius concluded by stating that there were instances where the Department of Contracts received clarifications even after the 16 calendar days, possibly even from the appellants, however, in this case no questions were received after the 16 days.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28.10.2009 and also through their verbal submissions presented during the public hearing held on the 15.02.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of, Messrs Joint Venture Confirma, appellant Company No.1’s (a) claim that the reason given by the Department of Contracts for the exclusion of his client was that the Bid Bond submitted was not issued for the correct value as requested by Clarification 4, (b) contention that , albeit the difference was of €50 only, they had submitted their Bid Bond with the amount specified in the Tender Document itself, that is, €6,450, which was confirmed in various parts of the tender document, (c) claim that clause 14.3.1 (page 13 of the tender document) indicated also the amount of €6,450, (d) contention that the PCAB had, repeatedly, argued that a tenderer could not amend or depart from the amount indicated on the Tender Guarantee Form which in this case was at page 35 of 346 of the Tender Document, (e) statement wherein it was argued that, under normal circumstances, the value of the Bid Bond was 1% of the value of tender, and, in this case, the figure of €6,450 tallied with budget available for this tender, i.e., €645,000 (excluding VAT), (f) claim that the only instance where the figure of €6,500 was indicated was under Clause 18.1 (page 17 of 346 of the tender document) which, evidently, was a mistake because this did not tally with the 1% of the tender value, (g) claim that the question raised in the so-called “Clarification 4” the question was not related to the value of the Bid-Bond but whether a Bid-Bond issued by a UK bank (RBS) would be admissible, (h) claim that the difference of a mere €50 should never warrant the exclusion of a bidder especially in the light of the fact that there was a mistake by the drafter/s of the tender document, (i) explanation that, in their case, it was technically impossible to issue another bid bond within one week because when a bid bond was issued by a foreign bank another bid bond had to be issued back
to back from Malta, (k) argument that, to ensure that no one was misled, the Department of Contracts should have issued a separate *addendum* but not in a clarification and (l) statement to the effect that, although they acknowledged that the Director of Contracts had the discretion on the bid bond, yet the tender dossier was drafted by another person on the basis of the template wherein it was stated that the value of the bid bond was to be set at 1% of the estimated cost

- having also taken note of, *Messrs C.A.V.V.ALLIERI Joint Venture*, appellant Company No.2’s (a) claim that the reason for its exclusion as given by the Director of Contracts was not *Clause 18 Tender Guarantee (Bid Bond)* but, instead, ‘Clarification Number 4’ had been chosen as the reason for them being considered as administratively non-compliant, (b) contention that if the Director of Contracts wanted to amend the tender he could have submitted an addendum and not a clarification, (c) claim that they did not have enough time to query the validity of this clarification because *Clarification 4* was received after the date allowed for the submission of questions, (d) argument that the 1% of the value of tender used for the calculation of the value of the Bid Bond was not only a praxis it was even stated on the Contracts Department’s electronic site wherein there is a template with guidelines to help tenderers in the preparation of their bids with a footnote under *Clause 18 Tender Guarantee (Bid Bond)* specifying just that; (e) insistence that the directive issued by the Department of Contracts to those who were preparing the tenders was that the value of the bid bond was to be set at 1% which, in this case, was 1% of €645,000, that is, €6,450 which, was also claimed that it equivalent to that deposited by them, (f) statement whereby it was argued that the principle should be to have as many bidders as possible in order for one to obtain the most favourable offer, placing emphasis on the fact that it is better for the country to have more tenders in the adjudication process with all offers being evaluated rather than having a scenario wherein two tenderers are excluded for a mere €50, (g) insistence that their argument was not that the appellants had decided to submit a bid bond for €6,450 capriciously to save €50 but their argument was that the manner in which the tender was drafted was misleading and (h) reference to the provisions of *Article 9 Explanations Concerning Tender Documents*, especially, clause 9.1 which stipulated terms of reference in connection with the submission of and reply to clarifications prior to the deadline for receipt of tenders, maintaining that, once clarification 4 was sent on 8 October 2009, they had no chance or possibility to seek another clarification;

- having heard and deliberated upon the Department of Contracts’ representatives’ claims wherein, *inter alia*, it was stated that (a) the Department of Contracts had communicated this clarification to everybody, uploaded it on the Department’s website and sent it also to all those who had already purchased the tenders, including the two appellants, (b) they had documents that showed that the appellants had received this clarification and, as a result, they should have known that the value of bid bond was €6,500, (c) there was no need for another clarification because the Department of Contracts was clear in the clarification issued, (d) the clarification issued by the Department of Contracts formed an integral part of the tender document, so much so that the document itself, where reference was made to clarifications, requested tenderers to sign
them and submit same with their offer, (e) the dates on the Bank guarantees (including the appellant Company’s) and Clarification 4 showed that the former were issued after the latter and this was an indication that the appellants did not take heed of the contents of this clarification when they submitted their offer, (f) albeit the fact that difference in the value of their bid bond was a mere €50 was an issue of principle where tenderers had to be regulated by the law and the tender document since, otherwise, one would arrive at a situation where anything would be acceptable, (g) 1% of the estimated value of tender was a praxis used by the Department of Contracts to calculate the value of a bid bond, however, he said that this could fluctuate as it was not cast in stone, (h) they chose the €6,500 and not the €6,450 because the appropriate section that regulated the bid bond specified that amount, (i) considering the fact that in the tender document there were two figures for the bid bond, the Department of Contracts had exercised its right by issuing a clarification to clear this ambiguity and notified bidders with the actual amount, (j) at any stage, none of the bidders queried the fact that the tender indicated two different amounts for the bid bond and (k) the appellants had to explain to the Board whether they understood that clarification;

• having also heard Schembri Barbros Ltd’s legal representative (a) state that the tender dossier, including the clarification, was the tender law and that everybody had to abide by that law arguing that, while his clients had complied with the tender conditions, others paid less attention, (b) claim that, in the tender under reference, two out of five tenderers understood that there was a mistake in the tender document because there were two different amounts (€6,450 and €6,500), however, they were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the amount of €6,500, (c) claim that it seemed like the appellants were giving the impression that, once the amount of €50 was trivial they should be allowed to amend the bid bond in order to proceed and (d) state that, although they agreed that the clarification could have been worded better, yet the most important and relevant part of the tender document, that is, Clause 18, was clear enough stating that the tender guarantee was set at €6,500;

• having taken full cognizance of the fact that albeit it was a fact that two out of five tenderers were careful and considered the most important and relevant clause in the tender document regarding the bid bond which specified the amount of €6,500, yet it was also a fact that three out of five tenderers were rejected for the same reason;

• having taken into consideration the issues raised by Dr Manicaro on behalf of an interested party, wherein, *inter alia*, he stated that (a) a tender would not be accepted if these clarifications were not signed and submitted with the tender and this meant that, in doing so, a tenderer would be accepting the conditions and specifications in each and every clarification, (b) a clarification becomes part and parcel of the tender document;

• having deliberated on whether the clarification under reference, as worded, necessitated another clarification from the tenderers because it might not have been clear and, as a result, it may have been interpreted rather vaguely;
reached the following conclusions, namely:

1. The PCAB argues that the content of the Tender Document and Clarification note was anomalous.

2. The PCAB opines that the Contracts Department could have easily included the new value of the bid bond under separate cover instead of leaving such information, seemingly, as a passing comment right at the bottom of a clarification reply which, ironically enough, had nothing to do with the same subject as it related to a question asked by a third party as to whether bid bonds issued by a U.K. bank would be accepted. The PCAB reiterates that the methodology adopted was far from what one would, under normal circumstances, consider professional.

3. The PCAB cannot base its analysis on the triviality of the amount, which in this case was a mere € 50 difference – this Board bases its argument on principles.

4. The PCAB argues that, albeit there exists no doubt that matters could have been attended to in a much better way, the PCAB also feels that whilst the responsibility for ensuring the correctness of the content of the documentation originated by a public entity should equally be entrusted to the contacting authority and the Contracts Department, yet, it is also a fact that the onerous task of checking correctness of a submission remains with the tenderer.

5. The PCAB also opines that clarifications made subsequent to original publication of tender document should be considered as forming part of the said tender document and the content of such clarifications remain valid and binding to all parties concerned.

6. The PCAB also feels that the fact that it was established and acknowledged that (a) the contended clarification was sent to all parties concerned on 8 October 2009 and (b) the closing date of tender was 22 October 2009 demonstrated that the time frame involved between the said dates provided enough evidence that all interested parties had ample time to react to apparent anomalies in content of the tender document vis-a-vis content as stated in the clarification note.

7. The PCAB acknowledges that the fact that two participants abided by the content of the clarification note is proof enough that such note, albeit written in a way that left to be desired as it contained a ‘clarification’ and a ‘statement’ in the same clarification, was clear enough for all parties to follow. The PCAB argues that documents are meant to be meticulously read in their entirety and any one refraining from doing so in a capricious manner cannot be exculpated – and, this, despite the triviality of the amount in question which this Board has not considered as being a pivotal issue in its deliberation process.

As a consequence of (1) to (7) above this Board finds against both appellant Companies.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by both appellants should not be reimbursed.

Alfred R Triganza            Anthony Pavia            Edwin Muscat
Chairman                    Member                        Member

14 March 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 188

M464/2009
Tender for the Development and Delivery of an ICT Diploma for the ESF 2.12
Second Step Training Programme

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

Four (4) different tenderers submitted their offers.

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

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

Present for the hearing were:

**STC Training Ltd (STC)**
Mr Patrick Pullicino Chief Executive Officer
Mr David Catania Representative

**Computer Domain Ltd**
Mr Nicholas Callus Representative
Dr Robert Sultana Legal Representative

**Malta Information Technology Agency (MITA)**
Dr Pauline Debono Legal Representative
Dr Ron Galea Cavallazzi Legal Representative
Dr Kristina Pullicino Legal Representative

**Adjudication Board**
Ms Daniela Busuttil Chairperson
Ms Caroline de Marco Member
Mr Anton Mifsud Member

Mr Krassimir Andreinski Advisor and Dep. Dir. IICT MCAST
Dr Enest Cachia Advisor and Dean ICT University of Malta
Mr Ivan Alessandro Financial Controller MITA
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

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

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

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

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

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

and

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

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

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

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

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<tr>
<th>British Level (QCF)</th>
<th>European (EQF)/Maltese (MQF) Levels</th>
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<tr>
<td>2</td>
<td>3</td>
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<td>3</td>
<td>4</td>
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<td>4 and 5</td>
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Mr Callus corrected Mr Pullicino in the sense that this was an ‘A’ level course and that the duration was 2 years and not 1 ½ years.

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

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

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

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

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

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

and

- he explained that in 2006 Malta opted to align its qualifications with the European Qualification Framework according to the Bologna Process, the advantages of which were mutual recognition of qualifications and easier access to Maltese students to follow ICT courses overseas. He added that the Malta Qualifications Council was established as per LN 347 of October 2006 as the sole authority to deal with such levels and standards.

- he informed the hearing that, since 2006, the Maltese Levels no longer reflected the British Levels but, instead, reflected the European Standards. Mr Andreinski then referred to the reference manual issued by the Malta Qualifications Council, particularly to page 84 which displayed a comparative table no. 27 showing the various qualification frameworks and how they compared with one another which table established the legally accepted standards in Malta. He remarked that the tender document requested EQF level 4 which was equivalent to QCF level 3 whereas QCF levels 4 and 5 were equivalent to EQF 5 (as indicated earlier on)

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

Mr Andreinski continued giving evidence by:

- reiterating that the Maltese Levels had been aligned with the European Levels since 2006 and that those levels were applicable when the tender was issued,
however, one had to appreciate that both the Maltese and the British levels were going through a transition period;

- explaining that the tender requested a matriculation level whereas the appellant presented a first year of a B.Sc course, which was a level higher than that requested and thus it would make it difficult for Level 3 students to follow the programme submitted by appellant Company as that meant that they would be skipping level 4 and move directly to level 5, which proposal was unacceptable;

- remarking that STC Training Ltd had also included in its proposal modules that belonged to British Levels 3 and 4, yet, most of the modules were of level 4 which were equivalent to European Level 5. Mr Andreinski remarked that it was not acceptable to mix levels. He added that, officially, the appellants quoted the registration number of the higher British Level, i.e. 4;

- noting that a programme had three components, i.e the level, which was crucial, the content and the duration. Mr Andreinski referred to page 41 of the Malta Qualifications Council reference manual wherein it was demonstrated that:
  - 1 credit = 25 hours of learning, of which 6.22 hrs were contact/supervised hours and the remaining 18.75 hrs were to study on one’s own;
  - and
  - from level 2 to level 7 it took 60 credits per year x 25 hours per credit = a total of 1,500 hours per year out of which 375 hours had to be guided/supervised study;

- pointing out that the tender document requested a 2-year programme, however, the appellant Company’s tender submission presented a programme of about 320 hours which was equivalent to a course of (less than) 1 year, so much so, that on the website of STC Training Ltd it was advertised as a 1-year programme;

- questioning how could the 2-year programme requested in the tender be delivered by the appellants in 1 year. He added that the standards established that anything less than 60 credits (1,500hrs) per year for levels 2 to 7 would not lead to a full certificate and hence would not lead to the next level;

- arguing that it was in the interest of the tenderer to present his submission as clearly and as detailed as possible to enable the adjudication board to be in a position to properly understand and evaluate the submission. He informed the hearing that, with regard to content, the other tenderer/s presented 3 totally different programmes with each having different topics except for 1 topic which was common to 2 programmes. In the case of STC Training Ltd, Mr Andreinski noted that it was offering 3 programmes which had 8 of the modules common to all 3 programmes with only 1 or 2 modules being different from one programme to the other, which meant that the bulk of the content was practically the same in each programme presented by STC Training Ltd. Mr Andreinski remarked that the marks given to the appellant Company with regard to service requirements reflected these shortcomings – 213.4 to STC Training Ltd compared to 294 to Computer Domain out of 370 points;
• explaining that he carried out his assessment of the bids on criteria that he had set himself and which he applied across the board. Mr Andreinski added that (i) he was given the technical part of the submissions and that his evaluation was limited to the technical requirements and (ii) when the two advisers concluded their separate and independent evaluation they met with the Chairperson of the adjudication board to discuss their findings and it had transpired that, in essence, both of them came to the same conclusions, in the sense that 3 bidders had failed on matters of level and content whereas the recommended tenderer was the one that could deliver the service requested in the tender;

and

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

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

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

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

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

Dr Ernest Cachia, Dean ICT at the University of Malta and adviser to the Adjudication Board, under oath, gave the following evidence:
• he confirmed what Mr Andreinski had stated in the sense that both experts had carried out their evaluation independently and that, at one point, they met to discuss their findings;

• his main concern was the content of the submission and, in that regard, he had reported that none of the tenderers were a perfect match to the tender requirements but, at the end of the day, what he considered important was how and to what extent/level a topic was going to be delivered to the students;

• at the University of Malta they covered levels 5 to 8 and that mixing a level with another was not recommendable at all but one had to stick to the universally established levels, even if one held a different personal opinion on these levels;

and

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

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

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

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

Dr Sultana submitted that with regard to the relationship between STC Training Ltd and Nucleus Training International Ltd and the audited accounts provided by the appellant Company, the appellant failed to abide by what the tender document provided for in the case of a joint venture and for the submission of the accounts of other companies. Dr Sultana remarked that, in itself that could have been enough to
disqualify the appellant Company. He also submitted that the Malta Qualifications Council letter was inadmissible since it had not been submitted with the original tender submission while noting that the same document did not prove that the appellant Company’ proposal met the specifications set out in the tender.

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

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28.09.2009 and also through their verbal submissions presented during the public hearing held on the 17.02.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s basis for objection based on issues relating to ‘Level’ (level presented by appellants was QCF 5 - Qualification and Credit Framework (England, Wales and Nth. Ireland) - instead of 4, as requested in the tender dossier), ‘Audited Accounts’ (the tender document asked for the audited accounts of the previous 5 years and since STC Training Ltd had not been set up for 5 years they had to submit the audited accounts of Nucleus Training International Ltd in order to cover the 5-year period with appellants representative stating that the accounts in respect of 2008 had not been audited by the closing date of the tender but a declaration to that effect had been submitted) and ‘Time Frame’ (that the contracting authority had noted that the number of hours indicated by STC Training Ltd was not enough to deliver this course whereas the appellant Company was insisting that the course could be delivered over a shorter period of time than that provided in the tender);

- having also taken note of the fact that, according to the appellant Company’s representative’s own admittance, besides submitting Level 4, his firm included also some modules from Level 3 since it was considered that this mix of Levels 3 and 4 would still result in an overall Level 4 as clearly requested in the tender;

- having also noted Mr Pullicino’s claim that the letter issued to his firm on 4th September 2009 by the Malta Qualifications Council indicated that their course was equivalent to MQF Level 4;

- having considered the point raised by appellants’ representatives wherein it was stated that since the said firm was aware of the level reached by the students in Step 1, it was decided to present a mix of Level 3 and Level 4 modules and it was also considered a good idea to share a number of modules between the three programmes at foundation level;

- having heard the MITA representatives (a) state that the contracting authority could not rely on the audited accounts and resources of third parties irrespective of the legal connection between the two entities unless the third party concerned presented a guarantee that it would provide the resources, (b) explain that the purpose of this tender was to provide a training programme for students who had finished Level 3 that would lead them to Level 4 with contracting authority requesting Level 4 of the Malta Qualification Framework (MQF) which was identical/equivalent to the European Qualification Framework (EQF) and (c) claim that the proposal put
forward by the appellant Company provided for a training programme which led to Level 5, which meant that the students would find it difficult to follow the appellants’ training programme as it skipped Level 4 altogether as it was a level higher than that requested;

- having also heard Dr Debono state that all the other bidders had adhered to the level 4 requirement in the call for tenders;

- having taken full cognizance of Mr Callus’ - representing an interested party - intervention wherein he (a) explained the way course ‘levels’ are structured going into details as to, *inter alia*, the equivalence of British Level (QCF) to European (EQF) / Maltese (MQF) Levels and so forth, (b) stated that, contrary to what had been erroneously stated by appellant Company’s representative, this was an ‘A’ level course and that the duration was 2 years and not 1 ½ years, (c) referred to the appellant Company’s letter of objection and to a letter dated 26th June 2009 from NCC (UK), where the appellants indicated that their proposal was equivalent to the first year of a degree course and that NCC (UK) confirmed that it corresponded to Level 4 of the British National Standards, (d) remarked that since his Company’s offer abided by the tender requirement of a 2-year course, its bid involved a considerable number of additional hours when compared to the appellants’ 1-year course with the logical consequence that its price was much higher than that quoted by the appellant, so much so, that Computer Domain had been heavily penalised with regard to price – 170 scored by Computer Domain as against 248 scored by STC Training Ltd out of 320 points – which, in turn, had a significant bearing on the overall score and (e) pointed out that the three diplomas requested in the tender were very distinct from one another whereas the three diplomas presented by the appellants were practically the same in content except for 1 or 2 modules;

- having noted Mr Andreinski’s testimony wherein, *inter alia*, he (a) informed the hearing that, since 2006, the Maltese Levels no longer reflected the British Levels but, instead, reflected the European Standards, (b) remarked that the tender document requested EQF level 4 which was equivalent to QCF level 3 whereas QCF levels 4 and 5 were equivalent to EQF 5 – as per reference manual issued by the Malta Qualifications Council, particularly to page 84 which displayed a comparative table no. 27, (c) stated that despite of what Mr Pullicino had claimed, namely that the report referred to by him - which was issued in September 2009, i.e. after the closing date of the tender in May 2009 – (1) was still under discussion as part of a consultation process and that (2) up till then, there was no final document – he (Mr Andreinski) reiterated that the Maltese Levels had been aligned with the European Levels since 2006 and that those levels were applicable when the tender was issued albeit, admittedly, both the Maltese and the British levels were going through a transition period, (d) explained that the tender requested a matriculation level whereas the appellant presented a first year of a B.Sc course, which was a level higher than that requested and thus it would make it difficult for Level 3 students to follow the programme submitted by appellant Company as that meant that they would be skipping level 4 and move directly to level 5, which proposal was unacceptable, (e) remarked that STC Training Ltd had also included in its proposal modules that belonged to British Levels 3 and 4, yet, most of the modules were of level 4 which were equivalent to European Level 5, adding that it was not acceptable to mix levels, (f) pointed out that the tender document requested a 2-year programme, however, the appellant Company’s tender submission presented a programme of about 320 hours which was equivalent to a course of (less than) 1 year, so much so, that on the website of STC Training Ltd it was advertised as a 1-
year programme, (g) questioned how could the 2-year programme requested in the tender be delivered by the appellants in 1 year, (h) argued that, unlike the other bidders, the appellant Company was offering 3 programmes which had 8 of the modules common to all 3 programmes with only 1 or 2 modules being different from one programme to the other, which meant that the bulk of the content was practically the same in each programme presented by STC Training Ltd, (i) stated that the ‘mix-and-match’ modules from different levels adopted by the appellant Company was out of the question, remarking that the tender document was very specific in the sense that tenderers had to provide for a Level 4 course and no mix-and-match or leeway were allowed, (j) remarked that the marks given to the appellant Company with regard to service requirements reflected these shortcomings – 213.4 to STC Training Ltd compared to 294 to Computer Domain out of 370 points, (k) stated that if he were the adjudicating board he would have disqualified the appellant Company from the tendering process because it did not present the level requested in the tender dossier, something which was crucial in this contract and (л) insisted that the tender clearly indicated a 2-year course and that, both academically, as well as, according to the Bologna Process, that meant an established number of hours;

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

reached the following conclusions, namely:

1. Since no evidence to the contrary was produced during the hearing, the PCAB is satisfied that the adjudication process was correct and sees no reason to modify it in any way

2. The PCAB also feels that the appellant Company had substantially deviated from what was really requested by the contracting authority in the tender document making its bid inadmissible and unacceptable;

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

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

14 March 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 189

CT 2633/2009
Negotiated Procedure For The Reconstruction Of Part Of Xlendi Road, Xlendi, Gozo

The closing date for this call for tenders - a negotiated procedure (works) published under the three package system – with a contracted estimated value of € 4,218,351, was 9.10.2009.

Three (3) different tenderers submitted their offers.

On 11.01.2010 Messrs Polidano Bros. filed an objection against the decision by the Contracts Department to reject its tender after having been found to be administratively non-compliant.

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 03.03.2010 to discuss this objection.

Present for the hearing were:

Polidano Brothers Ltd
- Dr Jesmond Manicaro Legal Representative
- Dr Noel Camilleri Legal Representative
- Prof Ian Refalo Legal Representative
- Mr Charles Polidano Representative

JPF Joint Venture
- Dr Kenneth Grima Legal Representative
- Dr Carmelo Galea Legal Representative
- Mr Mark John Scicluna Architect
- Mr Victor Hili Representative
- Mr Paul Magro Representative

Ministry for Gozo
- Dr Tatiane Scicluna Cassar Legal Representative
- Dr Alex Perici Calascione Legal Representative
- Mr Joseph Portelli Director, Projects & Development
- Ms Rita Cutajar Director EU Affairs

Adjudication Board
- Ms Ivana Farrugia Chairperson
- Mr Angelo Portelli Member
- Mr Godwin Sultana Member
- Ms Mariella Xuereb Member
- Mr Mario Camilleri Secretary

Contract Department
- Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant was invited to explain the motives of the objection.

Dr Jesmond Manicaro, legal advisor of Polidano Brothers Ltd, the appellant Company, started by contesting the admissibility of the negotiated procedure in the circumstances of this case. He then quoted from Article 71 (1) of the Public Contracts Regulations:

“A contracting authority may award its public works contracts by negotiated procedure, after prior publication of an EU contract notice:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable in terms of regulations 27 (that dealt with the award criteria. i.e. if it was the lowest price or the most economically advantageous tender) 30(1) (that dealt with sub-contracting and conditions for performance), 31 (referring to joint and group tendering), 46 (relating to variances), 60 (relating to information) and 62 (relating to entitlement to carry out a service activity) in response to an open or restricted procedure or a competitive dialogue in so far as the original terms of the contract are not substantially altered. 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 49 to 52 and who during the preceding open or restricted procedure have submitted tenders in accordance with the formal requirements of the tendering procedure …“

Dr Manicaro asked if the negotiated procedure was resorted to on any of the grounds mentioned in regulations 27, 30 (1), 31, 46, 60 and 62.

Dr Tatiane Scicluna Cassar, legal adviser of the Ministry for Gozo, declared that it was untenable for the appellant to question at this stage whether it was regular to go for the negotiated procedure when the appellant (i) was informed by Contracts Department letter dated 12 October 2009 and even attended a meeting during which the negotiated procedure was launched and explained, (ii) participated in the negotiated procedure, thus accepting its conditions, and (iii) only lodged his objection when his tender was disqualified during the negotiated procedure. She added that the tender document stipulated that, in submitting a tender, the tenderer accepts in full and without restriction the special and general conditions governing the contract and, as a consequence, the appellant Company’s participation meant that the appellant Company accepted all those conditions.

Mr Francis Attard, Director General (Contracts), under oath, gave the following evidence:

- the public call for tenders was advertised in the Government Gazette whereas the negotiated procedure was not published;
the decision that the original call for tenders was cancelled was made public and all interested parties had the opportunity to appeal from that decision but the fact was that no one filed an objection;

in the case in question no tender was fully compliant and the evaluation committee recommended that the tender be cancelled and, should no appeal be lodged to challenge the tender cancellation, a negotiated procedure would be initiated by inviting each one of the tenderers who had submitted a bid;

when a negotiated procedure was launched, the tenderers who had participated were called to a tenderers’ briefing where the contracting authority explained the shortcomings observed in the previous tender submissions – where each tenderer would already have been informed of the reason/s for the refusal of one’s offer – and also explained what they were expected to submit. During the tenders’ briefing tenderers had all the opportunity to ask for any clarification and, at the end, they were handed over a new tender document and the interested tenderers were invited to submit the bid by a given date;

the tender document given out at the tenders meeting was the same as the original one and, had there been some alterations, these would have been explained to the bidders at the tenderers’ meeting;

the benefit derived from a negotiated procedure was that a shorter period would be given to tenderers to submit their offer, in fact the regulation stipulated a minimum of 15 days, though, since this contract was rather extensive and complex in nature the period must have been longer than that, whereas a new call for tenderers would have had a publication period of 52 days;

the negotiated procedure was launched because, in the original call for tenders, all offers received were found to be administratively/technically irregular or non-compliant and that occurred prior to the opening of the third packet which contained the price; and

the negotiated procedure, although open only to tenderers who had submitted an offer in response to the original call for tenders, was considered as a fresh competitive process where tenderers could ameliorate their original offer.

Dr Kenneth Grima, legal adviser of JPF Joint Venture, an interested party, pointed out that regulation 71 (1) stated that a negotiated procedure could be launched “in the event of irregular tenders or” and that meant that there was no need to enter into the merits of regulations 27, 30 and so forth because the fact that all the tenders received were irregular was sufficient ground to move on to the negotiated procedure. He added that it was a fact that none of the tenderers had appealed from the decision that one’s offer was found to be irregular. Dr Grima continued that, following the tenderers’ meeting, one of the tenderers did not submit a bid, two tenderers submitted a tender but both were, eventually, found, once again, non-compliant with one of them, the appellant Company, lodging an appeal and the fourth one was his client who had submitted a regular tender. Dr Grima declared that the process was transparent and fair to one and all.
Dr Manicaro argued that Regulation 71 (1) laid down that regulations 27, 30 (1), 31, 46, 60 and 62 had be satisfied – all of them - in order to activate the negotiated procedure and that it was evident that regulation 27 had not been met since the third package had not been opened by the time that the tender had been cancelled.

The PCAB intervened to remark that the price criterion was subject to tenderer(s) having been found compliant administratively and technically, which evidently, was not the case.

Dr Manicaro then went on to quote again from Reg. 17 (1):

“…. 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 49 (Qualitative selection criteria), 50 (Evidence of financial and economic standing), 51 (Evidence of technical capacity) to 52 (Supplemental Information) and who during the preceding open or restricted procedure have submitted tenders in accordance with the formal requirements of the tendering procedure”

Dr Manicaro argued that the evaluation committee should not have gone into the financial statements of his client during the negotiated procedure because once his client had qualified to participate in the negotiated procedure that meant that he had already satisfied regulations 49 to 52.

Dr Scicluna Cassar reiterated that if the appellant wished to object to the negotiated procedure he should have done so prior to taking part and not after participating and after having his offer rejected. Mr Attard corroborated this and added that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure.

Dr Manicaro conceded that a negotiated procedure could be initiated either in case tenders were irregular or the submissions were unacceptable in terms of the regulations mentioned in Reg. 71 (1) but stuck to his contention that the fact that tenderers were admitted to the negotiated procedure meant that they had already satisfied regulations 49 to 52 otherwise the negotiated procedure could not have been resorted to.

Dr Manicaro stated that, by way of letter dated 6th January 2010, the Department of Contracts had informed his client that his tender for the above-mentioned contract had been ruled administratively non-compliant for, among other things, the following reason:

“Form 4.4 requested certified statement of accounts. Following legal advice, although the accounts presented have been endorsed and stamped by a certified public accountant it was expected that a covering accountant’s report should be submitted certifying the accounts. The accounts submitted were only stamped and signed by a certified accountant.”

Dr Manicaro then referred to a press release which he claimed was issued by the Ministry for Gozo which stated that the tender document requested the company’s accounts for the previous 3 years signed and certified by a public accountant. Dr
Manicaro claimed that the type of accounts that his client submitted with this tender had been submitted with previous tenders and had been accepted. He even queried if the accounts presented by JPF Joint Venture included the covering accountant’s report.

The Chairman, PCAB, remarked that the accountant on his own could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification.

Dr Scicluna Cassar quoted section 4.1.2 (page 7):

“Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant…”

Dr Scicluna Cassar explained that, in the 2005 financial statements, the appellant indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the ‘notes to the financial statements’ and ‘the auditor’s report’. She added that the same applied to the financial statements presented for 2006 and 2007.

The Chairman PCAB remarked that a financial statement should always be submitted in its entirety. He added that in accounting practice the accounts were verified not by an accountant but by an auditor and that the auditor could even qualify those accounts by adding his remarks thereon.

Ms Ivana Farrugia, Architect and Chairperson of the evaluation committee, under oath, stated that tenderers had to fill in Form 4.4 covering the annual turnover and the assets and liabilities and they had also to supply the evidence requested at section 4.1.2 quoted earlier on by Dr Scicluna Cassar. Moreover, Ms Farrugia referred to paragraph 4.4.4 of Form 4.4 which stated

“Please attach copies of the company’s previous 3 years certified statements of account from which the following basic data could be abstracted; ...

Ms Farrugia informed the hearing that the evaluation committee was made up of architects and a secretary, none of whom with professional accounting experience. However, on checking the submission made by the appellant Company, they observed that (a) the financial statements he submitted were incomplete in the sense that ‘the notes to the financial statements’ and ‘the auditor’s report’ were missing and (b) the accounts were only stamped and signed by the accountant – who, according to Dr Scicluna Cassar acted also as company secretary. Ms Farrugia remarked that, in the circumstances, the evaluation committee sought the advice of the Contracts Department, who, in turn, directed that expert advice should be sought, preferably, from within the public service. Ms Farrugia declared that the committee was advised that the accounts required some sort of third party verification.

Dr Grima pointed out that he had checked with the Malta Financial Services Authority (MFSA) but could not find the appellant company’s audited accounts for the 3 years
requested in the tender document. Dr Grima claimed that the appellant Company
omitted the auditor’s report simply because the accounts had not been audited.

At this stage, the PCAB verified that the individual companies forming JPF Joint
Venture had in fact submitted the audited accounts with the tender submission of JPF
joint venture.

Dr Manicaro, once again, referred to a letter dated 6th January 2010 sent to his client
by the Department of Contracts and quoted:

“Lighting report Form 4.6.12 was not submitted and on verification of the
submitted information it was found that no confirmation was given with
regards to ‘the division of the road in four sections... each section will be sub-
divided into at least 2 circuits thereby giving a total of 8 circuits’... The main
cabling shall be 4 core ... The terminal block inside the pole shall be equipped
with a fuse cut-out of not more than 2 Amperes to act as protection to
luminaire.”

Dr Manicaro remarked that the Form 4.6.12 submitted by his client was not identical
to that provided in the tender document but claimed that that information had been
included in a separate report. Dr Manicaro argued that, in itself, the negotiated
procedure implied that the contracting authority should have called on his client to
discuss and to negotiate on such matters but, in effect, his client was never
approached to forward any clarification.

Ms Farrugia explained that Form 4.6.12

(i) laid down how the street lighting works had to be carried out and required the
tenderer to endorse the form so as to bind himself to abide by those
instructions, and

(ii) requested the tenderer to submit a street lighting report

Ms Farrugia remarked that the appellant submitted (a) a signed sheet of paper entitled
Form 4.6.12 but without any of the instructions given in Form 4.6.12 provided in the
tender document and (b) a street lighting report. Ms Farrugia explained that although
the tenderer had not submitted the form in the requested format, which in itself was an
infringement with regard to administrative compliance, the evaluation committee
went on to check the street lighting report with a view to verifying whether the
information omitted in the form had, at least, been included in the report under
review. Ms Farrugia stated that, on checking the street lighting report, the evaluation
committee found certain information missing as indicated in Contracts letter dated 6th
January 2010 referred to earlier on. Ms Farrugia confirmed that the evaluation
committee’s main concern was not that the appellants did not submit the form in the
format provided in the tender document but that the appellants had not submitted all
the information that had been requested of them.

Ms Farrugia verified that the appellant had not endorsed Form 4.6.12 in its original
submission but she stressed that the negotiated procedure requested the tenderers to
make a fresh and complete submission irrespective of what they had submitted in the
original offer, i.e. it did not involve adding up to what they had originally submitted.
At that stage the PCAB examined the form 4.6.12 as submitted by the appellant Company and as provided in the tender dossier.

Ms Farrugia pointed out that, contrary to what the appellant seemed to imply, the negotiated procedure did not allow the evaluation committee to negotiate with the bidders during the tender evaluation process.

Dr Manicaro stated that the European Court of Justice (ECJ) made reference to what was called ‘the material advantage test’ which meant that if the contracting authority requested clarifications or additional information which did not prejudice the position of the other tenderers then the contracting authority was duty bound to ask for that information. He argued that, if the contracting authority would not seek clarifications of this kind, then the contracting authority would end up disqualifying many tenders to the detriment of competition and price.

The Chairman PCAB remarked that the kind of clarifications that the evaluation committee could ask for during the adjudication process was the same both in the case of a normal call for tenders, as well as, in the case of a negotiated procedure. He added that the evaluation committee could not ask for documents and information that should have been submitted by all tenderers in the first place.

Dr Scicluna Cassar remarked that the submission of Form 4.6.12 was a mandatory requirement and that section 20.4 of the tender dossier (page 20) laid down that:

“The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority, or if the tender documents are not filled in properly.”

Dr Manicaro then moved on to the last shortcoming that led to the rejection of his client’s offer and read out the reason given by the Contracts Department, i.e.:

“The following drawings were not provided: A3.1 (railing) A1.1a, A1.1b, A1.2a, A1.2b, A1.3a, A1.3b, A1.4a, A1.4b, A1.5a, A1.5b, A1.6, A3.1 (Section through the road)”

Dr Manicaro did not contest the fact that, through an oversight, these drawings were not included in his client’s submission. He explained that these drawings were provided with the tender dossier and the tenderer had just to endorse them.

Dr Manicaro cited a European Court of Justice (ECJ) case the Commission vs Denmark (C243 in the 1993 European Commission Report) which drew a distinction between fundamental and non fundamental conditions. Dr Manicaro also referred to another ECJ case (B211/02) where the ‘Court of First Instance’ stated that the Commission’s decision to reject the tender without first seeking clarifications was clearly disproportionate and, thus, initiated a manifest error of assessment. He added that the purpose of the pertinent directive was to allow for unrestricted and undistorted competition whereas it, sometimes happened, that the contracting authority would end up with only one compliant tenderer out of four or six tenderers.
Dr Scicluna Cassar remarked that, out of 21 drawings, the appellant Company submitted only 8 and she pointed out that these drawings were mandatory requirements so much so that Form 4.6.11 (pg 64) stated that “Tenderers are to include a signed copy of all tender drawings provided by the MGOZ and any other drawings prepared by the Tenderer.” Dr Scicluna Cassar stated that section 14.3 indicated that the tender must comprise a list of duly completed documents, among them, the ‘drawings’ referred to at section 14.3.2.8 (pages 16 & 17).

Ms Farrugia argued that, irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as requested in the tender document.

Dr Scicluna Cassar reiterated that:

(i) with regard to the admissibility of the negotiated procedure, the appellant should have raised his objection prior to taking part in this procedure - because his participation meant that he had accepted the negotiated procedure - and not after taking part in the process and after having been disqualified due to non-compliance;

(ii) the financial statements submitted by the appellant were incomplete in such a way that the “auditor’s report” and “the notes to the accounts” were omitted, intentionally or not. Besides, the accounts were only signed and rubberstamped by the company secretary which did not constitute verification by an independent auditor;

(iii) Form 4.6.12 was not submitted as requested and, more importantly, the accompanying street lighting report did not cover all the areas included in the form provided in the tender document and hence that amounted to a deletion or alteration of the tender document; and

(iv) only 8 out of 21 drawings had been submitted when the tenderer was not at liberty to omit any of these mandatory documents.

On his part Dr Grima maintained that once the tenders were irregular then the contracting authority had enough grounds to initiate the negotiated procedure and therefore it acted correctly. He added that the tenderer was not at liberty to alter the tender document in any way or to refrain from submitting information but, on the contrary, the tenderer had to submit all mandatory information and in the requested form.

Dr Manicaro explained that his client was raising his objection to the negotiated procedure at this stage because his client thought that, once he was allowed to participate in the negotiated procedure, then his submission was in order as far as regulations 49 to 52 were concerned. He added that his client had expected the contracting authority to consult him and to ask him for clarifications during the negotiated procedure.
Dr Manicaro remarked that the accounts submitted by his client were the same set of accounts that had been provided and accepted in connection with other calls for tenders. Dr Manicaro claimed that his client’s accounts were verified by a certified accountant as laid down in the tender document and again referred to the press release by the Ministry for Gozo stating that the bidders were not obliged to deposit their audited accounts at the Malta Financial Services Authority. Dr Manicaro argued that the company accounts were requested so as to ascertain the financial standing of the company, however, there were other means to verify the financial standing of a firm, such as, through a bank statement or a letter from the bank.

Dr Manicaro insisted that the street lighting report had in fact been submitted but that the contracting authority had failed to seek any clarifications from his client in this regard. He considered the information requested in this form and report as rather basic and not fundamental.

Dr Manicaro did not contest the fact that through an oversight some of the drawing had not been submitted but pointed out that all the drawings had been submitted with the original submission. Moreover, Dr Manicaro mentioned the pronouncements by the ECJ (a) with regard to disproportionate action in rejecting a tender and (b) that in the light of the principle of good administration it was considered both practical and necessary for the contracting authority to seek information with a view to ensure effective, genuine and undistorted competition for public contracts. Dr Manicaro alleged that the compliant tenderer (JPF Joint Venture) had been awarded about 95% of the contracts in Gozo – Dr Scicluna Cassar intervened to reject the insinuation that there was some kind of bias in favour of the compliant tenderer in the award of tenders.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 20.01.2010 and also through their verbal submissions presented during the public hearing held on the 03.03.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of, amongst other things, the appellant Company’s legal representative’s (a) reference to issues related to the admissibility of a negotiated procedure in this particular instance and whether, in particular, the negotiated procedure in question was resorted to on any of the grounds mentioned in regulations 27, 30 (1), 31, 46, 60 and 62, (b) claim that the Department of Contracts had informed his client that his tender for the above-mentioned contract had been ruled administratively non-compliant due to, among other things, having submitted accounts that were only stamped and signed by a certified accountant, (c) remark that the accounts submitted by his client were the same set of accounts that had been provided and accepted in connection with other calls for tenders, (d) mentioning of the European Court of Justice (ECJ) reference to what was called ‘the material advantage test’ implying that if the contracting authority requested clarifications or additional information which did not prejudice the position of the other tenderers then the contracting authority was duty bound to ask for that information, (e) admittance that, through an oversight, drawings that were considered mandatory in the
tender dossier were not included in his client’s submission and (f) citation of a European Court of Justice (ECJ) case the Commission vs Denmark (C243 in the 1993 European Commission Report) which drew a distinction between fundamental and non fundamental conditions and another case (B211/02) where the Court of First Instance stated that the Commission’s decision to reject the tender without first seeking clarifications was clearly disproportionate and thus initiated a manifest error of assessment;

- having taken note, *inter alia*, of the contracting authority’s (a) declaration that it was untenable for the appellant Company to question, at this stage, whether it was regular to go for the negotiated procedure when the appellant Company (1) was informed by a letter, dated 12 October 2009, sent by the Contracts Department (2) attended a meeting during which the negotiated procedure was launched and explained, (3) participated in the negotiated procedure, thus accepting its conditions, and (4) only lodged an objection when the said Company’s tender was disqualified during the negotiated procedure, (b) reference to the fact that whilst 4.1.2 (page 7) stated that the tenderer has to provide “…Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant…”, in the financial statements, as submitted by the appellant Company, e.g. the 2005 financial statements, the appellant Company indicated in the contents pages, pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the ‘notes to the financial statements’ and ‘the auditor’s report’ - adding that the same applied to the financial statements presented for 2006 and 2007, (c) remark wherein emphasis was placed on the fact that the submission of Form 4.6.12 was a mandatory requirement and that section 20.4 of the tender dossier (page 20) laid down that “... The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority, or if the tender documents are not filled in properly.” and (d) remark that, out of 21 drawings, the appellant Company submitted only 8, pointing out that these drawings were mandatory requirements, so much so, that ‘Form 4.6.1’ (pg 64) stated that “Tenderers are to include a signed copy of all tender drawings provided by the MGOZ and any other drawings prepared by the Tenderer.”

- having also taken note of the DG Contracts’ testimony wherein, *inter alia*, he gave a thorough insight as to what prompted a negotiated procedure and the ‘modus operandi’ followed in this particular instance;

- having noted DG Contracts’ remark wherein he corroborated a point raised by the contracting authority’s legal advisor who argued that if the appellant Company wished to object to the negotiated procedure it should have done so prior to taking part and not after participating and after having its offer rejected, stating that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure;

- having heard JPF Joint Venture’s (an interested party) issues raised during the hearing, particularly, those relating to the fact that (a) since all the tenders
received were judged to have been irregular, there was sufficient ground to move on to the negotiated procedure, (b) following the tenderers’ meeting, one of the tenderers did not submit a bid, two tenderers submitted a tender but both were, eventually, found, once again, non-compliant with one of them, the appellant Company, lodging an appeal and the fourth one (his client) who had submitted a regular tender, (c) he had checked with the Malta Financial Services Authority (MFSA) but could not find the appellant Company’s audited accounts for the 3 years requested in the tender document and (d) the appellant Company omitted the auditor’s report simply because the accounts had not been audited;

- having also heard the testimony given by the Chairperson of the adjudication board wherein, amongst other things, she stated that (a) the financial statements the appellant Company had submitted were incomplete in the sense that ‘the notes to the financial statements’ and ‘the auditor’s report’ were missing and the accounts were only stamped and signed by the accountant, (b) following advice sought from the Contracts Department, the committee was advised that the accounts required some sort of verification, implying an audited set of accounts, (c) with regards to the street lighting issue, albeit Form 4.6.12 laid down how the street lighting works had to be carried out and required the tenderer to endorse the form so as to bind himself to abide by those instructions, as well as, requesting the tenderer to submit a street lighting report, yet, the appellant submitted (1) a signed sheet of paper entitled ‘Form 4.6.12’ but without any of the instructions given in ‘Form 4.6.12’ provided in the tender document and (2) a street lighting report, (d) with regards to as to why the adjudication board had found that the tenderer had not abided by the contracting authority’s terms and conditions as per its published tender dossier, the evaluation committee’s main concern was not that the appellant Company did not submit the form in the format provided in the tender document but that the appellants had not submitted all the information that had been requested of them, (e) contrary to what the appellant Company seemed to imply, the negotiated procedure did not allow the evaluation committee to negotiate with the bidders during the tender evaluation process and (f) in the case relating to the mandatory drawings that had to be submitted by tenderers, irrespective of the fact that the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the appellants, these would have been bound only by the 8 drawings that they submitted and not by the 21 drawings provided as requested in the tender document

reached the following conclusions, namely:

1. The PCAB feels that if the appellant Company had wished to object to the negotiated procedure, the same appellant Company should have done so the moment the negotiated procedure was launched and not in the course of the process when its offer had been rejected.

2. The PCAB feels that the ‘modus operandi’ followed by the Contracts Department in dealing with the ‘negotiated’ procedure was correct.

3. The PCAB opines that (a) an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification and (b) unless otherwise
instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA.

4. The PCAB cannot agree with the appellant Company’s statement wherein it was argued that the evaluation committee should not have gone into its financial statements during the negotiated procedure because, once a tenderer had qualified to participate in the negotiated procedure, that meant that the said Company had already satisfied regulations 49 to 52. The PCAB agrees with the DG Contracts’ interpretation of the issue wherein the latter claimed that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure and that the negotiated procedure is, *per se*, a new process.

5. The PCAB retains the examples provided by the appellant Company, in so far as the clarification procedure to be followed is concerned, as not in line with the spirit of the appeal discussed during this hearing and concludes that the kind of clarifications that the evaluation committee could ask for during the adjudication process is the same, both in the case of a normal call for tenders, as well as, in the case of a negotiated procedure, adding that the evaluation committee could not ask for documents and information that should have been submitted by all tenderers in the first place, these being regarded as mandatory.

6. The PCAB agrees with the adjudication board’s conclusion, namely that, irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as requested in the tender document.

As a consequence of (1) to (6) above this Board finds against the appellant Company.

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

Alfred R Triganza Anthony Pavia Edwin Muscat
Chairman Member Member

*14 March 2010*
PUBLIC CONTRACTS APPEALS BOARD

Case No. 190

Advert No CT 245/2009 - CT 2569/07
Tender for the Supply, Delivery, Installation and Commissioning of a Various Equipment for State Schools Science & Technology Laboratories (Lots 2 and 6)

The closing date for this call for tenders published on 30.06.2009 was 25.08.2009.

Re: Lot 2
Seven (7) different tenderers submitted offers which were considered as administratively and technically compliant

Re: Lot 6
Three (3) different tenderers submitted offers which were considered as administratively and technically compliant

The total amount budgeted for this tender – Lots 1 to 7 - was € 2,489,064 (excluding VAT).

On 18.01.2010 Messrs Labo-Pharm Ltd filed an objection against the intended award of the tender in caption (Lots 2 and 6) to Cherubino 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 05.03.2010 to discuss this objection.

Present for the hearing were:

Labo-Pharm Ltd
Dr Michael Psaila LL.D. Legal Representative
Dr Simon Tortell LL.D. Legal Representative
Mr Stephen Debono

Cherubino Ltd
Dr Adrian Delia LL.D. Legal Representative
Dr Francis Cherubino LL.D.
Mr David Basile Cherubino

Ministry of Education, Culture, Youth and Sport
Dr Stephen Zammit Legal Representative

Adjudication Board
Mr Raymond J. Camilleri Chairperson
Mr Duncan Pulis Secretary
Ms Desiree Scicluna Bugeja Evaluator
Mr Mario Falzon Evaluator
Mr Gaetano Bugeja Evaluator
Mr Franco Costa Evaluator
After the Chairman PCAB’s brief introduction about this case the appellant Company’s representatives were invited to explain the motives of the objection. This was followed by the intervention of (a) the Ministry of Education, Culture, Youth and Sport’s legal representative, (b) the recommended tenderer, namely, Cherubino Ltd and (c) the Director General Contracts.

Dr Michael Psaila, legal representative of Labo-Pharm Ltd, the appellant Company, commenced his intervention by stating that, in their motivated letter of objection dated 21 January 2010, they explained and indicated that at paragraph ‘A’ of the Instructions to Tenderers, which was in the first page of the tender document under reference, it was clearly specified in bold that:

‘Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender dossier. Failure to submit a tender containing all the required information and documentation within the deadline will lead to the rejection of the tender’

He continued by saying that, apart from this, under Clause 11.3 A financial bid calculated on a basis of DDP for the supplies tendered, including if applicable, which was to be inserted ONLY in Package 3, tenderers were required to submit, inter alia:

‘(e) the details of the bank account into which the payment shall be made (as per Financial Identification Form attached)’

Furthermore, Dr Psaila, proceeded that, among the items that had to be examined at the administrative compliance stage, were the documentation indicated under clause 11 since the ‘Administrative Compliance Grid’, required, amongst other things, a reply for its query

“Is documentation complete as per Article 11 Content of tenders of the Instructions to Tenderers? (Y/N)”

He contended also that, in every tender, there was a template of the Financial Identification Form which was always indicated as a tender requirement by the Department of Contracts. The appellant Company’s lawyer said that, as a matter of fact, there was another appeal regarding a tender in connection with roads where one of the reasons given as to why Polidano Group’s offer was rejected was that they did not submit such a document.

At this point his attention was drawn by another interested party’s legal representative, namely, Dr Adrian Delia, that this case has not yet been heard by the PCAB, the appellant Company’s legal representative explained that he just wanted to highlight the fact that it was clear that it was a standard practice of the Department of
Contracts that any document that was requested had to be submitted, otherwise such tender would not be considered as administratively compliant and would be rejected.

He said that, as a matter of fact, as far as Lot 6 was concerned, on the ‘Summary of Tenders Received’ that was signed by the General Contracts Committee and published on the Department of Contracts’ notice board, it was noted that the Financial Identification Form pertaining to the recommended tenderer was missing. Dr Psaila also said that, on the Department of Contracts’ website, there was indicated that the Financial Identification Form was missing for both Lots 2 and 6.

As a consequence, they were contending that, once the tender requirements were clear and that this document was not submitted as requested, the offer of Cherubino Ltd should not be accepted.

Dr Stephen Zammit, legal representative of the Ministry of Education, Culture, Youth and Sport, commenced his intervention by stating that, from inquiries carried out, it resulted that the Financial Identification Form was one of the documents that was presented by Cherubino Ltd and, therefore, they could not understand how it was being stated that it was not submitted. However, in reply to a specific question by the PCAB, Dr Zammit confirmed that this document was inserted in Package 2. He pointed out also that the basis of the appeal was that the Financial Identification Form was not submitted.

Dr Psaila intervened by stating that he was confused because the document that was signed and issued by the General Contracts Committee clearly stated that such a document was missing. He said that it was only during these proceedings that they became aware of the fact that this document had been inserted in the wrong package. Furthermore, Dr Psaila explained that they based their appeal on the documentation available. However, he contended that, once it has been declared that the Financial Identification Form had been inserted in the wrong package then there was another grievance because Clause 11.3 clearly specified that this document had to be inserted ONLY in Package 3. Dr Psaila maintained that once this document was inserted in Package 2 it should not have been considered admissible.

Dr Adrian Delia, legal representative of Cherubino Ltd, said that, apart from quoting from the article of the ITT mentioned by the appellants, there were other articles which had to be complied with. He said that article 26.2 specified that:

“Payments due by the Contracting Authority shall be made to the bank account mentioned on the financial identification form completed by the Contractor”

Dr Delia emphasised that this referred to the number of the Bank account into which the payment had to be made and not to the ‘financial statement’ or the ‘financial capability’ or the ‘financial position’ or the ‘financial status’ of the tenderer. The recommended tenderer’s legal advisor also pointed out that this had to be submitted by the contractor and not the tenderer, that is, after the award of the contract. He argued that, as a consequence, this was not a mandatory document that was required under the terms of clause 11.3 referred to by the appellant Company’s legal representative.
Dr Delia stated that, as a state of fact, the list indicated under Clause 11.3 was not mandatory because of the words “including if applicable”. Furthermore, he maintained that no reference was made to the Financial Identification Form in the Index of this tender. Dr Delia contended that it was absolutely not true that Package 2 was only “technical” and that Package 3 was only “financial”. He said that clause 11.2, which referred to the information that had to be inserted in Package 2 (technical bid) *inter alia* stated that:

*e) Contact Details of the Tenderer/s in the duly signed form provided in Annex VII – Details of Bidder*

and

*f) Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers.*

Messrs Cherubino Ltd’s lawyer said that Article 3.6 referred to the ‘financial statements’ and, in this particular tender, it was specifically requested that such documents were to be submitted in Package 2. He maintained that it could not be argued that a ‘financial statement’ that included an account number could not be inserted in Package 2.

Dr Delia said that all the arguments brought forward by the appellant Company’s legal representative were unfounded because:

- a. the submission of the financial identification form was not mandatory;
- b. the financial identification form had to be completed by the contractor and not the tenderer;
- c. clause 11.3 quoted by the appellants stated ‘if applicable’ and
- d. in Package 2, reference was specifically made to Article 3.6 wherein tenderers were requested to submit all financial information.

Dr Delia said that on the basis of appellant Company’s argument that financial information had to be inserted in Package 3, with the permission of the PCAB and if considered relevant, he would ask any witness from Labo-Pharm Ltd to state whether the appellants had submitted the financial information in Package 2 because otherwise even they should have been excluded.

Dr Psaila maintained that there was a big difference between a ‘financial statement’ and the ‘financial bid’ because the former showed the financial capabilities of the company and the latter was the financial offer in respect of a particular tender. He said that such requirement was so applicable that the Department of Contracts or the Contracting Authority wanted to know in which bank account payments were to be made.

Dr Tortell insisted that this tender stipulated that the details of the bank account had to be inserted *ONLY* in Package 3.

At this stage it was decided to call Mr Francis Attard, Director General (Contracts) to the witness stand. He gave his testimony under oath.
On cross examination by the PCAB, Mr Attard testified that the scope of the financial identification form was that, if, eventually, the bidder was awarded the contract and, as a result, would need to be paid for works carried out or services rendered, as well as, for supplies provided, the contracting authority would know the details where payments due had to be made. He also confirmed that the financial identification form did not show the financial standing or status of the bidder and that it had no bearing on the evaluation process. The Director General (Contracts) said that, according to the Public Contracts Regulations and the tender conditions, the significance of ‘financial’ in the context for insertion in Package 3, was the financial offer by which a tenderer would be competing with its rivals for a particular call for tenders.

When specifically asked to state whether the financial identification form was part of the financial offer, the reply given by Mr Attard was in the negative. He also said that, normally, the financial identification form was requested for submission in Package 2 and therefore, in this tender, they could have made a mistake. It was confirmed that, if the financial identification form was missing or displaced, it did not prejudice government’s interests and that it was applicable if it was one of the mandatory requirements.

Mr Attard said that the conditions published in a particular tender were pivotal as these were binding. He proceeded by stating that he could not exclude the possibility that in other tenders the financial identification form might have been requested for insertion in Package 3 but, normally, it is requested in Package 2.

At this stage, Dr Tortell intervened by insisting that, contrary to what was being stated by the Director General (Contracts), such document was always requested in Package 3 and that it was never requested in Package 2. The appellant Company’s lawyer acknowledged that it only included the account number and that its importance was questionable, however, it was not correct to state that, normally, it was requested in Package 2.

Dr Delia said that, in substance, his client did not fail because there was anything that was required for the purpose of evaluation that was not submitted. He said that the evaluation process could have been prejudiced if the price were to be disclosed in Package 2. The lawyer also said that he did not think that his colleague was correct when he said that Package 2 referred to the technical bid only because in this package there was also the administrative compliance, which among other things, apart from the tender price which had to be inserted in Package 3, included the “financial part”. At this point, he referred to the above-mentioned Article 3.6 and also Clarification 1 that was issued by the Department of Contracts on the 28 July 2009 that was sought before the submission of the tender wherein it was stated that:

‘The final beneficiary would be ready to accept “Financial Statements” instead of Full Audited Accounts, which Financial Statements would still however, be required to be verified by an independent auditor/accountant...’

and also required
‘An appropriate statement from his bankers, indicating his financial standing would still be required.’

Dr Delia questioned whether the financial statements that were inserted in Package 2 would be considered invalid if these included a bank statement with an account number. He argued that if Package 2 included data that was also requested in Package 2 then it was no longer mandatory to be re-submitted in Package 3.

The Chairman PCAB pointed out that it was the balance of the account that mattered and not the account number because the account number on the financial identification form could easily be changed. Furthermore, he said that the choice of words that was being used in the specifications created confusion because it was not possible to establish what was applicable or mandatory. It was also stated that one could not have something which was ‘mandatory’ and ‘if applicable’.

With regard to what was stated by Dr Delia regarding the distinction between a tenderer and a contractor, Dr Psaila said that everyone knew that a tenderer would become a contractor after being awarded the tender and that the contract would be signed with the latter. He said that such details were necessary because, on signing the contract, reference would be made to the information given in the financial identification form which in, this particular tender, had to be inserted in Package 3. Dr Tortell emphasized that, under normal circumstances, whenever a tenderer made this type of mistake their tender was disqualified. He said that, earlier on, reference was made to an objection relating to a €40m roads tender because the appellant Company was rejected for the same reason indicated in the Contacts Department’s schedule and website, namely, because they did not submit the financial identification form. He reiterated that, although it was acknowledged that, in substance, they did not make a serious mistake, the regulations were identical for everybody and, in this case, all tenderers had to insert the financial identification form in Package 3 and not in Package 2.

Continuing with his testimony, Mr Attard said that the General Contracts Committee had followed the same procedure adopted in all other tenders and that it decided to award Lots 2 and 6 to Cherubino Ltd on the basis of the Evaluation Committee’s recommendations. The witness testified that he did not recall that they had discussed the issue regarding the missing financial identification form after the receipt of the Evaluation Committee’s report. He emphasized that, although this form was reported missing in Package 3, it was not found missing from the whole offer.

Dr Tortell intervened to point out that on the Department of Contracts’ website it had been indicated that the financial identification form of Cherubino Ltd was missing from Package 3 because everyone knew that it had to be inserted in this package and not in Package 2.

In his concluding remarks, Dr Delia explained that the financial identification form was not inserted in Package 3 because it was part of the documents inserted in Package 2 as specified in clause 11.2 (f) Information related to the selection criteria as per Article 3.6 of the Instructions to Tenderers. He reiterated that this document was not even mentioned in the ‘Index/Annexes’. The recommended tenderer’s lawyer argued that his clients did nothing wrong when they did not re-submit the financial
identification form in Package 3 once this document had already been inserted in Package 2 and considering the fact that under clause 11.3 it was stated ‘if applicable’.

Dr Tortell concluded by stating that article 3.6 did not specify the account number as specifically requested in the financial identification form but requested tenderers to submit copies of audited accounts and the bank reference(s). He contended that, apparently, someone made a mistake by inserting the ‘form’ in the wrong package and, as a result, such a tender should be declared ‘null’ once they did not comply with the tender’s specific instructions. He agreed that, in substance, this clause was useless but he felt that the PCAB had no alternative in the terms of the conditions of this tender. Dr Tortell said that, albeit the Director General (Contracts) was stating that, normally, this form was requested in Package 2, under clause 11.3 it was clearly specified that “this information is to be inserted ONLY in Package 3”. As a consequence, he maintained that the arguments brought forward and the clauses referred to by Dr Delia were all irrelevant because the tender conditions did not permit that such a document be inserted in Package 2.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18.03.2010 and also through their verbal submissions presented during the public hearing held on the 05.03.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant’s legal representative’s claims regarding the fact that (a) with regards to Lot 6, the ‘Summary of Tenders Received’ that was signed by the General Contracts Committee and published on the Department of Contracts’ notice board, it was noted that the Financial Identification Form pertaining to the recommended tenderer was missing, which offer, sui generis, should have led to outright rejection, (b) the recommended tenderer’s Financial Identification Form was inserted in the wrong package, namely 2 instead of 3 as was specifically stated in Clause 11.3 of the Tender document, (c) this tender stipulated that the details of the bank account had to be inserted ONLY in Package 3, (d) there was a big difference between a ‘financial statement’ and the ‘financial bid’ because the former showed the financial capabilities of the company and the latter was the financial offer in respect of a particular tender, (e) contrary to what had been stated by the Director General (Contracts), the Financial Identification Form was always requested in Package 3 and that it was never requested in Package 2, (f) although it was acknowledged that, in substance, the appellant Company did not make a serious mistake, the regulations were identical for everybody and, in this case, all tenderers had to insert the financial identification form in Package 3 and not in Package 2, so much so that on the Department of Contracts’ website it had been indicated that the financial identification form of Cherubino Ltd was missing from Package 3 because everyone knew that it had to be inserted in this package and not in Package 2 and (g) the appellants agreed that, in substance, this clause was useless but he felt that the PCAB had no alternative in the terms of the conditions of this tender;
having taken note of the contracting authority’s (a) claim that, from inquiries carried out, it transpired that the recommended tenderer’s *Financial Identification Form* was one of the documents that was presented and (b) confirmation that the recommended tenderer’s *Financial Identification Form* was inserted in Package 2;

having also taken note of the recommended tenderer’s legal advisor’s comments relating to (a) particularly, article 26.2 which, according to the same lawyer, referred to the number of the Bank account into which the payment had to be made – which was not a mandatory document - and not to the ‘financial statement’ or the ‘financial capability’ or the ‘financial position’ or the ‘financial status’ of the tenderer, (b) the fact that the list indicated under Clause 11.3 was not mandatory because of the words “including if applicable”, (c) the ‘financial statements’ wherein these had been specifically requested to be submitted in Package 2 and which, according to the same interested party’s lawyer it could not be argued that a ‘financial statement’ that included an account number could not be inserted in Package 2, (d) the *financial identification form* only included the account number and that its importance was questionable, (e) the fact that the *financial identification form* had to be completed by the contractor and not the tenderer and (f) the fact that, in substance, his client did not fail because there was anything that was required for the purpose of evaluation that was not submitted;

having heard the DG Contracts (a) state that the scope of the *financial identification form* was that, if, eventually, the bidder was awarded the contract and, as a result, would need to be paid for works carried out or services rendered, as well as, for supplies provided, the contracting authority would know the details where payments due had to be made, (b) confirm that the *financial identification form* did not show the financial standing or status of the bidder and that it did not form part of the financial offer and, as a result, it had no bearing on the evaluation process, (c) state that according to the Public Contracts Regulations and the tender conditions, the significance of ‘financial’ in the context for insertion in Package 3, was the financial offer by which a tenderer would be competing with its rivals for a particular call for tenders, (d) state that, normally, the *financial identification form* was requested for submission in Package 2 and therefore, in this tender, they could have made a mistake, (e) confirm that, if the *financial identification form* were to go missing or be displaced, it would not mean that this would, somehow, prejudice government’s interests and (f) state that he could not exclude the possibility that in other tenders the *financial identification form* might have been requested for insertion in Package 3 but, normally, it is requested in Package 2,

reached the following conclusions, namely:

1. The PCAB feels that, in this particular instance, especially in consideration of the DG Contracts’ testimony, it has to acknowledge that the contracting authority and the Department of Contracts had made a mistake by referring to the wrong package in the tender conditions. In this context, prior to reaching its decision, the PCAB also reflected on the fact that such a mistake did not in any way disadvantage any of the participating tenderers.
2. Furthermore, this Board feels that the DG Contracts’ testimony also provided more than adequate assurances about (a) the significance of the *financial identification form*, (b) the immateriality surrounding the package in which it should be submitted as compared to the need for it to be submitted in whichever package as long as it is submitted and (c) the significance of ‘financial’ in the context of type of document which needs to be inserted in Package 3 vis-a-vis the ‘financial offer’ by which a tenderer would be competing with other tenderers for a particular call for tenders - in this instance, this Board concluded that an account number does not, in any way, alter or effect competitive forces.

3. It also agrees with the submission of Dr. Delia that, as requested in the Tender Document, the *financial identification form* was not mandatory.

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

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be reimbursed since the appeal may have been prompted by misleading information published by the Department of Contracts.

Alfred R Triganzia
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

*18 March 2010*
PUBLIC CONTRACTS APPEALS BOARD

Case No. 191

CT/2253/2007; Advert CT308/2007 GPS 68.333.T.07.BM
Tender of Chemistry Reagents with Equipment on Loan

This call for tenders relating to a contract running for a period of 36 months and with an estimated value of € 1,682,113 (Lm 722,131) was originally published in the Government Gazette on 28.07.2007. The original closing date for this call for offers was 13.11.2007.

Four (4) different tenderers had originally submitted their offers.

On 24.11.2009 Messrs Vivian Corporation Limited filed an objection against the decision taken by the Contracts Department to disqualify its bid for being adjudicated administratively/technically non-compliant since the delivery period was not according to tender specifications and conditions.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Trigano (Chairman) with Mr Anthony Pavia and Mr Carmel Espósito, respectively, acting as members convened a public hearing on 22.03.2010 to discuss this objection.

Present for the hearing were:

Messrs Vivian Corporation Ltd

- Dr Kenneth Grima Legal Representative
- Ms Joanne Cremona Representative
- Ms Denise Borg Manche’ Representative
- Mr Gordon Zammit Representative

Government Pharmaceutical Services

- Ms Anne Debattista Director

Evaluation Board

- Ms Miriam Dowling Chairperson
- Dr Gerald Buhagiar Consultant in charge
- Dr Christopher Barbara Chairman Pathology
- Ms Carmen Buttigieg Member
- Mr Carlo Calamatta Technical Specifier

Department of Contracts

- Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Dr Kenneth Grima, legal representative of Vivian Corporation Ltd, the appellant Company, remarked that, in his view, the case in question ought to be decided upon very rapidly for the following reasons, namely:

a) it turned out that his client was at one stage adjudicated as compliant. Nevertheless, continued Dr Grima, one year later, following an appeal by one of the two bidders that had been judged non compliant - an appeal that resulted in the readmission of the objecting party following which, technically, there should have been three compliant bidders still in the running - his client was informed that the Company’s bid was found to be non-compliant;

b) what appeared to have happened was that the evaluation board had overlooked something and this aspect came to light at a later stage which prompted the evaluation board to reject his client’s offer;

c) referring to page 4 of the decision dated 18th November 2008 with regard to PCAB Case No. 134 (CT/2253/07) – in respect of the objection raised by Olympus Italia – Dr Grima quoted what Dr Buhagiar had remarked in the sense that V.J. Salamone Marketing Ltd and Vivian Corporation Ltd met the requirements and, consequently, were recommended to proceed to the third stage.

Ms Anne Debattista, representing the Government Pharmaceutical Services (GPS), the contracting authority, remarked that the offer presented by the appellants was technically compliant but during the summer of 2009 there cropped up a problem with regard to the delivery period in the sense that the requested delivery period was between 4 to 6 weeks whereas the appellant quoted a delivery period of 6 to 8 weeks for the chemistry reagents. She added that there was no problem with regard to the delivery of the equipment. Ms Debattista, whilst confirming that the appellant Company was found compliant in the first report of the evaluation board, yet, following the first appeal by Olympus Italia, the contracting authority had obtained the clarifications indicated in the sentence handed down by the PCAB and, as a consequence, the evaluation board drew up another (2nd) report which was submitted to the Contracts Committee. She stated that it was at that moment in time, precisely on the 23rd July 2009, that the Contracts Committee referred the file back to the Government Pharmaceutical Services because the delivery period given by the appellants did not correspond to that requested in the tender document.

The Chairman PCAB intervened and stated that he could not comprehend why in 2010 the PCAB was still dealing with the same call for tenders in spite of the fact that it had decided an appeal relating to this same tender way back in 2008! He added that the timeline of events was rather difficult to accept in the sense that the PCAB issued a decision in November 2008, then another evaluation report was sent to the Contracts Department in July 2009 and in March 2010 the PCAB has, once again, been called upon to decide on another appeal, which appeal dealt with the delivery period being 6 to 8 weeks instead of 4 to 6 weeks when this process has been dragging on for a couple of years. The Chairman PCAB remarked that the fact that the PCAB
had given only one week to obtain the necessary clarifications was, *sui generis*, an indication that the clarification requested was not complex in its nature.

Dr Christopher Barbara, Chairman of the Pathology Department, remarked that the call for tenders was issued in February 2007 at the time when St Luke’s Hospital was still in operation. He added that when operations moved to Mater Dei Hospital they experienced a complete change in the way tests were carried out and communicated to doctors, a ‘modus operandi’ which necessitated the introduction of new software which made test results available to doctors online thus eliminating the possibility of errors in transcription. Dr Barbara pointed out that, since 2007, substantial developments had taken place in this field with regard to both quality and price such that the specifications of the tender in question were, at this stage, practically obsolete. Dr Barbara informed the PCAB that in October 2009 a financial authority was issued for the Health Department to contract this service so as to bridge the gap between the previous contract which had expired and this tender which was still in the process. Dr Barbara acknowledged that should this tender be awarded the contracting authority would end up with a ‘white elephant’.

The Chairman PCAB remarked that the cancellation of this tender in the prevailing circumstances ought to be an administrative issue and should, therefore, be decided upon by those quarters. He added that the PCAB should not be called upon to decide on an appeal conscious that the service requested in this tender in question was no longer required and would result in a sheer waste of public money.

Dr Gerald Buhagiar, consultant in charge, gave the following evidence:

- the contracting authority never raised any problems with regard to the delivery period of these items because experience had demonstrated that, in practice, the goods were delivered well before the deadline;
- he conceded that a lot of time was wasted in this tendering process and expressed the view that most of it was on the part of the Contracts Department;
- he agreed that it did not make sense to proceed further with this tender and added that, once this call for tenders was still in progress, the department could not initiate another tender incorporating up-to-date specifications;
- the contracting authority had acted upon the decision of the PCAB regarding the first appeal; and
- this was an essential supply contract in the delivery of a public health service and that within a year something had to be done since the bridging contract would expire.

At the request of Mr Francis Attard, Director General Contracts, Dr Buhagiar, Dr Barbara and Ms Debattista furnished the following timeline of events:

a. the closing date of tender (extended) was 11.12.2007

b. the first evaluation report was referred to Contracts Department on 14.04.2008
c. the PCAB decided on the appeal on 18.11.2008 which decision was communicated to the contracting authority on 4.12.2008

d. on 10.12.2008 the Contracts Committee authorised the contracting authority to seek the clarifications from Olympus Italia

e. an internal issue arose in the sense that in April 2009, when operations were shifted to Mater Dei Hospital, a new data management software was introduced which software had to be reflected in the tender specifications so as to render possible the interfacing between the hardware and the software

f. the second adjudication report (incorporating the clarifications) was referred to Contracts Department in mid July 2009

g. on 23.07.2009 the Contracts Committee raised the issue with regard to the delivery period given by the appellant Company

Dr Barbara stated that in view of the continuous technological developments that take place in this field of science this kind of tender was issued every three years so as to enable the department to obtain the latest technology and consequently provide a better service.

Ms Debattista stated that she had raised with the Contracts Department the question of the length of time being taken up in the processing of tenders in general but not specifically on this particular tender. She informed the PCAB that the estimated price of this tender was Lm 700,000.

The Chairman PCAB informed those present that albeit the PCAB was meant to deal with whether a tendering process was conducted in a correct and transparent manner, yet, in this particular instance, that aspect was, at this stage, irrelevant once the technical experts both agreed that the service originally requested was no longer required since technological developments had rendered it obsolete.

Dr Grima intervened to, *inter alia*, argue that

(i) his client was compelled to lodge an appeal because its offer was disqualified for being adjudicated non-compliant
(ii) the terms of reference of the PCAB called upon it to decide on the appeal before it
(iii) he opined that the PCAB ought to decide in favour of his client thus resulting in the refund of his client’s deposit and
(iv) it was up to other quarters to decide whether it was in the national interest to proceed with this call for tenders or to cancel it

On her part, Ms Debattista explained that the whole process was lengthy and complex because it involved, among others, the financial, technical and administrative aspects, which aspects were not all within her department’s control.
Mr Attard shared the view that the whole process was a complex one as it entailed various aspects, stages and departments, e.g. Ministry of Finance, the contracting department and the Contracts Department, and that as a consequence, it was difficult to forecast the time required to process a fresh call for tenders for the provision of this service.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 24.11.2009 and also through their verbal submissions presented during the public hearing held on the 22.03.2010, had objected to the decision taken by the General Contracts Committee;
- having duly noted the points raised by the appellant Company’s legal representative;
- having taken note of the highly unacceptable timeline covering this particular tender reference;
- having also taken note of the lack of administrative co-ordination amongst all interested parties;
- having also thoroughly considered both Dr Barbara’s and Dr Buhagiar’s remarks, especially the one referring to the fact that (a) should this tender be awarded the contracting authority would end up with a ‘white elephant’ and that (b) it did not make sense to proceed further with this tender;
- having heard Dr Buhagiar claim that (a) this particular tender referred to a supply contract relating to the delivery of a very important public health service and (b) within a year, something had to be done since the bridging contract would expire with possible negative consequential circumstances to the entire health system and the corresponding adverse effect on the ultimate patient;

reached the following conclusions, namely:

1. The PCAB feels that a great amount of time has been lost for reasons which are anything but acceptable;

2. The PCAB feels that the issue raised against appellant Company at this juncture denotes that proper analysis was not carried out ‘ab initio’;

3. The PCAB argues that, considering what transpired during the hearing, the question of a bid being adjudicated administratively/technically non-compliant since the delivery period was not according to tender specifications and conditions - especially when one takes note of the original date of publication of the said tender (28.07.2007) and the fact that there was already an appeal lodged in connection with this same tender a couple of years ago - has to be classified as extremely unreasonable and bureaucratic causing complete waste of time and resources;
4. The PCAB also feels that all parties concerned could have acted in a more proactive and less nonchalant manner, especially in the light of the fact that, according to one of the expert witnesses, Dr Buhagiar, this tender was very much an essential supply contract in the delivery of a public health service and that, within a year, something had to be done since the bridging contract would expire resulting in a potential complete shutdown in the same service;

5. The PCAB does not feel that it is within the realms of its remit to state that the tender in question is dealing with a ‘white elephant’. Yet, the PCAB also feels morally responsible to ensure that public procurement reflects a conscientious, professional, transparent, equitable and responsible undertaking by all interested parties. It is the opinion of the said Board that it can only recommend that public funds will not be allocated to the provision of an obsolete service or product item

6. The PCAB recommends that (a) another call for offers, devoid of all the errors committed in the tender under review, should be re-issued and (b) bearing in mind that the time frame is restricted, all parties should ensure that (1) proper measures should be taken so that a set of specifications, terms and conditions are professionally written with these being followed by an equitable and transparent adjudicating process and (2) an accelerated ‘modus operandi’ be resorted to in order to ensure timely delivery of pertinent chemistry reagents.

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 reimbursed.

Alfred R Triganza  Anthony Pavia  Carmel J Esposito
Chairman  Member  Member

22 April 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 192

CT/2184/2009; Advert CT269/2009

ETC Service Tender for the Publicity and Marketing Campaign for the Employability Programme

The closing date for this call for tenders was 10 September 2009. The budget available for this tender was €289,600 excluding VAT.

Five (5) different tenderers submitted their offers.

On 21.12.2009 Outlook Coop filed an objection against the intended award of the tender in caption to JP Advertising Ltd.

A public hearing was convened at the Board Room of the Department of Contracts to hear evidence in the above case on Wednesday 14th April 2010. The Public Contracts Appeals Board (PCAB) was made up of Mr Anthony Pavia (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members.

Present for the hearing were:

**Outlook Coop**
Mr Godfrey Kenely Managing Partner
Mr David Bezzina Representative

**JP Advertising Ltd**
Mr Chris Bianco Representative
Ms Audrey Abela Representative

**Employment and Training Corporation (ETC)**
Dr Ivan Gatt Legal Representative
Mr Willie Spiteri Adviser (contracts) to ETC

**Evaluation Board**
Mr Louis Cuschieri Chairman
Mr Felix Borg Evaluator
Mr Joseph Cutajar Evaluator
Mr Tonio Montebello Evaluator
Mr Martin Casha Secretary

**Department of Contracts**
Mr Francis Attard Director General
The Chairman PCAB explained that following the first hearing of this case, Mr. Alfred Triganza who had chaired the first meeting felt he should abstain from taking further cognizance of this appeal and consequently asked the administration to appoint a substitute in his stead to chair the fresh hearing of this case. Mr Pavia stated that he has been appointed chairman of the PCAB with the specific assignment to preside over this case.

Dr Ivan Gatt, legal representative obo of ETC, asked for the reason why the PCAB, as composed during the first hearing, felt that it should not decide on this case and that there should be a fresh hearing before another appeals board. Dr Gatt requested this information so as to ascertain that the circumstances and/or conditions that rendered the first hearing null did not prevail at this second hearing.

Mr Pavia reiterated that the Chairman of the PCAB had felt that he should not preside over this specific case and had asked to be temporarily replaced. Mr Pavia informed those present that there were no circumstances that precluded the PCAB in its present formation from considering this appeal.

Mr Pavia informed the parties concerned that whatever had been submitted during the first hearing was being entirely discarded and ignored and he therefore invited them to make fresh submissions on which the PCAB would base its decision.

Dr. Gatt expressed his reservations that since two members of the present board had already been present during the first hearing they could already be biased by what had been heard and discussed before.

Dr Gatt had nothing further to add but to request that his observations should be put on record.

The Chairman invited the appellant to explain the motives of the objection.

Mr Godfey Kenely, on behalf of Outlook Coop explained that they were basing their objection on two counts, namely on television advertising and on the allocation of a contingency provision.

Television Advertising: Mr Kenely explained that there were three main local television stations, namely Television Malta (TVM) with 32% audience share, One TV with 14.7% and NET TV with 5.6%. He added that given the net superiority of TVM in terms of audience share his firm had concentrated its television advertising proposal on TVM spots so as to reach out at the largest audience possible. Mr Kenely remarked that what mattered most was not the number of TV spots but rather their quality in terms of choice of TV stations and the time/s the spots were aired, i.e. prime time as against lean time.

Mr Kenely submitted that on comparing the number and quality of the spots proposed by his firm with those proposed by the recommended tenderer they found out that in terms of audience coverage the ratio worked out at 69:31 meaning that although the recommended tenderer included a larger number of TV spots the audience covered was inferior to the TV spots presented by his firm. Mr Kenely claimed that although
both bidders allocated about 50% of the budget, or about €100,000, towards TV promotion when one looked at the way the adjudication board awarded the points one would note that this did not reflect the importance given to TV promotion so much so that such items as ‘stationery’ and ‘newspapers’ were given the same weighting. Mr Kenely then quoted from page 50 of the tender document ‘Item 5 – Television Spots’:

TV spots shall be commissioned to promote the scope of the project on at least the three TV stations in Malta with the highest recorded viewing audience (as per Broadcasting Authority Survey)……………… The contractor is to guide the Beneficiary accordingly as to the most suitable airing times, recommended duration of adverts and any other variables involved.

Mr Kenely maintained that in spite of the weightings as worked out by the adjudication board still his firm had quoted a price cheaper than that quoted by the recommended tenderer. He said that he got certain details on the tender submitted by the recommended tenderer from the information available on the website of the Contracts Department.

Contingency Provision: Mr Kenely remarked that the recommended tenderer included an amount of €7,000 for contingencies which, according to instructions they had received from the Department of Contracts in connection with other tenders, should not have been included in a service tender since provision for contingency was requested for works tenders. He added that in a service contract bidders had to cost all the items submitted in their offer and that there was no room for contingencies.

Dr Ivan Gatt, obo the ETC, said that he was going to leave the technical aspects of the contract to the technical members of the adjudicating board however from the legal and general points of view he submitted the following:

the appeal was inadmissible because the appellant was not complaining that he was treated unjustly or differently from the other bidders or that the criteria used were discriminatory in his regard but the appellant was lamenting because he felt that the adjudication board should have used a different set of criteria;

it was up to the contracting authority to establish the adjudication criteria and it was its duty to apply such criteria uniformly with all the participating tenderers;

the PCAB was not meant to substitute the contracting authority or the adjudicating board in the sense that the PCAB should dictate to the adjudication board the criteria that had to be applied;

the PCAB’s task was to ensure that the adjudication board conducted a fair and transparent adjudication process that was equitable to all the participating tenderers; and

the members of the adjudication board had carried out their evaluation independently and had submitted all the detailed workings that had led to the final recommendations indicated in the adjudication reports.
The Chairman PCAB, remarked that, if required, the PCAB had the right and the duty to go into the entire tendering process, including the criteria adopted and applied by the adjudication board and if it turned out that any criteria were defective then the PCAB was duty bound to submit its comments thereon stopping short of dictating its own criteria to the adjudication board. He added that this was more so if the criteria had not been published in the call for tenders. Mr Pavia agreed that the PCAB could not replace the adjudication board.

Mr Martin Casha, secretary to the evaluation board, explained that the evaluation grid formed part of the tender document and that the grid spelled out the following evaluation criteria, i.e. rationale carried 10% of the marks, strategy carried 40% and ‘timetable and quality of activities’ carried 50%. He added that the Contracts Department had vetted the tender document prior to publication. Mr Casha remarked that at its first meeting the adjudication board had sub-divided the three evaluation criteria in the grid into number of items and the adjudication board allocated marks to each and every item as demonstrated in the workings in the evaluation report. Mr Casha further explained that the three board members carried out their evaluation individually and the marks given were backed by an explanatory note and the final mark was the average of the marks given by the three evaluators. Mr Casha added that the contracting authority did not specify the airing times of the adverts but left it up to the bidders to guide it regarding the most suitable airing times to reach out to the categories specified in the tender, which included the unemployed, employers and the general public.

Mr Casha remarked that the contracting authority did not attach an estimate to the different advertising media indicated in the same call for tenders but indicated a global amount with the aim of leaving the bidders at liberty to design their publicity structure as they deemed most fit without the imposition of restrictions on the part of the contracting authority, i.e. a bidder could have allocated 50% of the budget to newspapers ads rather than TV spots. He reiterated that the criteria upon which the adjudication board had based their work had formed part of the Tender Document and were not formulated by the adjudication board at the time of evaluation.

As regards Mr. Kenely’s remark that his company had quoted the cheapest bid Mr Casha commented that the points on this subject had been worked out according to a formula applicable to all bidders and that in fact the appellant company had been allocated the highest score in this respect.

Mr David Bezzini, on behalf of Outlook, remarked that their main contention was about the fact that TV spots represented 50% of the contract value but this did not reflect itself in the distribution of marks among the different evaluation items. Mr Bezzina opined that could have happened through an oversight on the part of the adjudication board or for some other reason.

Mr Kenely remarked that according to the regular research conducted by the Broadcasting Authority the viewing audience share was as follows: TVM with 32%, ONE TV with 14.7% and NET TV with 5.6%.

Mr Pavia observed that the appellant was claiming that he concentrated his TV spots at prime time on TVM, which had by far the highest viewership, and asked what weight was given to this aspect of the evaluation.
Mr Tonio Montebello, marketing manager at ETC and evaluator, under oath, gave the following information:

- Marketing was carried out with the aim of reaching out to the biggest audience that one intended to target and that was exactly what the five participating bidders set out to do in their submissions in response to this call for tenders;

- the evaluators found the strategies presented by both Outlook and JP Advertising very valid in content and the number of points awarded to these two bidders clearly showed this fact;

- the evaluation board had to find or to develop a method whereby to award points on the different media that had been proposed to transmit the message of this advertising campaign, such as newspapers, magazines, websites, radio, posters and TV;

- one of the criterion was the allocation of 12% of the 50% - assigned to the Publicity (and flexibility) Schedule - to TV spots which criterion was applied to all bids;

- the strategy of both JP Advertising and Outlook with regard to TV adverts covered the three main TV stations and the airing times chosen were such that they both adequately covered the audience that the contracting authority had in mind and hence, given that both strategies were deemed quite valid, the evaluation board had to establish a variable for the award of a number of points and the variable used across the board was the number of TV spots proposed;

- the two bidders proposed such a mix of TV stations and airing times - from prime time to lean time and from morning to afternoon to evening and late evening - that they would hit the different audiences that the contracting authority wanted to target, which included particular sectors, such as housewives, employers, unemployed besides the general public;

- If a tenderer had proposed all the TV spots at prime time or on one or two particular TV stations only, the evaluation board would have considered such a strategy as deficient because it would not have covered the full spectrum of the desired audiences and would have lost points with regard to strategy and implementation;

- A marketing campaign had to be evaluated not on one particular aspect – TV advertising was only one promotional medium - but in a holistic manner because different advertising media were directed at different audiences; and

- The evaluation board tried to be as objective as possible in its deliberations, for example, with regard to radio spots, the evaluation board awarded the same number of points for quality since the radio advert itself was not available for examination whereas it awarded different marks to JP Advertising which offered 2,994 spots and to Outlook which offered 2,520 spots. Mr Montebello
remarked that the evaluation board could not go into minute details by examining each and every radio spot with regard to airing time, radio station and so forth considering the number of radio stations and the number of spots involved otherwise it would have been a never ending exercise. Likewise, both bidders offered different notepads and hence were not awarded the same number of points.

Mr Bezzina pointed out that notwithstanding the greater number of spots proposed by the recommended tenderer and that his firm had allocated more prime time TV spots the prices quoted were €80,000 by Outlook and €105,000 by JP Advertising, meaning that both were reaching out at more or less the same audiences with the recommended tenderer having to pay an additional €25,000. Mr Kenely remarked that this had to be seen in the light that 50% of the budget was earmarked for TV advertising.

With regard to price, Mr Casha remarked that the price quoted by the appellant was about €8,000 cheaper than that of the awarded tenderer and that reflected itself in the points awarded such that Outlook was given 16.91 and JP Advertising got 16.39.

Mr Casha stated that the recommended tenderer opted to quote a contingency provision of €7,000 which, in his view, was attached to the item marked ‘others’ where bidders were asked to propose items not contemplated in the tender document. He confirmed that the marks were awarded on the total price offered and not on the different items presented to which a specific cost had been attached. In fact, the total price offered by the recommended tenderer was €289,000 which included the contingency of €7,000 and therefore, if anything, JP Advertising was ‘penalised’ for including this contingency.

Mr Kenely remarked that under ‘other items’ one could have included innovative means of advertising not included in the tender but ‘contingency’ in itself was meaningless and without any value because it was not attached to any particular activity and one could have inserted any amount by way of ‘contingency’ and the penalty that a tenderer would have sustained was of a mere 0.5. He reiterated that according to procurement procedures no contingency should have been quoted in a service tender.

Mr Chris Bianco, on behalf of JP Advertising, under oath, gave the following evidence:

- This tender was to run for a duration of two years during which developments would take place in the marketing sector;

- This advertising campaigned was intended to target the registered unemployed, the securely employed, the inactive (mostly housewives or persons of a certain age) and the employers;

- The contingency would be used to effect any adjustments to the campaign to render it more effective or focused should circumstances on the ground so indicate, which corrective or additional measure would be subject to approval by the contracting authority, in other words, no additional services and payment thereof could be effected on the basis of the contingency provision
without clearance from the contracting authority and if the contingency was
not put to use his company would not receive payment in this respect;

- Regarding ‘item 5 TV spots’, his firm allocated €35,000 for TVM, €23,000 for
ONE TV and €21,000 for NET TV which in itself was proof that all three
main local TV stations were included in their strategy and the difference in the
number of TV spots on each station reflected the cost of each spot according
to the TV station;

- The morning and afternoon adverts were intended to target the inactive and the
unemployed with adverts specifically designed towards these two categories,
the prime time adverts were to target the employed and the general public
whereas the late evening adverts were to target the employers; and

- The appellant was saying that JP Advertising offered 533 TV spots whereas
Outlook offered 392 such spots resulting in a difference of 111 spots and noted
that the appellant had 52 spots that were to be aired after 11 p.m. when it was
likely that these would not reach much viewership. Mr Bianco questioned
how the appellant obtained certain information with regard to his bid, such as
the airing time of the TV spots.

Mr Kenely responded that the late evening adverts were intended for employers and
reiterated that he obtained the information with regard to the offer presented by the
recommended tenderer from the website of the Department of Contracts.

Mr Joe Cutajar, project leader ETC and evaluator, under oath, explained that this
advertising campaign was directed towards the unemployed, the securely employed,
the inactive and the employers and covered a wide range in terms of age groups and
level of education and skills. He added that one required a wide range of advertising
media to reach all the various categories of the population as indicated in the tender
document and hence the inclusion of all those items and the space reserved for bidders
to propose their own ideas and to make their own input. Mr Cutajar stressed that the
evaluation board carried out its adjudication in the light of all these considerations and
in a holistic manner and not solely on TV spots or any other particular aspect of the
tender.

Mr Francis Attard, Director General (Contracts), remarked that it was not against the
procurement regulations for bidders in regard to services to make a provision for
contingency in their offers.

In closing Dr Ivan Gatt concluded that (i) the tender document set out the evaluation
criteria and hence bidders were aware of the rules of the game from the very start and
(ii) the evaluation board carried out its work in an objective manner and gave an equal
treatment to all the participating bidders.

The appellant company’s representatives offered no closing remarks.

This Board –
having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 23 December 2009 and also through their verbal submissions presented during the public hearing held on the 14 April 2010, had objected to the decision taken by the General Contracts Committee;

having taken note of the appellant’s claims that –

a. on comparing the number and quality of the TV spots proposed by his firm with those proposed by the recommended tenderer they found out that in terms of audience coverage the ratio worked out at 69:31 meaning that although the recommended tenderer included a larger number of TV spots the audience covered was inferior to the TV spots presented by his firm, and that

b. although both bidders allocated about 50% of the budget, or about €100,000, towards TV promotion when one looked at the way the adjudication board awarded the points one would note that this did not reflect the importance given to TV promotion so much so such items as ‘stationery’ and ‘newspapers’ were given the same weighting. And

c. that the recommended tenderer included an amount of €7,000 for contingencies which, according to instructions they had received from the Department of Contracts in connection with other tenders, should not have been included in a service tender since provision for contingency was requested for works tenders.

having also noted the reservations expressed by the legal representative of the contracting authority regarding the possibility that the circumstances that led to the previous chairman to forego taking further cognizance of the case might also apply to the Board as specifically appointed to investigate the case anew, and that there might already exist a bias in the Board’s mind considering that what had already been heard and discussed between the previous Board’s member cannot simply have been forgotten.

the PACB also noted the legal representative’s contention that it was not empowered to go into the criteria that the evaluation board had used to evaluate the case and also that it was not there to replace the adjudication board’s discretion.

Having taken note of Item 5 of the Tender Document which was mentioned by both sides and runs as follows- “TV spots shall be commissioned to promote the scope of the project on at least the three TV stations in Malta with the highest recorded viewing audience (as per Broadcasting Authority Survey)................. The contractor is to guide the Beneficiary accordingly as to the most suitable airing times, recommended duration of adverts and any other variables involved;

Having heard and taken note of the evidence of members and secretary of the Evaluation Board particularly as regards that -
i. the evaluation criteria had been published in the Tender Document itself,

ii. the modus operandi of the board, i.e. that marks had been given individually according to the grid as laid down in the Tender Document and later averaged out to create an objective mark,

iii. the contingency amount as offered by JP Advertising could be attached to the item ‘others’ as allowed in the Tender Document

- Having heard the representative of JP Advertising saying that his company had constructed the proposed TV coverage based on the three TV stations which attracted the highest viewership as laid down in item 5 of the Tender Document and also his remarks that the appellant’s company proposal to channel a substantial amount of the budget to advertisements after 2300 hours might not make much sense.

- Having taken note of the Director General’s statement that the item of contingency as offered in the bid by JP Advertising may be allowed:

reached the following conclusions, namely:

1. None of the circumstances that instigated the former Chairman to abstain from taking further cognizance of the case are applicable to the PCAB as specifically constituted to hear the case anew and that such PCAB does not carry forward any bias from the previous hearing particularly since the sentence had not even reached the drafting stage.

2. The PCAB feels it is very significant that the criteria of adjudication had been published in the Tender Document and that, while item 5 of the Document referred to the three TV stations with the highest viewership it did not oblige tenderers to focus on any one single channel but left it to the tenderers to guide the contracting authority as to how the TV campaign should be conducted.

3. Having examined the modus operandi of the Evaluation Board the PCAB is satisfied that the evaluation was carried out in a fair and transparent manner and that no strong evidence has been presented to show that the resulting recommendations were erroneous.

4. The PCAB is satisfied that the contingency amount as offered by the company that had been recommended for the award of tender and about which the appellant company protested is allowable, particularly as it was established during the hearing that no extra marks were granted by the adjudication board for this contingency and that if anything, the amount inflated the company’s bid and therefore worked against them.
As a consequence of (1) to (4) above this Board finds against the appellant Company and decides that the amount deposited in respect of this appeal with the Director General Contracts shall be forfeited to Government.

Anthony Pavia  Edwin Muscat  Carmelo Esposito
Chairman  Member  Member

23 April 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 193


Finishing of Residential Block at 49 Lion Street and 47 & 56 Argotti Street Floriana

This call for tenders with an estimated value of € 787,386 was originally published in the Government Gazette on 21.08.2009. The closing date for this call for offers was 01.10.2009.

Six (6) different tenderers submitted their offers.

On 24.01.2010 Messrs Project Technik / Mr Kurt Abela filed an objection against the decision taken by the Contracts Department to disqualify his offer for being administratively non-compliant.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 07.04.2010 to discuss this objection.

Present for the hearing were:

**Project Technik**
- Mr Kurt Abela: Sole Trader
- Dr Kenneth Grima: Legal Representative
- Mr Paul Abela

**Schembri Barbros Ltd**
- Dr John Bonello: Legal Representative
- Mr Anton Schembri: Representative
- Mr Simon Schembri: Representative

**Housing Authority**
- Mr Aldo Ellul: Financial Controller

**Evaluation Board**
- Architect Sandra Magro: Chairperson
- Architect David Farrugia: Member
- Mr Charles Vella: Member

**Contracts Department**
- Mr Francis Attard: Director General

**N.B**
- Camray Co. Ltd
  - No representative turned up
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Dr Kenneth Grima, Project Technik’s legal advisor, submitted that the reason given by the Contracts Department for the rejection of his client’s offer was the non-submission of various documents as explained hereunder:

**Appendix 7 General Conditions Governing Employment and Appendix 8 the Sample Performance Bond**

Dr Grima explained that these two appendices did not form part of the tender dossier which his client obtained/procured from the contracting authority and, as a result, he contended that his client and, for all that matters, all the other bidders, should not be expected to submit documents which were not part of the tender document. Dr Grima also submitted that as a double check he looked up this tender document on the internet and he could not trace the two appendices in question. The appellants’ lawyer remarked that these appendices referred to general conditions which also reflected themselves in the laws of Malta.

Architect Sandra Magro, chairperson of the Evaluation Board, remarked that the two appendices referred to by the appellants did form an integral part of the tender document, so much so, that they were submitted by other bidders. She added that the appendices were to be submitted with the offer as they were, i.e. the bidders were not requested to give any information or to sign them. She explained that tenderers were expected to re-submit the tender document in its entirety as a sign that they had accepted it as it was. She agreed that in signing the *Tenderer’s Declaration* the tenderer would have already accepted the provisions of the tender in their entirety, without reservation or restriction. She remarked that in the ‘contents’ the tender document did indicate Appendices 7 and 8 and, therefore, the tenderer could have asked the contracting authority about them.

Mr Kurt Abela, in his name and acting on behalf of Project Technik, the appellants, under oath, confirmed that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, and that he had signed the *Tenderer’s Declaration* whereby he accepted all the tender conditions.

**The General Conditions of Contact**

Dr Grima submitted that the same arguments applied to the non-submission of the general conditions of contract except that, in this case, his client was in fact in possession of these conditions but, somehow, failed to submit them with his offer. Dr Grima conceded that section 4.3 did indicate that the conditions of contract were one of the documents that had to be submitted in Envelope 2. He added that once his client had signed the *Tenderer’s Declaration* thereby accepting all the tender conditions, part of which were the general tender conditions, and once the bidder was not asked to provide any input or to specifically sign them, then the submission of the general conditions of tender with the offer was almost irrelevant.
Mr Abela confirmed that the general conditions were not submitted with his offer through an oversight and added that he did not have to add any information or to sign it but simply to submit them as presented in the tender dossier.

Non-submission of Appendices 4.1 to 4.5

Dr Grima explained that the appendices in question were the following: App 4.1 – Financial Identification Form, App 4.2 – Power of Attorney, App 4.3 – Financial Statement, App 4.4 – Litigation History and App 4.5 – Sub-Contracting. He submitted that, in most instances, these appendices referred to a limited liability company whereas his client was a sole trader and, hence, he could not submit certain information, e.g. the share capital or the audited accounts, but he added that his client did however submit his income tax returns as a self-employed along with the list of works he had performed over the previous three years.

Dr Grima maintained that his client had submitted all these appendices duly filled in according to his circumstances, i.e. being a sole trader, and displayed copies of the appendices drawn up by his client. Dr Grima said that he interpreted the term - ‘not submitted’ - as ‘not filled in’ ... in line with what the contracting authority had requested, namely with the details relative to a limited liability company, something which his client could not have done as a sole trader.

Architect Magro informed the PCAB that it was not a question that the appellant had failed to submit the information as requested but the question was that the appellant did not submit these appendices at all.

Mr Edwin Muscat, PCAB member, remarked that it could be the case that the appellant had included these appendices in the 3rd envelope rather than in the 2nd envelope as required.

Mr Abela, the appellant, was presented with the original documentation that he had submitted in envelope 2 and on examining the contents he confirmed that he could not trace Appendices 4.1 to 4.5. Mr Abela did not exclude the possibility that these appendices were mistakenly inserted in envelope 3 instead of in envelope 2.

At that stage it was established that one could not open envelope 3 with a view to ascertaining whether it contained the appendices in question. Moreover, Mr Francis Attard, Director General (Contracts), submitted that, according to regulations, if a tenderer was eliminated at some early stage then the envelopes submitted by the same tenderer in respect of subsequent stages could not be opened and, for example, if this case were to be decided against appellant, then his third envelope would not be opened but would remain sealed at the Contracts Department.

With regards to ‘Submission of Tenderer’s Declaration in Envelope 2 instead of in Envelope 3’ Architect Magro pointed out that the evaluation board had, in fact, found in Envelope 2 the Tenderer’s Declaration, which included the total price offered by the appellant, along with the Tender Form which should have been inserted in Envelope 3. She added that it was clearly indicated that tenderers had to insert these documents in Envelope 3.
The Chairman PCAB remarked that the submission of the *Tenderer’s Declaration* - which included the total price quoted in Envelope 2 instead of in Envelope 3 - *per se*, offered sufficient ground to disqualify the appellant and certainly a more serious shortcoming on the part of the appellant than those listed in the letter of rejection.

Dr Grima contended that what Ms Magro had just stated was not one of the reasons given for the rejection of his client’s offer and added that the appeal had to deal with the reasons for rejection communicated to his client. Dr Grima argued that it was not admissible to include fresh accusations at that stage because he had based the defence of his client’s case according to the reasons for disqualification quoted by the Department of Contracts.

Mr Attard, under oath, submitted that at the time of the opening of Envelope 2 the Contracts Committee had noted that the bidder had divulged the price he offered, something which he was required to do in Envelope 3. He added that it was normal procedure that in such a case the evaluation of the documentation submitted in Envelope 2 still had to be carried out.

The Chairman PCAB remarked that one would have expected the evaluation board to include in its report the fact that the appellant had divulged the price offered in Envelope 2 instead of in Envelope 3 and that reason would have been sufficient for the outright exclusion of the appellant. He added that this was a crucial aspect of the 3 package tendering system and it should have led to outright disqualification.

Dr Grima submitted that had he known of this shortcoming on the part of his client he would have advised his client not to lodge the appeal.

The Chairman PCAB agreed that the PCAB had to stick to its terms of reference however justice had to be done with regard to those tenderers who, scrupulously, followed the tendering process as against those who did not. He added that the PCAB was going to do its part and then other quarters had to do their part too.

Dr John Bonello, representing Schembri Barbros Ltd, an interested party, raised the question that in his reasoned letter of objection Dr Grima had referred to his client as Mr Kurt Abela trading in the name of Project Technik. He therefore contended that even if the Tenderer’s Declaration had been inserted in the correct envelope it would have been null because it was in the name of Project Technik, which was neither a body corporate nor a person. He claimed that, since the appeal was lodged in terms of Regulation 82, the reasons for objecting should have been given in the notice of objection itself and not in a separate (reasoned) letter. Dr Bonello added that a sole trader was not exempted from filling in appendices 4.1 to 4.5.

Dr Grima maintained that the fact that his client, Mr Kurt Abela, used the trade name of Project Technik did not alter anything because all the tender documentation was signed by Mr Kurt Abela.

Architect Magro explained that the evaluation board had to draw up a report for each stage of the evaluation process and, in fact, the appellant was found to be administratively non-compliant and, as a result, the evaluation board did not have to evaluate the appellant from the technical aspect. She confirmed that the evaluation
Report did not include the fact that in Envelope 2 the appellant had divulged the total price he offered.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 29.01.2010 and also through their verbal submissions presented during the public hearing held on the 7.04.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of issues relating to Appendix 7 General Conditions Governing Employment and Appendix 8 the Sample Performance Bond, particularly, the fact that whilst (a) Mr Abela stated under oath that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, and that he had signed the Tenderer’s Declaration whereby he accepted all the tender conditions, yet, (b) Architect Magro argued that in the ‘contents’ the tender document did indicate Appendices 7 and 8 and, therefore, the tenderer could have asked the contracting authority about them;

- having also taken note of the issues raised in connection with The General Conditions of Contract, particularly, wherein Dr Grima, the appellants’ legal representative, (a) admitted that albeit his client was in fact in possession of these conditions yet, somehow, he failed to submit them with his offer and (b) contended that once his client had signed the Tenderer’s Declaration thereby accepting all the tender conditions, part of which were the general tender conditions, and once the bidder was not asked to provide any input or to specifically sign them, then the submission of the general conditions of tender with the offer was almost irrelevant;

- having also deliberated upon the points discussed relating to the Non-submission of Appendices 4.1 to 4.5, especially, those brought forward by Dr Grima regarding the fact that (a) whilst, in most instances, these appendices referred to a limited liability company whereas his client was a sole trader and, hence, he could not submit certain information, e.g. the share capital or the audited accounts, yet (b) his client did however submit his income tax returns as a self-employed along with the list of works he had performed over the previous three years;

- having further deliberated on the fact that with regards to the Non-submission of Appendices 4.1 to 4.5, Ms Magro placed emphasis on the fact that it was not a question that the appellant had failed to submit the information as requested but the question was that the appellant did not submit these appendices at all;

- having also taken note of the fact that, when presented with the original documentation that he had submitted in envelope 2, Mr Abela could not trace Appendices 4.1 to 4.5;
having taken full cognizance of Architect Magro’s reference to the fact that the evaluation board had, in fact, found in Envelope 2 the Tenderer’s Declaration, which included the total price offered by the appellant, along with the Tender Form which should have been inserted in Envelope 3, adding that this happened despite the fact that it was clearly indicated that tenderers had to insert these documents in Envelope 3;

having, despite of the fact that it was not officially stated as being one of the reasons given for the rejection of the appellant’s offer, also deliberated on the fact that the submission of the Tenderer’s Declaration - which included the total price quoted in Envelope 2 instead of in Envelope 3 - per se, should have offered more reason for the appellant’s offer to be disqualified;

having reflected on the fact that (a) Mr Attard had admitted that at the time of the opening of Envelope 2 the General Contracts Committee had noted that the bidder had divulged the price he offered, something which he was required to do in Envelope 3, adding that it was normal procedure that, in such a case, the evaluation of the documentation submitted in Envelope 2 still had to be carried out and (b) Architect Magro confirmed during the hearing that the evaluation report did not include the fact that in Envelope 2 the appellant had divulged the total price he offered;

having considered the appellant’s legal advisor’s remark wherein he stated that had he known of his client’s shortcoming, namely that had divulged the price offered in Envelope 2 instead of in Envelope 3, he would have advised his client not to lodge the appeal,

reached the following conclusions, namely:

1. The PCAB feels that, albeit the appellant claimed that the tender document he obtained from the Contracts Department did not contain Appendices 7 and 8, yet, considering that the content page indicated such appendices should have given him enough reason to seek apposite clarification.

2. The PCAB opines that, despite the fact that the appellant stated that he was in possession of The General Conditions of Contact, yet, it was also a fact – corroborated by own admission – that the appellant failed to submit them with his offer.

3. The PCAB argues that, with regards to the Non-submission of Appendices 4.1 to 4.5, the fact that such appendices were mostly applicable in instances where the tenderer was a limited liability company, could have led the appellant to feel that these were not applicable in his particular case, thus refraining from submitting these appendices at all. In this instance the PCAB opines that the appellant’s claim is justified.

4. The PCAB, however, feels that, whilst (a) it is a fact that the appellant was not also officially disqualified due to the fact that the evaluation board had, in fact, found in Envelope 2 the Tenderer’s Declaration, which included the total price offered by the appellant, along with the Tender Form which should have
been inserted in Envelope 3, yet, (b) the PCAB cannot disregard the fact that justice has to be carried out with regard to those tenderers who, scrupulously, followed the tendering process as against those who did not. The PCAB feels that, during the hearing, enough evidence was brought to the attention of those present that the appellant contravened a cardinal element in the three envelope system rendering such system futile. The PCAB does not feel that such a public manifestation of basic non adherence to regulations should be condoned. The PCAB argues that, amongst its salient scope for being formally constituted, it has to ensure that the procedure followed in any adjudicating process is transparent, equitable and in total adherence to public procurement regulations. As a consequence, were it to disregard the fact that the appellant failed to observe such a crucial aspect of the three envelope system the PCAB would itself be refraining from its own remit rendering such a process anything but equitable as well as irregular.

As a consequence of (1) (2) and (4) above this Board finds against the appellant Company.

As a result, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellant Company should not be reimbursed.

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

26.04.2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 194

CT/2173/2008; Advert CT/250/2008

Period Contract for the Handling and Compaction of Permitted Waste Delivered to Ghallis Landfill and to Undertake other Works within the Maghtab Environment Complex

This call for tenders with an estimated value of €1,071,513 was originally published in the Government Gazette on 05.12.2008. The closing date for this call for offers was 15.01.2009.

Three (3) different tenderers submitted their offers.

On 22.01.2010 Messrs Polidano Brothers Ltd filed an objection against the intended award by the Contracts Department of the tender in caption to Messrs Bonnici Brothers Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 07.04.2010 to discuss this objection.

Present for the hearing were:

Polidano Brothers Ltd

Dr Jesmond Manicaro Legal Representative
Mr Paul Polidano Representative
Mr Joseph Cachia Representative

Bonnici Brothers Ltd

Dr Adrian Delia Legal Representative
Dr John L. Gauci Legal Representative
Mr Mario Bonnici Representative
Mr Reuben Aquilina Architect

WasteServ Malta Ltd

Dr Victor Scerri Legal Representative

Evaluation Board

Eng. Mario Agius Evaluator
Mr Joseph Mifsud Evaluator
After the Chairman’s brief introduction the appellant Company’s representative was invited to explain the motives of the objection.

Dr Jesmond Manicaro, legal representative of Polidano Brothers Ltd, explained that this was a three package tender and then went on to quote from a letter dated 22nd September 2009 which his client received from the Contracts Department as follows:

“….. the General Contracts Committee has recommended that unless any objection is received the financial proposals (prices) relative to the tenders which qualified for this stage are to be opened on Thursday, 1st October 2009 after 10.00 a.m. at the Committee Room of the Contracts Department. Your tender has been adjudicated as complying with the tender specifications. If you wish, you may be present for the opening of said prices.”

Dr Manicaro remarked that this meant that his client’s offer had qualified from both the first and second packages. He then went on to quote from a Contracts Department letter dated 14th January 2010 wherein his client was informed as follows:

“… I regret to inform you that the tender submitted by you was not successful as you did not submit the required appendix to tender for a work’s contract.”

Dr Manicaro claimed that, at ‘package 3’ stage, the evaluation board had to deal solely with the issue of price and that the previous two stages had been satisfactorily concluded as far as his client was concerned. He contended that his client had submitted the *Appendix to Tender for a Work’s Contract* and went on to state that one only had to fill in (i) the name and address of the tenderer – which had already been given elsewhere in the tender submission and (ii) the name and address of the representative of the contracting authority, namely the final beneficiary. Dr Manicaro considered the filling in of this ‘appendix’ as trivial.

Dr Victor Scerri, legal representative of WasteServ Ltd, did not contend the fact that the appellants had been found compliant in envelopes 1 and 2 but stressed that the *Appendix to Tender for a Work’s Contract* was found missing in Envelope 3. Dr Scerri pointed out that, contrary to what the appellants had just claimed, the ‘appendix’ in question included relevant information such as the ‘deadline for notice to commence’; the ‘period of access to the site’; ‘the amount of third party insurance’ and others. Dr Scerri referred to sections 14.3, 14.3.3.1 and 14.4 at pages 12 and 13 of the tender document which clearly indicated that this document was to be inserted only in Envelope 3 and that the document was a mandatory requirement.

On his part, Dr Adrian Delia, acting as legal advisor of Bonnici Brothers Ltd, agreed that the appellant Company was evidently compliant as far as Envelopes 1 and 2 were concerned but disagreed with the statement of the appellants that Envelope 3 only dealt with the price because that envelope had also to contain other information, including the ‘appendix’ in question. Dr Delia remarked that it was amply clear that this ‘appendix’ was mandatory and that it had to be inserted in Envelope 3. He recalled that the PCAB had handed down several decisions with regard to missing forms and information which necessitated mandatory requirements. Dr Delia added that, contrary to what had been alleged by the appellants, the ‘appendix’ in question
was indeed relevant. Dr Delia referred to the ‘Note’ on this ‘Appendix’ which read: *Tenderers are required to fill in the blank spaces in this Appendix* and, while he acknowledged that some of the information had been given, other data had to be filled in by the tenderers.

Dr Manicaro held the view that the only part of the ‘appendix’ which was marked ‘To be completed by the tenderer’ was the ‘name and address of the tenderer’ and argued that he could not give, for instance, ‘the deadline for notice to commence’ and the ‘period of performance’. Dr Manicaro maintained that most of the information was furnished by the contracting authority in the tender *dossier*. Dr Delia intervened to argue that, according to the note on the ‘appendix’, the blank spaces had to be filled in by the tenderer and that it was not up to the tenderer to decide not to fill them in.

The Chairman PCAB remarked that he found it hard to understand that the contracting authority would furnish a 2-3 page ‘ appendix’ for the tenderer to fill in only his ‘name and address’ and opined that, in case of doubt, the tenderer ought to have sought a clarification.

Dr Manicaro remarked that when Envelope 3 was opened and his clients’ offer turned out to be the cheapest, the appellants received the notice that their bid had been disqualified. He added that the information requested in this ‘appendix’ had already been made available in Envelope 2. Dr Manicaro maintained that the reason given for exclusion was the non-submission of the ‘appendix’ to tender for a works contract and not whether it was filled in or not and, strictly speaking, what he was out to prove was that his client did submit the ‘appendix’ as all other considerations were secondary to this primary issue. He contended that, according to the documentation available at his clients’ end, it was evident that this ‘appendix’ had been submitted.

The Chairman PCAB opined that the appellant Company had misinterpreted the contents of this ‘appendix’ because it was evident that there was certain information that had to be given by the tenderer irrespective of whether one could find that same information elsewhere in the tender documentation. He remarked that a tenderer did not only have to submit the information but also that the latter had to submit it in the manner requested by the contracting authority.

Mr Mario Agius, an engineer and member of the evaluation board, under oath, stated that:

- he was not responsible for the compilation of the tender document;
- certain information requested in the ‘ appendix’ did not apply to the contract in question, such as, the ‘amount of insurance for design’ because the contracting authority was not proposing any design;
- the ‘deadline for notice to commence’ was already established by the contracting authority in the tender *dossier* and the tenderer was expected to confirm that, along with other similar given information;
- this ‘appendix’ did not provide any additional information that was not already available to the contracting authority; and
• the evaluation board disqualified the appellants simply because they did not submit this ‘appendix’

At this point Dr Delia went through some of the items mentioned in the said ‘appendix’ and discussed them with Eng. Agius. The following salient observations were made, viz:

**Deadline for notice to commence**

Eng. Agius stated that the tender document stipulated a mobilisation period not exceeding 4 weeks. Dr Delia contended that the tender document often indicated the minimum requirement and submitted a case where a tenderer indicated a mobilisation period of, say, 1 week instead of 4 weeks, and asked Eng. Agius if he would consider that as new and relevant information. Replying to this question Eng. Agius remarked that if a tenderer did not indicate a mobilisation period then he would have considered it as if the tenderer was going to adhere to the period stipulated in the tender dossier because the tenderer would have signed the declaration form (at page 3) accepting in full and without restrictions the special and general conditions governing this contract.

Dr Delia intervened to note that the same declaration stated that ‘Failure to submit a tender containing all the required information and documentation with the deadline specified may (‘may’) lead to the rejection of the tender.

**Period of Performance**

Eng. Agius referred to section 1.2 of Volume 3 (page 129) which read as follows:

*The duration of this contract shall be subject to termination upon the award of Contract Package 2A of the Integrated Solid Wastes Management Project, or up to a maximum period of 36 months, whichever is the earlier.*

**Period of access to the site**

Eng. Agius opined that this referred to the time when the contractor could enter the site and remarked that section 3.2.1 at page 131 which laid down the times during which the Maghtab Environmental Complex was open.

Dr Delia opined that the hearing was departing from the terms of reference and jurisprudence in the sense that the main concern was whether it was mandatory to submit this ‘appendix’ in Envelope 3 or not, an ‘appendix’ which had been demonstrated that it had not been submitted. Dr Delia recalled that the PCAB had decided on several occasions that a mandatory document had to be provided irrespective of the importance attached to by the tenderer.

The Chairman PCAB remarked that the PCAB was consistent in its decisions and that was why he started questioning whether this ‘appendix’ represented a synopsis of
what had already been laid down in the tender document or else provided by the
tenderer or if such ‘appendix’ gave the tenderer the opportunity to propose something
over and above the minimum stipulated which, in turn, would demonstrate the level of
efficiency of the contractor. He added that it was a fact that the submission of the
‘appendix’ was mandatory.

Dr Delia agreed that the ‘appendix’ gave the tenderer the chance either to confirm the
minimum requirements set in the tender dossier or else to quote better terms than
those laid down in the tender. However, he stressed that it was not up to the tenderer
to opt not to submit a document and the least he could have done was (a) to repeat
what he had already stated elsewhere in his submission or (ii) to indicate non-
applicability. Dr Delia remarked that his client had submitted the ‘appendix’ in
question and, evidently, it was properly filled because the contracting authority had
not raised any queries in that regard. Dr Delia made a legal point in the sense that
what had to be decided upon was whether the mandatory document had been
submitted because other issues regarding the information given therein were
secondary issues. He argued that it had already been demonstrated that, with regard to
the ‘deadline for notice to commence’, a tenderer could have submitted information
different from that indicated in the tender and, as a consequence, it could not be taken
for granted that the ‘appendix’ provided irrelevant information.

The Chairman PCAB asked Eng. Agius what the adjudication board expected for an
answer from the tenderers in respect of the following items that featured in the
‘appendix’, namely,

- Member of dispute-settlement committee (if not agreed) to be nominated by
  Eng. Agius replied that the nomination would be made by the
  contracting authority

- Number of arbitrators
  Eng. Agius replied the number was decided by the contracting
  authority

- Limit of liquidated damages for delay
  Eng. Agius said that this was established by the contracting authority
  and that the tenderer was not in a position to propose otherwise

- Deadline for submission of programme
  Eng. Agius said the tenderer was not in a position to propose other than
  what had been given in the tender document

- Period of access to the site
  Eng. Agius referred to section 3.2.1 at page 131 of the tender document
  which stipulated the opening and closing times of the Maghtab
  Environment Complex

Eng. Agius agreed with the observation of the Chairman PCAB that the ‘appendix’ in
question may not have been meant to yield information different from that laid down
elsewhere in the tender document.
Dr Delia remarked that it would be dangerous to allow tenderers to decide which mandatory documentation was important and worth submitting and which was not. Dr Delia did acknowledge that, recently, there had been a review of the internal policy of the Contracts Department. However, he added that the case under review was not affected by the said amendments in the sense that a tenderer still had to submit mandatory information.

Dr Manicaro remarked that the European Court of Justice had pointed out that what was fundamental or not fundamental to the tendering process depended on whether a tenderer would gain any material advantage over the other competing bidders. On the other hand, Dr Delia stated that the observance of equal treatment of tenderers required that all tenderers comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

Dr Delia reiterated that with regard to the item ‘deadline for notice to commence’ it was demonstrated that it could have provided fresh and relevant information and that it would have served for comparative purposes. He remarked that in public procurement, the procedure played a crucial part in order to ensure transparency and consistency as otherwise confusion would reign if it were left up to tenderers to decide on the requirements of the contracting authority.

Dr Manicaro agreed with Dr Delia’s submissions but added that, besides procedural issues, our Law Courts also considered the element of equity. He added that one of the aims of the Public Contracts Regulations was to exclude the possibility that a contracting authority would choose to be guided by other than economic considerations. Dr Manicaro argued that, in this tendering process, phases 1 and 2 had been concluded and one had moved on to phase 3 where the main consideration was the price.

The Chairman PCAB informed those present that the original submission with regard to Envelope 2 was unavailable at the moment so it cannot be ascertained if the said appendix was erroneously submitted in that envelope or not. In any case, even if it were, it would not make any difference to the outcome of this appeal.

Mr Paul Polidano, also representing Polidano Brothers Ltd, remarked that his firm had been involved in the running of this facility for the previous five years and, to his recollection, they have been rendering a good service.

Dr Scerri remarked that one had to keep in view that the adjudication board had to abide by the established procedure otherwise if the adjudication board had overlooked the non-submission of this ‘appendix’ by the appellant Company it was most likely that the case would have ended up before the PCAB just the same with the PCAB finding against the adjudication board for having gone ahead with the award in the absence of this mandatory document.

The Chairman PCAB remarked that an issue of concern was the inclusion in the tender dossier of mandatory requirements which, on closer examination, would turn out to be not that crucial or irrelevant to our specific circumstances. He opined that more often than not this was the result of ‘cut and paste’ exercises which did not reflect local realities.
At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28.01.2010 and also through their verbal submissions presented during the public hearing held on the 7.04.2010, had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellants’ claim that (a) at ‘package 3’ stage, the evaluation board had to deal solely with the issue of price and that the previous two stages had been satisfactorily concluded, (b) it had submitted the Appendix to Tender for a Work’s Contract containing information that was given elsewhere – in Envelope 2 - in the tender submission, (c) the only part of the ‘appendix’ which was marked ‘To be completed by the tenderer’ was the ‘name and address of the tenderer’ and that most of the information was furnished by the contracting authority in the tender dossier, (d) what was fundamental or not fundamental to the tendering process depended on whether a tenderer would gain any material advantage over the other competing bidders and (e) besides procedural issues, our Law Courts also considered the element of equity;

• having also taken note of Dr Scerri’s comment regarding the fact that (a) albeit it was a fact that the appellants had been found compliant in envelopes 1 and 2, yet, similarly, it was also a fact that Appendix to Tender for a Work’s Contract (Appendix to Volume 1) was found missing in Envelope 3, (b) the tender document clearly indicated that this document was mandatory and that it had to be inserted only in Envelope 3 and (c) one had to keep in view that the adjudication board had to abide by the established procedure otherwise if the adjudication board had overlooked the non-submission of this ‘appendix’ by the appellant Company it was most likely that the case would have ended up before the PCAB just the same with the PCAB finding against the adjudication board for having gone ahead with the award in the absence of this mandatory document;

• having heard Dr Delia state that (a) he disagreed with the statement of the appellants that Envelope 3 only dealt with the price because that envelope had also to contain other information, including the ‘appendix’ in question, (b) it was a fact that the submission of this certificate, duly signed, was mandatory, (c) the tender dossier was clear in stating that this ‘appendix’ had to be inserted in Envelope 3, (d) he disagreed with the appellants’ argument that this ‘appendix’ was irrelevant, (e) according to the note on the ‘appendix’, the blank spaces had to be filled in by the tenderer and that it was not up to the tenderer to decide not to fill them in, (f) the declaration through which a tenderer declares that one accepts in full and without restrictions the special and general conditions governing this contract also states that ‘Failure to submit a tender containing all the required information and documentation with the deadline specified may (‘may’) lead to the rejection of the tender’, (g) the ‘appendix’ gave the tenderer the chance either to confirm the minimum requirements set in the tender dossier or else to quote better terms than those laid down in the tender and (h) the observance of equal treatment of tenderers required that all tenderers comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers;

• having further deliberated on Mr Agius’ evidence, particularly, (a) his overall concern about the relevance of most of the content of the said ‘appendix’ and (b) his argument that if a tenderer indicates a mobilisation period of, say, 1 week instead of 4 weeks, he
would consider it as if the tenderer is going to adhere to the period stipulated in the
tender *dossier* in view of the fact that the tenderer in question would also be signing the
declaration form accepting in full and without restrictions the special and general conditions governing this contract;

reached the following conclusions, namely:

1. The PCAB fails to understand how the appellant Company could arbitrarily decide what to (a) submit or not without even daring to seek formal clarifications from pertinent authorities and (b) fill in the apposite ‘appendix’ provided in the same tender.

2. The PCAB also fails to comprehend as to how contents listed in a mandatory document can be overlooked by a tenderer, even though these may be considered of little or no relevance or significance at all, and this without, minimally, attempting at questioning the fact as to why a contracting authority would include in the tender dossier a 2-3 page document to be filled in by all tenderers specifying that its duly filled submission is mandatory.

3. The PCAB argues that both the appellant Company and Mr Agius seem to have misinterpreted the contents of this ‘appendix’ because it was evident that there was certain information that had to be given - beyond the information covered by the general declaration form wherein a tenderer accepts in full and without restrictions the special and general conditions governing this contract - by the tenderer irrespective of whether one could find that same information elsewhere in the tender documentation. It is also evident that the purpose of this ‘appendix’ was to give the tenderer the opportunity to propose something over and above the minimum stipulated – hence why such document is considered as *fundamental* and *material* - whilst, at the same time, demonstrating the level of efficiency of the said tenderer.

4. Whilst acknowledging that there has recently been a review of the internal policy of the Contracts Department, yet the PCAB agrees with the point raised by Dr Delia that the case under review was not affected by the said amendments.

As a consequence of (1) to (4) above this Board finds against the appellant.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

26.04.2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 195

CT/2673/2009; Advert CT/428/2009; FTS C11-09

Tender for the Floor/Wall Tiling, Marble and Granite Works at the New Boys’ Secondary School, Mosta, Ta’ Zokrija

This call for tenders with an estimated value of € 818,990 was originally published in the Government Gazette on 13.11.2009. The closing date for this call for offers was 05.01.2010.

Eight (8) different tenderers submitted their offers.

On 01.02.2010 Messrs Vella Falzon Building Supplies Ltd filed an objection following the decision of the Contracts Department to disqualify its offer for being administratively non-compliant.

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 21.04.2010 to discuss this objection.

Present for the hearing were:

Messrs Vella Falzon Building Supplies Ltd (Messrs Vella Falzon)

Dr Nicolai Vella Falzon Legal Representative
Mr Alexis Vella Falzon Representative

Schembri Barbro Ltd

Dr John Bonello Legal Representative
Mr Anton Schembri Representative

Camray Co. Ltd

Mr Brian Miller Representative

Foundation for Tomorrow’s Schools

Mr Loenord Zammit Technical Adviser

Evaluation Board

Mr Charles Farrugia Chairman
Mr Andrew Ellul Member
Mr Ivan Zammit Secretary

Contracts Department

Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Dr Nicolai Vella Falzon, legal advisor of Messrs Vella Falzon, explained that his client’s offer had been rejected as administratively non-compliant for two reasons, namely,

(i) failure to submit Volume 2 Section 5 ‘Non Collusive Tendering Certificate’ filled in and signed

(ii) failure to submit samples of polished granite and flamed-surface by the closing time of the tender.

(i) failure to submit Volume 2 Section 5 ‘Non Collusive Tendering Certificate’ filled in and signed

Dr Vella Falzon explained that this certificate had in fact been submitted and that the tenderer was not required to fill in anything but he simply had to sign it. Dr Vella Falzon conceded that, through an oversight, this certificate had not been signed and was quick to add that his client never had any difficulty to sign this ‘Non Collusive Tendering Certificate’ and, in fact, he was ready to sign it as he had the opportunity to do in the case of other tenders. The appellants’ legal representative reiterated that it was simply an error of omission and to corroborate his views he submitted the following legal arguments:

(a) the Minister of Finance, the Economy and Investment had announced a few weeks previously that, henceforth, such mere errors of omission should not lead to outright tender rejection but that the Department of Contracts had to exercise its discretion with a view to allow as wide a competition as possible in the award of public tenders so as to obtain better value for money. He added that, according to the new guidelines, a tenderer was to be given two days to rectify minor shortcomings such as the one under consideration

(b) Article 27.1 of the tender document provided that ... “Tenders which are incomplete, conditional, illegible, obscure or contain unrequested additions or other irregularities may be rejected” (emphasis added). Dr Vella Falzon admitted that his client’s bid was, at most, incomplete because of a minor shortcoming. However, he continued that the term ‘may’ afforded the Director of Contracts a measure of discretion in the sense that rejection was not outright and that a tenderer could have been given the chance to rectify such minor errors of omission. He explained that this certificate constituted a declaration by the bidder against price fixing and against arrangements with other persons binding them to refrain from tendering and the like. Dr Vella Falzon agreed that albeit the submission of this certificate was mandatory otherwise the tenderer could have opted to leave it out, yet he lamented that the Department of Contracts failed to exercise its discretion for the sake of justice and equity.
At this stage the Chairman PCAB questioned the purpose of the certificate ‘per se’ in the sense that nobody would expect a participating tenderer to declare out of his own free will that he was involved in any price fixing and the like.

(c) Article 28.2 of the tender document outlined what constituted an ‘admissible tender’, namely stating that “an admissible tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which (28.2.1) in any way influence the scope, quality or execution of the works, or (28.2.2) restricts the rights of the Central Government Authority, the contracting authority or the obligations of the Tenderer under the contract in a manner inconsistent with the tender document, or (28.2.3) rectification of which unfairly affect the competitive position of other Tenderers presenting admissible tenders”.

Dr Vella Falzon claimed that, in this case, the failure to sign this certificate was neither substantial nor did it in any way affect the competitiveness of the other bidders. Moreover, Dr Vella Falzon referred to ECJ Case 76/81 decided in 1982 (Transporoute Case) which clearly indicated that the aim of the Public Sector Directive was “to protect tenderers against arbitrariness on the part of the authority awarding the contracts … to exclude the possibility that a (contracting authority) may choose to be guided by other than economic considerations”.

On checking with the original tender submission made by Messrs Vella Falzon it was confirmed that this certificate had been submitted but without the required signature.

(i) failure to submit samples of polished granite and flamed-surface by the closing time of the tender

Dr Vella Falzon remarked that these two samples were not requested in the original tender document but were included in a variation dated the 22nd December 2009 and had to be submitted by 10am of 5th January 2010, i.e. the closing date/time of the tender. He added that his client had submitted all the samples requested in the original tender. Dr Vella Falzon claimed that his client had not received a letter or an email informing him of this variation. He added that his client learned of this variation on the 5th January 2010, following the Christmas shutdown, on checking the Contracts Department’s website. Dr Vella Falzon then quoted from Article 10.2 of the tender document: Each modification published will constitute a part of the tender document and be sent, in writing, to all known tenderers. He claimed that the Contracts Department was aware of the participating tenderers because, on acquiring the tender document, each prospective bidder had to give the contract details. Dr Vella Falzon maintained that the contracting authority failed to inform his client in writing of this variation and, as a consequence, it could not reject its offer for the late delivery of the samples – at 10.45 hrs instead of at 10.00 hrs – as required in that variation.
Mr Ivan Zammit, Secretary of the adjudication board, remarked that an email had been sent to the appellant Company on the 22\textsuperscript{nd} December 2009 on the email address pb@vellafalzon.com.

Mr Alexis Vella Falzon, also representing the appellant Company, under oath, gave the following evidence, namely that:

- a. his firm had been on Christmas shutdown from the 22\textsuperscript{nd} December till the 5\textsuperscript{th} January and that Ms Patrizia Borg, one of his employees and to whom the contracting authority claimed to have sent the email with the variation, did not have access to emails from outside the firm’s premises

- b. during the shutdown the company’s servers would be down and hence it could be the case that the contracting authority had received an ‘undelivered’ notice

- c. he had been informed of this variation on 5\textsuperscript{th} January 2010 by Ms Borg on checking the website of the Contracts Department

- d. had the contracting authority contacted him on his email address - avf@vellafalzon.com - as indicated in the tender submission, it would have been relayed to his mobile. At this point, Mr Vella Falzon’s attention was drawn to the fact that such information was not available to the contacting authority prior to the closing (opening) date of the tender

- e. as far as he was aware, the tender document had been picked up by one of his employees, Mr Charles Fenech – this was confirmed by the signature on the relevant Contracts Department receipt

- f. he considered the addendum (received prior to the tender closing date) as an integral part of the original tender

- g. his company had purchased the tender document, filled it in and submitted the samples with the clear intention of participating in this tendering process

- h. although Ms Borg, one of his employees - responsible for the compilation of the paperwork of this tender - might have included the addendum in tender submission – which on checking the appellant Company’s submission it was confirmed that the addendum had been included - the crux of the matter had to do with the timing

On his part, Mr Charles Farrugia, Chairman of the adjudication board, remarked that the two samples that were delivered late related to non-slip tiles specifically designed for outdoor use. He added that the contracting authority was not present when the tender box was opened and that it was not obliged to be present at that stage.

The Chairman PCAB expressed the opinion that although the contracting authority was not obliged to do so, yet, as the owner of the tender, it was in its interest to follow the different stages of the tendering process, including the tender opening stage.
Mr Zammit exhibited a copy of the original submission of the appellants on which it was indicated in pencil ‘replaced by addenda attached previous’ which indicated that the appellant Company was aware of this addendum.

On checking the original tender submission it turned out that there was the same note in pencil on the addendum referred to by Mr Zammit but in the absence of a signature thereon the PCAB had no option but to discard that evidence.

Mr Farrugia explained that, on the 5\(^{th}\) January 2010, the appellants’ deliveryman called on three separate occasions, namely, twice before the closing time (10.00 hrs), when he delivered the samples requested in the original tender and the third time at 10.45 hrs when he delivered the samples requested in the addendum. Mr Farrugia remarked that the adjudication board had to abide by the rules and that, at that stage, the appellant Company had been adjudicated administratively and, on being found non-compliant, they could not evaluate the Company’s offer technically. He stated that it was not correct for one to declare that the adjudication board disqualified a tenderer because, usually, the tenderer disqualifed itself by presenting a non-compliant tender submission.

Mr Francis Attard, Director General (Contracts), under oath, gave the following evidence, namely, that:

a. although it was not so in this case, in recent calls for tenders a standard provision was being included in the tender document which spelled out that it was the responsibility of the tenderer to keep himself up-to-date on the tendering process by following the website of the Contracts Department

b. the Non Collusive Tendering Certificate had been included in the tender document for the past three years or so on the suggestion of the European Commission and that the department attached a degree of importance to the submission of this document

c. confirmed that, prior to Malta’s accession to the EU, this same certificate used to be requested in the case of EU financed tenders and that, presently, this certificate was requested throughout the European Union

d. apart from the general declaration requested from the tenderer in the initial part of the tender dossier, the contracting authority also, specifically, requested the submission of the Non Collusive Tendering Certificate as a mandatory requirement

e. the stand taken by the Contracts Department was that the non-submission of mandatory documents would lead to tender rejection and, to his recollection, there were instances when tenders were rejected for the non-submission of the Non Collusive Tendering Certificate

f. the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12\(^{th}\) March 2010

g. one of the changes introduced referred to a case where a tenderer would have been found administratively non-compliant, such as failure to sign a form or a
Report on the Working of the GCC, PCAB, and PCRB During 2010

certificate, in which case the Contracts Department would request the tenderer to rectify the shortcoming within two days against the fee of €50

h. at law, the General Contracts Committee was responsible for the opening of the tenders and for drawing up the relative schedule of tenders and, therefore, the presence of the contracting authority at that particular stage was considered of minor relevance

i. the evaluation and rejection of tenders was the realm of the contracting authority which included the adjudication board

j. it had become standard procedure in the case of tenders the value of which exceeded the €0.5m to request tenderers to submit certain certificates, e.g. from (1) the Inland Revenue Department that they had no tax arrears or from (2) the Law Courts that there were no bankruptcy proceedings in course in their regard, and so forth.

At this stage the Chairman PCAB intervened to draw a distinction between requesting a certificate from the tax authorities or from the Law Courts which could be corroborated and a certificate of non-collusion from the tenderer himself which one could not corroborate.

Dr John Bonello, legal representative of Barbros Ltd, remarked that, on one hand, a false declaration is considered a criminal offence which carried up to a two-year jail sentence while, on the other hand, it is not considered a criminal offence if someone fails to submit what one is obliged to submit in a mandatory manner – hence the need for the submission of all mandatory certificates including all purposely requested information, concluded Dr Bonello.

Mr Zammit referred to articles 14.3, 14.3.2.8 and 14.4 of the tender document which clearly requested the submission, among other things, of the Non Collusive Tendering Certificate duly signed and the submission of samples in terms of article 4.1.

Dr Vella Falzon argued that the term ‘must’ at article 4.1 was a clear indication that the failure by this client to sign the Non Collusive Tendering Certificate rendered the appellants’ submission ‘incomplete’ and hence the Department of Contracts was bound to use or could have used the discretion contemplated in article 27.1. for the sake of proportionality, equity and justice.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 01.02.2010 and also through their verbal submissions presented during the public hearing held on the 21.04.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s representatives claims including, inter alia, the fact that (a) the ‘Non Collusive Tendering Certificate’ was submitted by the appellants and that tenderers were not required to fill in
anything but had simply to sign it, (b) through an oversight, they did not sign
the said certificate, (c) recent changes to local procurement procedures
contemplated that mere errors of omission should not lead to outright tender
rejection but that the Department of Contracts had to exercise its discretion with
a view to allow as wide a competition as possible, (d) Article 27.1 of the tender
document provided that “Tenders which are incomplete, conditional,
illegible, obscure or contain unrequested additions or other irregularities may
be rejected” placing emphasis on the fact that the term ‘may’ afforded the
Director of Contracts a measure of discretion in the sense that rejection was not
outright and that a tenderer could have been given the chance to rectify such
minor errors of omission, (e) the failure to sign the ‘Non Collusive Tendering
Certificate’ was neither substantial nor did it in any way affect the
competitiveness of the other bidders, (f) the samples referred to by the
Department of Contracts as being one of two reasons why the appellants’ offer
was adjudicated to be administratively non-compliant were not requested in the
original tender document but were included in a variation dated the 22nd
December 2009 and had to be submitted by 10am on 5th January 2010, i.e. the
closing date/time of the tender, (g) the appellant Company learned of this
variation on the 5th January 2010, following the Christmas shutdown, on
checking the Contracts Department’s website, (h) the contracting authority
failed to inform the appellants in writing of this variation and, as a consequence,
it could not reject their offer for the late delivery of the samples – at 10.45 hrs
instead of at 10.00 hrs – as required in that variation and (i) the term ‘must’ at
article 4.1 was a clear indication that the failure by the appellant Company to
sign the Non Collusive Tendering Certificate rendered the appellants’
submission ‘incomplete’ and hence the Department of Contracts was bound to
use or could have used the discretion contemplated in article 27.1. for the sake
of proportionality, equity and justice;

• having also taken note of the reference made by the appellants’ legal advisor to
ECJ Case 76/81 decided in 1982 (Transporoute Case);

• having taken note of the fact that (a) the Secretary of the adjudication board
stated that an email had been sent to the appellant Company on the 22nd
December 2009 on the email address pb@vellafalzon.com and (b) Mr Vella
Falzon’s claim that his firm had been on Christmas shutdown from the 22nd
December till the 5th January and that Ms Patrizia Borg, one of his employees
and to whom the contracting authority claimed to have sent the email with the
variation, did not have access to emails from outside the firm’s premises, this
being the reason why he was only informed by Ms Borg of the variation on the
5th January 2010 when the latter checked the website of the Contracts
Department;

• having heard Mr Farrugia state that (a) on the 5th January 2010, the appellants’
deliveryman called on three separate occasions, namely, twice before the
closing time (10.00 hrs), when he delivered the samples requested in the original
tender and the third time at 10.45 hrs when he delivered the samples requested
in the addendum and (b) the adjudication board had to abide by the rules and
that, at that stage, the appellant Company had been adjudicated administratively
and, on being found non-compliant (third sample delivered after 10.00 hrs), it could not evaluate the Company’s offer technically;

• having further deliberated on the DG Contracts evidence, particularly the reference made to the fact that (a) apart from the general declaration requested from the tenderer in the initial part of the tender dossier, the contracting authority also, specifically, requested the submission of the Non Collusive Tendering Certificate as a mandatory requirement and (b) the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12th March 2010;

• having also taken note of Dr Bonello’s remark relating to instances where declarations may be considered to be false thus being considered as a criminal offense;

reached the following conclusions, namely:

1. The PCAB feels that the issue relating to the submission of samples could have easily been resolved in time through proper communication between recipient of samples (contracting authority) and tenderer’s representative. The PCAB has taken cognizance of the fact that before the closing time (10.00 hrs), the tenderer’s representative had already gone twice to submit samples to fulfil obligations. On this issue the PCAB favourably accepts the appellant Company’s reason for filing the appeal.

2. The PCAB, however, contends that mandatory certificates have to be duly filled and signed as required. Whilst it is a fact that recent changes to local procurement procedures contemplated that errors of omission should not lead to outright tender rejection, yet, the conditions prevailing at the time of this particular call still fell within the ‘old’ legal provisions. The PCAB notes that is a fact that the amendments to the tendering process announced by the Minister of Finance were applicable to tenders which had the closing date after the relevant information session, i.e. after the 12th March 2010 and, as is known, the closing date of this tender was 5th January 2010. This Board also cannot accept the argument that, since the appellants claimed that the ‘Non Collusive Tendering Certificate’ was neither substantial nor, in any way, affect the competitiveness of the other bidders, one could become oblivious of the fact that the tender dossier regarded this certificate as mandatory.

3. Furthermore, the PCAB cannot find in favour of the appellant Company who, arbitrarily, decided that the submission in question is ‘incomplete’, (PCAB) arguing that tenderers do not have the right to pick what they consider to be pertinent but, simply, they are required to abide by tender conditions ‘sine qua non’.

As a consequence of ‘2’ and ‘3’ above this Board finds against the appellant Company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

26.04.2010
Case No. 196

GHRC 007/2009
Tender for the Installation of Lifts at the ‘Banca Giuratale’, Valletta

This call for tenders was originally published in the Government Gazette on 30.09.2009. The closing date for this call for offers was 28.10.2009.

Four (4) different tenderers submitted five (5) offers.

On 23.11.2009 Messrs Panta Marketing and Services Ltd filed an objection against the intended award of the tender in caption to Messrs Titan International 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 21.04.2010 to discuss this objection.

Present for the hearing were:

Messrs Panta Marketing and Services Ltd
Mr Charles Barbara Manager
Mr Frans Borg Representative

Titan International Ltd
Dr Louis Thompson Legal Representative
Mr Steve Vella Representative

Grand Harbour Regeneration Corporation (GHRC)
Engineer Silvio Aquilina Technical Adviser

Evaluation Board
Mr Chris Paris Chairman
Mr Damien Vella Lenicker Member and A&CE
Mr Mario Sammut Member
Mr Antoine Portelli Member
Mr Ray Azzopardi Secretary

Contracts Department
Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Mr Charles Barbara, representing Messrs Panta Marketing and Services Ltd, the appellants, explained that their objection was based on three points, namely:

(i) **Discrepancies in Published Results**

According to Mr Barbara, in the ‘Schedule of Tenders’ published on the 29th October 2009 four valid offers were listed whereas in the subsequent ‘Notice of Award of Tender’ published on 16th November 2009 five offers were listed with Titan International Ltd, the recommended tenderer, offering two separate options. Mr Barbara contended that normal practice had it that different options submitted by the same tenderer were listed as separate offers.

Mr Chris Paris, Chairman of the adjudication board and CEO of Grand Harbour Regeneration Corporation, the contracting authority, explained that the ‘Schedule of Tenders’ was meant to display the tenderers who had participated in this call for tenders - with no prices divulged - whereas the ‘Notice of Award of Tender’ was meant to display the number of offers received with the price quoted against each one of them.

The Chairman PCAB drew the attention of Mr Paris that according to the heading given to the schedule it should have displayed the number of offers received – i.e. 5 offers - otherwise to display the tenderers the schedule should have been titled ‘Schedule of Tenderers’ – 4 tenderers in all.

Mr Paris conceded that perhaps the way the schedule had been titled was not very appropriate but he assured those present that the adjudication board had no intention to mislead anyone but that this shortcoming was the result of inexperience on similar matters on the part of the adjudication board.

(ii) **Specifications**

At this stage Mr Barbara declared that this aspect of the objection amounted to an assumption on their part or, as he put it, that they had ‘sufficient reason to believe’ that the equipment offered by the recommended tenderer did not comply with specifications.

The Chairman PCAB intervened to remark that, in the absence of concrete proof, the PCAB could not consider this aspect of the objection because arguments based on a series of assumptions would amount to a ‘fishing expedition’, something which the PCAB did not allow.

Mr Barbara admitted that he did not possess any proof regarding this allegation.
Mr. Paris declared that the adjudication board, acting on the advice of the technical adviser, had carried out the technical evaluation of the offer submitted by the recommended tenderer.

The Chairman PCAB expressed the opinion that, generally speaking, the PCAB is always against an adjudication board relying on the advice of a sole technical person because that would defeat the purpose of appointing a board to evaluate a tender and, as a consequence, he suggested that, preferably, there ought to be more than one technical opinion.

Mr. Damien Vella Lenicker, A&CE and member of the adjudication board, remarked that the technical adviser was asked to draw up a technical report, which report was then taken into consideration by the adjudication board in its deliberations. Mr. Paris said that the contracting authority expected its technical adviser to act professionally and declared that the technical adviser had signed the appropriate disclaimer form.

(iii) Tendering Opening Stage Not Conducted in Public

Mr. Barbara claimed that the tender opening process did not take place in public as was the norm. He stated that other competing tenderers had informed him that when they had asked whether they could be present for the tender opening stage they were informed that there was no need for them to be present for the opening of the tenders since the relative schedule of tenders would eventually be displayed on the notice board. Mr. Barbara retained that it was against normal practice not to open the tenders in public.

On his part, Mr. Paris declared that the closing time of the tender was at noon and soon after they opened the tender box to check the number of bids received. Mr. Paris informed those present that none of the bidders and no one from the general public happened to be present when the tender box was opened. Mr. Paris categorically denied that anyone had asked him to be present for the tender opening process or that he somehow refused such requests.

Mr. Francis Attard, Director General (Contracts), remarked that, usually, the tender box was opened right after the closing time of the tender.

Mr. Frans Borg, also representing the appellant Company, stated that he had delivered the tender submission just before tender closing time and added that he did not ask anyone if he could attend to the tender opening process.

Mr. Barbara reiterated that another tenderer participating in this call for tenders had informed him that when he asked whether he could stay on to watch over the tender opening process he was informed that the tenders were going to be opened at a later stage.

The Chairman PCAB stated that tenderers had every right to be present when the tenders were opened and that he preferred that tender boxes were opened right after the closing time rather than at a later stage.
remarked that the PCAB could not give much weight to the information that the appellant Company claimed to have obtained from another tenderer - to ‘second hand information’ - and it would have been preferable had the other tenderer lodged an objection in this regard in its own name.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 03.12.2009 and also through their verbal submissions presented during the public hearing held on the 21.04.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of Mr Barbara’s (a) contention that normal practice had it that different options submitted by the same tenderer have to be listed as separate offers and not as was originally stated by the contracting authority in the ‘Schedule of Tenders’ dated 29.10.2009, (b) claim - which remained unsubstantiated – as far as the appellant Company’s assumption that they had ‘sufficient reason to believe’ that the equipment offered by the recommended tenderer did not comply with specifications and (c) claim that the tender opening process did not take place in public as was the norm and that other competing tenderers had informed him that when they had asked whether they could be present for the tender opening stage they were informed that there was no need for them to be present for the opening of the tenders since the relative schedule of tenders would eventually be displayed on the notice board;

- having also taken note of Mr Paris’ (a) clarification as to the genuine mistake in the content listed in the ‘Schedule of Tenders’ which should have read ‘Schedule of Tenderers’ instead, (b) claim that the adjudication board, acting on the advice of the technical adviser, had carried out the technical evaluation of the offer submitted by the recommended tenderer, (c) declaration that that the closing time of the tender was at noon and, in line with praxis adopted by the Department of Contracts, soon after they opened the tender box to check the number of bids received being fully cognizant of the fact that the general public – including tenderers, of course – were aware of the fact that they could attend to the opening of tender boxes and (d) statement wherein he denied that anyone had asked him to be present for the tender opening process or that he somehow refused such requests;

- having heard Mr Vella Lenicker state that a technical adviser was asked to draw up a technical report, which report was then taken into consideration by the adjudication board in its deliberations;

reached the following conclusions, namely:

1. The PCAB feels that the fact that the contracting authority had erroneously titled a particular schedule as ‘Schedule of Tenders’ instead of ‘ Schedule of Tenderers’ was a genuine mistake and that, overall, such mistake did not adversely reflect in any way on the adjudication board’s ‘modus operandi’ adopted in reaching its decision following evaluation of alternatives presented.
2. The PCAB argues that, in the absence of concrete proof, it cannot consider the objection raised by the appellant Company with regard to the fact that they claimed that they had ‘sufficient reason to believe’ that the equipment offered by the recommended tenderer did not comply with specifications. The PCAB contends that arguments based on a series of assumptions would amount to a ‘fishing expedition’, something which the PCAB never allows.

3. The PCAB also feels that the tender opening process did take place in line with normal praxis.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

26.04.2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 197

Advert No 317/2009 – CT 2584/2008
Reconstruction and upgrading of 4 Sections of the TEN-T Road Network in Malta

This call for tenders was published in the Government Gazette on 14.08.2009. The closing date for this call for offers with an estimated value of Euros 40,150,000 was 19.11.2009.

Five (5) different tenderers submitted their offers.

On 2.03.2010 Messrs Polidano Bros Ltd and Giustino Costruzioni Spa, Joint Venture filed an objection after being informed that ‘the tender submitted by you is administratively not compliant for the following reasons:

- CV’s submitted were incomplete, whereby they failed to provide evidence of the necessary experience within the job description field
- Financial Identification Form and Non-Collusive tendering certificate were not submitted.’

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 10.05.2010 to discuss this objection.

Polidano Bros Ltd and Giustino Costruzioni Spa, Joint Venture

Dr Henri Mizzi  
Dr Jesmond Manicaro  
Mr Claudio Grech  

Legal Representative  
Legal Representative  

Road Network Joint Venture

Dr Adrian Delia  
Dr John L. Gauci  
Mr Emanuel Bonnici  
Perit Ray Sammut  
Perit David Bonnici  
Mr Mark Vella  
Dr John Refalo  
Perit Malcolm Gingell  
Mr Paul Magro  
Ms Sandra Magro  

Legal Representative  
Legal Representative  

Following a brief introduction by the Chairman PCAB, Dr Henry Mizzi, legal representative of Polidano Bros Ltd and Giustino Costruzioni Spa, Joint Venture (PBGCJV), the appellants, raised a preliminary objection on the reasoned reply submitted by Road Network Joint Venture (RNJV) which was received by his clients on 21 April 2010. He said that on 28 April 2010 they submitted a complaint about this reasoned reply arguing that RNJV did not have any standing in these proceedings. He explained that his clients’ complaint of the 2nd March 2010 was regulated by Regulation 82 of the Public Contracts Regulations which referred to procedures to be followed in case of a three package system. Dr Mizzi said that they were contesting the disqualification of their clients’ offer in order to remain in the tendering process together with other tenderers. He maintained that, in spite of the fact that the other party had an economic interest to exclude them from the tendering process, yet, this did not mean that they had a legitimate interest in defending otherwise the evaluation committee’s decision that led to the discarding of their offer. It was stated that the law (Regulation 82) did not permit the other party to participate in these proceedings since this was only applicable to objections filed against a proposed award in terms of Regulation 83.

At this point the Chairman PCAB referred to Regulation 84 (11) (a) which specified that:
‘The Chairman shall have the power to determine the procedure for the hearing of all complaints lodged with the Appeals Board and shall ensure that during the public hearing all interested parties are given this opportunity to make their case.’

He said that the PCAB had always followed this procedure as a general rule for purpose of transparency.

Dr Mizzi replied that the Regulations made a clear distinction between the type of process where their appeal was filed under Article 82 and an appeal filed under Article 83 where it was clear that the recommended tenderer was deemed to have registered an interest. He claimed that Article 84, that was quoted before, was qualified with what was not specific because that was a general article and, as a result, could not be applied with specific dispositions because who was still in the process would wish that whoever was disqualified remained disqualified. He said that, in this case, other tenderers did not have a legitimate interest because the appellants were not challenging the award of tender but to remain in the process.

Mr Triganza explained that in the past other tenderers who were still in the process had always been given the chance to participate in the proceedings and so the same praxis would be used in this case.

Dr Adrian Delia, legal representative of RNJV, concurred that the PCAB had always adopted this procedure in previous cases.

With regard to the motives of their complaint, Dr Henri Mizzi said that, contrary to what was alleged in the Department of Contracts’ letter dated 24 February 2010, namely that the Non-Collusive Tendering Certificates were not submitted, his clients had copies thereof that were duly dated and signed by each partner of the Joint Venture which were printed from the copy of the CD that was submitted with the tender.

Dr Mizzi said that, prior to these proceedings, he had submitted a request to the Contracts Department’s office to be given the opportunity to view and examine what was submitted by his clients but, for some reason, this request was turned down. As a consequence, he considered that it was important that they should first verify what was submitted in their tender because they wanted to establish what the case against them was. The Chairman PCAB pointed out that the board was in possession of a copy of such documents (in respect of Lot 3 only) that reflected something but it preferred if these were verified with the original ones. So, the Director General (Contracts) was asked to exhibit the relevant original documents in respect of the four lots. The PCAB decided to proceed with the hearing since it transpired that it was going to take some time for the Contracts Department’s officials to find them since this tender consisted of four lots and was very bulky.

With regards to the alleged failure to provide evidence of the necessary experience within the job description field of the CVs, the appellants’ lawyer made reference to Volume 1 Section 4 Form 4.6.1.2 Personnel to be Employed on the Contract and Form 4.6.1.3 Professional Experience of Key Personnel Curriculum Vitae. He said that, as a state of fact, his clients acknowledged that Section 13 Specific experience in
industrialised countries of the latter form was left blank. However, he sustained that, although the relevant information was not in Form 4.6.1.3 where it was requested, it was included in the last column of Form 4.6.1.2 which dealt with the experience of personnel that were to be involved on this project.

As regards Volume 1 Section 4: Form 4.5 Financial Identification Form, Dr Mizzi declared that the only document submitted was that which indicated that the account holder was Polidano Bros Ltd and this was duly provided with all the relevant details, including the bank account number and the bank’s and account holder’s endorsement. The appellants’ lawyer said that his clients had agreed between them that payments should be made in the bank account of one of the partners of the joint venture, Polidano Bros Ltd, and that, as a consequence, there was no need for them to submit separate account details pertaining to the other partner in the same joint venture, namely, Giustino Costruzioni Spa.

Furthermore, Dr Mizzi said that where the Contracting Authority requested that a particular form was to be signed by all the members of the consortium, the tender document was very specific, but this was not the case in respect of the ‘Financial Identification Form’. At this point he made reference to Clause 14.3.2.2 which stated that:

\[
A \text{ signed declaration from each legal entity identified in the tender form certifying their eligibility to participate, using the form in Volume I Section 2 – Tenderer’s Declaration (refer to Article 3.2 above)}
\]

Dr Mizzi made specific reference also to Article 28.2 which dealt with the admissibility or otherwise of the tender. He said that this article was important even in view of what had been stated recently in public regarding tenders that were disqualified on the basis of administrative non-compliance. This article specified that:

\[
\text{An admissible tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which:}
\]

\[
28.2.1 \text{ in any way influence the scope, quality or execution of works, or}
\]

\[
28.2.2 \text{ restrict the rights of the Central Government Authority, the Contracting Authority or the obligations of the tenderer under the contract in a manner inconsistent with the tender documents, or}
\]

\[
28.2.3 \text{ rectification of which would unfairly affect the competitive position of other tenderers presenting admissible tenders.}
\]

He contended that, according to this article, (i) a tender to remain in the process had to be substantially compliant and (ii) the process permitted rectifications of those aspects that had no competitive and negative impact on other tenderers.
At this stage, he referred to point 2 of the PCAB’s conclusion in Case No 170: CT 2286/2009 Tender for Artificial Ground Surface at the Mosta Football Ground wherein, inter alia, it was stated that:

The PCAB also feels that given that, in some way or other, pertinent details were included in the appellant Company’s tender, albeit, admittedly, not necessarily in the form requested, yet, the PCAB concludes that the appellant Company’s offer was substantially compliant

He claimed that the same situations in the above article regarding substantial compliance were reflected in this case and the facts as to where the relevant information regarding experience of personnel was included were also similar.

Dr Mizzi explained that their complaint was based on the argument that (i) the relevant information regarding experience of personnel, though not included in the form requested, was actually provided (ii) even if for the sake of the argument there were shortcomings in the other two forms (which was not admitted), these deficiencies were not substantial. He argued that if the Department had asked them to rectify or clarify the matter instead of eliminating them from the tendering process none of the other tenderers’ position would have been prejudiced. Dr Mizzi insisted that if the Contracting Authority found that the administrative mistake was not of a substantial nature and it was not going to negatively affect the other tenderers, it was obliged to use its discretion by allowing the tenderer to remedy the situation. He emphasised that it was in the public interest that more than one tenderer remained in the process. He said that in this case, if his clients were to be disqualified, the Contracting Authority would end up with only one bidder because all the others were disqualified.

The appellants’ legal representative said that, in their reasoned letter of objection, they made specific reference to two cases decided upon by the European Court of Justice whereby in

1. Commission vs Denmark (Storebaelt), the Contracting Authority conducted negotiations with a tenderer whose tender was not compliant (missing items) and the court decided that this was prohibited because it was fundamental for the contract.

2. Tideland Signa vs Commission, the appellants were disqualified because when they resubmitted the tender they did not change the validity period of 90 days from the final date for submission of the original tender and the court decided that this was something that applicant should have been allowed to rectify.

Dr Mizzi also made reference also to PCAB’s Case 138: CT 2075/06 – Adv No 381/07 0Tender for the Reconstruction of Marsascala Bypass, Marsascala/Zabbar wherein, inter alia, it was stated that the PCAB:

“decides that, considering all that transpired, as well as, formally submitted during the hearing, the Adjudication Board (a) could not seek
a clarification regarding the fact as to why the requested schedules were not submitted because that would have created grounds for any other participating tenderer to cry foul as soon as the latter would have been made fully aware of the apparent over zealousness of a formally appointed adjudicating body to assist any tenderer in particular to, possibly, fine tune a particular submission previously made by one or more of the participating tenderer ...”

Dr Mizzi said that the PCAB did not uphold this appeal and confirmed the disqualification because there was the possibility that the tenderer could carry out a fine tuning of an aspect of the tender that was fundamental.

He said that in the above-mentioned cases the PCAB reflected the jurisprudence of the European Court of Justice.

Dr Jesmond Manicaro, also representing the appellants, pointed out that the most important thing was that the Evaluation Committee had all the information available because there were a number of documents that were common to each lot and therefore there was no need to submit them in every lot. Here, he made reference to Note 6 of Clarification No 3 issued on the 19 October 2009 (a copy of which was tabled – which inter alia stipulated that:

The different bids must include the documents listed hereunder and as indicated in the attached table:

(i) Documents which are common for all road projects, irrespective of the number of road projects and irrespective of the combination of the road projects for which the tenderer decides to bid – These must be included in Envelope 2.

The PCAB (Mr Pavia) intervened to draw Dr Manicaro’s attention that this did not specify that one document had to be submitted for all lots but that it had to be included in Envelope 2.

Dr Joseph Bonello, legal representative of Transport Malta, intervened to state that tenderers had to submit the documents for each lot and these had to be included in Envelope 2.

Continuing, Dr Manicaro argued that the fact that the title of the rejection letter dated 24 February 2010 received from the Department of Contracts was ‘Reconstruction and Upgrading of 4 sections of the Ten-T Road Network in Malta’ suggested that their offer was considered as one tender and this was because their clients submitted the bid for all four lots. Furthermore, he pointed out that in the same letter no reference was made to the specific lots when it was stated that the Financial Identification Form and the Non-Collusive Tendering Certificates were not submitted.

Nevertheless, Dr Bonello intervened to rebut what had been argued by making reference to Question/Answer 1 of Clarification Number 4 that was issued to all prospective bidders on 27 October 2009 wherein it was stated that:
**Question 1**: with reference to Question 7 of Clarifications issued on 6 October 2009 Since the answer appears to us still not clear please confirm that the Tenderer must submit a separate form for each Lot (i.e. Lot 1A, Lot 1B, Lot 2A, etc.) where he shall indicate at point 2 the description of only one Lot, i.e. the Lot to which refers the form, and at point 3 the tender price of only the same Lot.

**Answer 1**: Bidders are hereby being notified that they must submit one form for each lot i.e. one for lot 1A, one for lot 1B, one for lot 2A, one for lot 2B, etc.

When his attention was drawn that these clarifications were not related with one another, Dr Bonello insisted that, in spite of the fact that it did not make reference to the clarification mentioned by Dr Manicaro, it dealt with the same issue. He said that the clarification issued on 27 October 2009 superseded all previous clarifications on the same subject.

Mr Claudio Grech, one of the appellants’ representatives, drew the attention of those present that (i) this clarification referred to those forms that had to be inserted in Package 3 and not in Package 2 since reference was made to the price and (ii) they were referring to documents ([Financial Identification Form](#) and [Non-Collusive Tendering Certificate](#)) which had nothing to do with the proper offer.

Mr Francis Attard, Director General (Contracts) and Mr Dennis Attard, Chairman of the Evaluation Committee were the main witnesses during these proceedings. They gave their testimony under oath.

Mr Francis Attard testified that the clarifications were sent to bidders by post and were also published on the Contracts Department’s website.

The Director General (Contracts) said that in their letter dated 24 February 2010 addressed to Polidano Bros Ltd and Giustino Const. Spa. Joint Venture it was stated that:

‘Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by you is administratively not compliant for the following reasons:

- CVs submitted were incomplete, whereby they failed to provide evidence of the necessary experience within the job description field
- Financial Identification Form and Non-Collusive tendering certificate were not submitted.

*The Extract of the Evaluation Report concerning your offer is attached in annex to this letter.*’

Mr Triganza intervened to point out that, in spite of the fact that in the above-mentioned letter it was stated that the documents referred to in the second bullet were not submitted, in the Extract of the Evaluation Report it was stated that ‘The Non-
Collusive Tendering Certificate as per Form 4.6.14 was submitted but not signed by Giustino Costruzioni Spa, one of the partners in the Joint Venture.’

Furthermore, when Mr Attard was shown the original document of one of the lots and asked to confirm whether it was signed by Giustino Costruzioni Spa, the reply given was in the affirmative. Moreover, in reply to a specific question by the PCAB, Mr Attard confirmed that this document was requested for each lot.

Dr Manicaro failed to understand how it was stated that such documents were not submitted considering the fact that these were available. Furthermore, he pointed out that these were also available on the CD that was submitted with his clients’ offer.

At this stage the Chairman PCAB asked Mr Dennis Attard, Chairman Evaluation Committee, to explain why the appellants’ offer was discarded. The witness pointed out that, on the basis of what had been stated by the appellants, the details and information requested in Form 4.1.6.3 were much more specific and different from those requested in Form 4.1.6.2. He explained that the job description field under part 14 Professional experience in Form 4.6.1.3 of most of the CVs was left blank. He claimed that such details were indispensable for evaluation purposes because they had to ascertain that the professional experience of the Key Personnel was relevant to the roads projects referred to in this tender. He sustained that the lack of experience would have a negative impact on the implementation of the project.

When his attention was drawn to the fact that the fields under part 13 Specific experience in industrialised countries were empty, Mr Attard said that their contestation was on part 14 Professional experience because they found themselves in a difficult situation to ascertain the capabilities of the experts provided by the appellants vis a vis the road works for which the tender was issued.

Furthermore, he said that, although this was not indicated in the rejection letter, some CVs in respect of Lot 2 were found in Lot 3 and vice versa.

The PCAB also drew the attention of Mr Attard that, whilst in the letter of exclusion it was stated that the Non-Collusive Tendering Certificate was not submitted, the fact that the Department of Contracts had forwarded the PCAB a copy of the relevant document pertaining to Lot 3 indicated that it was, in actual fact, submitted. However, the Chairman Evaluation Committee explained that in their report they said that as far as Lots 3 and 4 were concerned they had no problems. The Evaluation Committee pointed out that it was the Non-Collusive Tendering Certificates pertaining to Lots 1 and 2 that were not signed by the two partners. The PCAB remarked that the extract of the Evaluation Report forwarded to the appellants did not make any reference to lots and therefore, once it resulted that this document was submitted, it would conclude that they made a mistake. He maintained that the lot numbers should have been indicated in their report because, otherwise, the appellants could not defend themselves appropriately.

Here, Mr Attard claimed that these were four lots that had four separate contracts. Dr Manicaro intervened and stated that this was not true and he insisted that the PCAB should not be misled in this manner.
On his part, Mr Grech said that, if these were four different lots, it would have been more than necessary that the lots were indicated and he was not surprised that the General Contracts Committee had taken such a decision because it was misled. Mr Dennis Attard said that they had attached the detailed minutes of the adjudication meetings in respect of each bidder with their report and these clearly indicated the deficiencies under each lot.

Dr Bonello said that the appellants should have drawn the attention of the Department of Contracts if they had doubts about the correctness of the letter once it was stated that the relevant forms were missing instead of not signed.

Dr Mizzi replied that when they asked the Department of Contracts to have access to their tender, such request was turned down.

Mr Triganza explained that, as it happens in similar circumstances, the PCAB did not give its consent to such request in order to ensure that no tampering with documents took place. Furthermore, the Chairman PCAB added, it was acknowledged that each bidder should retain a copy of a submission.

Dr Bonello clarified that he was not stating that the appellants should have been given access to documents but, once the appellants submitted a formal request, the Authority should have clarified the matter in writing.

Dr Adrian Delia, legal representative of RNJV, argued that the manner in which the proceedings were developing showed that the only advantage that the eliminated tenderer could have was that of trying to create confusion or uncertainty. He said that their main arguments dealt with the admissibility of tenders and the substantiality or otherwise of missing elements in their offer. He insisted that the only state of fact that the appellants’ representatives were contesting was that concerning the Non-Collusive Tendering Certificate which was not submitted. Dr Delia contended that, in the prevailing circumstances, the appellants were admitting the grounds of rejection with regard to the other issues, that is, the CVs and the Financial Identification Forms. Dr Mizzi interrupted by stating that he was being misquoted.

Dr Delia continued by making reference to the legal point raised by Dr Manicaro wherein he maintained that this did not consist of four tenders but one tender. The lawyer said that, on the basis of this argument, he failed to understand why the appellants were insisting that if they had something missing this would affect only one offer and not the other. Dr Delia explained that if the CVs and the Financial Identification Forms were missing in the four lots then their disqualification should be confirmed.

Dr Delia also explained that, as a result of a clarification, it was decided that bidders had to submit four guarantees. He said that this was being mentioned just to point out why he did not agree with the appellants’ submission that this should be considered as one contract. Furthermore, he said that the Contracting Authority or the Department of Contracts could award different lots to different bidders.

As regards the Non-Collusive Tendering Certificate, Dr Delia said that, on the basis of the appellants’ argument that this was one contract, if they had 4 lots and
(i) they had missing documents and/or shortcomings in any of these lots;
(ii) it was specified in the tender document that such forms had to be submitted by every tenderer and by each partner of the joint venture; and
(iii) according to the clarification referred to by the appellants, this form had to be common for all lots and inserted in Envelope 2,

then the appellants were condemning themselves and would, as a consequence, lose the whole tender.

Dr Delia said that on the basis of Transport Malta’s arguments that these were four separate contracts only those lots where the Non-Collusive Tendering Certificates were found to be deficient would be discarded. He also contended that the appellants had to decide because it was not so clear for one to comprehend what they were actually stating. Dr Delia remarked that, as was being explained by the Chairman of the Evaluation Committee, this tender was not discarded capriciously but because the shortcomings were affecting their deliberation in substance. He maintained that there was no need to identify which lot/s was/were deficient because if this was one contract and they had shortcomings, then the whole tender would have to be eliminated since, in similar circumstances, the law did not permit the Evaluation Board to continue with the adjudication process.

At this stage Dr Delia made reference to the two case laws of the European Courts of Justice that were mentioned by the appellants’ legal representatives.

He said that in the *Commission vs Denmark* case it was stated that:

“In this regard it must be stated that first of all that observance of the principle of equal treatment of tenderers required that all the tenderers comply with the tender conditions so as to ensure an objective comparison of the tender submitted by the various tenderers.”

In the *Tideland Signal vs Commission* case, he said that the tender document itself provided a 24-hour period within which clarifications could be sought. He contended that once this clause was not included in the tender under reference, they could not quote from this case because the ECJ decided on completely different facts.

With regard to Case 138 relating to the Marsascala By-Pass which was also mentioned in their reasoned letter of reply, Dr Delia said that, rightly so, this tribunal decided against one of the partners he was representing precisely because they had missing documents that were mandatory and substantive. He argued that, on the basis of this decision and once the appellants made the same mistake, the PCAB should, likewise, confirm the decision of exclusion since, otherwise, they would be creating an injustice with another tenderer who passed from the same experience. Dr Delia pointed out that in those instances where a tenderer did not comply with the tender conditions and requirements (mandatory documents not filled in or incomplete, or unsigned, not submitted in separate forms and so forth) the PCAB had always decided against such appellants and should continue to decide accordingly since, otherwise,
the public tendering system would collapse. He said that the PCAB had always been consistent in such instances.

Regarding the Case in respect of CT 2286/09 - Mosta Turf, Dr Delia maintained that the facts were different because in that case the PCAB decided (i) in favour of a shortcoming that was not substantial and (ii) not on issue regarding a form that was not submitted but on a form that was not submitted in the format requested.

Dr Delia sustained that, considering the fact that the appellants admitted that Section 13 of the CVs was left blank and that the Financial Identification Form was submitted by only one of the partners, then the PCAB should confirm their exclusion from the tender procedure since the PCAB had always argued that admission 'per se’ does not automatically lead to a party being excused. With regard to the Non-Collusive Tendering Certificate, Dr Delia maintained that, after checking the documents exhibited, these were not submitted in the form requested in the tender since this stipulated that these had to be presented by each partner of the Joint Venture and for each lot and the appellants had, until then, not provided any proof to the contrary.

Dr Stanley Portelli, Head Executive of Transport Malta, requested to intervene to state that he did not know whether the Evaluation Committee was representing the Contracting Authority or the Department of Contracts because they (Transport Malta) might not be agreeing fully with the evaluation process. He said that whilst they were not stating that the recent regulations were not followed, yet, they thought that, as the regulations were recently changed to ascertain that ultimately the paying authority would get the best deal, a tender should not be excluded solely on administrative shortcomings. Dr Portelli maintained that he was not mentioning these points to defend any particular tenderer but to ensure the money that would be spent would go to a tenderer that gave the best value.

In reply to a specific question by the PCAB, Dr Portelli said that he did not know whom the adjudication board was representing and the reason given was that the procedure adopted by the Adjudication Board was so rigid that he, as an Executive Head of an Authority, at no point in time was aware of what was happening in the adjudication process.

At this point the Chairman PCAB drew Dr Portelli’s attention regarding the fact that once he was not part of the adjudication committee it was not his role to be involved in such a process. However, it was explained that, prior to the adjudication, there was the preparation of the tender document which reflected the authority’s goals and, as a result, the adjudication process had to, ultimately, reflect what would have been strategically decided upon ab initio.

Furthermore, the Chairman PCAB said that the new amendments to the local procurement procedures concerning administrative shortcomings were not applicable retroactively and, therefore, were not applicable to this tender because these were introduced before the closing date of tender.

Dr Portelli concluded by stating that Transport Malta, being the entity that was going to pay for this project, preferred if it had a wider selection of contractors where to choose from.
Dr Delia responded by stating that the query regarding who was the Contracting Authority was indicated in the tender document and in this case was Malta Transport Authority. He said that the tender sometimes made a difference as to who was the implementing authority and who was the Contracting Authority.

With regard to the amendments concerning administrative procedures, Dr Delia said that in Case 194 re CT/2173/2008; Advert CT/250/2008 - Period Contract for the Handling and Compaction of Permitted Waste Delivered to Ghallis Landfill and to Undertake other Works within the Maghtab Environment Complex, the PCAB had already decided on the applicability or otherwise of such amendments where the closing date of tender was before their introduction. Furthermore, he said that even if they were to apply the new amendments, considering the fact that under ‘Technical Capacity’ of the new Tender Forms it was specified that “No rectification shall be allowed. Only clarifications on the submitted information requested may be requested. *This is indicated by the symbol*”, in this particular case they could not sanction relative shortcoming as regards experience of personnel.

At this stage the PCAB decided to continue with the cross examination of the witnesses.

In reply to a specific question by the PCAB, Mr Francis Attard said that the scope of the *Financial Identification Form* was that the Contracting Authority (not the Department of Contracts) would know where payments resulting from this contract were to be made. When asked to state whether the whole consortium was expected to sign this document if the only account number indicated on this form was related to one partner of the joint venture, he replied that, if the consortium had not been officially set up yet, then this had to be signed by all partners.

Dr Manicaro intervened to claim that once the parties of the Joint Venture had agreed that payments by the Contracting Authority should be made in one particular bank account, there was no need for one to have the names both partners. However, Mr Attard also maintained that it was important that somewhere in the submission of the bid it would have been explained that the Bank account was not representing one particular economic operator but that it was in the name of the Joint Venture. On his part, Dr Mizzi also intervened to point out that the Form only requested the signature of the account holder and not that of the partners of the Joint Venture.

However, Dr Delia drew the attention of the PCAB that point 7 on page 71 under the heading ‘ADDITIONAL NOTICE TO TENDERERS’ specified that:

‘*Each partner in a joint venture/consortium must fill in and submit every form.*’

He explained that once the tenderer was the ‘joint Venture’ and in this ‘Joint Venture’ there were two partners, if they decided to have a common account they had to provide the relevant details and submit the signatures of both partners and if they had a separate account they had to provide details of the account in respect of each partner. He argued that if the appellants provided an account number of one of the partners of the ‘Joint Venture’ then there was one missing.

In reply to a comment by the PCAB, Dr Bonello said that they were not contesting that there was one account number but that the ‘form’ had to be signed by both
partners. Mr Triganza pointed out that he could sign as an account holder but the partner could not sign on his behalf. Dr Delia insisted that each partner was obliged to submit every ‘form’ in accordance with the requirements of the tender.

At this stage the Chairman PCAB moved on to discuss the issue concerning the CVs and this with a view to establish where the appellants were not compliant. He said that according to the Evaluation Report:

“The bidder submitted incomplete CVs (Form 4.6.1.3) whereby the bid failed to provide the necessary evidence of experience within the job description field, in order to fulfil the requirements as stipulated in Clause 4.2 paragraph 6 of the Instructions to Tenderers.

From the information provided:

a. In Form 4.6.1.1 for both partners it resulted that Giustino Costruzioni Spa. has a less human resources contribution than Polidano Brothers. The contribution of these resources was made as Key Personnel, who mostly have submitted incomplete CVs

b. The Evaluation Committee was not in a position to endorse the contribution of Giustino Costruzioni Spa with regards to Plant since the relative Form 4.6.2 was not submitted in the tender.

From the details submitted in Form 4.6.6 – Data on Joint Ventures – it was indicated that the bid is a joint venture with 50%/50% responsibility of both partners. The Evaluation Committee was not in a position to endorse this shared responsibility due to the very limited resources (both human and plant) allocated by Giustino Costruzioni Spa. This was considered to have an important bearing on the commitment of Giustino Costruzioni Spa, given that this partner is indicating most of the required project experience (Form 4.6.5) for eligibility of the bidder for this tender.”

He said that the first reason given by the Evaluation Board that the bidder should not be considered further was as follows:

‘Lack of the necessary evidence of experience of the Key Personnel, in order to fulfil the requirements as stipulated in Clause 4.2 paragraph 6 of the Instructions to Tenderers’

On cross-examination by the PCAB, Mr Dennis Attard testified that para. 6 of Clause 4.2 of the Instructions to Tenderers stipulated and provided guidance in respect of the Key Personnel that were requested for each lot and related experience, such as, Minimum Years of Professional Experience and Minimum years of Experience in Similar Works. He explained that when they (the appellant Company) examined the CVs submitted, while in respect of Form 4.6.1.2 they had no particular problems, as far as Form 4.1.6.3 was concerned, the job description field under item 14 Professional Experience of most of the CVs was missing. Furthermore, he said that they were concerned about the capabilities of Key Experts because of incomplete CVs whereby the job description field was not detailed enough.
The same witness testified that the details of some of the personnel indicated in Form 4.6.1.2 of lots 2 and 3 did not corroborate with the relative CVs because some of those pertaining to Lot 2 featured in Lot 3 and vice versa. Yet, he argued that, unfortunately this did not feature in their report. In reply to the PCAB’s remark, Dr Delia pointed out that although this was one tender there was the possibility that different lots were awarded to four different bidders.

When the PCAB made reference to the Evaluation Committee’s report whereby it commented about the two partners’ contribution in respect of human resources and plant, Mr Dennis Attard said that, while the joint venture was a 50%/ 50% basis partnership, the contribution of Giustino Costruzioni Spa in terms of plant could not be verified because it was not submitted and that regarding human resources it was difficult for them to establish whether these were 50%. When asked by the PCAB to state what did the specifications of the tender document request, Mr Dennis Attard said that they did not specify the number of Key Experts or Plant each partner had to contribute, because the most important thing was that they were capable of carrying out these works.

When asked to state whether the submission of such information as regards human resources and plant was mandatory, the reply given was in the affirmative.

At this stage Dr Delia intervened to draw the attention of those present regarding page 6 of the tender document which stated that:

“4 INFORMATION/DOCUMENTS TO BE SUPPLIED BY THE TENDERER

NOTE: All items required under this section shall be submitted for every lot being tendered for.

Tenderers bidding for more than one road section must demonstrate in their submissions that they possess sufficient human resources, plant and equipment in order to carry out these works concurrently.”

Mr Grech interjected to claim that in a joint venture there were different but joint responsibilities of the partners. He said that they submitted sufficient resources (plant, equipment and labour force) for the execution of the works that had to be delivered. He argued that, once Polidano Bros Ltd contributed sufficient resources in accordance with requirements of the tender, then the contestation was on how many resources would be contributed by Giustino Costruzioni Spa over and above those required in the tender.

In reply to a specific question by the PCAB, Mr Dennis Attard said that when they were checking the administrative compliance of the appellants’ offer, the Evaluation Committee did not find the list of plant that was supposed to have been submitted by Giustino Costruzioni SpA. When asked to state whether this was mandatory, the reply given was in the affirmative and this was due to the fact that in the tender document it was stipulated that each partner in a Joint Venture had to submit all forms.
The Chairman PCAB pointed out that any party in a joint venture may participate by contributing through various means, such as, know-how. The PCAB’s Chairman proceeded by stating that, hypothetically, based on the reasoning of the Evaluation Committee, a tenderer could proceed to the technical stage of the evaluation process following the submission of the forms regardless of the fact that such tenderer might not have, for example, the necessary plant. Similarly, another tenderer’s bid could be discarded by an Evaluation Committee at the administrative stage simply for not submitting the forms even though such tenderer may be the supplier of all the plant being provided by the joint venture.

The Chairman Evaluation Committee said that at administrative stage tenders were evaluated to establish whether they were compliant with the requirements of the tender documents. He said that they had to evaluate the tenders in this sequence: administratively, technically and financially.

Dr Manicaro claimed that in case of a joint venture it would be futile if the partners submitted the same things.

Dr Delia said that the partners in a joint venture did not need to provide the same quantity of equipment or the same number of human resources but it was mandatory for each partner to submit a form even if their contribution was nil. At the administrative stage, continued Dr Delia, the Evaluation Board had to ascertain that tenderers submitted everything in order to proceed to the next stage. He contended that the Evaluation Board would have breached the regulations if they were administratively non-compliant and proceeded with the technical evaluation.

Mr Dennis Attard confirmed that the Evaluation Board could not evaluate a tenderer technically if not administratively compliant.

On cross-examination by the PCAB, Mr Francis Attard testified that the Financial Identification Form was mandatory and that whoever signed it (i) represented the Joint Venture and not part thereof and (ii) had to assume responsibility on behalf of the Joint Venture. He said that the Financial Identification Form would not be valid if that economic operator in the Joint Venture did not indicate that it was being signed on behalf of the Joint Venture.

The DG Contracts said that he was of the opinion that, in case of a dispute between the partners regarding payments, the parties involved did not need to sue the Department because the contractual relationship was between the ‘Contracting Authority’ and the ‘Joint Venture’. He insisted that the Financial Identification Form had to be signed by all partners of the joint venture but if signed by one of the partners it had to be clearly indicated that the signatory was assuming responsibility on behalf of the Joint Venture. The witness said that the Financial Identification Form as submitted did not provide legal comfort since it was not indicating that Polidano Brothers Ltd were also representing someone else.

The Chairman PCAB begged to slightly differ because it could never happen that a company would be allowed to sign on behalf of another’s account holder unless accompanied by an authorization.
Dr Delia said that, if the Joint Venture opted to use one account number, both partners could have filled in the two forms and made a cross reference.

Dr Manicaro contended that the issue concerning the submission of the account number of Polidano Bros Ltd was an internal matter between the partners of the Joint Venture. He said that the authority had the necessary comfort considering the fact that in the Tenderer’s Declaration(s) in the Tender Form for a Works Contract it was confirmed that ‘all partners are jointly and severally liable by law for the performance of the contract’ in respect of all lots. Mr Dennis Attard said that he was not in a position to sanction this statement because the Tender Form was inserted in Package No 3, which had not yet been opened. Mr Francis Attard pointed out that in Package 2 one could find ‘Details of Bidders’, who according to Dr Manicaro were Polidano Bros Ltd and Giustino Costruzioni Spa. However, Mr Dennis Attard said that the ‘Details of Bidders’ and the ‘Tender Form’ were two separate and different documents and that it was the latter that was binding and stated that the partners were jointly and severally liable.

Dr Delia said that the tender document made it clear that all forms were to be submitted by all the partners of the joint venture and, as a result, the Evaluation Committee would have failed from its responsibilities had it decided to accept offers which did not comply with this requirement. At administrative stage tenderers were obliged to submit all forms otherwise they would have been rejected, contended Dr Delia.

Dr Manicaro argued that he would foresee a problem if there were two forms with two different account numbers because then the Authority would not know where to effect payments.

In his concluding remarks, Dr Mizzi said that the letter of disqualification was misleading because, up to that time, they had already traced the documents of three Lots in respect of the Non-Collusive Tendering Certificates in their original bid. With regard to the CVs, they thought that their shortcoming was in Form 4.6.1.3 Section 13 and not in Section 14, yet, it appeared that the Evaluation Committee did not find any problem with the former section.

Dr Mizzi pointed out that in spite of the fact that the heading of Section 14 was Professional experience, none of the sub-items made reference to experience but to Position and Job Description, which had the same meaning. He contended that, if anything, ‘experience’ was to be included under Section 13 Specific experience in industrialised countries but it resulted that under this section the Evaluation Board did not find any deficiencies. However, the appellants’ lawyer said that the necessary information regarding experience was duly provided in Form 4.6.1.2.

As regards the Financial Identification Form, Dr Mizzi said that the tender was submitted by the two partners of the joint venture and, therefore, they were assuming responsibility jointly. He failed to understand why there was all this fuss about the fact that his clients had chosen that payments be made in a bank account pertaining to one of the partners.

In response to Dr Delia’s statement that the tender document requested that all forms were to be signed by each partner of a joint venture, Dr Mizzi maintained that this was
a general clause. He said that the specific clause wherein it was indicated which forms had to be signed by each legal entity identified in the tender was 14.3. The lawyer claimed that the Financial Identification Form had to be signed by the Bank Representative and the ‘Account Holder’ only, who did not necessarily need to be a tenderer.

In reply to a specific question by the PCAB, Dr Bonello confirmed that the Financial Identification Forms in respect of all lots were submitted and that these were signed by Polidano Bros Ltd.

At this point, Mr Attard confirmed also that the original Non-Collusion Tendering Certificates in respect of all lots were found and that each document was signed by both partners separately. The documents were verified by the legal representatives of both parties.

Dr Bonello said that once it had been confirmed that the Non-Collusive forms were found they were withdrawing their claim.

Finally, Dr Mizzi said that this process, if anything, showed how the latest amendments in the department’s procedures were necessary and important. However, he said that it was a mistake to think that the law was amended because what happened was that the existing procedures were just being formalized and implemented by the Department. He sustained that it was realized that the Department was not applying the law properly because the law already provided that in case of shortcomings they had to verify whether and which could be sanctioned. He said that if there was any deficiency or administrative shortcomings the tender permitted to be rectified or sanctioned. Dr Mizzi said that in Case 170 - CT/2286/2009 - Advert No. 213/2009; KMS/TEN/11/2009 - Tender for Artificial Ground Surface at the Mosta Football Ground, which was also mentioned by Dr Delia in his reasoned letter of reply, the PCAB had identified the criteria of substantial compliance. He said that the PCAB was consistent with previous decisions where it even excluded tenders in those instances where there was a problem of substance and not a problem of form. In cases where there was a problem of substance the PCAB did not allow (i) clarification if a particular tenderer was going to get an advantage over the other or (ii) tenderers to modify the offers.

Dr Mizzi said that the interested party did not state how any of the supposed deficiencies was going to affect them if rectified. He said that, in his opinion, the process required by law was not just checking whether a form was signed or not but it required that:

(i) public funds be properly spent
(ii) an offer was fair not only in the interest of tenderers but mainly for government
(iii) anyone who was in the process or could remain in the process without harming others should remain in the process

He said that he was pleased that the Transport Authority mentioned this point.

Dr Mizzi claimed that even if there was a deficiency in the Non-Collusive Tendering Certificate this was not a shortcoming that merited the disqualification of a tenderer.
On his part, Dr Delia maintained that the objectives of this tribunal were

- to establish what was missing in this tender
- if this was the reason, why did the Evaluation Board decide to disqualify the appellants’ tender
- whether the Evaluation Board was correct in its decision

With regard to the amendments referred to by the appellants’ lawyer, Dr Delia clarified that they did not make any reference to the amendments in the Public Contracts Regulations, which he said were going to be amended on that day and were to be effective from 1 June, but to those amendments in respect of Departmental internal regulations.

He said that the public tendering process was carried out so that the implementing Department/Authority would identify its requirement and an Evaluation Board was set up to verify whether the offers submitted were compliant with the tender requirements. He explained that this process was carried out under the surveillance of the Department of Contracts.

Dr Delia said that they had to establish whether the decision of the Evaluation Committee with regards to deficiency was within the parameters of the tender and the law. He said that the deficiencies were the Financial Identification Form which was submitted by Polidano Bros Ltd only - not on behalf of the Joint Venture but only on his behalf. He said that this was stated by the Evaluation Committee and confirmed by the Department of Contracts and the appellants did not bring any evidence to the contrary. Dr Delia sustained that this was a choice by one of the partners which could not, nevertheless, be sanctioned. At this stage he quoted verbatim from Case 194 re CT 2173/2008 Period Contract for the Handling and Compaction of Permitted Waste Delivered to Ghallis Landfill and to Undertake other Works within the Maghtab Environment Complex wherein it was stated that:

“7. The PCAB also fails to comprehend as to how contents listed in a mandatory document can be overlooked by a tenderer, even though these may be considered of little or no relevance or significance at all, and this without, minimally, attempting at questioning the fact as to why a contracting authority would include in the tender dossier a 2-3 page document to be filled in by all tenderers specifying that its duly filled submission is mandatory.”

Dr Delia said the PCAB has always taken this stand on mandatory requirements and he thought it was legally justified. He maintained that this document could not be overlooked or considered irrelevant because it was obligatory and mandatory. He insisted that tenderers could not, explicitly, make choices that went against the tender requirements. Both the Evaluation Board and the PCAB had no power to disregard any of the mandatory tender requirements.

Road Network Joint Venture’s legal representative pointed out that the most important thing that the Evaluation Board required for the technical evaluation was the professional experience which was missing. He insisted that the appellants did not provide proof that it was submitted. Dr Delia said that, whilst in form 4.6.1.2 the
contracting authority only required a list of personnel, in section 14 Professional experience in Form 4.6.1.3 the authority wanted to know the capabilities of the ‘Key Personnel’ that were to be employed on this contract which consisted of four roads having a length of 10km.

Dr Delia emphasised that the issue was not that once they had 50% shareholding they should contribute 50% of the personnel or plant but the point was that there was a ‘Form’ which the tender document required that it should be filled in by all partners of the joint venture. Therefore, when they were requested to fill in their professional experience they were expected to describe their professional experience. Dr Delia explained that the Contracting/Implementing Authority had a right to know who were the key personnel (including their professional experience), considering the fact that they were going to be involved in the concurrent reconstruction of a very long stretch of roads. At this point he referred to page 14 of the tender document which stipulated that:

<table>
<thead>
<tr>
<th>Lot no.</th>
<th>Description</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lot 1A &amp; 1B</td>
<td>Reconstruction and upgrading of Council of Europe Avenue and Garibaldi Avenue, Luqa</td>
<td>56 weeks</td>
</tr>
<tr>
<td>Lot 2A &amp; 2B</td>
<td>Reconstruction and upgrading of Sea Passenger Terminal Access Road, Floriana/ Marsa</td>
<td>50 weeks</td>
</tr>
<tr>
<td>Lot 3A &amp; 3B</td>
<td>Reconstruction and upgrading of Marfa Road, Mellieha</td>
<td>56 weeks</td>
</tr>
<tr>
<td>Lot 4A &amp; 4B</td>
<td>Reconstruction and upgrading of Mgarr Road, Xewkija and Triq Fortunato Mizzi, Triq ir-Republika Victoria., Gozo</td>
<td>60 weeks</td>
</tr>
<tr>
<td><strong>Total Completion Period</strong></td>
<td></td>
<td><strong>60 weeks</strong></td>
</tr>
</tbody>
</table>

*Note: Works on all four (4) road sections must be carried out concurrently.*

Dr Delia said that the Evaluation Committee had to verify whether they had sufficient personnel for each lot because a tender could be awarded per lot. The same lawyer maintained that their professional experience was considered substantial because the Evaluation Committee had to ensure that they had the ability to carry out the relevant works.

He concluded by stating that, on the basis of the above, the Evaluation Committee’s decision to disqualify the appellants’ tenderer should be confirmed because it was correct and according to law and also it would have been illegal if they did not act accordingly.

Dr Bonello said that they had nothing further to add to what had already been stated.

Finally, Dr Mizzi said that the Financial Identification Form was being misinterpreted because it was signed by Polidano Bros Ltd not as a tenderer but as an account holder. He insisted that the tender did not require that this ‘form’ had to be signed by tenderers but to be submitted by tenderers and, as a result, who was the account holder was, in his opinion, irrelevant.
Dr Mizzi failed to understand how Dr Delia stated that the appellants did not submit any evidence on the issue of experience because the requested information was included in Form 4.6.1.2.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 2.03.2010 and also through their verbal submissions presented during the public hearing held on 10.05.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the points raised by the appellants’ representatives, in particular:
  - the fact that, contrary to what had been stated, namely, that the Non-Collusive Tendering Certificates were not submitted, the Evaluation Board had copies thereof that were duly dated and signed by each partner of the Joint Venture which were printed from the copy of the CD that was submitted with the tender;
  - the fact that, whilst Section 13 Specific experience in industrialised countries was not filled in by appellants as requested, yet, such information was included in the last column of Form 4.6.1.2 (which dealt with the experience of personnel that were to be involved on this project) instead of Form 4.6.1.3 where it was actually requested the relevant information regarding experience of personnel;
  - the reference made to Volume 1 Section 4: Form 4.5 Financial Identification Form wherein it was stated that the only document submitted by appellants indicated that the account holder was Polidano Bros Ltd with all relevant details pertaining to their account being included;
  - the fact that, there was nowhere specifically specified that the Financial Identification Form had to be signed by all the members of the consortium;
  - the fact that, for a tender to remain in the process, it had to be substantially compliant and for such tender to be allowed to remain in the process it had to allow for rectifications of those aspects that had no competitive and negative impact on other tenderers;
  - the fact that, even, for the sake of the argument, there were shortcomings in a couple of forms, yet, these discrepancies were not substantial;
  - the fact that, if the Department had asked them to rectify or clarify the matter instead of eliminating them from the tendering process, none of the other tenderers’ position would have been prejudiced;
  - the fact that, the Evaluation Committee had all the information available subject to one taking into consideration the fact that these were common to each lot and, as a result, these needed not to be submitted in every lot;
  - the fact that, in case of a joint venture, it would be futile if the partners submitted the same things;
  - the fact that, the issue concerning the submission of the account number of Polidano Bros. Limited was an internal matter between the partners of the joint venture;
the fact that, one could foresee a problem if these (the Financial Identification Forms) were two forms with two different account numbers because then the Authority would not know where to effect payments;

the fact that, the letter of disqualification was misleading because, during the hearing, documents of three lots in respect of the Non-Collusive Tendering Certificates were traced in the original bid submitted by appellants;

the fact that, the Financial Identification Form included a general clause whereas the specific clause wherein it was indicated which forms had to be signed by each legal entity, as stated in the tender document, was 14.3;

the fact that, the Financial Identification Form had to be signed by the bank official and the account holder only, who did not necessarily need to be a tenderer;

the fact that, it was a mistake for one to think that the procedures governing public procurement, as these were recently amended, were a novelty as the law, ‘sui generis’, already provided that in the case of shortcomings one had to verify which could be sanctioned, if any at all;

the fact that, the PCAB, in the past, had already identified the criteria of substantial compliance as distinct from problems of form

• having also taken note of the fact that:
  
  • with regards to the alleged failure to provide evidence of the necessary experience within the job description field, the appellants admitted that Section 13 ‘Specific experience in industrialised countries’ was left blank;
  
  • the parties forming the appellant joint venture had agreed between them that payments should be made in the bank of one of the partners, namely Polidano Bros Ltd and that, as a consequence, there was no need for the other member of the joint venture to submit separate account details;
  
  • note 6 of the Clarification No. 3 issued on 19.10.2009 did not, necessarily, specify (as the appellant Company had interpreted it) that one document had to be submitted for all lots but that it had to be included in Envelope 2;
  
  • in spite of the fact that in the Department of Contracts’ letter dated 24.02.2010, it was stated that Financial Identification Form and Non-Collusive tendering certificate were not submitted’, yet, in the Extract of the Evaluation Report it was stated that ‘The Non-Collusive Tendering Certificate as per Form 4.6.14 was submitted but not signed by Giustino Costruzioni Spa, one of the partners in the Joint Venture.’

• having heard Dr Bonello
  
  • state that tenderers had to submit the document for each lot and these had to be included in Envelope 2 with the issue being amply highlighted in Question / Answer 1 of Clarification 4 that was issued to all prospective bidders on 27.10.2009;
  
  • state that they were not contesting that there was one account number but that the ‘form’ had to be signed by both partners;
  
  • confirm that the Financial Identification Form in respect of all lots were submitted and that these were signed by Polidano Bros. Ltd;
  
  • confirm that the Non-Collusive Tendering Certificates were found and that the contracting authority was withdrawing this specific ground for disqualification.

• having taken consideration of Mr Grech’s
• stand relating to the fact that the Financial Identification Form and the Non-Collusive Tendering Certificates had nothing to do with the proper offer;
• claim that in a joint venture there were different but joint responsibilities of the partners;
• statement that they (the appellants) had submitted sufficient resources (plant, equipment and labour force) for the execution of the works that had to be delivered

• having reflected on the DG Contracts’ testimony who, inter alia,
  • evidenced the fact that the Non-Collusive Tendering Certificate was signed by Giustino Costruzioni SpA;
  • reiterated the fact that the Non-Collusive Tendering Certificate was required for each lot;
  • stated that, with regards to the Financial Identification Form, if a consortium would not have been officially set up as yet, then this had to be duly signed by all partners;
  • claimed that even in a case where the parties forming a joint venture would have agreed that payments by the contracting authority should be made in one particular bank account, yet, in such circumstance, it would be important that, somewhere in the submission of the bid, it would be explained that the Bank account would not be representing one particular economic operator but that it would be in the name of the joint venture;
  • testified that the Financial Identification Form was mandatory and whoever signed it (1) represented the joint venture and not part thereof and (2) had to assume responsibility on behalf of the joint venture;
  • claimed that the Financial Identification Form would not be valid if that economic operator in the joint venture did not indicate that it was being signed on behalf of the joint venture and, in his opinion, the Financial Identification Form, as submitted by the appellants, did not provide legal comfort since it was not indicating that Polidano Bros. Limited were also representing someone else;
  • following a thorough check conducted elsewhere within the same premises during the hearing session by Contract Department staff members, confirmed also that the original Non-Collusive tendering certificates in respect of all lots had been located and that each document was signed by both partners (appellants’ joint ventured) separately

• having duly noted Mr Dennis Attard’s evidence wherein, inter alia, he
  • stated that the job description field defined under part 14 Professional experience in Form 4.6.1.3 relating to CVs was not filled by the appellants;
  • stated that the Evaluation Committee members found it difficult to ascertain the capabilities of the experts provided by the appellants vis-à-vis the road works for which the tender was issued;
  • explained that in its report, the Evaluation Committee stated that, as far as Lots 3 and 4 were concerned, they had no problem but the said Committee was referring to the Non-Collusive tendering certificates pertaining to Lots 1 and 2 which remained (and duly submitted) unsigned by the two partners forming the joint venture;
  • stated that while the joint venture was on a 50% / 50% basis, particularly, the contribution of Giustino Costruzioni SpA in terms of plant could not
be verified because it was not submitted and that regarding human resources it was difficult for them to establish whether these were 50%;

- stated that the appellants did not specify the number of Key Experts or Plant each partner had to contribute, because the most important thing was that they were capable of carrying out these works;
- stated that when the Evaluation Committee was checking the administrative competence of the appellants’ offer it did not find the list of plant that was supposed to have been submitted by Giustino Costruzioni SpA;
- stated that, at the administrative stage, tenderers were evaluated to establish whether these were compliant with the requirements of the tender documents

- having also considered the points made by Dr Delia, particularly, those relating to
  - the fact that given that bidders had to submit four guarantees – one for each lot – was evidence enough that this tender should not be considered as including only one contract, so much so that the Department of Contracts could award different lots to different bidders;
  - the fact that there was no need to identify which lot/s was/were deficient because if this was a single contract and they had shortcomings, then the whole tender would have to be eliminated;
  - the reference made to appeal filed in connection with CT 2286 / 09 wherein the PCAB ruled (1) in favour of a shortcoming that was not substantial and (2) not on issue regarding a form that was not submitted but on a form that was not submitted in the format requested;
  - the fact that the appellants had admitted that Section 13 of the CVs was left blank and that the Financial Identification Form was submitted by only one of the partners, then the PCAB should confirm their exclusion from the tender procedure;
  - the fact that even if the PCAB were to apply the new amendments, considering the fact that under ‘Technical Capacity’ of the new Tender Forms it was specified that “No rectification shall be allowed. Only clarifications on the submitted information requested may be requested. This is indicated by the symbol”, in this particular case they could not sanction relative shortcoming as regards experience of personnel;
  - the fact that point 7 on page 71 it was stated that ‘Each partner in a joint venture/consortium must fill in and submit every form.’
  - the fact that partners in a joint venture did not need to provide the same quantity of equipment or the same number of human resources but it was mandatory for each partner to submit a form even if their contribution was nil;
  - the fact that, at the administrative stage, the Evaluation Committee had to ascertain that tenderers submitted everything in order to proceed to the next stage, placing emphasis on the fact that any tenderer refraining to follow such procedure would be in outright breach of regularities;
  - the fact that if the joint venture opted to use one account number both partners could have filled in the two forms and made a cross reference;
  - the tender document required that it should be filled in by all partners of the joint venture and that the contracting authority had a right to know who the key personnel (including their professional experience) were, maintaining that professional experience was considered substantial because the Evaluation Committee had to ensure that they had the ability to carry out the relevant works.
reached the following conclusions, namely:

The PCAB claims that, remaining consistent with previous decisions taken, it is of the opinion that ‘substance’ vis-a-vis ‘form’ should be the overriding principle governing any tendering procedure. Having analysed documents, heard various interventions and testimonies given under oath, the PCAB...

1. feels that it is not convinced that the procedure followed was the most practical with the Evaluation Board, seemingly, falling short from conducting a proper assessment, overlooking in the process, details submitted by appellant Company – e.g. Non-Collusive Tendering Certificates and CVs which were either found (Non-Collusive Tendering Certificates) when further analysis was conducted during the hearing or else, amply identifiable in other areas (professional status of key personnel).

2. maintains that with regards to the Financial Identification Form the arguments brought by the appellant Company were more convincing, especially, when one recognises the fact that the ‘Form’ formally establishes that it has to be signed by the bank official and the account holder. It is also pertinent to state that the claim made by the DG Contracts regarding the fact that the Financial Identification Form would not be valid if an economic operator in the joint venture does not indicate that it is being signed on behalf of the joint venture has been given due consideration. The PCAB feels that had the appellant Company completely disregarded the submission of the said ‘form’, it would have been different. However, in this particular instance, considering that the ‘form’ was submitted but signed only by one of the joint venturers gives more than a hint about ‘substance’ over ‘form’. As a consequence, it is felt that stating that the Financial Identification Forms were not submitted is substantially incorrect, especially when the form’s content does refer to an account holder and not a tenderer.

3. The PCAB is of the opinion that the contracting authority, regardless of whether the Financial Identification Form is signed by one of the joint venturers or all of its components, is irrelevant as, this Board considers that one signature suffices to cover all the legal and pecuniary interests of the said authority in case of possible, albeit undesirable, future litigation. Furthermore, this Board recognises that no one accepts to participate in a joint venture by endorsing and submitting a document with other parties and then try to disassociate itself from a particular ‘form’ as submitted, especially, when in the Tender Form for a Works Contract there is stated that “all partners are jointly and severally liable by law for the performance of the contract.”

4. The PCAB is of the opinion that, regardless of whether the Financial Identification Form is signed by one or all of the parties involved in the joint venture, the fact that it relates to the identification of an account number and not the financial standing of a tenderer renders such ‘forms’ less significant (especially when an account number can easily be changed whilst a financial standing is not easily turned around by a simple stroke of a pen!), albeit important and mandatory. Yet, most importantly, the ‘form’ was submitted and signed by one of the joint ventureres, the account holder. As a consequence, it is the PCAB’s opinion that the mandatory obligation was duly fulfilled by appellants.
5. Undoubtedly, this Board, having taken into consideration the fact that:

a. pertinent CVs, albeit may not have been submitted by the appellant Company in the format as specified, yet, quite evidently, were described elsewhere in their nature and substance

b. the same contracting authority during the hearing has formally withdrawn its claim of non-submission of the Non-Collusive Tendering Certificates by the appellants

considers, in view of the points raised in (2) to (4) above, the issues raised in connection with the Financial Identification Form are not enough to lead an Evaluation Board to recommend that such a tender, as submitted by the appellants, be deemed as ‘administratively not compliant’.

As a consequence of (1) to (5) above this Board finds in favour of the appellant Company.

Furthermore, the PCAB recommends that the appellants’ bid be re-integrated in the adjudication process thus enabling the Evaluation Board to thoroughly cross check all the documentation it failed to check from a technical perspective in the first instance in view of its stand not to evaluate further the remaining documents submitted taken as a consequence of it finding the appellants’ bid non-compliant administratively at a preliminary stage.

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

Alfred R Triganiaz
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

9 June 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 198

Advert No. 325/2009; CT/2360/2009; GPS 07119 T09 BB
Supply of Olanzapine 5mg and 10mg Tablets and Capsules

This call for tenders was published in the Government Gazette on 21.08.2009. The closing date for this call for offers with an estimated value of Euros 4,919,307 was 13.10.2009.

Three (3) different tenderers submitted their offers.

On 10.03.2010 Messrs Charles De Giorgio Ltd filed an objection after its offer was adjudicated administratively/technically non-compliant because the shelf-life of the product offered was not according to tender specifications and conditions.

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 05.05.2010 to discuss this objection.

Present for the hearing were:

Charles De Giorgio Ltd
Mr David Stellini Representative
Mr Ivan Laferla Representative
Dr Antoine Cremona Legal representative
Dr Julienne Portelli Demajo Legal representative

Europharma Ltd
Mr Michael Peresso Representative
Mr Oliver Scicluna Pharmacist/representative

V.J. Salomone Pharma Ltd
Dr John Gauci Legal Representative
Ms Jackie Mangion Representative
Ms Deborah Campbell Representative of Actavis Malta Ltd

Government Hospital Procurement Services
Ms Anne Debattista Director

Evaluation Committee
Ms M Dowling Chairperson
Mr Sonia Bonnici Member
Mr David Baldacchino Member
Mr Mark Spiteri Member

Department of Contracts
Mr Francis Attard Director General
After the Chairman’s brief introduction, the appellant was invited to explain the motives of the objection.

Dr Antoine Cremona, legal representative of Messrs Charles de Giorgio Ltd, the appellant Company, while acknowledging that this issue did not directly concern his client’s case, stated that Annex II – Item Description – indicated ‘Olanzapine 5mg and 10mg tablets/capsules or orally disintegrating tablets’ which meant that the tenderer did not have the option to bid for one of the two dosages but the tenderer had to bid for both dosages and that the option applied only as to the formulation, i.e. whether intablet / capsule form or in a disintegrating tablet form.

Ms Anne Debattista, Director Government Hospital Procurement Services held the view that a tenderer could bid for either the 5mg or the 10mg dosage or for both. This version, when analysed thoroughly, was contradicted by the PCAB.

Dr Cremona explained that his client was tendering for both the 5 mg and the 10 mg tablet/capsule and that his client had been supplying the Health Department with this product for a period of about 15 years.

Dr Cremona remarked that his client’s offer was adjudicated as administratively/technically non-compliant because ‘the shelf-life is not as per tender specifications and conditions’. He explained that the tender document did not request an absolute shelf life – e.g. of 2 or 3 years - but a relative shelf life, i.e. five-sixths of the product’s total declared shelf life. He added that the conditions were such that, on the date of delivery to Government Hospital Procurement Services, the product still had to have five-sixths of its life, which life could vary according to the brand or type of the product.

Dr Cremona then refereed to Annex VI – Technical and Special Conditions – 11 ‘Shelf life’ which stated that the “shelf life of the product must be clearly indicated in the Tender document submitted. Goods received at Government Heath Procurement Services must not have their shelf life expired by more than one-sixth of their total declared shelf life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services. When five-sixths of the total shelf life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf life will be given preference. The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.”

Dr Cremona declared that, in the tender submission, his client had indicated a minimum shelf life of 18 months, which he claimed was in full compliance with tender conditions because the minimum of 2 years was a preference and not a mandatory requirement.

At this point, Ms Debattista intervened to explain that the reason why the Government Hospital Procurement Services did not indicate an absolute shelf life in order not to reduce or stifle competition since that would have eliminated certain brands producing the ‘same’ type of product but with varying shelf lives.
To a direct question posed by Ms Debattista, Dr Cremona stated that the shelf life of the product submitted by his client was 36 months but that his client was guaranteeing a minimum shelf life of 18 months. Following this, Ms Debattista declared that she learned of the product’s shelf life from the package insert of the sample which indicated a shelf life of 36 months and she even confirmed that that matched the shelf life indicated in the information on the basis of which the product had been registered. She added that the information given in the tender submission had to be corroborated by the information pertinent to the product being offered and she claimed that, it this case, there was a discrepancy.

Dr John Gauci, legal representative of Messrs VJ Salomone Pharma Ltd, an interested party, argued that, according to the tender specifications, a product with a total declared shelf life of 36 months, as the one offered by the appellant company, should have been offered with a minimum shelf life of 30 months (five sixths of 36 months) and not with a minimum shelf life of 18 months as submitted by the said appellants.

Ms Debattista agreed with what Dr Gauci had stated and added that that was exactly what she had been trying to explain in the sense that the 18 months minimum shelf life indicated by the appellant company in its tender submission amounted to half or three sixths of the product’s total declared shelf life as against the five sixths, in this case 30 months, requested in the tender specifications. She declared that the way the appellants presented their product in its tender submission rendered it non-compliant with tender specifications and conditions. At this juncture, Ms Debattista recalled a similar case which dealt with the shelf life of a product, which hearing was held by the PCAB on the 22nd January 2010.

Dr Cremona intervened and alleged a measure of inconsistency in the adjudication process in the sense that, whereas, in the case of the appeal lodged by Europharma Ltd, it was stated that the contracting authority was not obliged to verify information from websites, in his client’s case, the contracting authority seemed to have verified information submitted against that displayed on websites.

By way of conclusion, Dr Cremona contended that the product offered by his client was compliant with tender specifications and the event that other tenderers could have offered a product with a longer shelf life should certainly have not led to the disqualification of his client’s tender.

On her part, Ms Debattista rejected the allegation that the GHPS acted inconsistently and added that as part of the evaluation process the contracting authority did resort to websites to corroborate information submitted. She reiterated the point that, contrary to the argument put forward by the appellant company, it would be detrimental to competition should the Government Hospital Procurement Services request a definite shelf life as that would automatically rule out certain products because the shelf life of medicinal products manufactured under different brands tended to vary to a certain extent.

At this point, Ms Debattista expressed her satisfaction that, over the past few years, more medicinal products were being registered resulting in more competition and better prices. She added that this was a 3 package tender and that the evaluation process was at technical evaluation stage and that this bid was disqualified on
technical grounds and not on the merits of price, which was to be considered at the third stage of the process.

In concluding her intervention, Ms Debattista stated that there was absolutely nothing wrong with the product offered by the appellant company and, as a matter of fact, it was not adjudicated as unfit but as technically non-compliant. She remarked that another condition was that goods received at the Government Hospital Procurement Services must not have their shelf life expired by more than one sixth of their total declared shelf life.

Mr David Stellini, intervening on behalf of the appellant company, stated that the product offered by his firm, *Zyprexa*, had been in use locally for about 15 years and that his firm had been awarded several contracts by the Health Department and that a minimum shelf life of 18 months had invariably been indicated. Mr Stellini added that another reason why his firm had indicated an 18-month minimum shelf life was because his firm kept a stock of this product to supply the department when it ran short of this product.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 10.03.2010 and also through their verbal submissions presented during the public hearing held on 5.05.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the fact that whilst (a) Dr Cremona’s interpretation of facts which sustained that the tenderer did not have the option to bid for one of the two dosages but the tenderer had to bid for both dosages and that the option applied only as to the formulation, i.e. whether in tablet / capsule form or in a disintegrating tablet form, (b) Ms Debattista’s interpretation of same held that a tenderer could bid for either the 5mg or the 10mg dosage or for both;

- having also taken note of Dr Cremona’s remarks as to the fact that (a) the tender document did not request an absolute shelf life – e.g. of 2 or 3 years - but a relative shelf life, i.e. five-sixths of the product’s total declared shelf life and that (b) the conditions were such that, on the date of delivery to Government Hospital Procurement Services, the product still had to have five-sixths of its life, which life could vary according to the brand or type of the product;

- having heard appellant Company’s legal representative state that (a) in the tender submission, his client had indicated a minimum shelf life of 18 months, which he claimed was in full compliance with tender conditions because the minimum of 2 years was a preference and not a mandatory requirement and (b) the shelf life of the product submitted by his client was 36 months but that his client was guaranteeing a minimum shelf life of 18 months;

- having taken into consideration Ms Debattista’s claim that the information given in the tender submission had to be corroborated by the information pertinent to the product being offered claiming that in the appellant Company’s submission there was a discrepancy;
having also considered (a) Dr Gauci’s remarks relating to the appellant Company’s offer, (b) Ms Debattista’s agreement with Dr Gauci’s interpretation claiming also that, contrary to the argument put forward by the appellant company, she opines that it would be detrimental to competition should the Government Hospital Procurement Services request a definite shelf life as that would automatically rule out certain products because the shelf life of medicinal products manufactured under different brands tended to vary to a certain extent, and (c) Dr Cremona’s reiteration that the fact that other tenderers could have offered a product with a longer shelf life should certainly have not led to the disqualification of his client’s tender;

- having also noted Mr Stellini’s comments,

reached the following conclusions, namely:

1. The PCAB considers favourably the appellant company’s reasoning, namely that, Annex VI - Technical and Special Conditions – 11 ‘Shelf life’, should be interpreted as it is supposed to be.

2. The PCAB feels that the fact that the shelf life, as declared by the appellant company, and the relative information, seen by the contracting authority, did not tally, in that such relative information indicated a longer shelf life, should not have been sufficient reason to disqualify the tender and, at best, could have given ground to a clarification.

3. The PCAB, being in full cognisance of the content of Annex VI – Technical and Special Conditions – 11 ‘Shelf life’, cannot but agree with appellant company’s submission with regards to the fact that the quality of its product was technically compliant with tender specifications (as verified by Ms Debattista) and that, whilst it could have well resulted that other tenderers may have offered a product with a longer shelf life, yet this should certainly not have necessarily led to the outright disqualification of its offer, especially when one considers that it is specifically stated that “Products with a longer shelf life will be given preference”.

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.
PUBLIC CONTRACTS APPEALS BOARD

Case No. 199

Advert No. 325/2009; CT/2360/2009; GPS 07119 T09 BB
Supply of Olanzapine 5mg and 10mg Tablets and Capsules

This call for tenders was published in the Government Gazette on 21.08.2009. The closing date for this call for offers with an estimated value of Euros 4,919,307 was 13.10.2009.

Three (3) different tenderers submitted their offers.

On 09.03.2010 Messrs Europharma Ltd filed an objection after its offer had been adjudicated administratively non-compliant because the package inserts were not in the English language.

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 05.05.2010 to discuss this objection.

Europharma Ltd
Mr Michael Peresso Representative
Mr Oliver Scicluna Pharmacist/representative

Charles De Giorgio Ltd
Mr Davis Stellini Representative
Mr Ivan Laferla Repersentative
Dr Antoine Cremona Legal representative
Dr Julienne Portelli Demajo Legal representative

V.J. Salomone Pharma Ltd
Dr John Gauci Legal Representative
Ms Jackie Mangion Representative
Ms Deborah Campbell Representative of Actavis Malta Ltd

Government Health Procurement Services (GHPS)
Ms Anne Debattista Director

Evaluation Committee
Ms Miriam Dowling Chairperson
Mr Sonia Bonnici Member
Mr David Baldacchino Member
Mr Mark Spiteri Member

Department of Contracts
Mr Francis Attard Director General
After the Chairman’s brief introduction, the appellant company was invited to explain
the motives of the objection.

Mr Oliver Scicluna, representing Europharma Ltd, the appellants, stated that their
offer had been adjudicated administratively and technically non-compliant because
the package inserts were not in the English language. He explained that:

a. in the tender submission they had clearly indicated that the product they were
offering had been registered through the ‘Centralised Procedure’ and had quoted
the relative reference number so that the contracting authority would be able to
effect its verifications;

b. the ‘Centralised Procedure’ was a European Medicines Agency (EMEA)
registration which was considered as one of the most costly and rigorous
procedures such that a product registered under this particular procedure could be
marketed throughout the European Union;

c. one of the requisites of this kind of registration was that the literature
accompanying the product had to be in English and even in other languages,
including Maltese;

d. in order to obtain the marketing authorization the product’s literature had to be
in English or in Maltese and the authorization references quoted in the tender
submission clearly indicated that they were offering a product in line with EU and
Maltese legislation;

e. this was a new product on the Maltese market and, since it was a mass produced
product, at that point in time, the manufacturing company could not produce just
one sample for Malta but instead his firm submitted a representative sample the
literature which was neither in the English nor the Maltese language; and

f. in envelope 2 of the tender submission, they had also submitted in English and
in Maltese the ‘summary of product characteristics’ (SPC), which was a much
more technically detailed document than the package insert, to enable the
technical officers of the contracting authority to evaluate the product.

Ms Anne Debattista, representing the Government Health Procurement Services,
submitted the following:

a. this call for tenders was for the supply of Olanzapine 5mg and 10 mg tablets or
capsules and that Europhama Ltd had quoted only for the 10mg, which she
considered in line with tender conditions;

b. section 1.5 of the ‘Instructions to Tenderers’ stated that “The supplies must
comply fully with the technical specifications as indicated above and conform in
all respects with the indicative quantities, samples and other instructions’ and
section 7 of the Annex VI ‘Tender Technical and Special Conditions’ provided
that “The tenderer must ensure that the following is submitted with each offer: a
ture representative sample of the product…… Original/true copy of the outer
packaging and immediate packaging labeled in one of the official languages of
MR. MICHEL PERESSO, also representing the appellant company, supported Mr. Scicluna’s contention, namely that, once the product was registered under the
Centralised Procedure’, then the product had to be delivered in Malta accompanied with the relative literature in the English or Maltese languages.

The Chairman PCAB remarked that, apparently, the language requirement with regard to the package insert was overlooked by the appellant company because he took it for granted that once the product was centrally registered the product would eventually be delivered in Malta with all relative literature in our official language/s, adding that tenderers were expected to abide by all tender requirements and that any deviations had to be exhaustively explained.

Mr Scicluna remarked that his supplier in Slovenia had informed him that, at that point in time, they did not have a sample of the product with all the packaging in English. He reiterated that the registration reference number quoted in the tender submission was verifiable on the websites of the competent authorities and that he expected that one of the basic verifications that the adjudication board would carry out as part of its evaluation exercise was to check that the product was registered as per reference number quoted. Mr Scicluna found it odd that his offer was being excluded for administrative and technical grounds when, for technical evaluation purposes, they had submitted the ‘summary of product characteristics’ in English and in Maltese which was far more detailed than the package insert.

On her part, Ms Debattista agreed that the ‘summary of product characteristics’ (SPC) was a highly technical document meant for specialised professionals whereas the patient information leaflet (package insert) was meant for the man-in-the-street. However, she also remarked that when a product was registered in a country it was a basic requirement that the package of that product had to be in the official language/s of that same country.

Dr John Gauci, representing Messrs V.J. Salomone Pharma Ltd, an interested party, referred to Case No. 174 CT 2574/08 where a tenderer had been excluded for submitting the sample in the French language and the package insert in the English language because that was considered in conflict with the tender conditions.

Replying to a question raised by the PCAB, Ms Debattista informed the PCAB that a tenderer could bid either for the 5mg or for the 10mg or for both dosages in which case each dosage had to be provided in the same formulation, i.e. both had to be in the form of a tablet/capsule or in the form of an orally disintegrating tablet.

Dr Antoine Cremona, legal advisor of Messrs Charles de Giorgio Ltd, a tenderer which had, similarly, lodged an appeal on this same tender, while acknowledging that this issue did not directly concern his client’s case, argued that Annex II ‘Item Description’ indicated ‘Olanzapine 5mg and 10mg tablets/capsules or orally disintegrating tables’ which meant that the tenderer did not have the option to bid for one of the two dosages but the said tenderer had to bid for both dosages and that the option applied only as to the formulation, i.e. whether in tablet/capsule form or in a disintegrating tablet form.

At this point the hearing was brought to a close.

This Board,
having noted that the appellants, in terms of their ‘reasoned letter of objection’
dated 09.03.2010 and also through their verbal submissions presented during the
public hearing held on 5.05.2010, had objected to the decision taken by the General
Contracts Committee;

having taken note of Mr Scicluna’s (a) reference to the fact that in its submission
the appellant Company had quoted the relative reference number so that the
contracting authority would be able to effect its verifications, (b) reference to the
fact that the ‘Centralised Procedure’ was a European Medicines Agency (EMEA)
registration which was considered as one of the most costly and rigorous
procedures such that a product registered under this particular procedure could be
marketed throughout the European Union and that one of its requisites was that the
literature accompanying the product had to be in English and even in other
languages, including Maltese, (c) argument that in order to obtain the marketing
authorization the product’s literature had to be in English or in Maltese and the
authorization references quoted in the tender submission clearly indicated that they
were offering a product in line with EU and Maltese legislation, (d) statement that
in envelope 2 of the tender submission, they had also submitted in English and in
Maltese the ‘summary of product characteristics’ (SPC), which was a much more
technically detailed document than the package insert, to enable the technical
officers of the contracting authority to evaluate the product;

having also taken note of Mr Scicluna’s statement that this was a new product on
the Maltese market and that, since it was a mass produced product, at that point in
time, the manufacturing company could not produce just one sample for Malta and
that his firm submitted a representative sample the literature of which was neither in
the English nor in the Maltese language;

having considered Ms Debattista’s intervention especially the emphasis placed on
the content of section 7 of the Annex VI ‘Tender Technical and Special Conditions’
of the tender dossier which, inter alia, states that, with each offer, a tenderer must
submit an “…… Original/true copy of the outer packaging and immediate
packaging labeled in one of the official languages of Malta. Original/true copy of
the package insert in one of the official languages of Malta”;

having taken into consideration the fact that the samples submitted by the appellant
company, both in respect of the tablets and the disintegrating ones, had their
literature not in any one of the official languages of Malta but, presumably, in
Slovenian, the country of manufacture and that no translation thereof had been
submitted;

having also considered Ms Debattista’s argument relating to the fact that , whilst
confirming that, once registered, the product had to respect the local language
requirements with regard to product literature, yet, she insisted that the tender
dossier contained two specific conditions requesting a true and representative
sample and that the sample submitted by the appellant company did not conform to
those two condition;

having taken particular cognizance of the fact that the adjudication board had to
evaluate the tender submissions according to the conditions laid down in the tender
dossier including the possibility to assess the product ‘per se’ as well as the extent
of consumer information being provided with a view that the latter’s protection is
guaranteed, especially considering that the product being offered, namely ‘Zalasta’ was new to the Health Department;

- having also considered the appellants’ claim that (a) the manufacturer had registered this product in all EU countries and that the file in respect of Malta had been deposited in Dublin and (b) the fact that the product was registered meant that it had satisfied all the requirements both at local level and at EU level

reached the following conclusions, namely:

1. The PCAB, albeit being highly aware of the difficulty that one could encounter when asking a manufacturer to produce a single sample in Maltese or English (Malta’s official languages), yet is equally aware of the fact that tender specifications, terms and conditions should be observed and, in this instance, the PCAB feels that the tender dossier’s content was unequivocal, namely, that a tenderer should have submitted an “…… Original/true copy of the outer packaging and immediate packaging labeled in one of the official languages of Malta” as well as an “Original/true copy of the package insert in one of the official languages of Malta”.

2. The PCAB agrees with contracting authority’s representative that although the product was properly registered and that an English and Maltese version of the ‘summary of product characteristics’ (SPC) had been submitted which was a much more detailed document from the technical point of view than the package insert which was meant for the consumer, yet, technically, it is a fact that the appellant company did not deliver what was expected as far as the ultimate consumer is concerned, an issue more than adequately covered by the phrase … “Original/true copy of the package insert in one of the official languages of Malta”.

3. The PCAB fails to understand why the appellant company did not submit a translation of the inserts in any one of the official languages of Malta arguing that, contrary to what had been submitted by the appellant company’s representative, the responsibility for submitting a compliant tender rests with the bidder and that the adjudication board should never be expected to carry out verifications which go beyond its remit.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

18 May 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 200

Tender for Nursing Services at Mount Carmel Hospital

This call for tenders was published in the Government Gazette on 20.11.2009. The closing date for this call for offers with an estimated value of Euros 1,049,000 was 12.01.2010.

Two (2) different tenderers submitted their offers.

On 01.03.2010 Messrs Medicare Services Ltd filed an objection following the decision of the Contracts Department to disqualify its offer for being considered administratively non-compliant.

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 07.05.2010 to discuss this objection.

Medicare Services Ltd (MSL)
Dr Jonathan Spiteri Legal Representative
Mr Jesmond Cilia Representative

Health Services Group Ltd (HSGL)
Dr Martin Fenech Legal Representative
Mr Alan Bonnici Representative
Mr Philip Bonnici Representative

Mount Carmel Hospital (MCH)
Mr Josef Borg Representative

Evaluation Board
Mr Mario Hili Chairman
Mr John Degiorgio Member
Mr Anthony Mifsud Member
Ms Maria Assunta Bonello Member

Contracts Department
Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Dr Jonathan Spiteri, legal representative of Medicare Services Ltd, explained that his client’s offer had been rejected having been considered to be administratively non-compliant in view of the following reasons, viz:

(i) insufficient number of past/present clients;
(ii) insufficient number of references; and
(iii) when contacted, some of the listed references, three references declared that the tenderer only supplied doctors services to such clients.

At this point Dr Spiteri referred to section 3.1 (a) under the ‘Selection Criteria’ (page 4) which stated that "A minimum of 10 past and/or present clients, the duration and value of these contracts and references to substantiate these claims (MCH reserves the right to contact these clients of tenderer for further information)."

Dr Spiteri stressed that the wording of this tender condition did not specify that the references had to be strictly in the nursing sector but simply referred to ‘clients’. He declared that the tender document was the legal instrument that one had to be guided with during evaluation. The appellant Company’s legal advisor contended that the information submitted by his client provided the necessary proof in terms of experience and reliability because the ten references submitted covered nursing services, doctor services and care workers. He added that although the 10 references were not limited to nursing services they covered areas connected with medical services.

Dr Spiteri recalled that the contracting authority alleged that, when contacted, certain references stated that the services rendered to them by his client did not include nursing services. Dr Spiteri conceded that the call for tenders was for nursing services but he reiterated that the request for references was not limited to nursing services and, as a result, the fact that some of the references submitted by his client also covered other medical services apart from nursing services should not have rendered his submission non compliant with tender conditions and specifications. Dr Spiteri claimed that the references submitted by his client proved his experience in managing large contracts covering various medical services including nursing services including at Mount Carmel Hospital itself.

The Chairman PCAB expressed the view that since the tender was issued for nursing services, the contracting authority was interested in references for the provision of nursing services and not for doctor or care worker services even though these fell under medical services.

Mr Jesmond Cilia, also representing Medicare Services Ltd, explained his firm had been participating in public tenders for about 12 years and had been awarded various public contracts, e.g. the one at Corradino Correctional Facilities which was considered a high risk service. Mr Cilia added that his tender submission included the list of ten references, the company profile and an extensive list featuring all the employees attached to Medicare Services Ltd, which included nurses, doctors and care workers. Mr Cilia felt that the list of employees they submitted apparently was
to the satisfaction of the contracting authority since it did not raise any complaints in
that regard.

Mr Mario Hili, Manager Nursing Services and Chairman of the adjudication board,
submitted the following:

a. the tender in question was issued specifically for nursing services, so much so
that other tenders were in the pipeline for the provision of other medical
services at MCH;

b. the nursing services requested involved high risk groups such as asylum
seekers and persons attending the Forensic Unit at MCH;

c. the list of ten references submitted by the appellant Company included a
duplicate reference – the Armed Forces of Malta with whom the same
appellants had two separate contracts - and even if one were to put that aspect
aside, other references, when contacted, were either not aware of the services
indicated by the appellants or the services rendered did not involve nursing
services but referred to sick leave verification by doctors or other services;

d. the references given by the other tenderer, Health Services Group Ltd (HSGL),
were in respect of nursing services and had been duly verified by the
contracting authority;

e. the contracting authority was concerned with nursing services so much so that
section 3.1 (b) ‘Personnel’ under ‘Selection Criteria’ (page 4) stated that
“Tenderers are to provide the names, experience (if any) and a statement that
all proposed personnel are in a position to produce the recognized
qualification certificate (from the University or any other governing body)
showing that they are able to perform nursing duties...”; and

f. the contracting authority was satisfied with the list of personnel submitted by
the tenderers.

The Chairman PCAB intervened to remark that references had to be evaluated not
only in terms of the number given but more importantly in the light as to what they
represented, in other words, it did not matter much if instead of 10 one submitted 9
references but what mattered more was the quality and the extent of service that those
9 references represented.

Under oath Mr Hili gave the following evidence:

(i) the contracting authority did phone up the references given by the
appellant Company, except for Corradino Correctional Services and
Mater Dei Hospital because he had first-hand experience of those work
places;

(ii) on contacting the Bank of Valletta and the Malta Transport Authority
he was informed that they did not make use of nursing services but
used the services of doctors to verify sick leave;
(iii) the contact person indicated at the University of Malta could not be traced whereas the Education Department was reluctant to divulge any information in this regard;

(iv) the Armed Forces of Malta were provided with doctor services; and

(v) HSGL provided nursing services to all the references provided, among them, Malta Shipbuilding, Corradino Correctional Services, Malta Hospice, St James Hospital, Marsa Power Station, Delimara Power Station and the Forensic Unit at MCH.

Mr Cilia, under oath, confirmed that with regard to BOV, MTA, UoM, Education Department and the current contract with the AFM (they had a contract for nursing services that had expired) his firm provided sick leave verification services by doctors and/or doctors to sit on medical boards. Mr Cilia did not consider it ethical that the Forensic Unit at MCH provided a reference to his competitor when he was still providing the services to that organisation because he himself had such a reference from the Forensic Unit but refrained from submitting it.

Dr Martin Fenech, representing HSGL, declared that his client had submitted a fully compliant tender submission and that he found nothing unethical in the submission of a reference from the Forensic Unit (MCH) which was a very high risk entity.

At this stage the appellants made reference to another issue, namely that relating to a Court decision, namely, Case No. 102/2009 – The Malta Police vs Mr Gaetano Bonnici.

Dr Spiteri stated that another aspect of his client’s appeal concerned the court judgment handed down on the 9th February 2009 against Mr Gaetano Bonnici (ID 970050M) who had been charged that, as the person responsible for Health Services Group Ltd, he had employed foreign worker/s without the necessary work permit and, as a consequence, he was found guilty as charged and fined €2,000.

Dr Spiteri referred to Annex IX ‘Exclusion Criteria’ which requested, among other things, that tenderers must indicate a ‘yes’ or ‘no’ as to whether their organisation had fulfilled its obligations relating to the payment of social security contributions and fulfilled its obligations relating to the payment of taxes. The appellants’ legal advisor remarked also that this requirement emanated from EU Directive 2004/18/EC. At this point Dr Spiteri pointed out that, although in Case No. 102/2009 the accused was Mr Gaetano Bonnici and the guilty verdict was issued in the name of the same Mr Gaetano Bonnici, the charge at page 2 read that Mr Bonnici was acting as the person responsible for the work of Health Services Group Ltd and that the accused was found guilty as charged.

Dr Spiteri declared that his client was raising this point because if the contracting authority was treating his client by the book, then the contracting authority should have likewise treated the competing tenderer by the book and found that Health Services Group Ltd had contravened the mandatory provisions laid down at Annex IX, i.e. the non-payment of social security contributions and taxes in respect of persons working without the necessary permits.
Mr Josef Borg, representing the contracting authority (MCH), remarked that the Contracts Department had at no time informed the contracting authority that HSGL was on the black list. He added that HSGL had submitted a clean declaration for the purposes of Annex IX. (page 57).

At this point Dr Fenech requested the floor in order to deplore the attitude displayed by the appellants. He raised the procedural point that, in its defence, the appellant Company should have stuck to the reason on which its bid had been rejected, namely the references, and not indulge into other issues which did not concern the reason for its elimination. Dr Fenech argued that, if anything, the appellants could have raised the court sentence issue at some other stage but certainly not at that stage.

Mr Cilia intervened to inform those present that on the 21\textsuperscript{st} January 2010 his legal counsel had informed the Chairman, Contracts Committee, of Court Case 102/2009 involving HSGL, which letter was acknowledged on the 26\textsuperscript{th} January 2010.

On his part, Mr Borg remarked that the 1\textsuperscript{st} envelope was opened on the 12 January 2010, the adjudication of the 2\textsuperscript{nd} envelope had been concluded on the 3\textsuperscript{rd} February 2010 and that the letter (dated 21./01/10) from the appellant’s legal counsel was referred to the adjudication board through covering letter dated 4\textsuperscript{th} February 2010.

Dr Fenech maintained that the appellant Company should have limited itself to convincing the contracting authority that its offer was a valid one and that it should have refrained from casting doubt as to whether HSGL’s offer was compliant or not. Furthermore, continued Dr Fenech, with regard to the court sentence involving Mr Gaetano Bonnici, he

a. asked from where did it emerge that Mr Gaetano Bonnici was a director or a shareholder of HSGL and if HSGL was among the blacklisted contractors;

b. pointed out that in this case ‘The Police’ charged ‘Mr Gaetano Bonnici’ and not HSGL and in fact the guilty verdict was issued in the name of Mr Bonnici and not in representation of HSGL. He added that the Police could have easily taken action against Mr Gaetano Bonnici in his own name and in representation of HSGL but apparently the Police chose not to do that;

c. claimed that the statements in terms of Annex IX were requesting a confirmation as to whether a firm had any outstanding dues with regard to the payment of social security contributions and taxes and the fact was that his client certainly did not have any outstanding matters of these kinds at the time he submitted this tender;

d. submitted that the verdict on page 3 read ‘issib lill-imputat hati tal-akkuzzi migjuba fil-konfront tieghu u tikkundannah ….’ and recalled that the accused was Mr Gaetano Bonnici as indicated on page 1 of the Court proceedings and, therefore, the Court did not convict Mr Bonnici on behalf of HSGL.

The Chairman PCAB, while noting the points mentioned by Dr Fenech, remarked that the Court found the accused guilty as charged and that the charge read ‘\textit{bhala persuna responsabbli mix-xoghol ta’ Health Services Group Ltd}’.
Dr Fenech also stated that the Court had also decided ‘illi dwar ittalba tal-Pulizija sabiex jiġu revokati l-liċenzi li kellu l-imputat sabiex jopera n-negożju tiegħu l-Qorti tqis illi l-ebda prova ma tressqet dwar l-imsemmija liċenzi oltre l-fatt li l-imputat ammetta mal-ewwel għall-akkuzi miġjuba fil-kontront tiegħu’ which Dr Fenech interpreted in the sense that Mr Bonnici had no trading licence in his name. He declared that Mr Gaetano Bonnici was not the representative or an employee or a shareholder of HSLG from the time this tender was submitted till that day.

Dr Spiteri stated that, according to the charge brought by the Police, Ms Stojanovic was employed with HSGL and that Mr Gaetano Bonnici was the person responsible for the work of HSGL. Dr Spiteri made it clear that he had introduced this shortcoming on the part of HSGL in his appeal to draw the attention of the contracting authority that all tenderers had to receive equal treatment.

Mr Anthony Pavia, a PCAB member, observed that it appeared that the letter sent by the appellant Company dated 21st January 2010 to the Contracts Department was not acted upon neither by the Contracts Department nor by the adjudication board.

Mr Francis Attard, Director General (Contracts), gave the following evidence under oath, stating namely that

a. it was usual practice that any information received by the Contracts Department relevant to a call for tenders would be passed on to the adjudication board for its consideration in the evaluation process;

b. the Public Contracts Regulations did not provide for the-blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future;

c. the appellants’ letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company;

d. in the case of contracts with a value that exceeded €0.5 million, the economic operator was being requested to submit letters from the Court and from tax departments that attributed no offence to that operator; and

e. a tenderer had the right to appeal against any aspect of a decision taken by the contracting authority at the end of each stage of the tendering process.

Dr Spiteri then introduced the concept of ‘the lifting of the corporate veil’ and a discussion ensued. He declared that the wife of Mr Bonnici was the director and main shareholder of HSLG and, as a result, there existed a direct link between Mr Bonnici and HSGL. Dr Spiteri argued that, contrary to what Dr Fenech had claimed, the charge was part and parcel of the court sentence and it followed that there was a direct link between Mr Bonnici and HSGL.

On the other hand, Dr Fenech, after reiterating that there was no link between Mr Bonnici and HSGL, explained that the application of ‘the lifting of the corporate veil’ was meant to prevent directors and shareholders from committing fraudulent acts and then hide behind the corporate structure of the company.
In concluding, Dr Spiteri reiterated that his main contention was that section 3.1 (a) under ‘Selection Criteria’ did not lay down that the ten past and/or present clients had to relate exclusively to nursing services and hence his client’s bid should be reintegrated in the tendering process and that the award of the tender would then be decided upon after the opening of the 3rd envelope which contained the prices.

On his part, Dr Fenech remarked that (i) the appellant Company was admitting that its tender submission was deficient with regard to the references submitted, (ii) the Director General of Contracts had confirmed that the letter of the 21st January 2010 regarding Court Case 102/2009 had been taken into consideration by the General Contracts Committee, (iii) Mr Gaetano Bonnici did not represent HSGL in any way and (iv) since his client had abided by all tender specifications and conditions then it was reasonable to expect that his client would be awarded this contract.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 01.03.2010 and also through their verbal submissions presented during the public hearing held on 07.05.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of Dr Spiteri’s arguments raised in connection with (a) the reasons given to his client as to why his company was considered as being administratively non-compliant, especially the fact that the company in question provided a list containing insufficient number of past/present clients and insufficient number of references, (b) the fact that the wording of section 3.1 (a) under the ‘Selection Criteria’ (page 4) did not specify that the references had to be strictly in the nursing sector but simply referred to ‘clients’, (c) the fact that the references submitted by his client proved the latter company’s experience in managing large contracts covering various medical services including nursing services including at Mount Carmel Hospital itself and (d) the fact that a court judgment handed down on the 9th February 2009 found against Mr Gaetano Bonnici fining the latter €2,000 - as the person responsible for Health Services Group Ltd he had employed foreign worker/s without the necessary work permit - should have sufficed for the adjudication board to, equally, disqualify the other tenderer on grounds of administrative non-compliance;

- having also taken note of Dr Spiteri’s admission that although the 10 references submitted by his company were not limited solely to nursing services but they covered areas connected with medical services;

- having heard Mr Hili’s submissions which, inter alia, referred to the fact that (a) the tender in question was issued specifically for nursing services, so much so that other tenders were in the pipeline for the provision of other medical services at MCH, (b) when references provided by the appellant company were contacted, these were either not aware of the services indicated by the appellants or the services rendered did not involve nursing services but referred to sick leave verification by doctors or other services and (c) the references given by
the other tenderer, Health Services Group Ltd (HSGL), were in respect of nursing services and had been duly verified by the contracting authority;

- having taken into consideration Mr Cilia’s (a) confirmation under oath regarding the fact that with regard to BOV, MTA, UoM, Education Department and the current contract with the AFM (they had a contract for nursing services that had expired) his firm provided sick leave verification services by doctors and/or doctors to sit on medical boards and (b) statement that that on the 21st January 2010 his legal counsel had informed the Chairman, Contracts Committee, of Court Case 102/2009 involving HSGL, which letter was acknowledged on the 26th January 2010, a letter which, according to Mr Borg, was referred to the adjudication board through covering letter dated 4th February 2010;

- having also taken note of Dr Fenech’s points raised in relation to the fact that (a) the appellant Company should have stuck to the reason on which its bid had been rejected, namely the references, and not indulge into other issues which did not concern the reason for its elimination, (b) it emerges from nowhere that Mr Gaetano Bonnici was a director or a shareholder of HSGL and that HSGL was among the blacklisted contractors, (c) ‘The Police’ charged ‘Mr Gaetano Bonnici’ and not HSGL and, in fact, the guilty verdict was issued in the name of Mr Bonnici and not in representation of HSGL, (d) the statements in terms of Annex IX were requesting a confirmation as to whether a firm had any outstanding dues with regard to the payment of social security contributions and taxes and the fact was that his client certainly did not have any outstanding matters of these kinds at the time he submitted this tender and (e) the lifting of the corporate veil was meant to prevent directors and shareholders from committing fraudulent acts and then hide behind the corporate structure of the company and had nothing with the case under review as the appellant’s legal advisor was suggesting;

- having also considered the points raised by Mr Attard who, inter alia, stated that (a) the Public Contracts Regulations did not provide for the blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future and (b) the appellants’ letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company,

reached the following conclusions, namely:

1. The PCAB feels that since the tender was issued for nursing services, the contracting authority was interested in references for the provision of nursing services and not for doctor or care worker services even though these fell under medical services. As a matter of fact the Tender Document was clear enough stating in section 3.1 (b) ‘Personnel’ under ‘Selection Criteria’ (page 4) that “Tenderers are to provide the names, experience (if any) and a statement that all proposed personnel are in a position to produce the recognized qualification certificate (from the University or any other governing body) showing that they are able to perform nursing duties...”.
2. The PCAB argues that the contracting authority provided enough evidence to demonstrate as to what it was really after when issuing this call.

3. The PCAB also feels that the DG Contracts’ evidence was clear enough regarding the fact that (a) the Public Contracts Regulations did not provide for the blacklisting of contractors as yet but such a mechanism was going to be introduced in the near future and (b) the appellants’ letter dated 21.01.10 was discussed at General Contracts Committee level and no action thereon was deemed necessary because one had to draw a distinction between an individual person and a limited liability company. The PCAB concurs with both conclusions reached by the General Contracts Committee.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

18 May 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 201

Advert No. 440/2009; CT/2477/2009

Publicity and Marketing Campaign for the ESF 3.59 NISTA Project

This call for tenders was published in the Government Gazette on 27\(^{th}\) November 2009. The closing date for this call for offers with an estimated value of €1,068,920 was 19\(^{th}\) January 2010.

Two Tenderers had submitted their offers

JP Advertising Ltd filed an objection on the 9\(^{th}\) March 2010 after its offer had been adjudicated administratively non-compliant for having disclosed the price offer in the Tenderer’s Declaration Form in package 2.

The Public Contracts Appeals Board composed of Mr. Anthony Pavia as Chairman and Mr. Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Wednesday, 12\(^{th}\) May 2010 to discuss this objection.

Present for the hearing were:

**JP Advertising Ltd**

- Dr Franco Vassallo  
  - Legal Representative
- Ms Becky Vassallo  
  - Representative
- Mr Chris Bianco  
  - Representative

**WE Advertising Ltd & MPS Ltd**

- Dr Adrian Delia  
  - Legal Representative
- Dr Mark Vassallo  
  - Legal Representative
- Mr George Mifsud  
  - Representative
- Mr Christopher Mifsud  
  - Representative
- Mr P J Vassallo  
  - Representative
- Mr Lou Bondi  
  - Representative

**Employment and Training Corporation (ETC)**

- Dr Ivan Gatt  
  - Legal Representative

**Evaluation Committee:**

- Mr Louis Cuschieri  
  - Chairperson
- Mr Felix Borg  
  - Member
- Ms Josephine Farrugia  
  - Member
- Mr Tonio Montebello  
  - Member
- Mr Martin Casha  
  - Secretary

Mr Anthony Pavia informed those present that he had been appointed to chair the hearing because the regular Chairman PCAB (Mr. Alfred Triganza) felt that he should not preside over this case.
After the Chairman’s brief introduction, the appellant was invited to explain the motives of the objection.

Dr Franco Vassallo, on behalf of JP Advertising Ltd, explained that his client was disqualified for disclosing the price he offered in the Package Two whereas it was claimed that it should have been disclosed in Package Three. Dr Vassallo further explained that the tender document itself in the Declaration Form referred to in Point 3 of the Service Tender Submission Form (page 80) the tenderer was requested indicate ‘The price of our tender is:………”, i.e. the full price. Dr Vassallo stated that his client faced a dilemma in the sense that according to the same tender document he should either, in terms of 4.2 (b) Technical Offer (Instructions to Tenderers), have to submit a signed declaration form using the format attached to the Tender Submission Form, conscious that he was not at liberty to refrain from giving requested information, while at the same time he would be infringing the tender conditions which also indicated that the price must be submitted in the 3rd Package. Dr Vassallo argued that the bidder was not expected to contact the contracting authority or the Director of Contracts to clarify this point and, furthermore, his client had submitted other tenders of the same nature (CT2070/2009; CT2068/2009; CT2187/2009) where he had submitted this same information and the bids were not disqualified. Dr Vassallo stated that that was another reason why his client did not feel the need to seek any clarifications.

Dr Vassallo argued that those were the facts and therefore what one had to deliberate upon was the remedies to this situation, which, in his view were: to reintegrate his client’s tender in the tender process if it is judged that this disclosure did not prejudice the process but would maintain the same level of competition to the benefit to the contracting authority; the cancellation of the tender because the tender instructions were contradictory and misleading and to engage into a negotiated procedure if it was deemed that delay in awarding the tender could jeopardize EU funds. Dr Vassallo contended that his client abided by the tender instructions and stood to be penalised whereas other tenderer/s decided to unilaterally discard/ignore certain instructions and stood to be rewarded instead of being disqualified. For the sake of justice and equity Dr Vassallo called on the PCAB either to reintegrate his client in the tender process or to cancel the tender.

Dr Ivan Gatt, obo the ETC, stated that the appellant based his argumentation on the conflict that existed in two separate provisions in the tender document however Dr Gatt referred to section 2 of the Draft Service Contract ‘Structure of the Contract’ which listed in order of precedence the special conditions and annexes and the last sentence stated that ‘In case of any contradiction between the above documents, their provision shall be applied according to the above order of precedence’ where Annex V ‘Budget’ preceded Annex VI ‘Forms and other relevant documents’. Dr Gatt claimed that these provisions outlined that article 4 which in its NB stated that ‘Financial proposals are to be submitted ONLY in package three’ took precedence over the ‘forms’ that were to be submitted. Dr Gatt stated that it was not unheard of that a contract would contain conflicting clauses however, in such cases, the contract itself would provide for its interpretation. Dr Gatt also referred to article 4 (iii) of the Instructions to Tenderers which stated ‘Package Three; Completed price schedules and, or bills of quantities …’

Dr Vassallo contended that the appellant referred to the ‘draft service contract’, which was meant to regulate the relationship between the awarded tenderer and the client once the contract had been awarded, and not to the tender conditions. Dr Vassallo contended that the contracting authority was confirming his point that the tender documents contained conflicting conditions which, he claimed, misled his client.
Dr Adrian Delia, obo WE Advertising Ltd & MPS Ltd, an interested party, while expressing agreement as to the fact that there existed conflicting conditions in the tender document, at the same time submitted the following:

The appellant was not disqualified for submitting the ‘service tender submission form’ in envelope 2 but for disclosing the price in envelope 2.

Contrary to what the appellant stated, there were the following options open, that is: (i) to submit the ‘service tender submission form’ in package 2 and in the space provided for the price he could have indicated ‘as per package 3’ - he contended that tenderer/s who acted in this manner did not go against tender condition – (ii) section 82 (1) of the Public Contracts Regulations clearly indicated that in the three package system the price had to be given in envelope 3; (iii) the Director of Contracts ought to look into the appellant’s claim that he had participated in other tendering processes and that he had made similar submissions but his offers had not been disqualified but Dr Delia insisted that even if that were to be the case ‘two wrongs did not make a right’; (iv) contrary to what the appellant stated, it was admissible to seek a clarification on such a point prior to the closing date of tender and went further to state that such clarifications were an integral part of the tendering process. Dr Delia conceded that the appellant could have been misled to a certain extent however the appellant had ways how to remedy the situation.

Dr Delia stressed that in a three package system it was imperative not to disclose the price prior to package 3 otherwise it would condition and prejudice the tendering process. He added that this principle has been retained in the revised Public Procurement Regulations published the day before this hearing. Dr Delia claimed that the adjudication board acted properly in disqualifying the appellant for having infringed a basic provision of the three package system, i.e. the disclosure of the price in envelope 2, and in considering his client’s offer compliant since it respected the tender conditions.

Dr Delia then rebutted the remedies indicated by Dr Vassallo in the sense that (a) the reintegration of the appellant was out of the question because his tender submission violated the provision laid down in legislation and even infringed the tender conditions, (ii) there were no grounds for the cancellation of tender and (iii) the conditions were not present to undertake the negotiated procedure.

Dr Delia argued that the option left for the appellant was to take legal action against the ETC, the contracting department, or against the Contracts Department

In the case of such conflicts in a tender document then the law should prevail and in this case the law so provided. He quoted the PCAB judgements in cases 164 and 33 to further prove his point.

Dr Gatt shared the view expressed by Dr Delia that the appellant could have easily asked for a clarification.

Dr Vassallo remarked that the PCAB should not tolerate a situation where a contracting authority issued a call for tenders with conflicting provisions whereby a bidder was expected to ignore and to discard the specific request made in the tender document, i.e. the last part of section 4 (iii) stated that:

*Each Technical Offer and Financial Offer must contain one original clearly marked “Original” and 2 copies, each marked “Copy”. Failure to respect the*
requirements in clauses 4.1, 4.2 – which Dr Vassallo referred to - 4.3 and 8 shall result in the rejection of the tender.

N.B. Financial proposals are to be submitted ONLY in package three.

Dr Vassallo reiterated that his client respected the provisions in the tender by submitting the form at section 4.2 which turned out to be in conflict with the Nota Bene and that was the reason why he was calling for the cancellation of the tender. He claimed that it appeared that the other tenderer had not respected the tender conditions if he did not fill in the ‘Tenderer’s Declaration’ at page 80 and that the disqualification of his client’s offer would eliminate competition to the detriment of the contracting authority.

Dr Gatt refused the contention that there were conflicting clauses when the tender document provided for ways how to deal in such cases besides the fact that, as Dr Delia had mentioned, the regulations outlined what the three packages had to include.

Dr Delia concluded that the grounds that merited resort to the negotiated procedure were found at section 38 (1) where not applicable to this case. He added that the same applied with regard to section 38 (6) which dealt with the cancellation of the tender. Dr Delia argued that this hearing was not convened to consider the cancellation of the tender because that was the responsibility of the Director of Contracts but to look into whether the appellant should be disqualified or reintegrated in the tendering process.

Dr Vassallo claimed that had the adjudication board acted correctly according to regulations and likewise disqualified the other tenderer with the result that none of the tenderers were compliant then there would have been grounds to undertake the negotiated procedure. Dr Vassallo concluded that in his letter of objection he had asked for his client’s offer to be reinstated and, failing that, the PCAB should consider the tendering process null and void because the tender document had not been drawn up according to regulations.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 15 March 2010 and also through their verbal submissions presented during the public hearing held on 12 May 2010, had objected to the decision taken by the General Contracts Committee;

- having heard Dr. F. Vassallo state that his client was disqualified for disclosing the price he offered in the Package Two whereas it was claimed that it should have been disclosed in Package Three, and his arguments that that the tender document itself in the Declaration Form referred to in Point 3 of the Service Tender Submission Form (page 80) provided that the tenderer was requested to indicate ‘The price of our tender”, i.e. the full price;

- Having also heard Dr Vassallo’s further arguments that his client faced a dilemma in the sense that according to the same tender document he should either, in terms of 4.2 (b) Technical Offer (Instructions to Tenderers), have to submit a signed declaration form using the format attached to the Tender Submission Form, conscious that he was not at liberty to refrain from giving requested information, while at the same time he would be infringing the tender conditions which also indicated that the price must be submitted in the 3rd Package;
having also considered Dr. Vassallo’s statement that in his view the remedies to this situation were: to reintegrate his client’s tender in the tender process if it is judged that this disclosure did not prejudice the process but would maintain the same level of competition to the benefit to the contracting authority; the cancellation of the tender because the tender instructions were contradictory and misleading or to engage into a negotiated procedure if it was deemed that delay in awarding the tender could jeopardize EU funds;

having also noted the rebuttal by Dr. I Gatt of Dr. Vassallo’s arguments that section 2 of the Draft Service Contract ‘Structure of the Contract’ listed in order of precedence the special conditions and annexes and the last sentence stated that ‘In case of any contradiction between the above documents, their provision shall be applied according to the above order of precedence’ where Annex V ‘Budget’ preceded Annex VI ‘Forms and other relevant documents’

having further heard Dr Gatt contend that these provisions were also reflected in article 4 which in its NB stated that ‘Financial proposals are to be submitted ONLY in package three’ and that this took precedence over the ‘forms’ that were to be submitted and that it was not unheard of that a contract would contain conflicting clauses however, in such cases, the contract itself would provide for its interpretation, Dr Gatt went on to refer to article 4 (iii) of the Instructions to Tenderers which stated ‘Package Three; Completed price schedules and, or bills of quantities …’;

having noted the submissions of Dr. A Delia that (i) instead of declaring the price on the relative form in package 2 the tenderer could have opted to indicate on the form that the price was contained in package 3, (ii) section 82 (1) of the Public Contracts Regulations clearly indicated that in the three package system the price had to be given in envelope 3; (iii) even if the Director of Contracts found the appellant’s claim correct that he had participated in other tendering processes and that he had made similar submissions where his offers had not been disqualified, two wrongs did not make a right; (iv) contrary to what the appellant stated, it was admissible to seek a clarification on such a point prior to the closing date of tender and went further to state that such clarifications were an integral part of the tendering process.

reached the following conclusions, namely:

1. The PCAB finds that there is no doubt that a gross error was committed in the drafting and issuing of the Tender Document, an error which conflicted with the very basis of the concept and the mechanism of the three package system as provided for in the relative legislation and in this respect the competent authorities should ensure that such errors will not be repeated;

2. The fact that according to Dr Vassallo the appellant had faced a dilemma when filling in the forms and only acted in the way he did because on other occasions he had done the same and was not disqualified shows that the company was sufficiently aware of how the three package system works;

3. The reason brought forward that allegedly the same circumstances had occurred previously without the appellant company having been penalized is not sufficient justification to perpetuate an error, the PCAB also notes and agrees that there had
been ample time to ensure that the tenderer adopted the correct procedure by seeking a clarification and that there was no reason that precluded him from doing so;

4. The PCAB feels that the Regulations regarding the three package system are very clear and it is also very true that such Regulations supersede any other thing that may be written in a Tender Document, besides which the Board also agrees that there were sufficient warning lights contained within the Tender Document itself to have prompted any prospective tenderer who found himself in doubt to seek to clarify the requirements of the Tender Document;

5. The PCAB also feels that if any of Dr. Vassallo’s suggested remedies were to be applied this would act against the other tenderer who had correctly submitted their bid notwithstanding the contradictions in the Tender Document.

As a consequence of (1) to (5) above this Board finds against the appellant Company and declares that the deposit paid in respect of the appeal should be forfeited to Government.

Anthony Pavia  Edwin Muscat  Carmelo Esposito
Chairman  Member  Member

26 May, 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 202

Ref: 322/CSD//09

Restricted Invitation to Tender for a Concession Contract for the Provision of Scheduled Bus Services in Malta

This call for tenders was published in the Government Gazette on 14.07.2009. The closing date for this call for offers was 17.02.2010.

Four (4) different tenderers submitted their offers.

On 15.04.2010 Messrs Nex Continental Holdings SLU filed an objection after its bid had been adjudicated non-compliant due to various shortcomings listed in letter dated 12.04.2010.

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 26.05.2010 to discuss this objection.

NEX Continental Holdings SLU (NEX Holdings)
Dr. John Bonello Legal Adviser
Dr. James Muscat Azzopardi Legal Adviser
Dr Ged McEwan Legal advisor, National Express Group
Sra Maria Perez Prieto Legal Adviser
Sr. Rafael Gonzalez Urban Division General Manager
Sr. Carlos Huesa Development Division General Manager
Mr Juan Jose Cobo Representative

Transdev Plus Consortium
Mr Leo Grech Representative
Mr Anthony Mamo Representative
Mr Glen Warren Representative
Prof. Ian Refalo Legal Adviser
Dr. Roderick Zammit Pace Legal Adviser

Arriva Malta Consortium
Dr George Hyzler Legal Adviser
Mr Silvan Fenech Representative of Tumas Group
Ms Elena Cattaneo Representative of Arriva

Transport Malta
Dr Adrian Delia Legal Adviser
Dr John L. Gauci Legal Adviser
Dr Nicolette Spiteri Bailey Legal Adviser
Mr Mark Portelli Chairman Transport Malta

Core Evaluation Committee
Dr Stanley Portelli Chairperson
Mr David Sutton Evaluator
After the Chairman’s brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Ged McEwan, Legal advisor, National Express Group and NEX Holdings, stated, *inter alia* that the purpose of the appeal was not because they maintained that their bid was the most advantageous but that they were convinced that, on the basis of the letter of rejection they received from Transport Malta, their bid should not have been disqualified but that their bid should be allowed to continue participating in this tendering process.

Dr James Muscat Azzopardi, also representing NEX Holdings, contended that the issues raised by Transport Malta in its letter dated 12th April 2010 were incorrect both in fact and at law. Dr Muscat Azzopardi after explaining that, in the course of tender evaluation, the Adjudicating Board had requested a number of clarifications, fifteen (15) in all, as per letter dated 23rd March 2010 which his client had answered he proceeded by posing the question as to why the contracting authority, Transport Malta, decided to issue its letter of disqualification instead of asking for further clarifications on those same reasons for disqualification in terms of section 4.6.4 (page 32) of the tender document which stated that:

*‘The Adjudicating Board shall have the right to seek clarifications from Tenderers on points of a technical nature to enable a proper evaluation of any Tender.’*

**Job Description**

Dr Muscat Azzopardi then referred to the first reason for disqualification which, quoted verbatim, read as follows:

*“you have failed to satisfy the requirements of the ITT as you have failed to provide a detailed job description of top management which had to be provided in terms of Annex 2 and which had to indicate the relevant qualifications and expertise.”*

Dr Muscat Azzopardi claimed that his client had submitted the information requested, however, if that information was not as detailed as the contracting authority wanted it to be then it could have asked for more details as it was entitled to do. He argued that if the contracting authority considered this issue as of fundamental importance to the tender process then why did it not seek a clarification thereon, as it did on fifteen (15) other issues as per letter dated 23rd March 2010. Also, on the other hand, if it did not consider this shortcoming as fundamental to the process then this deficiency should not have led to disqualification. Dr Muscat Azzopardi asked the PCAB to look at this matter from the point of view that it was to the advantage of Transport Malta to have as many bidders as possible since more competition would produce better service
quality and prices. At this point Dr Muscat Azzopardi referred to clause 4.6.8 which stated that:

“……In exceptional circumstances, the Adjudicating Board reserves the right to accept Tenders which are not fully compliant with this Invitation to Tender but only where the deficiencies do not affect materially the requirements of this Invitation to Tender and the contents of the Tender.”

Dr Muscat Azzopardi did not consider that lack of detail in the job description of top management should lead to tender rejection when the invitation to tender was a very complex one requesting the provision of buses. He then explained that he really meant the provision of transport services.

Dr Adrian Delia, legal representative of Transport Malta, by way of introduction submitted the following:

- The appellant appeared to have admitted that this invitation to tenders was not for the provision of management but for the provision of buses/transport, however, the problem with Malta’s public transport was not the lack of buses but the problem was the mismanagement of the transport system and thus the management aspect of this tender was crucial.

- Clarifications were in fact sought from the appellant Company as had already been pointed out by the same appellant Company. He added that clarifications were meant to explain better what had already been submitted but clarifications were certainly not meant to request information that should have been submitted in the first place as a mandatory requirement.

- With regard to management, the tender document requested, as follows, at page 122:

(2) Operational Strategy – This shall include, inter alia:

A high level plan of staff complement required and a detailed job description of the persons who will be responsible for the top management on the Project, indicating the required level of relevant qualifications and expertise, and a clear indication of the resources dedicated to network planning and auditing.

Dr Nicolette Spiteri Bailey, also a legal representative of the contracting authority, explained that, contrary to what the appellants seemed to imply, Transport Malta was keen to have as wide a competition as possible and that efforts were made in that direction and that was demonstrated by (i) the number of clarifications sought from the appellants and (ii) the opportunity given to the appellants at envelope one stage to correct the bank guarantee which had erroneously been issued in the name of NEXT Continental Holdings instead of NEX Continental Holdings, something which could have led to outright disqualification of the appellants from the outset.
Dr Spiteri Bailey contended that this invitation to tender did not involve only the purchase of buses but it involved the provision of a public transport system in a holistic manner. She added that Government was, in fact, granting a concession whereby the contractor would derive his revenue from the sale of tickets and from compensation paid on certain services which were not considered commercially feasible. She continued that Annex 2 to the tender document included all the essential and mandatory requirements and that this annex should not be considered as secondary in importance to the tender document itself. Dr Spiteri Bailey remarked that the appellant Company’s bid was deficient both in administrative and in technical aspects and that, on seeking clarifications, the contracting authority was further convinced that the appellants, either did not fully understand the tender document, or else it could not provide the standard of service requested. She added that the evaluation process involved the setting up of four separate committees, each specialized in a specific area, which reported to the core evaluation board and she confirmed that all the decisions were taken unanimously, i.e. with no dissenting opinions.

Dr Spiteri Bailey stressed that the tender dossier specifically requested qualifications and expertise and that there were directives in force which dealt with the recognition of qualifications across borders. She added that, over the ten-year period, managers could change but the contractor would be obliged to provide replacements with the qualifications and expertise laid down in the contract.

Dr Muscat Azzopardi referred the PCAB to pages 69 and 70 (of his client’s submission with regard to General Management.

The Chairman PCAB opined that the contracting authority needed to know the competencies of the top management within the foreseeable future – 10 years –who would be operating this service and thus the request for qualifications and expertise and not simply the title/nomenclature of the post as was indicated by the appellant Company at page 70 of its submissions.

Dr Muscat Azzopardi remarked that it could not be said that his client did not submit information. However, he conceded that the submission did not contain that level of detail, which, he argued, the contracting authority could have (i) either asked for in a clarification for the sake of not eliminating competition on such details or (ii) penalized his client by awarding him fewer points as per award criteria at page 31.

Dr John Bonello, also representing the appellant Company, agreed with Dr Spiteri Bailey that this was a ‘restricted invitation to tender’ and not a normal call for tenders and submitted that the adjudicating board should have applied throughout the evaluation process the provisions of clause 4.6.4 quoted earlier on at the hearing.

Dr Delia remarked that the appellants did not provide evidence of the qualifications and expertise of managers and did not even indicate if they were going to be, say, engineers or lawyers or architects.

Dr Muscat Azzopardi maintained that his client was an international operator of transport systems and that his client did appreciate the important role of management in the running of such public transport services. Dr Muscat Azzopardi did not contest the argument that the contracting authority required more details with regard to
management but he insisted that it could not be said that his client did make a submission with regard to management.

The Chairman PCAB remarked that clarifications were to be sought for the purpose of throwing more light on information already submitted and not to obtain information which was requested but not submitted because that could amount to a form of negotiation.

Dr Spiteri Bailey explained that there were various stages and that a tender had to be found administratively and technically compliant to be allowed to move on to the weighting stage as explained in the evaluation criteria at page 31 which provided for, among other things, the following:

“4.6.1 – The Authority shall have the right to reject any or all Tenders which are not compliant with the procedural or substantive requirements of this Invitation to Tender on the recommendation of the Adjudication Board. Any tender which is so disqualified shall be discarded once the Tender Procedure is completed.

4.6.3 - An evaluation of Tenders will be made to ensure that the tendering procedural requirements and/or the mandatory specifications included in the Invitation to Tender are satisfied. Tender submissions which meet the minimum requirements, hereunder ‘Compliant Bids’, will then be weighted in accordance with the award criteria set forth hereunder”

Dr Spiteri Bailey also referred to clause 4.6.8. which read as follows:

“4.6.8 - The Authority shall have the power to disqualify any Tenderer who, in its opinion, based on the information it holds, will not be able to comply with its Tender submissions. In exceptional circumstances, the Adjudicating Board reserves the right to accept Tenders which are not fully compliant with this Invitation to Tender but only where the deficiencies do not affect materially the requirements of this Invitation to Tender and the contents of the Tender.”

Dr Spiteri Bailey explained that an exceptional circumstance was, for example, when only one tenderer submitted a bid, in which case one could have accepted the bid even if not fully compliant but still the deficiencies should not affect materially the requirements which, she claimed, was not the case with the appellant Company. Dr Spiteri Bailey referred to the appellants’ letter of objection where, inter alia, it was stated that “....it is impractical to specify particular academic requirements at this early state...”.

Dr Bonello intervened and insisted that if the contracting authority considered the lack of detail with regard to the job description of top management as a fundamental issue such that it amounted to disqualification then it should have been included in the list of clarifications which it sought from his client on 23rd March 2010, otherwise, he argued, what was the use of seeking the other clarifications.
Technical Grounds

At that stage it was decided that certain issues listed in the letter of objection – referred in (i) to (iii) hereunder could be grouped and tackled together because they were interrelated.

i) “The Peak Vehicle Requirement (PVR) submitted following a request for clarification fall between 27 (or 8.7%) and 38 (or 11.7%) buses short from that considered to be required for the provision of the Services by the Authority, based on the network requirements. It is therefore clear that the proposed bus fleet is insufficient to comply with the requirement of the ITT.”

ii) “The Bus fleet submitted in the Tender demonstrates that you failed to thoroughly analyse the bus routes and the maximum waiting time as mandatorily required by clause 2.6.1.1 of the ITT”

iii) “The submission with respect to the Bus Fleet also indicates that you have failed to distinguish between the difference between the Maximum Waiting Time requirement and the scheduling requirement.”

Dr Spiteri Bailey explained that the contracting authority did not specify the number of buses required but instead gave the bidders certain information, such as the number of routes and bus stops and the maximum waiting time for a passenger to board the bus, and on the basis of that information and on the analysis carried out by the bidders themselves then they had to arrive at the number of buses required. Dr Spiteri Bailey remarked that Transport Malta experts had arrived at 300 buses which was not disclosed to the bidders but was meant to serve as a benchmark. She stated that ‘the maximum waiting time’ was the most important output level.

Mr Juan Jose Cobo, NEX Holdings technical representative, with Dr Muscat Azzopardi acting as interpreter, submitted that the appellants had brought over to Malta a number of experts to undertake the necessary studies on the ground and according to their calculations 288 buses would be required. He added that the number of buses was arrived at by using the formula given by the contracting authority and by adding 10% thereon which, through experience, was considered more than sufficient to local conditions including the maximum waiting times indicated. He explained that the average speed of 17 km/hr was considered as very conservative.

Dr Spiteri Bailey remarked that, although the number of buses had not been disclosed by the contracting authority, the tender document made various references in relation to this requirement particularly clause 2.2.2 (page 17) which stated that:

“The Operator shall ensure that a passenger does not wait at any particular Bus Stop for a time which is longer than the Maximum Waiting Time described for each Bus Stop in Item A1 of the Data Room before he can board the Bus which he is waiting for. The Operator shall moreover coordinate the times at which Buses pass by a particular Bus Stop in order to reduce the waiting time, as much as possible, for persons who need to make an interchange between different Bus Routes. The Operator shall endeavour to coordinate the times at which Buses leave and/or arrive at a
particular destination from which the public can utilise scheduled means of transport other than by road, with the transport organiser or coordinator of such other means of transport. For this purpose, the Operator shall endeavour to plan the Buses' arrival at, and departure from, such destinations in such a way that the waiting time for the use of such other means of transport is minimised. The Operator shall consult with operators and/or coordinators of such other means of transport, including inter alia, the operator of the Malta International Airport for the purpose of scheduled flights, operators and/or coordinators of international and national passenger ferry services and the operator of any sea plane services as well as any operator of vertical connections and any other operator or coordinator providing different scheduled means of transport other than by road.”

Dr Spiteri Bailey remarked that the evaluation board did not discard the appellant Company’s offer because Mr Cobo quoted 288 buses instead of the 300 buses worked out by Transport Malta but because when asked for a clarification - as per document which read that “in terms of clause 2.6.1.1” of Part Two of the ITT, “Tenderers are required to analyse the Bus Routes and the Maximum Waiting Time applicable to each Bus Stop with a view to establishing an appropriate mix of Bus type or types to render the Scheduled Bus Service - the appellant Company did not present in its reply the analysis undertaken with regard to, for example, traffic congestion or to tourist seasonality. As a result, Dr Spiteri Bailey argued, in the absence of such analysis as to how the number of buses was arrived at, the contracting authority did not have the comfort that the number of buses proposed by the appellants was in fact adequate. On being specifically asked by the PCAB, Dr Spiteri Bailey stated that the successful tenderers had presented from the outset the number of buses required, which were well below the 10% variation indicated by the appellants, along with detailed workings that backed their proposal. Dr Spiteri Bailey remarked that the adjudicating board even noticed that (i) the summer route extensions (e.g. Mgarr-Gnejna), (ii) a particular route (ML 73) and (iii) the return trip on another route were not included in the spreadsheet submitted by the appellants and that only one bus was proposed for Mgarr Gozo which was by far insufficient in relation to the maximum waiting time requested.

Dr Muscat Azzopardi argued that such workings were to accompany the economic aspect of the submission in envelope 3. The Chairman PCAB disagreed because this aspect concerned customer satisfaction with regard to the proposed service and that it was apart from the economic aspect that affected the operator. Dr Muscat Azzopardi insisted that (a) the clarification was answered, (b) the formula used was adequately explained with the result having been topped up by 10%, (c) the spreadsheet submitted did take into account various aspects, e.g. peak and off peak waiting times, and (d) a team of about 10 officers came over to Malta to work on these calculations. Dr Muscat Azzopardi expressed the view that the fact that their experts calculated that 288 buses would be required against the benchmark of 300 buses was quite reasonable indeed.

Dr Bonello reminded those present that the appeal should be limited to the points raised in the letter of rejection dated 12 April 2010.
Dr Delia argued that the fact that the adjudicating board did request clarifications demonstrated that there was no intention to reject any tenders at the first opportunity that occurred but, on the other hand, one had to appreciate that the replies given by the appellant Company to the clarifications requested by the contracting authority did not provide the comfort needed but these replies rather convinced the contracting authority that the appellants either did not understand properly what was being requested or else could not deliver the level of service requested. Dr Delia went on to stress that a 10% variation in the number of buses could have severe consequences on the quality of the service.

iv) “The Statement in the Tender that operations conducted abroad will be implanted into Malta and the failure to indicate that these need to be adapted to the local context and explain how this will be done.”

v) “The branding and marketing campaign is insufficiently detailed, and once again relies heavily on transplanting marketing campaign from other transport operations to Malta rather than looking at the specific issues relating to the existing and potential customers and tailoring the approach.”

vi) “The operational Strategy gives a fairly standardized description of bus operations and no specific local applications was made in the context of the processes proposed.”

Mr Cobo, through Dr Muscat Azzopardi acting as his interpreter, stated that what had been submitted in this tender was not general in nature but it was based on experience gained from overseas operations but adapted to the conditions prevailing in Malta. He added that what had been submitted conform to ISO 9001 and ISO14001 and to the geophysical conditions in Palma de Majorca and Marrakesh (Morocco), which were similar to those in Malta.

Dr Spiteri Bailey remarked that although it had been stated both in the letter of objection and at the hearing that this submission was tailor-made for Malta, the appellants failed to demonstrate this assertion.

Dr Delia declared that no evidence had been made available by the appellant Company that demonstrated that it had arrived at its calculations on conditions prevailing in Malta. Dr Delia said that the appellants did submit material with regard to branding and marketing, however, it invariably referred to other countries, e.g. one of the billboards referred to ‘Bristol Road’, and no attempt was made to adapt same to the local context.

Dr Muscat Azzopardi claimed that the experience gained by his client in various countries should be taken as a plus and not as a handicap because what his client did was to use his experience in the Maltese context. Dr Delia remarked that the contracting authority had nothing against the overseas operations of the appellants but it was necessary for the said appellants to demonstrate how it was going to utilise that experience in its proposed operations in Malta.

Dr Spiteri Bailey remarked that in terms of marketing campaign the contracting authority requested an outline of the branding and marketing strategy distinguishing
between the strategy for the launch and the initial period of the services and the on-going marketing strategy including the relative budget. Dr Spiteri Bailey remarked that the submission presented by the appellants demonstrated that the Company was not aware of the local realities with regard to public transport.

Dr Delia again pointed out that the appellant Company did make a submission in this respect but it failed to indicate which sections of the population it would be targeting and how the product was going to look. The contracting authority’s legal representative added that one of the main thrusts behind this exercise was to encourage more people to use public transport and that aspect was missing from the appellants’ submission.

Dr Muscat Azzopardi denied the claims made by the contracting authority and referred to the following quotes from his clients’ submission (pages 55 to 66):

"Page 56 – The primary target audience for the promotional campaign is permanent residents of Malta, though we recognize that in the peak tourist season there is heavy use of the bus network by tourists. ... The peak tourist season will be over by the anticipated commencement date so it is not anticipated that a great deal of focus on the tourist market will be required until the 2011 peak season begins.

Page 57 – NEXCON will advertise extensively in both the English language and Maltese language daily newspapers in the two month period prior to the commencement date."

The Chairman PCAB remarked that what the PCAB had to deliberate upon was whether a poor submission constituted a non-submission.

Dr Delia referred to clause 4.6.8. which stated, inter alia, that the “Authority shall have the power to disqualify any Tenderer who, in its opinion, based on the information it holds, will not be able to comply with its Tender submissions” and, as a result, he claimed, the contracting authority was obliged to discard the appellants’ submission. Moreover, he remarked that no marks were allotted specifically to ‘branding’ and ‘marketing’ but that 25 marks were given to ‘Overall Quality of the Tender submission’. However, proceeded Dr Delia, to qualify for those points the submission had to satisfy the procedural and mandatory specifications as per clause 4.6.3.

Dr Muscat Azzopardi argued that the contracting authority had two options, namely:

(i) to decide that the submission was not compliant and hence disqualify it, or

(ii) the submission was there but could be improved upon through a clarification and hence the bid should be kept in the process.

Dr Muscat Azzopardi referred to the last part of clause 4.6.3. which stated that “The points allotted to (i) the Public Service Compensation, (ii) the Concession Fee, (iii) the concession Guarantee, (iv) the Parking Fee and (v) Cost of Eligible Modifications shall be allotted on a relative grading system, with the best offers getting full points and the worst offers getting nil points.” Dr Muscat Azzopardi
interpreted this to mean that with regard to the two remaining bids, the worse bid was not going to be awarded any points while the better bid was going to be awarded all the 315 points available and, as a consequence, it was in the best interest of the contracting authority to have as wide a competition as possible.

Dr Delia declared that the bidders were aware of the tender conditions and specifications from the very start.

vii) “The Tender does not contain an executive summary in line with the requirements of part B Annex 2 and fails to adapt the operations described in the specific requirements of the ITT and the Maltese public transport system. Moreover, the Tender lacks any significant description with respect to training and recruitment which will have to be conducted within short periods of time, which is a high risk particular to Malta and the lack of any mitigating plans.”

Dr Bonello remarked that Part B of Annex 2 (page 122) provided as follows:-

“(1) Executive summary

Tenderers must submit an executive summary of their overall understanding of the Project and its goals as well as a high-level explanation of the Tenderer's proposal to achieve such goals. This should include, inter alia:

- A stakeholders' interest analysis;
- Tenderer's vision of the Technical and Operational requirements which are important for the successful execution of the Project, in particular its objectives and expected results, thus demonstrating the degree of understanding of the Project;
- An opinion on the key issues related to the achievement of the Contract objectives and expected results;
- An explanation of the risks and assumptions affecting the execution of the Contract.”

Dr Bonello refused the ‘non-submission’ claim made by the contracting authority contending that pages 1 to 26 of Book 2 of his client’s submission dealt specifically with this matter.

Dr Spiteri Bailey intervened to remark that the first bullet requested a ‘stakeholders' interest analysis’ whereas the appellant presented a ‘business interest analysis’ which were two different things. She added that the contracting authority had issued the Request for Clarifications No. 2 dated 9.11.2009 no. 2.66 which gave the following further explanation, viz:

“Tenderers are expected to provide their analysis of the identity, needs and likely interests of segments of the community and other market sectors that hold a stake in the success of the services. This is considered relevant to be able to assess the understanding of the Tenderers of the identity and needs of the customer base which is presumed to be the first step to be able to develop and refine a product that meets those needs.”
Dr Spiteri Bailey declared that what the appellants submitted was a ‘business interest analysis’ which dealt solely with the reasons why the appellants wished to operate the transport system of Malta, with Transport Malta’s legal advisor arguing against the impression the appellants gave that the only stakeholder contemplated within the context of this tender was the operator when, as is widely known, there are various other ‘stakeholders’.

Dr Muscat Azzopardi stated that if it was a question of a misinterpretation a clarification should have been requested. On the other hand Dr Delia stated that this point had already been clarified as stated earlier on by Dr Spiteri Bailey and that clarification formed part of the tender dossier.

Dr Muscat Azzopardi remarked that once his client had made a submission in respect of one stakeholder and the contracting authority requested the inclusion of more stakeholders then there was justification for a request for a clarification or for a penalty when allotting points. Dr Muscat Azzopardi could not understand why the shortcomings mentioned by Transport Malta in its letter of rejection dated 12 April 2010 were not included in the list of clarifications requested by Transport Malta on the 23 March 2010.

The Chairman PCAB opined that a bidder should not expect the contracting authority to keep on seeking clarifications on end on the same issue and one had to always keep in mind that it was, ultimately, up to the bidder to submit a complete and compliant tender right from the very start.

viii) "In page 26 it is stated that “Any wrong data in this information should be checked and compared at the start of the operations in order to offset the harmful effect this might have on the service. Indicating that you are not prepared to take the risk inherent in certain parts of the Project”

Dr Muscat Azzopardi interpreted this statement to mean that any erroneous data submitted by his client would be rectified by his client so that the service would not be negatively affected.

Dr Delia remarked that the tender document did not request this kind of statement or declaration but the appellant Company chose to submit it out of one’s own free will. Dr Delia said that the statement did not indicate that the bidder would shoulder the risk or who was going to carry out the proposed checking. Dr Delia noted that in the ‘letter of objection’ the appellants had added the words ‘without any risk or cost to the Authority’.

Mr Mark Portelli, Chairman, Transport Malta, remarked that the appellants included this statement under 1 (d) ‘Risk Assessment’ at para. (f) of page 26 of their bid (Book 2) and hence the bidder was considering this as a risk and that he was passing on this risk onto the contracting authority whereas all risks were to be taken by the operator.

Dr Muscat Azzopardi refused the argument put forward by the contracting authority and insisted on his interpretation that his client was going to assume all the risks and that the service would not be adversely affected.
Dr Spiteri Bailey remarked that the conditions of the tender and of the ‘Expression of Interest’ (EOI) were clear that the operator was to take all the risks but the inclusion on the part of the appellants of this sentence that was interpreted as a 'condition' shifted the risk onto the contracting authority.

ix) “Failure to provide any detail on how the operations control centre, a very important element of the Project, would be staffed and managed also indicates that you have not given sufficient weighting to this requirement.”

Dr Spiteri Bailey referred to the sixth bullet at page 123 which referred to a ‘Detailed description of Operations Control Centre.’ She added that these centres were of utmost importance because, through it, the operator would, effectively, control the entire public transport system. Dr Spiteri Bailey remarked that, besides the physical side of the operations control centre, the contracting authority was interested in how this centre was going to be manned, a requirement laid down on page 122 discussed earlier on at the hearing under ‘job description’.

The Chairman PCAB observed that the details of the operations control centre – document 2.k of the appellants’ submission, page 151 onwards – seemed to deal more with equipment rather than personnel.

Dr Muscat Azzopardi referred to pages 75 to 79 of his client’s submission where details had been given even with regards to staff and added that if the contracting authority required more information then it could have asked for it.

x) The Gantt Chart provided is insufficiently detailed, and does not specify key and important milestones, including the preparation of the time-tables, the adaption of the IT system, which according to the submission, must occur after the network and time-tables are available, and also the design and planning of the marketing campaign”.

Dr Muscat Azzopardi maintained that part of the clarifications submitted by his client on the 24th March 2010 included a more detailed Gantt chart.

The Chairman PCAB, after the Board had examined the document submitted by the appellant Company, noted that it did not represent a proper Gantt chart but was simply a spreadsheet.

Dr Spiteri Bailey remarked that the contracting authority had granted a maximum preparation period of 130 days and the appellant Company was proposing a preparation period of 170 days. She added that the contracting authority expected the appellants to submit a Gantt chart that laid down how the various stages were going to unfold together with appropriate explanations. Dr Spiteri Bailey stated that no explanations were submitted by the appellants and the Gantt chart made available would not enable the contracting authority to properly monitor progress and to enable the contracting authority to intervene in good time.
xi) “No information was submitted with respect to the places where the buses will be stabled.”

Mr Cobo explained that the buses would be placed in the locations which would be provided by the Authority and that these places could not be determined at the time the tender was submitted because the Authority was in the course of adjudicating another tender for the provision of these places where the buses will be stabled. He added that, both in the tender document and in the clarification, it was indicated that the ‘park and ride’ and the ‘bus terminus’ would have specific areas where the buses would be stabled.

Dr Spiteri Bailey stated that, according to the appellant Company, the buses were going to be stabled in the garages provided by the contracting authority whereas the garages that were to be provided by the contracting authority were meant only for maintenance purposes and, in fact, they could not accommodate more than 19 buses.

At this point Dr Spiteri Bailey referred to clause IX.3 at page 103 of the tender dossier which stated that:

“The Park and Ride Sites shall also be used by the Operator in order to park its Buses therein; provided that between during day time hours the Operator shall not use more than 20% of the Park and Ride Sites for the purposes of parking Buses. The Park and Ride Sites shall also be used by the Operator in order to clean the Buses when these are not on duty; provided that this is done in a manner so as not to disturb or annoy person using the Park and Ride Sites and provided further the Operator shall before so doing obtain any permits which are required in terms of law.”

Dr Spiteri Bailey also referred to clause VII.12 (page 93) which laid down that the “Operator shall ensure that Buses are garaged or parked off street at all times while not on duty.”

Dr Muscat Azzopardi argued that his clients had committed themselves to the tender conditions and so they had to provide premises where to garage the buses. Notwithstanding, in practical terms, one could not expect that at tendering stage his client had to enter into rent or purchase agreements for the provision of these garages, i.e. prior to being awarded the tender. Dr Muscat Azzopardi stated that tenderers were not requested to indicate the garages where they were going to garage the buses but they were asked to commit themselves to garage the buses when off duty and his clients provided the requested guarantee/undertaking when they endorsed the tender document/submission.

Dr Spiteri Bailey stated that tenderers were obliged to demonstrate to the contracting authority their capability to meet the tender conditions and referred to page 17 of the tender document clause 2.2.1.1 under ‘Methodology’ which stated that

“Tenderers shall, in their Technical Offer (Envelope B), provide a detailed description of how they intend to fulfil the requirements of the Contract in order to demonstrate that they have (i) a clear understanding of the requirements of the Contract and (ii) the capacity and capability of carrying out the obligations included therein. As a minimum, Tenderers shall submit
the information required in Annex 2. The information submitted in pursuance of this provision shall become an integral part of the Contract and shall be binding on the successful Tenderer”

Dr Delia referred to the ‘letter of objection’ where, with regard to garaging, the appellant Company stated that ‘the Authority itself will be seeking an alternative site for the Malta garage’ and that the ‘facilities would be provided by the Authority’.

Dr Muscat Azzopardi explained that the facilities referred to in the previous paragraph were those that were not to be provided by the operator.

In concluding, Dr Adrian Delia, on behalf of the contracting authority, submitted the following:

- the PCAB had to take into account the letter dated 12 April 2010 which listed the reasons for the disqualification of the appellants’ bid. The PCAB has been called to consider whether the adjudicating board had taken its decisions reasonably and within the context of its competencies or if it went beyond that. The adjudicating board was vested with the responsibility to take the decisions;

- the mandatory requirements with regard to job description of top management, by way of qualifications and expertise and not by simply indicating the title of the posts, had not been submitted. This deficiency by itself should lead to tender disqualification;

- this invitation to tenders concerned the granting of a ten-year concession by government to a third party to provide and operate the public transport system and, as a consequence, the contracting authority issued specific conditions with a view to ensuring that the operator would deliver the service up to the required standard;

- with regard to clarifications, one had to make a clear distinction between those made prior to the closing date of tender, which formed part of the tender document itself, and those requested during evaluation stage, which were regulated by the pertinent legislation and by previous decisions taken by the PCAB. The adjudicating board was obliged to seek clarifications to enable it to understand something which had been submitted but the adjudicating board would not be correct to ask for missing mandatory information. Throughout the hearing the appellants kept on insisting that (i) either further clarifications should have been sought by the adjudicating board during evaluation stage on each and every reason given for disqualification - notwithstanding the 15 clarifications sought from the appellant on the 23 March 2010 - or (ii) the listed shortcomings should have led to the deduction of points but not to disqualification;

- it would have amounted to abusive behaviour on the part of the adjudicating board had it used clarifications to reinforce and to alter the original weak tender submission made by the appellant Company. Moreover, the
adjudicating board was bound to act according to the provisions of clause 4.6.3 (page 31) whereby bids, prior to being awarded any points, had first to be found administratively and technically compliant;

- the appellants did not produce any evidence on any one of the 11 reasons for disqualification that demonstrated that the adjudicating board had taken an erroneous decision but all along the appellants’ argument was that, if the contracting authority found the submission lacking in detail, then it should have asked for more information;

- the appellant Company failed to convince the contracting authority that it was able to provide the level of service requested in Malta and, in certain instances, even during the hearing, the appellants showed that they had not fully understood the tender conditions and specifications when claiming, for instance, that garaging facilities had to be provided by government when it was not the case; and

- the adjudicating board had to decide on the information made available, even after asking for a number of clarifications, and that it had carried out a thorough and correct evaluation process as demonstrated by the documentation at the disposal of the PCAB.

On his part, Dr James Muscat Azzopardi, representing the appellant Company, made the following concluding remarks:

- he discarded the allegation that his client had submitted a very poor and non-compliant bid because, had it been so, the adjudicating board would have rejected it outright from the beginning;

- the adjudicating board did not reject his clients’ bid from the start but retained it and at the same time requested more information. Dr Muscat Azzopardi queried once again as to whether, once the adjudicating board had felt the need to request 15 clarifications on the 23 March 2010, why did it not seek similar clarifications on the other points raised in the letter of rejection dated 12 April 2010;

- he conceded that perhaps there were instances where his clients could have substantiated their tender submission with more details from the very beginning. However, he invited the PCAB to consider the three options that were available to the adjudicating board, namely, (i) to ask for clarifications, (ii) to judge the ‘Overall Quality of the Tender submission’ of his client as poor due to lack of detail and consequently deduct 25 points, or part thereof, out of the total of 500 points or (iii) to disqualify the bid. He stated that if the PCAB considered that the shortcomings mentioned by the adjudicating board did not justify disqualification then his clients’ bid should be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,
having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 15.04.2010 and also through their verbal submissions presented during the public hearing held on 26.05.2010, had objected to the decision taken by the General Contracts Committee;

having taken note of Nex Holdings’ legal representatives’
  o claim that contended that the issues raised by Transport Malta in its letter dated 12th April 2010 were incorrect both in fact and at law;
  o reference to the fact that the Adjudicating Board had requested a number of clarifications, fifteen (15) in all, as per letter dated 23rd March 2010 which the appellant Company had answered;
  o contention that Transport Malta decided to issue its letter of disqualification instead of asking for further clarifications on those same reasons for disqualification;
  o claim that albeit the appellants had submitted the information requested as regards the detailed job description of top management, yet it was reasonable to expect that, had the information not been as detailed as the contracting authority wanted it to be then it could have asked for more details as it was entitled to do;
  o insistence that one would not consider that lack of detail in the job description of top management should have led to tender rejection when the invitation to tender was a very complex one requesting the provision of transport services;
  o remark that whilst it could not be said that the appellants did not submit the necessary information as regards the qualifications and expertise, yet they were conceding that the submission did not contain that level of detail that the contracting authority could have (1) either asked for in a clarification for the sake of not eliminating competition on such details or (2) penalized his client by awarding him fewer points as per award criteria at page 31;
  o claim that issues referred to by Dr Spiteri Bailey - see 3 (j) – relating to workings were meant to accompany the economic aspect of the submission in envelope 3;
  o insistence on the fact that (1) the various clarifications were answered, (2) the formula used was adequately explained with the result having been topped up by 10%, (3) the spreadsheet submitted did take into account various aspects, e.g. peak and off peak waiting times, and (4) a team of about 10 officers came over to Malta to work on these calculations;
  o statement that the experience gained by his client in various countries should be taken as a plus and not as a handicap because what his client did was to use his experience in the Maltese context;
  o claim that, contrary to what the contracting authority was stating, the appellants had stated that the “primary target audience for the promotional campaign is permanent residents of Malta” though the Company recognizes that in “in the peak tourist season there is heavy use of the bus network by tourists”;
  o argument that with regards to the lack of detail submitted with regards to the ‘stakeholders’ interest analysis it was a question of a
misinterpretation and that, in the circumstance, a clarification should have been requested;

- claim that the contracting authority had erroneously interpreted the appellants’ tender submission (page 26) to mean that the said appellant Company was “not prepared to take the risk inherent in certain parts of the Project” when what was really meant was that any erroneous data submitted by his client would be rectified by his client so that the service would not be negatively affected;
- reference to the presumed insufficient detailed Gantt Chart wherein it was argued that the clarifications submitted by the appellants on the 24th March 2010 included a more detailed Gantt Chart;
- statement wherein it was claimed that tenderers were not requested to indicate the garages where they were going to garage the buses but they were asked to commit themselves to garage the buses when off duty and his clients provided the requested guarantee/undertaking when they endorsed the tender document/submission

- having also taken note of Dr Delia’s
  - remark about the fact that clarifications were meant to explain better what had already been submitted but clarifications were certainly not meant to request information that should have been submitted in the first place as a mandatory requirement;
  - reference to ‘Operational Strategy’ about which he stressed that information provided should, *inter alia*, include “A high level plan of staff complement required and a detailed job description of the persons who will be responsible for the top management on the Project, indicating the required level of relevant qualifications and expertise, and a clear indication of the resources dedicated to network planning and auditing”;
  - comment relating to the fact that the appellants did not provide evidence of the qualifications and expertise of managers and did not even indicate if they were going to be, say, engineers or lawyers or architects;
  - remark that a 10% variation in the number of buses *vis a vis* the internal benchmark set by the Transport Authority could have severe consequences on the quality of the service;
  - reference to the fact that no evidence had been made available by the appellant Company that demonstrated that it had arrived at its calculations on conditions prevailing in Malta;
  - reference to the fact that albeit the appellants did submit material with regard to branding and marketing, however, it invariably referred to other countries, e.g. one of the billboards referred to ‘Bristol Road’, and no attempt was made to adapt same to the local context;
  - reference to the fact that the appellant Company did make a submission with respect to the ‘marketing campaign’ but it failed to indicate which sections of the population it would be targeting and how the product was going to look;
  - remark that the tender document did not request any kind of statement or declaration with regard to possible erroneous data. However, once given, it was also a fact that the statement did not indicate that the
bidder would shoulder the risk or who was going to carry out the proposed checking;

- reference to the ‘letter of objection’ where, with regard to garaging, the appellant Company stated that ‘the Authority itself will be seeking an alternative site for the Malta garage’ and that the ‘facilities would be provided by the Authority’

- having also considered the points raised by Dr Spiteri Bailey, particular those relating to the fact that

  o Transport Malta had sought to maintain a wide competitive base as possible, amply demonstrated by (1) the number of clarifications sought from the appellants and (2) the opportunity given to the appellants at envelope one stage to correct the bank guarantee;

  o this invitation to tender did not involve only the purchase of buses but it involved the provision of a public transport system in a holistic manner;

  o as she claimed, the appellant Company’s bid was deficient both in administrative and in technical aspects and that, on seeking clarifications, the contracting authority was further convinced that the appellants, either did not fully understand the tender document, or else it could not provide the standard of service requested;

  o the tender dossier, specifically requested qualifications and expertise and that, according to the EU directives in force, which dealt with the recognition of qualifications across borders;

  o there are exceptional circumstances when one may accept a bid even if not fully compliant but still the deficiencies should not affect materially the requirements, claiming that, nonetheless, this was not the case with the appellant Company;

  o the contracting authority did not specify the number of buses required but instead gave the bidders certain information, such as the number of routes and bus stops and the maximum waiting time for a passenger to board the bus, and on the basis of that information and on the analysis carried out by the bidders themselves then they had to arrive at the number of buses required;

  o ‘the maximum waiting time’ was the most important output level;

  o although the number of buses had not been disclosed, the tender document made various references in relation to this requirement particularly clause 2.2.2 (page 17);

  o the evaluation board did not discard the appellant Company’s offer because Mr Cobo quoted 288 buses instead of the 300 buses worked out by Transport Malta but because when asked for a clarification - as per document which read that “in terms of clause 2.6.1.1” of Part Two of the ITT, “Tenderers are required to analyse the Bus Routes and the Maximum Waiting Time applicable to each Bus Stop with a view to establishing an appropriate mix of Bus type or types to render the Scheduled Bus Service” - the appellant Company did not present in its reply the analysis undertaken with regard to, for example, traffic congestion or to tourist seasonality;

  o the adjudicating board even noticed that (1) the summer route extensions (e.g. Mgarr-Gnejna), (2) a particular route (ML 73) and (3) the return trip on another route were not included in the spreadsheet
submitted by the appellants and that only one bus was proposed for Mgarr Gozo which was, by far, insufficient in relation to the maximum waiting time requested;

- the contracting authority did not have the comfort that the number of buses proposed by the appellants was in fact adequate;

- with regards to the marketing campaign, the contracting authority requested an outline of the branding and marketing strategy distinguishing between the strategy for the launch and the initial period of the services and the on-going marketing strategy including the relative budget;

- in the authority’s opinion, the submission presented by the appellants demonstrated that the Company was not aware of the local realities with regard to public transport;

- the first bullet referred to in Part B of Annex 2 (page 122) referred to “a stakeholders’ interest analysis” whereas the appellant Company presented a ‘business interest analysis’ which were two different things, elaborating further that the Request for Clarifications No. 2 dated 09.11.2009 no. 2.66 provided additional explanation in regard, namely, “Tenderers are expected to provide their analysis of the identity, needs and likely interests of segments of the community and other market sectors that hold a stake in the success of the services”;

- the conditions of the tender and of the ‘Expression of Interest (EOI) were clear that the operator was to take all the risks but the inclusion on the part of the appellants of this ‘condition’ seemed to shift the risk onto the contracting authority;

- the ‘Operations Control Centre’ was of utmost importance and, besides the physical side of the operations control centre, the contracting authority was interested in how this centre was going to be manned, a requirement laid down on page 122 under ‘job description’. However, it seemed that the appellants’ submission dealt more with equipment rather than personnel;

- the contracting authority expected the appellants to submit a Gantt chart that laid down how the various stages were going to unfold together with appropriate explanations and that, however, no explanations were submitted by the appellants and the Gantt chart made available would not enable the contracting authority to properly monitor progress and to enable the contracting authority to intervene in good time;

- according to the appellant Company, the buses were going to be stabled in the garages provided by the contracting authority whereas the garages that were to be provided by the contracting authority were meant only for maintenance purposes and, in fact, they could not accommodate more than 19 buses, as specifically referred to (and, more evidently, highlighted) in (1) clause IX.3 at page 103 pf the tender dossier wherein it was stated that “between during day time hours the Operator shall not use more than 20% of the Park and Ride Sites for the purposes of parking Buses.” and (2) VII.12 (page 93) which laid down that the “Operator shall ensure that Buses are garaged or parked off street at all times while not on duty.”
• having also taken cognizance of Dr Bonello’s intervention wherein, *inter alia*, he
  o insisted that if the contracting authority considered the lack of detail with regard to the job description of top management as a fundamental issue such that it amounted to disqualification then it should have been included in the list of clarifications which it sought from his client on 23rd March 2010, otherwise, he argued, what was the use of seeking the other clarifications;
  o refused the ‘non submission’ claim made by the contracting authority with regards to the ‘Executive Summary’ contending that pages 1 to 26 of Book 2 of the appellants’ submission dealt, specifically, with this matter

• having duly considered Mr Cobe’s statements, particularly, those in connection with the fact that
  o the appellants had brought over to Malta a number of experts to undertake the necessary studies on the ground and, according to their calculations, 288 buses would be required;
  o 10% was added to the number of buses arrived at by the Company’s experts, calculated and based on the formula given by the contracting authority;
  o Nexus Holdings considered the average speed of 17 km / hr as very conservative;
  o what had been submitted by the appellants in this tender was not general in nature but it was based on experience gained from overseas operations but adapted to the conditions prevailing in Malta;
  o the buses would be placed in the locations which would be provided by the Authority and that these places could not be determined at the time the tender was submitted because the Authority was in the course of adjudicating another tender for the provision of these places where the buses will be stabled;
  o in the appellants’ opinion, both in the tender document and in the clarification, it was indicated that the ‘park and ride’ and the ‘bus terminus’ would have specific areas where the buses would be stabled

reached the following conclusions, namely:

1. The PCAB generally agrees with the evaluation board’s assessment and opines that the appellant Company’s bid (a) was deficient both in administrative and in technical aspects and (b) amply demonstrated that the said tenderer did not fully understand the tender document

2. The PCAB agrees with the arguments brought about by the contracting authority’s legal representatives, namely, the ones referring to the fact that (a) the tender *dossier* specifically requested qualifications and expertise and that there were directives in force which dealt with the recognition of qualifications across borders and (b) the contracting authority needed to know the competencies of the top management who would be operating this service within the foreseeable future – 10 years - and thus the request for qualifications and expertise and not, simply, the title/nomenclature of the post
as was indicated by the appellant Company at page 70 of its submissions. Furthermore, contrary to what the appellants’ legal representatives tried to argue, in this particular instance, the evaluation board was absolutely right in not trying to get more information as there was nothing further to be clarified as the issue was a question of outright ‘non submission’ of requested mandatory details

3. The PCAB also feels that, whilst, under specific circumstances, clarifications should be sought by evaluation boards, yet, clarifications were to be sought for the purpose of throwing more light on information already submitted and not to obtain information which was requested but not submitted because that could amount to a form of negotiation. Needless to say, argues the PCAB, the onus for a properly detailed submission rests with the tenderer as, the evaluation board’s remit should never go beyond what it is supposed to be doing, namely to evaluate in an objective and transparent manner the details provided by tenderers, and not to ensure that submissions, as originally submitted by bidders and which lack mandatory information, should be given a second chance to do what was expected of them in the first place

4. The PCAB feels that the appellant Company’s stand on the need for the evaluation board to seek continuous clarifications goes to demonstrate how just the evaluation board was in its overall assessment of the appellants’ bid which, taking everything in perspective, left very much to be desired in content and substance. It is the opinion of the PCAB that, in this instance, it was not a question of giving less points but a question of the evaluation board resorting to its prerogative not to accept a bid for various deficiencies ranging from (i) a very poorly designed marketing campaign for such an important economic sector – especially considering the reform and the need to attract new target audiences, (ii) lack of necessary details as regards professional accreditation and experience in the field, (iii) lack of knowledge of local operational requirements, (iv) totally unprofessional presentation of Gantt Chart details (even as revised following clarification) and so forth, (v) total amateurish way as to how one should interpret stakeholders’ interest, regardless of proper knowledge of the English language ... despite a considerable amount of clarifications already formally allowed and discussed with pertinent authorities;

5. Whilst recognising that the garaging (stabling) of buses could have been better detailed in the specifications, yet the misunderstanding of the spirit of the tender’s requirements, as so evidently demonstrated by the appellant Company - that ‘the Authority itself will be seeking an alternative site for the Malta garage’ and that the ‘facilities would be provided by the Authority’- leaves any evaluation board with little leverage, especially when one recognises the fact that the said specifications were clear enough as to what the contracting authority was really after. Once again, no evaluation board is expected to seek clarification(s) in similar circumstances – a tenderer either submits or not

6. Finally, the PCAB recognises that most of the problems with the appellant Company’s submission emanated due to linguistic issues. However, the PCAB argues that the need for linguistic dexterity does not fall within the
competence of the contracting authorities or evaluation boards but it is simply an issue that has to be shouldered by the tenderer ‘per se’.

As a consequence of (1) to (6) above this Board finds against the appellant Company.

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

Alfred R Triganza  Anthony Pavia  Edwin Muscat
Chairman  Member  Member

11 June 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 203

CT/2488/2009; Advert No. 420/2009

Tender for the Supply and Delivery of Aircraft Maintenance Toolboxes at MCAST

This call for tenders was published in the Government Gazette on 3 November 2009. The closing date for this call for offers with an estimated value of € 149,543 (excl. VAT) was 5 January 2010.

Five (5) Tenderers had submitted their offers

**AFS Ltd** filed an objection on the 5 April 2010 after its offer had been adjudicated administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 2 June 2010 to discuss this objection.

Present for the hearing were:

**AFS Ltd**
- Mr Joseph P. Attard Managing Director

**Wurth Ltd**
- Dr Renald Micallef Legal Representative
- Mr Arthur Calleja Sales and Finance Manager
- Ms Angela Zammit Managing Director

**Raymond Zarb obo European Pilot Academy Ltd**
- Capt. Raymond Zarb Representative
- Ms Sandra Zarb Representative

**Malta College of Arts, Science and Technology (MCAST) - Evaluation Board**
- Eng. Mario Cassar Chairman
- Eng. Martin Mifsud Evaluator
- Mr Alfred Galea Evaluator
- Mr Louis Scicluna Evaluator
- Ms Crisania Gatt Secretary

**Contracts Department**
- Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant Company was invited to explain the motives of the objection.

Mr Joseph P. Attard, Managing Director of AFS Ltd, explained that although he submitted the cheapest offer he was informed by the Contracts Department, as per letter dated 26th March 2010, that his offer had been rejected because (i) the documentation was incomplete, (ii) the financial capacity of the tenderer was not substantiated and, similarly, (iii) the technical capacity of the tenderer was not fully substantiated.

(i) Incomplete Documentation

Mr Attard claimed that most of the information/literature requested in the tender document had been submitted, albeit he conceded that some information was missing. He stated that the contracting authority requested the literature in respect of all the items included in the bill of quantities, over 300 items of tools, and acknowledged that his firm did not submit the literature in respect of about 10 items thereof.

Eng. Mario Cassar, Chairman of the Evaluation Board, stated that this tender was issued in connection with a European Social Fund Project and, as a result, it was issued Europe-wide, so much so, that a tenderer from overseas had submitted his bid. Eng. Cassar remarked that, apart from what the Contracts Department stated in its letter of the 26th March 2010 addressed to AFS Ltd, the Evaluation Board had indicated other shortcomings as per page 4 of the evaluation report dated 2nd February 2010. He added that the tenderer was asked to submit the technical specifications/literature for each item in the bill of quantities. Mr Cassar remarked that although Mr Attard seemed to imply that the non-submission of the literature in respect of 10 out of 300 items was of little importance, the fact was that there were instances when tenderers had been excluded after being found deficient in only one item.

On closer examination of the administrative schedule in the evaluation report, it transpired that AFS Ltd failed to submit the detailed description of supplies - i.e. the technical literature of all the equipment outlined in the tender specifications - in respect of about 130 items out of the 320 items requested.

Eng. Cassar explained that AFS Ltd was disqualified because it did not provide the technical literature on each and every item of tools as requested in the tender document. Mr Cassar added that the technical literature had to be compared with the technical specifications indicated in the tender not only as far as size was concerned but even for the material the tools were made of and such other technical considerations because these were meant for use in the aerospace industry.

Mr Attard remarked that on the 5th January 2010, the closing date of the tender, his firm had submitted a declaration which read as follows:

“With reference to our offer, kindly allow us to point out that we have interpreted the specifications indicated for each item to the best of our knowledge. In the event of award of tender we undertake to rectify any
incorrect interpretation by supplying/replacing tool/s to meet end user need without any price change to the one quoted in our tender.”

Mr Attard added that he had also signed the tender document and that, in so doing, he had undertaken to supply the goods as requested.

Mr Attard remarked that he was offering the same brand of tools offered by Wurth Ltd, another appellant Company, namely, BAHCO.

The Chairman PCAB noted that since Wurth Ltd and AFS Ltd were offering the same brand of tools how was it that the former could not cater for two particular items whereas AFS Ltd stated that it could supply the whole range. Mr Attard replied that these items could be supplied from different channels and that the channel he was dealing with had all the range requested and at more advantageous prices.

Eng. Cassar confirmed that, according to the tender conditions, tenderers had to submit the technical literature/data on each and every item requested and failure to do so would have led to disqualification and to a recommendation being made to issue another tender, as had happened in similar previous cases. Eng. Cassar remarked that (a) he was involved in the compilation of the technical specifications of this tender, (b) these technical specifications were standard for the supply of tools for aircraft maintenance and (c) this was not the first instance when they acquired these aviation tools.

The Chairman PCAB expressed his disagreement with an approach that led to the elimination of tenderers from a tendering process even on minor shortcomings with the likely result being that one would end up with only one offer not to mention the waste of time and resources put in by bidders in the compilation of the tender documentation.

Mr Cassar reiterated that, apart from the shortcomings communicated by the Contracts Department to AFS Ltd, the Evaluation Board had listed in its report other shortcomings in respect of AFS Ltd, namely the partial submission of (i) the list of the manufacturer’s data sheets and (ii) the financial bid calculated on a basis of DDP for the supplies tended.

AFS Ltd maintained that although not all the literature had been submitted, however, through the blanket declaration referred to earlier he had undertaken to supply all the items requested by the contracting authority and at the price quoted in his bid. On checking with his catalogue, Mr Attard remarked that in some cases, such as item 93 under ‘Mechanics’, although the item was marked ‘not submitted’ by the Evaluation Board, he had, in fact, inserted the reference of the product, admitting also to have failed to indicate the page where the literature was to be found.

The PCAB expressed the view that one should not expect the contracting authority to rely on a bidder’s blanket declaration that such bidder would eventually supply the items of the size and quality requested but the contracting authority needed to ensure the size, quality and quantity offered beforehand since the specifications submitted by the tenderer would form an integral part of the contract.
(ii) Financial Capacity

With regard to the issue of financial capacity, Mr Attard stated that from the balance sheet he submitted for 2008 one could note that his firm had financial facilities of up to €1 million and, as a result, there was no problem with undertaking this contract for which they quoted the price of about €61,000. Mr Attard, however, confirmed that he had only submitted the balance sheet for 2008 which, in itself, included the 2007 comparative data and, therefore, the financial data he submitted covered 2008 and 2007. At this stage Mr Attard questioned the relevance of financial data relating to four years previous and he even deemed that as outdated data. Mr Edwin Muscat, PCAB member, remarked that the contracting authority had the right to request such information and bidders were expected to comply.

(iii) Technical Capacity

Regarding the aspect of technical capacity, Mr Attard opined that the term ‘aircraft’ used in the title of the tender could have been misleading as one could, perhaps, imagine that these tools were out of the ordinary when, in his own words, a spanner was always a spanner. Mr Attard submitted that the way this call for tenders had been worded allowed for the participation of start-up companies provided that the tenderers delivered the goods.

The Chairman PCAB remarked that the PCAB had to establish whether the way this tender had been worded and issued allowed for as wide a competition as possible. He added that one had to be careful in the preparation and the adjudication of a tender so as not to end up with only one tenderer.

The Chairman PCAB also noted that, with regard to AFS Ltd, the evaluation report stated that “the technical capacity of the tenderer was not fully substantiated since tenderer did not submit a list of aircraft and, or aviation related supplies and, or works and, or services delivered and, or carried out accompanied by certificates of satisfactory execution.” He observed that since this call for tenders was open for start-up companies then these could not provide this kind of information. The Chairman PCAB questioned the relevance of asking for a track record in works carried out when one was dealing with the supply of tools and remarked that this could have been another cut-and-paste job from another tender document.

Mr Attard confirmed that he did not submit this information and added that the way this part of the tender was worded rendered it difficult to understand what the contracting authority was really after and, in fact, his firm had indicated to the contracting authority that it had interpreted the specifications to the best of its knowledge.

Eng. Cassar stated that this part of the tender document formed part of a standard template which they obtained from the Contracts Department and he remarked that, when in doubt, tenderers had the opportunity to seek clarifications.

Capt. Raymond Zarb, intervening on behalf of the recommended tenderer, European Pilot Academy Ltd, explained that the aviation industry was regulated by the European Aviation Safety Agency (EASA) both with regard to the training of pilots and the maintenance of aircraft. He added that the hangars of Air Malta, Lufthansa
and Medavia were regularly examined by inspectors of the EASA - the last inspection took place in January 2010 - and such inspections covered also the type and quality of tools used in aircraft maintenance. Furthermore, Capt. Zarb explained that aircraft tools had to be marked with an aircraft symbol and kept in an appropriate toolbox, which was not meant for storage purposes only but, more importantly, after finishing their work, aircraft engineers were obliged to check that all the tools were in place in the respective toolboxes so that none would be left behind in the aircraft since that could prove to be catastrophic. Capt. Zarb remarked that the aviation industry demanded strict compliance to safety rules and one mistake could lead to criminal charges or even to the withdrawal of the licence. Capt. Zarb appreciated the fact that MCAST was regulated under the IAGA* 147 (International Association of Geomagnetism and Aeronomy) and, hence, it was subject to regular inspections for compliance both from local and overseas regulators.

Capt. Zarb stated that the toolboxes requested in this contract were not found in any hardware store but were manufactured by specialised firms such as BAHCO and SNAP-ON Inc. Capt. Zarb continued that the manufacturers of aviation engines, machines and equipment recommend the type and quality of tools to be used for their maintenance. At this point he drew the attention of the PCAB that there were several international firms which manufactured tools for aviation use and that some of them were from outside the EU, e.g. from the US which is considered to be the leader in the aviation industry.

Capt. Zarb confirmed that he was also offering toolboxes manufactured by BAHCO, a subsidiary of SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd. He concluded that he should not be penalised for having submitted a fully compliant tender on time.

Mr Attard conceded that there were a few shortcomings in his tender submission, namely (a) the missing technical literature, (a) the missing 2006 accounts and (c) a missing signature on the financial identification form which, in any case, would be of use in case of award of tender. Yet, Mr Attard continued (i) the price he offered was almost half that of that submitted by the recommended tenderer and (ii) his firm had declared that it would supply all the tools requested in the tender and at the quoted price.

In his concluding remarks, the Chairman PCAB observed that although the appellant, Wurth Ltd (another appellant in this tendering process) and the recommended tenderer were all offering BAHCO tools there was quite a difference in the prices quoted as per schedule.

Eng. Cassar remarked that, in order to consider a tender on the basis of price, that tender had first to be adjudicated administratively and technically compliant.

At this point the hearing was brought to a close.
This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 09.04.2010 and also through their verbal submissions presented during the public hearing held on 02.06.2010, had objected to the decision taken by the General Contracts Committee;

• having taken note of Mr Attard’s (AFS Ltd) (a) statement wherein he conceded that whilst most of the information/literature requested in the tender document had been submitted by his firm, yet, it was also a fact that some information was missing with respect to some 10 of the 300 items of tools requested in the tender document, (b) declaration that he had, personally, signed the tender document and that, in so doing, he had undertaken to supply the goods as requested, (c) reference to the fact that he was offering the same brand of tools offered by Wurth Ltd, another appellant Company, namely, BAHCO, (d) claim that, although not all the literature had been submitted, however, through a blanket declaration he had undertaken to supply all the items requested by the contracting authority and at the price quoted in his bid, (d) claim that, on checking with his catalogue, Mr Attard remarked that in some cases, such as item 93 under ‘Mechanics’, although the item was marked ‘not submitted’ by the Evaluation Board, he had, in fact, inserted the reference of the product, admitting also to have failed to indicate the page where the literature was to be found, (e) although he had failed to submit the 2007 financial results thus eliminating the possibility of enabling the evaluation board to gain indirect access to the 2006 comparative financial results, yet, by the same token, the fact that he submitted the 2008 financial statements this implied that the 2007 were, albeit, indirectly, made available, (f) claim that there is, definitely, no problem with his firm undertaking this contract for which they quoted the price of about €61,000 considering that his firm had financial facilities of up to €1million, (g) submission that the way this call for tenders had been worded allowed for the participation of start-up companies provided that the tenderers delivered the goods, (h) reference to the fact that the price he offered was almost half that of that submitted by the recommended tenderer and (i) reference to the fact that his firm had declared that it would supply all the tools requested in the tender and at the quoted price;

• having also taken note of Mr Cassar’s (a) reference to the fact that the tenderer was disqualified because it did not provide the technical literature on each and every item of tools as requested in the tender document, (b) statement that the technical literature had to be compared with the technical specifications indicated in the tender not only as far as size was concerned but even for the material the tools were made of and such other technical considerations because these were meant for use in the aerospace industry and (c) declaration that he was involved in the compilation of the technical specifications of this tender;

• having established, following a thorough exercise carried out during the hearing by staff members from the Contracts Department’s office, that AFS Ltd, the appellant Company, failed to submit the detailed description of supplies - i.e. the technical literature of all the equipment outlined in the tender specifications - in respect of about 130 items out of the 320 items requested;
having taken into consideration Capt Zarb’s intervention, particularly, those
which referred to (a) the fact that the aviation industry demanded strict
compliance to safety rules, (b) the fact that the toolboxes requested in this
contract were not found in any hardware store but were manufactured by
specialised firms such as BAHCO and SNAP-ON Inc., (c) his confirmation that
his firm was also offering toolboxes manufactured by BAHCO, a subsidiary of
SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd and (d)
the fact that his firm should not be penalised for having submitted a fully
compliant tender on time;

reached the following conclusions, namely:

1. The PCAB expresses its disagreement with an approach that leads to the
elimination of tenderers from a tendering process even on minor shortcomings
such as the non submission of literature describing certain tools when the
tender specifications themselves are amply clear about what is required to be
supplied, with the likely result being that one would end up with only one
offer still in the running not to mention the waste of time and resources put in
by bidders in the compilation of the tender documentation;

2. The PCAB expresses the view that one should not expect the contracting
authority to rely on a bidder’s blanket declaration that such bidder would,
eventually, supply the items of the size and quality requested

3. The PCAB opines that since the tender document did not specify that a
tenderer had to have a considerable amount of related experience in the related
industry, so much so that, during the hearing, it was argued that the tender was
open for start-up business entities (and confirmed by the Chairman of the
evaluation board himself), then one wonders how come the same tender
document was asking for information related to ‘technical capacity’ which
only a business entity with a track record could have been, possibly, in a
position to provide. Undoubtedly, the fact that the evaluation report stated that
“the technical capacity of the tenderer was not fully substantiated since
tenderer did not submit a list of aircraft and, or aviation related supplies and,
or works and, or services delivered and, or carried out accompanied by
certificates of satisfactory execution” renders the negative evaluation
demonstrated against the appellant Company somewhat excessive

4. The PCAB also notes that the appellant Company is offering the same
products supplied by the recommended tenderer. As a consequence, the issue
of the missing literature takes a considerable lesser role from a holistic point of
view considering that it transpired that the recommended tenderer had
confirmed that the said, same, supplier was in a position to provide the product
range as requested in the tender document

5. The PCAB acknowledges that the appellant Company has only provided the
2008 financial statements - the latest and more updated set of the three years
requested in the tender document, namely 2006, 2007 and 2008. Yet, it is also
a fact that the 2007 comparative figures were, albeit indirectly, made available
in the 2008 figures. In this instance, the question of substance over form
should have been applied by the evaluation board considering that the evaluation process was not hindered in any way with the availability of the two most recent of the three sets of financial documents being made available.

As a consequence of (1) to (5) above this Board finds in favour of the appellant Company and recommends that the appellants’ offer be re-integrated in the process for further evaluation.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

11 June 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 204

CT/2488/2009; Advert No. 420/2009

Tender for the Supply and Delivery of Aircraft Maintenance Toolboxes at MCAST

This call for tenders was published in the Government Gazette on 3 November 2009. The closing date for this call for offers with an estimated value of €149,543 (excl. VAT) was 5 January 2010.

Five (5) Tenderers had submitted their offers

Wurth Ltd filed an objection on the 5 April 2010 after its offer had been adjudicated administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 2 June 2010 to discuss this objection.

Present for the hearing were:

Wurth Ltd
- Dr Renald Micallef, Legal Representative
- Mr Arthur Calleja, Sales and Finance Manager
- Ms Angela Zammit, Managing Director

AFS Ltd
- Mr Joseph P. Attard, Managing Director

Raymond Zarb obo European Pilot Academy Ltd
- Capt. Raymond Zarb, Representative
- Ms Sandra Zarb, Representative

Malta College of Arts, Science and Technology (MCAST) - Evaluation Board
- Eng. Mario Cassar, Chairman
- Eng. Martin Mifsud, Evaluator
- Mr Alfred Galea, Evaluator
- Mr Louis Scicluna, Evaluator
- Ms Crisania Gatt, Secretary

Contracts Department
- Mr Francis Attard, Director General
After the Chairman’s brief introduction the appellant Company’s representative was invited to explain the motives of the objection.

Dr Renald Micaleff, legal representative of Wurth Ltd, remarked that his client had been disqualified for the following reasons, namely, the fact that the said Company had submitted documentation which was incomplete due to the non-submission of (a) the technical literature in respect of two items, (b) the statement attesting the origin of the supplies, (c) the description of the commercial warranty tendered, (d) the tender form and the non-submission of the balance sheet/accounts for 2006.

(i) Incomplete Documentation

(a) Technical Literature: Dr Micaleff stated that one of the reasons for his client’s exclusion was for not having submitted the literature in respect of two items of tools, out of over 300 such items, namely item 103 ‘flexible workshop mirror’ and item 104 ‘screw removal tool’. Dr Micaleff remarked that the reason for this omission on his client’s part was simply because the toolboxes the Company supplied did not include these two specific tool items in its range.

Mr Arthur Calleja, representing the appellants, Wurth Ltd, remarked that, apart from being laser engraved, these tool boxes can also equipped with the facility of photographing the person withdrawing the tool for added accountability with regard to tool handling. Mr Calleja read out a document issued to Wurth Ltd by Lufthansa Technik (Malta) Ltd certifying that Wurth Ltd had been its regular tool supplier since 2007 and that its services were of a high standard. Mr Calleja declared that his firm had already supplied a number of tool boxes to MCAST. He explained that the tool box had to be of the same make as the tools themselves and that in their case the brand offered was BAHCO, a brand that turned out to be the same brand offered by the recommended tenderer and the other appellant in this case.

Eng. Mario Cassar, Chairman of the Evaluation Board, remarked that the tools specifications emanated from the nature of the works that had to be performed, in this case aviation maintenance, and that they were not drawn up to suit the specifications of any one particular manufacturer but these tools could be supplied by various specialised manufacturers.

Eng. Cassar informed those present that this tender was issued in connection with a European Social Fund Project and, as a consequence, it was issued Europe wide such that there was even a tenderer from overseas. Eng. Cassar stated that, although this was the first time that they had issued a tender of this sort, MCAST already had similar tool boxes and, to his recollection, they were supplied by Wurth Ltd.

Mr Cassar remarked that (a) he was involved in the compilation of the technical specifications of this tender, (ii) these technical specifications were standard for the supply of tools for aircraft maintenance and (iii) this was not the first instance that MCAST acquired these aviation tools.

Eng. Cassar stated that the tenderer was asked to submit the technical specifications/literature in respect of each item in the bill of quantities and that the
non-submission of literature in respect of any of the items requested would have led to
the disqualification of the tenderer concerned.

Eng. Cassar remarked that this tender had to be awarded to one bidder and that it
could not be split among more than one bidder. Dr Micallef intervened to point out
that there was a reservation to this statement and quoted clause 7.1 (page 5) which
stated that:

“This tender is not divided into lots. Tenders must be for the entirety of the
quantities indicated. Nevertheless, the Government reserves the right of
accepting any tender wholly or in part, or of dividing the contract among two
or more tenderers.”

The Chairman PCAB expressed his disagreement with an approach that led to the
elimination of tenderers from a tendering process even on minor shortcomings with
the result that one would end up with only one offer not to mention the waste of time
and resources put in by bidders in the compilation of the tender documentation.

(b) Attesting the origin of the Supplies tendered (or other proofs of origin): Dr
Micallef referred to page 166 of his client’s submission which clearly indicated that
the supply was of ‘EU origin’.

(c) Commercial Warranty: With regard to the description of the commercial warranty
tendered, Dr Micallef referred to the document dated 5th January 2010 whereby Wurth
Ltd provided an ‘eight-year availability’ and a ‘two-year warranty’. He added that,
since his client’s supply was of ‘EU origin’, the pertinent EU directive stipulated that
a minimum two-year warranty had to be provided.

(d) Tender Form and Declaration: Dr Micallef confirmed that on delivering the
tender documentation they had overlooked the tender form including the declaration
and, in fact, this was submitted about one hour after the closing time of the tender. Dr
Micallef remarked that certain information contained in the tender form and
declaration had already been submitted in other sections of the tender documentation
and he added that the minor shortcomings on their part did not, in any way, put the
other tenderers at a disadvantage nor did they limit the evaluation board in carrying
out a proper evaluation of the bid.

Dr Micallef expressed the view that the scope of issuing calls for tenders was to open
up for as much competition as possible and in that spirit, one should not eliminate
tenderers on grounds of procedure, something which the Ministry of Finance had
addressed in March 2010, otherwise the contracting authority stood to lose in terms of
quality and price.

(ii) Financial Capacity

Dr Micallef confirmed what had been reported by the evaluation board in the sense
that Wurth Ltd submitted the audited accounts in respect of 2007 and 2008, omitting
those for 2006. Dr Micallef however pointed out that the 2007 accounts included also
the 2006 financial data by way of comparative figures. Dr Micallef, therefore, claimed
that, for all intents and purposes, his client had, in fact, submitted the financial data
for the three-year period request, i.e. 2006-2008. He added that one could have also
checked the company’s accounts lodged with the Malta Financial Services Authority. Dr Micallef pointed out that the accounts of the company he represented indicated that the company had a share capital of about €2.3 million.

Eng. Cassar remarked that clause 3.6 (b) of the instructions to tenderers laid down that the tenderer had to provide the accounts of the three previous financial years.

The Chairman PCAB agreed with what Wurth Ltd was contending that, for evaluation purposes, the contracting authority had at its disposal the financial data of the three years requested.

Capt. Raymond Zarb, intervening on behalf of the recommended tenderer, European Pilot Academy Ltd, explained that the aviation industry was regulated by the European Aviation Safety Agency (EASA) both with regard to the training of pilots and the maintenance of aircraft. He added that the hangers of Air Malta, Lufthansa and Medavia were regularly examined by inspectors of the EASA - the last inspection took place in January 2010 - and such inspections covered also the type and quality of tools used in aircraft maintenance. Furthermore, Capt. Zarb explained that aircraft tools had to be marked with an aircraft symbol and kept in an appropriate toolbox, which was not meant for storage purposes only but, more importantly, after finishing their work, aircraft engineers were obliged to check that all the tools were in place in the respective toolboxes so that none would be left behind in the aircraft since that could prove to be catastrophic. Capt. Zarb remarked that the aviation industry demanded strict compliance to safety rules and one mistake could lead to criminal charges or even to the withdrawal of the licence. Capt. Zarb appreciated the fact that MCAST was regulated under the IAGA* 147 (International Association of Geomagnetism and Aeronomy) and, hence, it was subject to regular inspections for compliance both from local and overseas regulators.

Capt. Zarb stated that the toolboxes requested in this contract were not found in any hardware store but were manufactured by specialised firms such as BAHCO and SNAP-ON Inc. Capt. Zarb continued that the manufacturers of aviation engines, machines and equipment recommend the type and quality of tools to be used for their maintenance. At this point he drew the attention of the PCAB that there were several international firms which manufactured tools for aviation use and that some of them were from outside the EU, e.g. from the US which is considered to be the leader in the aviation industry.

Capt. Zarb confirmed that he was also offering toolboxes manufactured by BAHCO, a subsidiary of SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd. He concluded that he should not be penalised for having submitted a fully compliant tender on time.

Dr Micallef stated that the only shortcomings on the part of his client were (a) the omission of items 103 and 104, which were outside their range, and (b) the late delivery of the tender form and declaration in which case most of the information had already been submitted elsewhere in the tender documentation as explained in his letter of objection dated 13th April 2010. Dr Micallef stressed that the points raised by the Evaluation Board with regard to the ‘origin of the supplies’, the ‘warranty’ and the ‘2006 financial data’ had, in fact, been provided in the original submission.
Dr Micallef opined that the Evaluation Board acted correctly as far as the procedure was concerned but he reckoned that the same Evaluation Board was rather inflexible in its approach. He cited an instance where the tender document contained an erroneous instruction in the first paragraph of clause 22 (page 11) with regard to the tender guarantee because it stated that ‘It must remain valid up to and including the 5th January 2010’, which was the closing date of the tender. Dr Micallef stated that, in all fairness, the contracting authority was flexible in that case because it accepted an amended guarantee after the closing date of the tender and he, therefore, expected the same measure of flexibility with regard to the slightly late delivery of the tender form and declaration.

Dr Micallef reported that it was only in October 2009 that the European Pilot Academy Ltd had altered the objects in its memorandum and articles of association so as to enable it to supply aviation tools. He argued that, albeit the recommended tenderer had a lot of experience in aviation matters, it had no track record as a tool supplier.

Mr Calleja summed up that his firm was excluded because it did not supply two out of over 300 tool items, which items were not available in their range, and because the tender form and declaration were submitted one hour or so after the closing time of the tender. He added, however, that by endorsing the first part of the tender document the tenderer bound himself to accept the tender conditions in full.

On his part, Eng. Cassar, while acknowledging the erroneous instruction mentioned by Dr Micallef, he pointed out that on the front page of the tender document it was clearly indicated that the mandatory bid-bond had to remain valid up to 4th June 2010. Eng. Cassar remarked that, in this case, the tenderer could have sought a clarification as he did on other aspects of the tender.

Ms Sandra Zarb, intervening on behalf of the recommended tenderer, contended that the tender document was quite clear with regard to mandatory requirements, such as the tender form and declaration and the balance sheets/accounts, and that one could not just overlook such shortcomings.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 13.04.2010 and also through their verbal submissions presented during the public hearing held on 02.06.2010, had objected to the decision taken by the General Contracts Committee;

• having taken note of Dr Micallef’s (a) statement that one of the reasons for his client’s exclusion was for not having submitted the literature in respect of two items of tools, out of over 300 such items, namely item 103 ‘flexible workshop mirror’ and item 104 ‘screw removal tool’ with the appellants’ legal representative claiming that the reason for this omission on his client’s part being that the toolboxes the Company supplied did not include these two specific tool items in its range, (b) reference to page 166 of his client’s submission which clearly indicated that the supply was of ‘EU origin’, (c) claim
made with regard to the fact that, in his client’s opinion, since his client’s supply was of ‘EU origin’, the pertinent EU directive stipulated that a minimum two-year warranty had to be provided, (d) confirmation that, on delivering the tender documentation, they had overlooked the tender form including the declaration and, in fact, this was submitted about one hour after the closing time of the tender, (e) comment regarding the fact that certain information contained in the tender form and declaration had already been submitted in other sections of the tender documentation, adding that the minor shortcomings on their part did not, in any way, put the other tenderers at a disadvantage nor did they limit the evaluation board in carrying out a proper evaluation of the bid, (f) confirmation of what had been stated in the evaluation report, namely that Wurth Ltd had submitted the audited accounts in respect of 2007 and 2008 but omitted those for 2006. However, on the same issue, Dr Micallef also drew the attention of those present that the 2007 accounts included also the 2006 financial data by way of comparative figures and that, for all intents and purposes, his client had, in fact, submitted the financial data for the three-year period request, i.e. 2006-2008, (g) reference to the fact that the accounts of the company he represented indicated that the company had a share capital of about €2.3 million and (h) overall comment which stated that, albeit the Evaluation Board had acted correctly as far as the procedure was concerned, yet, in his opinion, the same Evaluation Board was rather inflexible in its approach;

- having also taken note of Mr Calleja’s (a) claim that his firm had already supplied a number of tool boxes to MCAST, (b) that the brand (BAHCO) of the tool box under review in this tender was of the same make as the one offered by the recommended tenderer and (c) argument that, whilst it was a fact that his firm had submitted the tender form and declaration one hour or so after the closing time of the tender, yet, in their opinion, by endorsing the first part of the tender document they had bound themselves to accept the tender conditions in full;

- having heard Mr Cassar state that (a) the tools specifications emanated from the nature of the works that had to be performed, in this case aviation maintenance, and that they were not drawn up to suit the specifications of any one particular manufacturer but these tools could be supplied by various specialised manufacturers, (b) although this was the first time that they had issued a tender of this kind, MCAST already had similar tool boxes in stock and, to his recollection, they were supplied by Wurth Ltd and (c) declaration that he was involved in the compilation of the technical specifications of this tender;

- having taken into consideration Capt Zarb’s intervention, particularly, those which referred to (a) the fact that the aviation industry demanded strict compliance to safety rules, (b) the fact that the toolboxes requested in this contract were not found in any hardware store but were manufactured by specialised firms such as BAHCO and SNAP-ON Inc., (c) his confirmation that his firm was also offering toolboxes manufactured by BAHCO, a subsidiary of SNAP-ON Inc, i.e. the same brand offered by AFS Ltd and Wurth Ltd and (d) the fact that his firm should not be penalised for having submitted a fully compliant tender on time;
taking cognizance also of Ms Zarb’s remark wherein she stated that the tender document was quite clear with regard to mandatory requirements, such as the tender form and declaration and the balance sheets/accounts, and that one could not just overlook such shortcomings,

reached the following conclusions, namely:

1. The PCAB expresses its disagreement with an approach that leads to the elimination of tenderers from a tendering process even on minor shortcomings such as the non submission of literature describing certain tools when the tender specifications themselves are amply clear about what is required to be supplied, with the likely result being that one would end up with only one offer still in the running not to mention the waste of time and resources put in by bidders in the compilation of the tender documentation;

2. The PCAB also notes that the appellant Company is offering the same products offered by the recommended tenderer. The PCAB observes that, albeit the appellant Company had stated that its supplier was unable to offer items 103 and 104 respectively, yet, the recommended tenderer was offering the same products (BAHCO) supplied by the same supplier and was recorded as stating that his supplier was in a position to offer all the products that the tender document had requested. Anyhow, regardless of this observation, the PCAB opines that the said issue which contributed towards the disqualification of the appellants’ offer takes a considerable lesser role from a holistic point of view considering that it transpired that the recommended tenderer had confirmed that the said, same, supplier was in a position to provide the entire product range as requested in the tender document

3. The PCAB acknowledges that the appellant Company has only provided the 2007 and 2008 financial statements - the latest two and more updated sets of the three years requested in the tender document, namely 2006, 2007 and 2008. Yet, it is also a fact that the 2006 comparative figures were, albeit indirectly, made available in the 2007 figures. In this instance, the question of substance over form should have been applied by the evaluation board considering that the evaluation process was not hindered in any way with the availability of the two most recent of the three sets of financial documents being made available

4. Finally, however, the PCAB feels that the most crucial point in this instance was the late delivery (one hour or so after closing of deadline for submission of tender offer) of the mandatory tender document and declaration form. Whilst it is true that such issues may seem to be trivialities, yet, this Board cannot go beyond its remit and overlook the fact that tender procedures are governed by specific rules and regulations. The ‘non’ or ‘late’ submission of mandatory documents cannot be accepted in principle. New regulations have, since the publication of this call, been introduced to offer a less stringent application of the rules and regulations. However, since this tender falls under the ‘old system’, the PCAB cannot accept the appellant Company’s arguments as far as this particular objection is concerned.
As a consequence of (1) to (4) above this Board finds against the appellant Company.

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

Alfred R Triganza Anthony Pavia Edwin Muscat
Chairman Member Member

11 June 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 205

CT/2713/2009 Advert No CT/A/004/2010

Service Tender for the Provision of Technical Expertise for the Appraisal, Guidance and monitoring of CABs/Financial Feasibility Studies

This call for tenders was published in the Government Gazette on 19 January 2010. The closing date for this call for offers with an estimated value of € 650,000 (excl. VAT) was 2 March 2010.

Two (2) tenderers had submitted their offers

*DKM Economic Consultants, CSIL, Mazars Consulting Ltd Consortium* filed an objection on the 3 May 2010 after its offer had been adjudicated administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 7 July 2010 to discuss this objection.

Present for the hearing were:

**DKM Economic Consultants, CSIL, Mazars Consulting Ltd Consortium (The Consortium)**
- Dr John L Gauci, Legal Representative
- Mr John Lawlor, Representative of DKM Economic Consultants
- Mr Alan Craig, Representative of Mazars Consulting Ltd

**London Economic Ltd**
- Dr Edward Firman, Legal Representative

**Planning and Priorities Coordination Division (PPCD) Evaluation Board**
- Ms Edel Vassallo, Evaluator
- Mr Jonathan Vassallo, Evaluator
- Mr Ivan Gauci, Secretary

**Contact Department**
- Mr Francis Attard, Director General
After the Chairman’s brief introduction, the appellant Company was invited to explain the motive/s of the objection.

The PCAB, after taking note that none of the interested parties raised any objection, acceded to the appellants’ request for the proceedings to be held in the English language so that Mr John Lawlor would be able to follow what was taking place.

Dr John Gauci, representing the ‘Consortium’, started by quoting the reason for exclusion as communicated by letter issued by the Contracts Department on the 28th April 2010:

“It emerged that the documentation provided was not in accordance with Article 4 of the ‘Instructions to Tenders’ since the Financial Proposal was submitted in Package Two instead of Package Three.”

The PCAB noted that Dr Gauci did not quote the remaining part of the reason for objection which read as follows:

“It is clearly stated in the tender document that the ‘financial proposals are to be submitted ONLY in package three and that any infringement to such a rule is to be considered as a breach and will lead to the rejection of the tender. In view of this the Committee felt that it should not continue any further with the evaluation of this bid.”

Dr Gauci declared that his client was very careful to adhere to all the conditions of the tender document. He then referred to the first set of clarifications issued on the 18th of February 2010 and he claimed that eight out of the ten questions were submitted by his client some of which concerned a number of inconsistencies in the tender procedure.

Dr Gauci recollected the PCAB’s stand that in the case of any incongruity between the tender document and the law, then the law would prevail. Dr Gauci contended that his client had submitted all that was required according to law which provided as follows:

“Reg. 82 (1)

(b) Package Two: technical specifications including supportive literature, details, designs, samples and any other matter as requested in the tender documents;

and

(c) Package Three: completed price schedules and, or bills of quantities, form of tender, payment terms or other financial arrangements; any covering letter which may provide other pertinent details of a commercial nature.”

Dr Gauci insisted that his client did not submit the financial offer in Package 2 but that it was in fact submitted in Package 3, which still had not been opened at that stage.
Dr Gauci then moved on to refer to:

i) Clause 4.2 ‘Technical Offer’ at page 6 of the tender document which stated that:

“The Technical offer must include the following documents:

(b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form”; and

ii) to para. (3) of the Service Tender Submission Form at page 68 of the tender document which had to be inserted in Package 2:

“(3) Declaration (s) – As part of their tender, each legal entity identified under point 1 of this form, including every consortium partner, must submit a signed declaration using the attached format. [For consortia, the declaration of the Leader must be a signed original but those of the partners may be faxed copies].”

Dr Gauci also referred to page 71 of the tender document which laid out the ‘format of the declaration’ referred to in point (3) of the Service Tender Declaration Form.

The Chairman PCAB drew the attention of the appellant Company’s representative that it was clearly indicated in bold print that this declaration referred to in page 71 had ‘To Be Inserted In Package 3’.

Dr Gauci did not contest the observation made by the Chairman PCAB but insisted that the ‘Format of the Declaration’ found at page 71 had to be submitted as part of the ‘Service Tender Submission Form’ as per paragraph (3) thereof. Dr Gauci argued that the ‘Format of the Declaration’ referred to in page 71 did not constitute the financial offer because the financial offer was in a totally different format as one could see from Annex V: Budget at page 60 of the tender document. Dr Gauci remarked that the only doubt in his client’s mind was whether to submit the ‘Declaration’ as per page 71 also in Package 3, and in fact claimed that his client had submitted this declaration in Package 2 and in Package 3.

Dr Gauci also referred to Clause 4.3 ‘Financial Offer’ at page 8 of the tender document which stated, *inter alia*, that:

“The Financial offer must be presented as an amount in euro and must be submitted using the template for the global-price version of Annex V of part B of this tender dossier (found at page 60).”

The Chairman PCAB remarked that, with regard to the Three Package System, the spirit of the law was that the financial offer had to be submitted in Package 3.

Dr Gauci referred to a document submitted by the Irish firm of solicitors “PHILIP LEE” where, among other things, it advised that:
“We are of the opinion that, in so far as procurement practice in Ireland is concerned, the three package system (whereby the bid bond, technical bid and the financial bid are separate) is not used in the consultancy services sector.”

Dr Gauci argued that, in terms of section 82 (1) (b) of the Public Contracts Regulations, in Package 2 the contracting authority had the right to ask for any document it deemed fit whereas in Package 3 the financial offer had to be broken down into five activities which, he claimed, was distinct from the global price of the offer. Dr Gauci contended that his client’s actions were not inconsistent with the law because his client had only submitted in Package 2 what he had been requested in the tender document whereas what his client submitted in Package 3 still had to be seen when the third envelope was opened.

Mr Anthony Pavia, PCAB member, asked how was it that, as Dr Gauci had indicated earlier on, the appellant Company had sought clarifications on a number of points but it failed to seek a clarification about this issue, i.e. whether tenderers could divulge the price of the offer in Envelope 2. Mr Pavia conceded that there could have been a situation where what was indicated in the tender document was inconsistent with the regulations – where only Package 3 dealt with the financial aspect of the tender - and hence the bidder should have sought a clarification before the submission of the offer.

Dr Gauci reiterated that his client had no doubt that the ‘Service Tender Submission Form’, together with the signed declaration requested at para. (3) therein, had to be inserted in envelope 2 but the only doubt that cropped up was as to whether the declaration had to be inserted also in Envelope 3.

Dr Gauci insisted that the financial proposal consisted of the details indicated in Annex V (page 60), which required more than the global price, and that it was incorrect to allege that his client submitted the financial proposal in package 2 when the said Company only submitted the (global) price of the tender in package 2 as per Tenderer’s Declaration at page 71 of the tender dossier.

The Chairman PCAB declared that the PCAB had always held that the price - call it financial offer or whatever - could not be divulged in Package 2.

Mr John Lawlor, representing the Consortium, the appellants, acknowledged that by the time they realised that there could have been an inconsistency between tender document and the law it was too late to seek a clarification. Mr Lawlor declared that he had followed the instructions of the tender to the best of his ability.

The Chairman PCAB remarked that one was not questioning whether things were done in good faith or not but the PCAB could not overlook the fact that in the ‘Three Package System’ the price had to be divulged only in Package 3 because the relevant regulations are clear that Package 2 was about the technical aspect to the offer.

At that stage Dr Gauci asked the adjudication board what the only other participating tenderer had submitted in this regard.

Ms Edel Vassallo, evaluator of the adjudication board, under oath, gave the following evidence:
the decisions taken by the adjudication board were unanimous;

there was no inconsistency in the instructions contained in the tender dossier;

she was aware of the link between one document and another and pointed out that the forms and declarations being referred to were clearly marked in which envelope each had to be submitted;

the adjudication board had noted that the bidder had deliberately deleted the instructions and that indicated that the bidder was aware of these instructions;

the bidder had inserted a note indicating the it was submitting the document in both packages 2 and 3 – the latter still had not been opened;

the other participating bidder included the ‘Service Tender Submission Form’ (page 68) in Envelope 2 but he did not include the ‘Tenderer’s Declaration’ (page 71) in Envelope 2, which represented the technical package;

the information, apart from the price, contained in the ‘Tenderer’s Declaration’ (page 71) was available in other sections of the tender submission; and

para. (3) of the ‘Service Tender Submission Form’ indicated that the ‘signed declaration’ had to be submitted ‘as part of their tender’ and not as part of Package 2.

Dr Gauci reiterated that under clause 4.2 ‘Technical Offer’ at page 6 of the tender document, it is stated that:

“The Technical offer must include the following documents:

(b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form”.

Dr Gauci complained that it appeared to him that his client has been rejected for including the global price in Package 2 whereas the other participating bidder was not rejected for not having submitted the ‘signed declaration’ with his technical offer. Dr Gauci insisted that the other tenderer should have submitted the ‘signed declaration’ in Package 2, even if without divulging the global price.

The Chairman PCAB remarked that it was true that in Clause 4.2 (1) of the instructions at pages 6 and 7 indicated that the technical offer must include (b) ‘a signed declaration’ but it was equally true that the ‘Tenderer’s Declaration’ had clear indications that it had to be submitted in Package 3. He agreed with Ms Vassallo that para. (3) of the ‘Service Tender Submission Form’ did not indicate that the ‘signed declaration’ had to be submitted in Package 2 or 3 but that it had to be submitted ‘as part of their tender’.

Dr Edward Firman, representing London Economics Ltd, pointed out that according to the instructions printed in bold at page 10 of the tender document: Any
infringement of these rules (e.g. reference to price in the technical offer) is to be considered a breach of the rules, and will lead to rejection of the tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 03.05.2010 and also through their verbal submissions presented during the public hearing held on 07.07.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the points raised by the appellants’ legal representative, particularly those relating to (a) the fact that what his client had submitted was according to law, (b) the fact that his client did not submit the financial offer in Package 2 but that it was in fact submitted in Package 3, which had still not been opened at that stage, (c) the fact that the ‘Format of the Declaration’ found at page 71 had to be submitted as part of the ‘Service Tender Submission Form’ as per paragraph (3) thereof, (d) the fact that the appellant Company had submitted this declaration in Package 2 and in Package 3, (e) the fact that his client’s actions were not inconsistent with the law because his client had only submitted in Package 2 what he had been requested in the tender document whereas what his client submitted in Package 3 still had to be seen when the third envelope was opened, (f) the fact that the financial proposal consisted of the details indicated in Annex V (page 60), which required more than the global price, and that it was incorrect to allege that his client submitted the financial proposal in package 2 when the said Company only submitted the (global) price of the tender in package 2 as per Tenderer’s Declaration at page 71 of the tender dossier, (g) the fact that clause 4.2 ‘Technical Offer’ at page 6 of the tender document stated that “The Technical offer must include the following documents: (b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form” and (h) the fact that it appeared to him that his client has been rejected for including the global price in Package 2 whereas the other participating bidder was not rejected for not having submitted the ‘signed declaration’ with his technical offer, insisting that the other tenderer should have submitted the ‘signed declaration’ in Package 2, even if without divulging the global price;

- having also taken note of Mr Lawlor’s contention relating to the fact that by the time they realised that there could have been an inconsistency between tender document and the law it was too late to seek a clarification;

- having taken into consideration Ms Vassallo’s evidence, particularly, (a) her claim that there was no inconsistency in the instructions contained in the tender dossier, (b) the fact that she was aware of the link between one document and another pointing out that the forms and declarations being referred to were clearly marked in which envelope each had to be submitted, (c) her claim that the bidder had deliberately deleted the instructions and that indicated that the bidder was aware of these instructions and (d) para. (3) of the ‘Service Tender Submission Form’ indicated that the ‘signed declaration’ had to be submitted ‘as part of their tender’ and not as part of Package 2.
reached the following conclusions, namely:

1. The PCAB opines that it was more than clear that the ‘Service Tender Declaration Form’ had to be ‘To Be Inserted In Package 3’, so much so that it was indicated in bold print

2. The PCAB also notes that, regardless of what had been stated by appellant Company, a price is part of a financial offer and, as a consequence, and in full consonance with the pertinent Maltese legal provisions, the financial offer had to be submitted in Package 3 in line with normal legal parameters

3. Whilst conceding that, in this particular instance, there could have, seemingly, been a situation where what was indicated in the tender document may have been ‘prima facie’ inconsistent with the regulations, yet nothing precluded the appellant from drawing the attention of the contracting authority in regard via a simple clarification

4. The PCAB agrees with the Chairperson of the adjudication board’s claim that (a) there was no inconsistency in the instructions contained in the tender dossier and (b) para. (3) of the ‘Service Tender Submission Form’ did not indicate that the ‘signed declaration’ had to be submitted in Package 2 or 3 but that it had to be submitted ‘as part of their tender’

5. The PCAB is further convinced that the appellant Company was fully aware of what it was doing by the fact that, during the preparation of its submission, it had deliberately deleted the instructions clearly indicating that the bidder was aware of these instructions at that moment in time.

As a consequence of (1) to (5) above this Board finds against the appellant Company.

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

Alfred R Triganza  Anthony Pavia  Carmel J Esposito
Chairman  Member  Member

16 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 206

CT/2499/2009 Advert No CT/245/2009; MTA 754/2009

Service Tender – Design and Construction of Stands at International Travel and Tourism Fairs for a Two Year Period 2010-2011 under a Framework Agreement

This call for tenders was published in the Government Gazette on 11 December 2009. The closing date for this call for offers with an estimated value of € 596,000 was 2 February 2010.

Four (4) tenderers had submitted their offers

Malta Fairs and Convention Centre (MFCC) filed an objection on the 7 April 2010 against the decision of the Contracts Department to disqualify its offer for being considered administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 7 July 2010 to discuss this objection.

Present for the hearing were:

Malta Fairs and Convention Centre (MFCC)
Mr Edward Zammit General Manager
Mr Godwin Caruana Representative

Casapinta Design Group
Mr Tonio Casapinta Representative
Mr Damian Casapinta Representative

Malta Tourism Authority (MTA)
Dr Michael Psaila Legal Representative

Evaluation Board
Mr Josef Formosa Gauci Chairman
Mr Francis Albani Evaluator
Ms Suzanne Cassar Dimech Evaluator
Ms Patricia Attard Secretary

Contracts Department
Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant Company was invited to explain the motive/s of the objection.

Mr Edward Zammit, authorised representative of the Malta Fairs and Convention Centre (MFCC), the appellant Company, made it clear that his firm’s objection did not concern the fact that the tender was going to be awarded to Casapinta Design Group but the objection was against the decision of the adjudication board to declare his offer as non-compliant on administrative grounds. Mr Zammit found it odd that, a number of days following the closing date of the tender, his firm had been called upon to make a presentation on its proposal and then the bid was adjudicated administratively non-compliant. The appellants’ representative went on to state that the reason given for the exclusion of the Company’s offer was the non-submission of an appropriate statement from the bank which, in his view, was a rather minor infringement given that his firm had submitted its audited accounts as lodged with the Malta Financial Services Authority.

Mr Zammit conceded that both the ‘bank statement’ and the ‘professional indemnity insurance’ were mandatory requirements and he even acknowledged that, through an oversight, these documents had not been submitted.

Dr Michael Psaila, legal representative of the Malta Tourism Authority (MTA), referred to his letter dated 19th May 2010 and remarked that, during the adjudication process, it transpired that this mandatory requirement had not been furnished by the appellant Company, a fact which was not being contested by the appellants and, as a result, the adjudication board had no option but to consider the Malta Fairs and Convention Centre’s bid as administratively non-compliant. Dr Psaila argued that the bank statement was considered an important document that would have aided the contracting authority in assessing the financial standing of the tenderer. Dr Psaila went on to cite the relevant clause in the tender document, i.e.:

Clause 3 (c) of the ‘Instructions to Tenderers’ stated that:

“Selection Criteria:

Article 50 – Evidence of Financial and Economic Standing

(1) Proof of economic operator’s economic and financial stability by supplying the following:

(i) appropriate statements from banks, or where appropriate a professional indemnity insurance;

(ii) the presentation of balance sheets or abridged audited accounts for the years 2006, 2007 and extracts of 2008”.

Dr Psaila remarked that whereas (i) provided an option of either a bank statement or an insurance, the requirements at (i) and (ii) were both mandatory in the sense that the submission of the audited accounts did not do away with the presentation of the bank statement or the professional indemnity insurance.
Dr Psaila informed those present that the presentation was made on the 16th of February, 2010 or five days following the opening of tenders and hence the bids had not been examined for administrative compliance by that time.

Mr Josef Formosa Gauci, Chairman of the Adjudication Board, explained that one of the firms had requested to make a presentation about the product it was offering and the contracting authority decided, with the concurrence of the other participating tenderers, to offer the same opportunity to all the bidders.

Mr Zammit stated that the bank reference letter dated 25th January 2010 which he had attached to the reasoned letter of objection had not been presented with his original tender submission. The Chairman PCAB pointed out that this admission by the appellant Company’s representative did not correspond to the declaration he made in paragraph (i) of his reasoned letter of objection.

Dr Psaila concluded that the fact was that the appellants had failed to produce a document which was a mandatory requirement.

The Chairman PCAB remarked that the recent amendments to the procurement regulations, which took into account the non-submission of certain documents in the original tender submission, were not in force at the time this tender was issued and adjudicated.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 07.04.2010 and also through their verbal submissions presented during the public hearing held on 07.07.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s General Manager’s (a) claim that the reason given for the exclusion of the Company’s offer was the non-submission of an appropriate statement from the bank which, in his view, was a rather minor infringement given that his firm had submitted its audited accounts as lodged with the Malta Financial Services Authority, (b) admission that both the ‘bank statement’ and the ‘professional indemnity insurance’ were mandatory requirements that, through an oversight, these documents had not been submitted and (c) declaration that the bank reference letter dated 25th January 2010 which he had attached to the reasoned letter of objection had not been presented with his original tender submission;

- having also taken note of the contracting authority’s legal advisor who, inter alia, stated that (a) during the adjudication process, it transpired that both the ‘bank statement’ and the ‘professional indemnity insurance’ had not been submitted by the appellant Company thus, as a consequence, the appellants’ bid being rendered as administratively non-compliant and (b) the bank statement was considered an important document that would have aided the contracting authority in assessing the financial standing of the tenderer and that the
submission of the audited accounts did not do away with the presentation of the bank statement or the professional indemnity insurance;

reached the following conclusions, namely:

1. The PCAB cannot disregard the fact that, through the appellant Company’s own submission, it was a fact that the latter had overlooked a mandatory requirement such as the one necessitating the submission of both the ‘bank statement’ and the ‘professional indemnity insurance’

2. The PCAB feels that the appellant Company’s attempt to try to score points by resorting to include in their reasoned letter of objection a bank reference letter dated 25th January 2010 which, by the appellant Company’s own representative’s admission, had not been presented with the original tender submission, to be in bad taste and unacceptable

3. The PCAB acknowledges that, whilst it is not permissible for a tenderer to select what to submit or not, yet, it is also equally not tolerable for repeated claims of oversights, regardless of whether these were carried out in good faith or not, to be acceptable during an evaluation / adjudication process.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza  Anthony Pavia  Carmel J Esposito  
Chairman  Member  Member

16 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 207

CT/2330/2009 Advert No CT/373/2009; AGRIC 150/2009

Supply, Delivery and Commissioning of Heavy Duty Palm Tree Shredder/Chipper for the Plant Health Department

This call for tenders was published in the Government Gazette on 18 September 2009. The closing date for this call for offers was 10 November 2009.

Four (4) tenderers had originally submitted their offers

Reactilab Ltd filed an objection on the 12 March 2010 following the decision taken by the Contracts Department to disqualify its offer for being considered administratively non-compliant which also led to the cancellation of tender as none of the bidders were found to be compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Friday, 9 July 2010 to discuss this objection.

Present for the hearing were:

Reactilab Ltd
  Dr Michael Psaila  Legal Representative
  Mr Stephen Debono  Representative

SR Services Ltd
  Eng. Ray Muscat  Representative
  Ms Sarah Muscat  Representative
  Mr Vincent Muscat  Representative

Ministry for Resources and Rural Affairs (MRRA)
  Dr Marica Gatt  Director (Plant Health)
  Dr Joseph Bonello  Legal Representative
  Ms Audrey Grima Baldacchino  Legal Procurator

Evaluation Board
  Ms Sonya Sammut  Chairperson
  Eng. Chris Cremona  Evaluator
  Mr Paul Zammit  Evaluator
  Mr Joseph Bonello  Evaluator
  Mr Mario Buttigieg  Secretary

Contracts Department
  Mr Mario Borg  Assistant Director
After the Chairman’s brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Michael Psaila, representing Reactilab Ltd, the appellant Company, stated that the reason given by the Contracts Department for the disqualification of his client’s offer read as follows:

“Your offer was administratively non-compliant because you did not give details of other shredders supplied during the last 5 years as per Part A Instructions to Tenderers Section 3.6.”

Dr Psaila then quoted from the ‘Notes’ included in his client’s tender submission which stated that:

“Please note that the offered Bandit 1680 Beast Shredder/Chipper is currently in use at various clients for the processing of palm trees – two such clients are ALM, BP 46145, 53061 Laval Cedex, 9 France and Guifor S L, C/Atallu 10-1220170 Usurbil, Spain.”

Dr Psaila remarked that his client had in fact submitted what the contracting authority requested at Clause 3.6 (b) and even satisfied the requirement set out at Clause 3.6 (c) with the submission of the written confirmation by the manufacturer that the machinery being offered was able to shred palm trees, which was made up of fibrous timber.

Dr Joseph Bonello, representing the Ministry for Resources and Rural Affairs (MRRA), quoted Clause 3.6 ‘Selection Criteria’ (b) Technical Abilities, namely:

“Tenderer is to give details of other shredders supplied during the last 5 years.”

Dr Bonello remarked that the information supplied by the appellants in this regard was considered insufficient by the contracting authority.

The Chairman PCAB observed that the tender document simply requested the tenderer ‘to give details of other shredders supplied during the last 5 years’.

Dr Psaila stressed that his client had indicated the model of the equipment, i.e. Bandit 1680 Beast Shredder/Chipper, which was the same type of equipment that his client was offering in his tender submission and which submission had been supported by a DVD, samples, brochures, instruction manuals and all such details.

Ms Sonya Sammut, Chairperson of the adjudication board, under oath, gave the following evidence:

- according to Clause 3.6 (b) ‘Technical Abilities’, the adjudication board was after the technical abilities of the bidder, i.e. that the bidder had supplied those machines and that he had the technical know-how to maintain such machines, and, as a result, the emphasis was laid on the technical abilities of the supplier/tenderer rather than those of the equipment itself;
• she agreed that the appellant Company had given a lot of detail about the palm tree shredder that it was offering;

• it had not been indicated that the two similar shredding machines used by clients in France and Spain were in fact supplied by the appellants;

• four tenderers participated in this call for tenders with three of them having had no previous experience in the supply of such a shredding machine;

• this shredder was required as part of the action plan to combat the destruction of palm trees caused by the Red Palm Weevil (Bumunqar Ahmar tal-Palm);

and

• the shredding machine offered by Reactilab Ltd appeared to be technically compliant, although no thorough technical evaluation had been carried out since the appellant Company failed at the administrative compliance stage.

The Chairman PCAB noted that the tender document at 3.6 (b) did not specify that the machines supplied over the past 5 years had to be supplied by the bidder himself. He added that, according to the contracting authority, it could have been the case that, locally, only one supplier could provide this type of equipment given its very particular use.

Dr Marica Gatt, Director (Plant Health), under oath, gave the following evidence:

• the contracting authority wished to ensure that the supplier would have the technical know-how to maintain the machinery that it supplied so as to avoid past negative experiences when suppliers failed to provide adequate after sales service to the detriment of the department;

• in order not to stifle competition, the contracting authority was careful to request experience not only on the requested type of shredder but on other types of shredders because the department was aware of the very limited availability of this kind of equipment on the local market; and

• in the absence of having this kind of shredder, the department was hiring one from a contractor who did not participate in this call for tenders.

Mr Anthony Pavia, a PCAB member, noted that, apart from Clause 3.6 (b), certain technical requirements were in fact requested in Clause 11.2 (page 6) of the tender document.

The Chairman PCAB remarked that Clause 3.6 (b) of the tender document did not specify that the shredders had to be supplied in Malta and that they had to be supplied by the bidder.
Dr Psaila concluded that his client had submitted all the information requested of him in the tender document and that as a consequence, there was no justification for the rejection of his client's offer on administrative grounds.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 17.03.2010 and also through their verbal submissions presented during the public hearing held on 09.07.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s legal advisor who, *inter alia*, (i) stated that his client’s offer was declared administratively non-compliant because it was claimed that Company did not give details of other shredders supplied during the last 5 years as per Part A Instructions to Tenderers Section 3.6., (ii) claimed that, contrary to what had been claimed his client had in fact submitted what the contracting authority requested at Clause 3.6 (b) and even satisfied the requirement set out at Clause 3.6 (c) with the submission of the written confirmation by the manufacturer that the machinery being offered was able to shred palm trees, which was made up of fibrous timber and (iii) stressed that his client had indicated the model of the equipment, i.e. *Bandit 1680 Beast Shredder/Chipper*, which was the same type of equipment that his client was offering in his tender submission and which submission had been supported by a DVD, samples, brochures, instruction manuals and all such details;

- having also taken note of Dr Bonello’s claim that the information supplied by the appellants was considered insufficient by the contracting authority;

- having heard the Chairperson of the adjudication board (a) claim that the adjudication board was after the technical abilities of the bidder, i.e. that the bidder had supplied those machines and that he had the technical know-how to maintain such machines, and, as a result, the emphasis was laid on the technical abilities of the supplier/tenderer rather than those of the equipment itself, (b) confirm that the appellant Company had given a lot of detail about the palm tree shredder that it was offering, (c) state that four tenderers participated in this call for tenders with three of them having no previous experience in the supply of such a shredding machine and (d) state that the shredding machine offered by Reactilab Ltd appeared to be technically compliant, although no thorough technical evaluation had been carried out since the appellant failed at the administrative compliance stage;

- having taken into consideration Dr Gatt’s intervention, particularly the one referring to (a) the fact that the contracting authority wished to ensure that the supplier would have the technical know-how to maintain the machinery that it supplied and (b) the fact that, being highly cognizant of the fact that the type of shredder being requested could not be easily sourced;

reached the following conclusions, namely:
1. The PCAB opines that the very fact that the tender document at 3.6 (b) did not specify that the machines supplied over the past 5 years had to be supplied by a tenderer in one’s own personal capacity rather than as a representative of some other local or foreign principal could not have been interpreted otherwise by the contracting authority’s adjudication board, regardless of what the overall intention was. Furthermore, this Board maintains that tenders are decided upon following a lengthy examination process of specifications, terms and conditions designed by or on behalf of contracting authorities and formally published, and by corresponding submissions formally made by tenderers. Undoubtedly, such process excludes anything which is not formally stated and published.

2. The PCAB also notes that, contrary to the initial impression given but in line with Ms Sammut’s admission, there is enough evidence highlighting the fact that the appellant Company provided more than sufficient information about the product being offered to corroborate its submission.

3. The PCAB opines that apart from Clause 3.6 (b), certain technical requirements were in fact requested in Clause 11.2 (page 6) of the tender document and submitted as requested.

4. The PCAB argues that the shredding machine offered by Reactilab Ltd appeared to be, seemingly, technically compliant. However, considering that a thorough technical evaluation had not been carried out since the appellant Company’s offer had been judged to have failed at the administrative compliance stage, it would be correct to give the said appellants the right for their offer to be reintegrated in the process with a view to enable its offer to be valued technically.

As a consequence of (1) to (4) above this Board finds in favour of the appellant Company and recommends that the cancellation of this tender be revoked.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

16 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 208

CT/2330/2009 Advert No CT/373/2009; AGRIC 150/2009

Supply, Delivery and Commissioning of Heavy Duty Palm Tree Shredder/Chipper for the Plant Health Department

This call for tenders was published in the Government Gazette on 18 September 2009. The closing date for this call for offers was 10 November 2009.

Four (4) tenderers had originally submitted their offers

SR Services Ltd filed an objection on the 15 March 2010 following the decision taken by the Contracts Department to disqualify its offer for being considered technically non-compliant with tender specifications which in turn led to the cancellation of tender as none of the bidders were found to be compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Friday, 9 July 2010 to discuss this objection.

Present for the hearing were:

**SR Services Ltd**
- Eng. Ray Muscat
- Ms Sarah Muscat
- Mr Vincent Muscat

**Reactilab Ltd**
- Dr Michael Psaila
- Mr Stephen Debono

**Ministry for Resources and Rural Affairs (MRRA)**
- Dr Marica Gatt
- Dr Joseph Bonello
- Ms Audrey Grima Baldacchino

**Evaluation Board**
- Ms Sonya Sammut
- Eng. Chris Cremona
- Mr Paul Zammit
- Mr Joseph Bonello
- Mr Mario Buttigieg

**Contracts Department**
- Mr Mario Borg
After the Chairman’s brief introduction, the appellant Company was invited to explain the motive/s of the objection.

Engineer Ray Muscat, director of SR Services Ltd, the appellant Company, remarked that besides being by far the cheapest one, his offer was the only administratively compliant one. He added that in its report, the adjudication board had indicated certain shortcomings which prevented it from carrying out a full evaluation of his tender submission.

The Chairman PCAB remarked that the way things turned out, none of the bidders were found administratively compliant except for SR Services Ltd, which, then again, was found to be technically non-compliant with the consequence that the tender was recommended for cancellation.

Eng. Muscat explained that the adjudication board had indicated a number of shortcomings, such as the absence of a fire extinguisher or of a manual, which he was prepared to rebut one by one. Eng. Muscat, however, started by referring to the blanket statement which he had included in four different sections of his tender submission whereby it had been declared that the machine offered would be fully compliant with specifications and, on top of that, attached a statement to that effect from the supplier ‘Caravaggi’ of Italy stating that model Bio 1250 would be custom built to meet all the tender specifications.

Eng. Muscat informed those present that his firm represented the Italian firm ‘Caravaggi’ with seventy years experience in this line of business. He explained that palm trees were very particular given that they were made up of both abrasive and fibrous fibre matter.

Ms Sonya Sammut, Chairperson of the adjudication board, under oath, explained that during the technical evaluation of the offer submitted by the appellants, they noticed several instances where there was lack of detail/evidence, such as that listed at point 4 in the evaluation report with regard to the number of knives/blades even though it was noted that the blades were mentioned in the warranty. Ms Sammut remarked that the tender document specified that the shredder should be equipped with hammers for crushing material and with knives for cutting material (minimum of 4 knives). Ms Sammut added that the shortcomings listed in the adjudication report might not amount to technical non-compliance but rather to lack of detail/evidence.

Eng. Muscat explained that albeit the standard machine Bio1250 usually had 44 hammers to break certain types of material, yet, this same model could be converted into a customised palm tree shredder by installing 22 hammers and 22 knives to deal with palm tree shredding. He further explained that some types of palm trees were made of abrasive material which had to be broken down by the use of hammers while other types were of fibrous material which had to be shredded by the use of blades and therefore his firm was offering a shredding machine equipped with both hammers and blades. Eng. Muscat remarked that the brochure submitted with his offer was in respect of the standard shredding machine but he added that an appropriate note was included to the effect that the standard model would be adapted to the needs of the contracting authority. Eng Muscat declared that such features as the voltage of the
machine offered, the stop button and safety aspects were all adequately covered by appropriate EU directives.

The Chairman PCAB appreciated the fact that it was difficult to have a readily available brochure of a custom built piece of equipment.

Ms Sammut stated that the blanket statement of compliance submitted by the appellant Company was given due consideration by the adjudication board so much so that in its evaluation report the board had recommended the acceptance of the offer made by SR Services and even in the letter dated 19th February 2010 sent to the General Contracts Committee the adjudication board had decided to recommend the acceptance of the offer by SR Services Ltd on the basis of the declaration that the machine shall be custom-built and fully compliant with specifications. However, one had to acknowledge the fact that, on the basis of the information provided in the tender, the adjudication board could not declare that the offer was fully compliant with the published specifications. She added that the reaction the adjudication board got from the General Contracts Committee was to reject the offer of SR Services Ltd once it was not fully compliant.

The Chairman PCAB commented that it seemed to have become a trend to resort to the cancellation of tenders and that, occasionally, this was resorted to even against the recommendation/judgement of the adjudication board, which included technical member/s. He added that, given the very limited availability on the international market and, more so, on the local market of the type of shredding machine requested in this tender, one had to exercise a measure of flexibility and to make certain allowances.

Dr Marica Gatt, Director (Plant Health), under oath, remarked that the palm tree shredding machine they were hiring did satisfy the tender specifications but the contractor concerned did not participate in this tendering process. She added that the reason why they did not refer specifically to palm tree shredders in Clause 3.6 (b) was precisely to avoid issuing a call for tenders tailor made to suit the, perhaps, unique position in the local market of the contractor who was hiring this equipment to the department. Dr Gatt stated that they requested a palm tree shredder because of the particular characteristics attached to palm tree shredding however that did not mean that this machine would be used exclusively to shred palm trees. Dr Gatt informed the PCAB that the department had obtained EU funding (up to 50%) to a programme designed to combat the destruction of palm trees brought about by the Red Palm Weevil (Bumungar Ahmar tal-Palm) and that the purchase of the palm tree shredder formed part of that programme.

Eng Muscat stated that his supplier had already sold adapted versions of the standard shredder for use as palm tree shredders some of which were being used in Dubai. Eng Muscat declared that he failed to find a brochure specifically drawn up for a palm tree shredder because, apparently, the market for such machines was so limited that there was no such machine as a palm tree shredder but it appeared that a standard model had to be adapted/converted into a palm tree shredder.

Ms Sammut remarked that, with regard to clarifications, the general direction that the adjudication board received from the Contracts Department was to stick strictly to what was requested in the tender document and to what tenderers actually provided in
their original submission. The Chairman PCAB remarked that it was legitimate and useful to seek clarifications on information that had already been provided by the bidder in its original submission because that did not involve the submission of fresh or mandatory information which should have been submitted by the bidder in the first place nor did it amount to negotiation.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 15.03.2010 and also through their verbal submissions presented during the public hearing held on 09.07.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of Ing. Muscat’s (a) remark that besides being by far the cheapest one, his offer was the only administratively compliant one, (b) reference to the blanket statement which he had included in four different sections of his tender submission whereby it had been declared that the machine offered would be fully compliant with specifications and, on top of that, attached a statement to that effect from the supplier ‘Caravaggi’ of Italy stating that model Bio 1250 would be custom built to meet all the tender specifications, (c) explanation that, albeit the standard machine Bio1250 usually had 44 hammers to break certain types of material, yet, this same model could be converted into a customised palm tree shredder by installing 22 hammers and 22 knives to deal with palm tree shredding, (d) claim that whilst the brochure submitted with his offer was in respect of the standard shredding machine, yet he added that an appropriate note was included to the effect that the standard model would be adapted to the needs of the contracting authority and (e) statement that his supplier had already sold adapted versions of the standard shredder for use as palm tree shredders some of which were being used in Dubai;

- having also taken note of the fact that the way things turned out, none of the bidders were found administratively compliant except for SR Services Ltd, which, then again, was found to be technically non-compliant with the consequence that the tender was recommended for cancellation;

- having heard Ms Sammut’s evidence wherein, inter alia, she (a) made reference to the fact that during the technical evaluation of the offer submitted by the appellants, they noticed several instances where there was lack of detail/evidence, (b) claimed that the shortcomings listed in the adjudication report might not amount to technical non-compliance but rather to lack of detail/evidence, (c) stated that the blanket statement of compliance submitted by the appellant Company was given due consideration by the adjudication board so much so that in its evaluation report the board had recommended the acceptance of the offer made by SR Services and (d) claim that despite the fact that in their letter dated 19th February 2010 sent to the General Contracts Committee the adjudication board had decided to recommend the acceptance of the offer by SR Services Ltd on the basis of the declaration that the machine
shall be custom-built and fully compliant with specifications, yet, the General Contracts Committee replied that the offer of SR Services Ltd had to be rejected once it was not fully compliant;

- having taken into consideration Dr Gatt’s intervention wherein, inter alia, the latter stated that that they requested a palm tree shredder because of the particular characteristics attached to palm tree shredding however that did not mean that this machine would be used exclusively to shred palm tree;

reached the following conclusions, namely:

1. The PCAB acknowledges that it is difficult for a tenderer to have a readily available brochure of a custom built piece of equipment albeit modified from an already existent model.

2. The PCAB also notes that whilst it may be understandable for the Contracts Department to reject a recommendation made by an adjudication board, yet, in this particular instance, some kind of pragmatic approach was required, especially when it is generally recognised that such equipment is not easily found in the respective market. The fact that the same adjudication board had decided to recommend the acceptance of the offer by SR Services Ltd on the basis of the declaration that the machine shall be custom-built and fully compliant with specifications should have provided enough comfort even though, on the basis of the information provided in the tender, the adjudication board could not declare that the offer was fully compliant with the published specifications. Yet, considering that it is widely accepted that, in similar circumstances, it is difficult for a tenderer to have a readily available brochure of a custom built piece of equipment, this should have given rise to some leeway by the Department of Contracts instead of the latter resorting to such a rapid rejection of the appellant’s offer despite the adjudication board’s favourable recommendation.

As a consequence of (1) to (2) above this Board finds in favour of the appellant Company and recommends that the cancellation of this tender be revoked.

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

Alfred R Trigiana  Anthony Pavia  Carmel J Esposito
Chairman       Member       Member

16 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 209

GHRC/002/2010

Tender for Architectural Consultancy Services for the Embellishment and Upgrading Works at the British and Knights Buildings, Dock 1

This call for tenders was published in the Government Gazette on 29 January 2010. The closing date for this call for offers was 26 February 2010.

Nine (9) tenderers had originally submitted their offers

Architecture Project filed an objection on 20 April 2010 following the decision taken by the Contracts Department to award the tender in question to Med. Design Associates Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 21 July 2010 to discuss this objection.

Present for the hearing were:

Architecture Project
Dr Franco Vassallo Legal Representative
Dr Joe Camilleri Legal Representative
Perit David Drago Representative
Ms Simone Vella Lenicker Representative

Med. Design Associates Ltd
Perit Charles Buhagiar Representative

Grand Harbour Regeneration Corporation (GHRC)
Dr John Bonello Legal Representative

Adjudicating Board:
Mr Antoine Portelli Member
Ms Charmaine Monseigneur Member
Mr Ray Azzopardi Secretary

Department of Contracts
Mr Francis Attard Director General

The PCAB was informed that Mr Chris Paris, Chairman, and Perit Damian Vella Lenicker, member, of the adjudicating board were both abroad and hence could not be present at the hearing.
After the Chairman’s brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Franco Vassallo, legal representative of Architecture Project, explained that although the recommended tenderer, Med. Design Associates Ltd, was a competent organisation in the architectural sector, it had failed to obtain an un-weighted score of 75% allocated to the technical evaluation as clearly indicated in Clause 17.1 – Technical Submissions – which, inter alia, stated that:

“… The Award Criteria will be examined in accordance with the requirements indicated in the Terms of Reference.

Those offers which have achieved a minimum un-weighted score of 75% in the Technical Evaluation will proceed to the next stage of Evaluation.”

Dr Vassallo pointed out that, according to the evaluation carried out by the board, Med. Design Associates Ltd obtained 42 points out of 60 or 70% of the points allocated which fell short of the 75% set out in Clause 17.1 and hence that offer should have been discarded. The Chairman PCAB referred to the ‘Technical Weighted Score’ sheet which showed that a weighted score of 42 translated itself into an un-weighted score of 65%.

Dr Vassallo remarked that the adjudicating board then decided to waive off the 75% un-weighted score in the technical evaluation and, according to the same board, considered the most economically advantageous tender (MEAT) in order to safeguard the public purse given that the recommended tenderer quoted the price of €112,000 against the price of €234,500 quoted by Architecture Project and €160,000 quoted by the next cheapest tenderer, ARC MPP Joint Venture. Dr Vassallo then quoted the analysis report dated 21.05.2010 drawn up by Mr Chris Paris, CEO of GHRC wherein it was stated that:

“Irrespective of the decision as to whether the Appeals Board would enter into the merits of the evaluation or not, it is reasonable to submit that in proposing award to Med. Design Associates Ltd, the GHRC acted diligently and demonstrated a clear intent to protect public funds.”

Dr Vassallo did not question whether the adjudicating board acted in good faith or not in its deliberations but he did declare that (i) the criteria for MEAT were to apply only once the tenderer had satisfied the tender specifications and conditions, (ii) the adjudicating board could not do away with the published award criteria which bound both the bidders and the contracting authority and (iii) his client was technically compliant, submitted a price within the declared budget and, as a result, should have been awarded the tender.

Dr John Bonello, legal representative of the contracting authority, the Grand Harbour Regeneration Corporation (GHRC), submitted that the adjudicating board could not have overlooked the wide variation in the price quoted by the recommended tenderer vis-à-vis the other tenderers in its overall evaluation of the bids under consideration since this was a single envelope tender. He added that the argument put forward by the appellants would have made sense had this been a three package tender. Dr
Bonello remarked that in its decision the adjudicating board sought to obtain the best value for money and, as such, it acted correctly and in good faith.

Mr Anthony Pavia, a PCAB member, referred to the ‘Technical Evaluation Grid’ (broken down) and observed that, under the ‘Score for Experience’, the recommended tender got 10 points out of 10 for ‘Bidder’s Experience as an Organisation’ but got no points at all out of the 15 allocated for ‘Experience in Previous Relevant Projects’ whereas the appellant got 10 and 14 points respectively.

Architect Charles Buhagiar, representing Med. Design Associates Ltd, remarked that the firm he represented had been operating for about 27 years and that it was experienced both in the design and in the implementation of such projects so much so that his firm carried out the restoration of a building known as the ‘Capitainairie’ in the same area as Dock No. 1. He added that his firm had quoted a relatively low price because it had already carried out similar works and, as a consequence, knew what such process entailed. Architect Buhagiar stated that he only got the opportunity to see the evaluation grid at the hearing. He informed those present that his firm had obtained the necessary clearance from Heritage Malta (Architect Reuben Abela’s employer) to employ Architect Abela on a part-time basis. Mr Abela is expected to strengthen Architect Buhagiar’s firm’s human resources, particularly in the specific assignment of supervising the project proposed in the call for tenders. Architect Buhagiar described Architect Abela as a well-known professional in the field of restoration works adding that it was normal practice for firms to employ specialised personnel on a part-time basis to carry out particular assignments.

Architect Buhagiar reiterated that the engagement of Architect Abela was intended to strengthen the human resources capabilities of his firm and that he considered that his firm’s past experience in restoration works was completely overlooked by the adjudicating board when the same board awarded zero marks.

At this point Med. Design Associates Ltd’s representative raised the issue of a manifest conflict of interest drawing the attention of those present that Ms Simone Vella Lenicker, who was present at the hearing representing Architecture Project, namely the appellant Company, happened to be Architect Damian Vella Lenicker’s wife, with Mr Vella Lenicker being a member of the adjudicating board.

Dr Bonello stated that, prior to the commencement of the evaluation process, albeit Architect Damian Vella Lenicker had declared that his wife was employed with one of the bidders yet GHRC’s CEO decided that this did not constitute a conflict of interest.

The Chairman PCAB noted that the fact that Ms Vella Lenicker was representing the appellants at the hearing was evidence enough that she was a high ranking member of the organisation. He added that with regard to transparency and impartiality even a perceived conflict of interest had to be considered.

Dr Bonello pointed out that one had to keep in view that the adjudicating board did not recommend the award of the tender to the appellant Company, which was the employer of Ms Vella Lenicker.
Architect Buhagiar remarked that he became aware of this conflict of interest at the hearing and he added that if the other tenderers were to know of this conflict of interest probably some might have lodged an appeal on that count.

The Chairman PCAB intervened to remark that, in its deliberation, the PCAB would have to look into how such a decision to allow Architect Damian Vella Lenicker to sit on the adjudication board despite his declared potential conflict of interest could be interpreted within the entire context of an adjudication process.

Dr Vassallo pointed out that with regard to ‘experience’ the recommended tenderer did not obtain zero marks but he obtained 10 marks as an organisation and zero marks for ‘experience in previous relevant projects’. He then stated that Clause 5 at page 4 of the tender document provided, among other things, that...

“The bidder’s submission shall include a comprehensive CV listing technical qualification and professional experience with particular attention to works of a similar or like nature undertaken during the last five years. The personnel and/or resources to be deployed by the bidder in the provision of the services under this contract shall be employees of the bidder’s organisation. The bidder may employ specialised experts for the performance of a specific task but sub-contracting of any part of the services is not allowed.”

Dr Vassallo remarked that, from the documents presented, the adjudicating board deduced that the recommended tenderer was in fact a renowned firm in the field of architecture but that in this case it was going to subcontract part of the services to Architect Reuben Abela and that was why the adjudicating board allocated zero marks in terms of experience in previous relevant projects.

Dr Vassallo continued to quote from Clause 5 (page 4) as follows:

“Bidders submitting offers for the services under this invitation for submissions shall have a minimum of ten (10) years professional experience.”

Dr Vassallo stressed that it was the bidding firm that had to have this experience and not its subcontractor.

Architect Buhagiar explained that this kind of work involved a number of tasks, e.g. taking measurements, applying with MEPA and the restoration aspect of the project, and that it was in the latter area that the services of Architect Abela would be mostly required considering his 17 years experience in the sector. Architect Buhagiar remarked that for this particular project he felt that his firm should strengthen/improve its human resources by the engagement of Architect Abela, even if on a part-time basis.

At this stage, the parties concerned presented their arguments as to whether the engagement of Architect Reuben Abela by Med. Design Associates Ltd would amount to sub-contracting or to employment, even if on a part-time basis, and the contracting authority declared that it was satisfied from the papers presented that the proposed engagement of Architect Abela would not amount to sub-contracting and so it was not in breach of tender conditions as was being alleged by the appellant. The
PCAB acknowledged that it was not unheard of that experts, especially in the limited local market, rendered their services to more than one employer.

Dr Vassallo insisted that the firm had to have the necessary experience and not the part-time employee who was going to be entrusted with the role of project leader. He added that Architecture Project had on its books three architects specialised in restoration works and that was why it was awarded 14 out of 15 marks for previous experience and that was also why the price offered was higher than that of the recommended tenderer because his client was specialised in this line of work.

Architect Buhagiar agreed with the view that it was not unheard of that a professional person would render service to more than one employer. He added that his firm had submitted a list of eight professionals who, as a team, would be in charge of the various aspects of the project and that Architect Abela was going to supervise the restoration aspect of the project. Architect Buhagiar declared that even without the services of Architect Abela, his firm possessed adequate human resources to undertake this project and, in fact, it had already carried out similar works.

The Chairman PCAB expressed the view that the adjudicating board did not consider Architect Abela as part of Med. Design Associates Ltd, as an organisation, otherwise it would not have awarded zero marks for experience on previous relative projects. He added that it appeared to him that the way the adjudicating board awarded the points for experience in related works meant that nearly all Architecture Project personnel were experts in restoration whereas Med. Design Associates Ltd did not even have one architect with experience in restoration works.

Ms Charmaine Monseigneur, member of the adjudicating board, under oath gave the following evidence:

- the adjudicating board, although it was aware of the firms specialising in restoration projects, had to evaluate on the documents made at its disposal by the tenderers;
- with regard to ‘experience as an organisation’, the adjudicating board considered the experience of the architects attached to the bidding organisations and it turned out that all the bidders employed experienced architects and hence each was awarded the maximum score of 10 points;
- with regard to ‘experience in previous relevant projects’ in the last five years, the adjudicating board considered the list of projects submitted by the bidders and it was noted that in the case of Med. Design Associates Ltd no such list was presented;
- the members of the adjudicating board carried out the evaluation separately and then the points were aggregated;
- the technical person on the adjudicating board was Architect Damian Vella Lenicker, however, the chairman possessed a qualification in construction management;
• the benchmark of 75% technical compliance was set by management so as to ensure that the work would be carried out to a high standard; and

• the adjudicating board could not overlook (i) the fact that Med. Design Associates Ltd quoted a very competitive/low price and (ii) that Med. Design Associates Ltd did possess a certain degree of experience even though it did not manage to clearly demonstrate it in its submission.

The PCAB asked Architect Buhagiar to go through his firm’s original submission and indicate his firm’s list of previous relevant projects. Architect Buhagiar, while noting that his submission’s covering letter dated 22 February 2010 was incomplete because the last page was missing, could not trace the list with regard to ‘previous relevant projects’ but he was quick to add that, in the covering letter itself, his firm had indicated the ‘Capitainaire’ restoration project at the Cottonera Marina and even submitted a brochure which included the restoration works carried out by his firm together with the capability statement.

The Chairman PCAB noted that with regard to Med. Design Associates Ltd the adjudicating board entered the note which read ‘none of a similar nature’ was submitted when tenderers were requested to submit a ‘description of projects of a similar nature undertaken during the last 5 years’ (statement titled ‘Selection Criteria’ refers).

Mr Pavia intervened to note that in the covering letter dated 22 February 2010, under ‘Organisation’, Med. Design Associates Ltd stated that since

“we do not possess the necessary expertise for restoration works we have appointed conservation architect perit Reuben Abela as the lead consultant for this project...”

Architect Buhagiar said that that statement referred to this project, which, he contended, was a very particular project and that was precisely why his firm was going to engage Architect Abela, i.e. to enhance its capability in this specific area.

The Chairman PCAB expressed the view that the declaration made by Med. Design Associates Ltd that as an organisation, without Architect Abela, it did not possess the necessary expertise for restoration works, could explain why it obtained zero marks for ‘previous relevant experience’.

Mr Pavia then referred to what the recommended tenderer had stated in the same letter under ‘experience’, i.e. that “Med. Design Associates Ltd has been involved in various projects located within the areas of historical importance – even within the same location as this project.”

Architect Buhagiar remarked that he could not understand how the adjudicating board did not give any weight to the previous works carried out by his firm. He opined that his firm, together with the engagement of an expert in the person of Architect Abela, provided enough comfort to the contracting authority that it was capable to execute this contract and to do that at a very competitive price.
The Chairman PCAB remarked that the PCAB had to decide on whether the adjudicating board was entitled to change the published award criteria during the evaluation process. He added that the MEAT procedure also meant that everything had to be in place, including the technical capability.

Dr Bonello acknowledged that it could have been the case that the points system applied could have caused certain anomalies at the end of the exercise.

Mr Antoine Portelli, member of the adjudication board, under oath,

- agreed that the recommended tenderer was not awarded any points for previous experience because of the tenderer's own admission that he did not possess such experience;
- opined that the adjudicating board ended up recommending the award of the tender to Med. Design Associates Ltd because of the very advantageous price it offered which had altered the scoring pattern obtained in the technical evaluation such that in the end Med. Design Associates Ltd ranked first with a score of 82 while Architecture Project ranked second with 79; and
- being a single envelope tender, the adjudicating board could not overlook the price element.

The Chairman PCAB remarked that it was emerging clearly that the price turned out to be the main factor that led to the award of the tender to Med. Design Associates Ltd.

In conclusion, Dr Vassallo made the following remarks:

- the hearing centred more on the reasons why the recommended tenderer was not awarded any marks with regard to previous experience rather than on the fact that it failed to obtain 75% on technical compliance as required by the award criteria, which was the reason that prompted his client to present the appeal;
- rightly so, the adjudicating board reached its decision on the documentation presented by the tenderers and since the recommended tenderer stated that he did not possess previous experience in this line of work the adjudicating board had no option but to award it no points in that regard;
- the technical evaluation grid demonstrated that the recommended bidder failed in that respect and he claimed that the evaluating board acted correctly that far;
- the adjudicating board however did not act correctly, both professionally and ethically, when it decided to do away with the 75% technical compliance requirement;
- the PCAB, as a board of review, had to determine whether the evaluation process was carried out correctly and in doing that it had to establish whether the adjudicating board acted correctly when it recommended the award to a tenderer that did not meet tender specifications and conditions;
apart from the provisions of clause 17.1, there were also the provisions of clause 17.3 ‘Selection of Preferred Bidder’ which read as follows:

“The Most Economically Advantageous Tender offer (MEAT) is the selection criteria to be used and will be established by weighing the Technical Quality against the Financial Offer on a 60/40 proportional basis respectively. GHRC is not bound to award the Contract to the Bidder that submits the cheapest offer’;

moreover, clause 8.3 (page 5) indicated that the maximum value of the contract was set at €250,000 and that the offer of €234,500 made by his client, Architecture Project, was within that estimate;

it was questionable whether a tenderer could make a bid for a tender which, in order to execute it he would have to engage an expert in that field when, according to the tender document, the bidding organisation itself had to be competent to undertake the contract;

for the sake of justice and equity, the tendering process had to be conducted in accordance with the published tender document and according to law; and

Architecture Project was a firm specialised in the field of restoration works and that was evident from the works undertaken at the Valletta Waterfront and by having on its books Architect Konrad Buhagiar, who was selected by Architect Renzo Piano to represent him on the City Gate Project. The financial offer submitted by Architecture Project reflected its expertise and the high quality work that it was capable of delivering.

On his part, Dr Bonello remarked that while nobody was questioning the technical competence of the other participating tenderers, it was evident that the offer made by Med. Design Associates Ltd was the most advantageous one to the contracting authority and that justified the decision taken by the adjudicating board.

At this point the hearing was brought to a close.

This Board,

having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 30 April 2010 and also through their verbal submissions presented during the hearing held on 21.07.2010, had objected to the decision taken by the pertinent authorities;

having taken note of Dr Vassallo’s comment relating to the fact that, according to the evaluation carried out by the board, Med. Design Associates Ltd obtained 42 points out of 60 or 70% of the points allocated which fell short of the 75% set out in Clause 17.1 and hence that offer should have been discarded, a point which was corrected during the hearing by the PCAB as it transpired that the ‘Technical Weighted Score’ sheet actually showed that a weighted score of 42 translated itself into an un-weighted score of 65%.
having also taken note of Dr Vassallo’s concluding remarks, especially when he (a) stated that the adjudicating board reached its decision on the documentation presented by the tenderers and since the recommended tenderer stated that he did not possess previous experience in this line of work the adjudicating board had no option but to award it no points in that regard, (b) claimed that the evaluation board did not act correctly, both professionally and ethically, when it decided to ignore the 75% technical compliance requirement and that, for the sake of justice and equity, the tendering process had to be conducted in accordance with the published tender document and according to law and that the evaluation board could not do away with the published award criteria which bound both the bidders and the contracting authority, (c) argued that it was questionable whether a tenderer could make a bid for a tender which, in order to execute it he would have to engage an expert in that field when, according to the tender document, the bidding organisation itself had to be competent to undertake the contract, (d) claimed that the criteria for MEAT were to apply only once the tenderer had satisfied the tender specifications and conditions, (e) said that his client was technically compliant, submitted a price within the declared budget and, as a result, should have been awarded the tender, and (f) pointed out that with regard to ‘experience’ the recommended tenderer did not obtain zero marks but he obtained 10 marks as an organisation and zero marks for ‘experience in previous relevant projects’ which, as far as he was concerned, came as no surprise considering the fact that it was the bidding firm that had to have this experience and not its subcontractor;

having duly considered Dr Bonello’s reference to the fact that (a) the adjudicating board could not have overlooked the wide variation in the price quoted by the recommended tenderer vis-à-vis the other tenderers in its overall evaluation of the bids under consideration since this was a single envelope tender placing emphasis on the fact that the argument put forward by the appellants would have made sense had this been a three package tender, (b) in its decision the evaluation board sought to obtain the best value for money and, as such, it acted correctly and in good faith, (c) prior to the commencement of the evaluation process, albeit Architect Damian Vella Lenicker had declared that his wife was employed with one of the bidders yet GHRC’s CEO decided that this did not constitute a conflict of interest, (d) one had to keep in view that the evaluation board did not recommend the award of the tender to the appellant Company, which was the employer of Ms Vella Lenicker and (e) it could have been the case that the points system applied could have caused certain anomalies at the end of the exercise;

having observed that under the ‘Score for Experience’, the recommended tender got 10 points out of 10 for ‘Bidder’s Experience as an Organisation’ but got no points at all out of the 15 allocated for ‘Experience in Previous Relevant Projects’ whereas the appellant got 10 and 14 points respectively:

having heard Architect Buhagiar’s arguments and observations, especially those relating to the fact that (a) his firm had quoted a relatively low price because it had already carried out similar works and, as a consequence, knew what such process entailed, (b) he only got the opportunity to see the evaluation grid at the
hearing, (c) his firm had obtained the necessary clearance from Heritage Malta (Architect Reuben Abela’s employer) to employ Architect Abela, a well-known professional in the field of restoration works, on a part-time basis with the aim of having the latter carrying out overall supervision of the project proposed in the call for tender apart from other work including e.g. taking measurements, applying with MEPA and the restoration aspect of the project, and that it was in the latter area that the services of Architect Abela would be mostly required considering his 17 years experience in the sector, (d) his firm’s past experience in restoration works was completely overlooked by the evaluation board when the same board awarded zero marks, (e) Ms Simone Vella Lenicker, who was present at the hearing representing Architecture Project, namely the appellant Company, happened to be Architect Damian Vella Lenicker’s wife, with Mr Vella Lenicker being a member of the evaluation board, (f) even without the services of Architect Abela, his firm possessed adequate human resources to undertake this project and, in fact, it had already carried out similar works and (g) the statement made by his own firm in their own submission, namely, that “do not possess the necessary expertise for restoration works” they “have appointed conservation architect perit Reuben Abela as the lead consultant for this project...”, was made within the parameters of this particular tender, claiming that this project was a very particular project and that was precisely why his firm was going to engage Architect Abela, namely to enhance its capability in this specific area;

• having taken into consideration the fact that the contracting authority declared that it was satisfied from the papers presented that the proposed engagement of Architect Abela would not amount to sub-contracting and so it was not in breach of tender conditions;

• having taken full cognizance of Ms Monseigneur’s testimony wherein, inter alia, she stated that (a) the evaluation board, although it was aware of the firms specialising in restoration projects, had to evaluate on the documents made at its disposal by the tenderers, (b) with regard to ‘experience in previous relevant projects’ in the last five years, the evaluation board considered the list of projects submitted by the bidders and it was noted that in the case of Med. Design Associates Ltd no such list was presented, (c) the technical person on the evaluation board was Architect Damian Vella Lenicker, however, the chairman possessed a qualification in construction management and (d) the evaluation board could not overlook (1) the fact that Med. Design Associates Ltd quoted a very competitive/low price and (2) that Med. Design Associates Ltd did possess a certain degree of experience even though it did not manage to clearly demonstrate it in its submission

• having also taken into consideration the fact that in the covering letter dated 22 February 2010, under ‘Organisation’, Med. Design Associates Ltd stated that since “we do not possess the necessary expertise for restoration works we have appointed conservation architect perit Reuben Abela as the lead consultant for this project...”;

• having also taken note of Mr Portelli’s evidence wherein, inter alia, he (a) confirmed that the recommended tenderer was not awarded any points for
previous experience because of the tenderer’s own admission that he did not possess such experience, (b) opined that the evaluation board ended up recommending the award of the tender to Med. Design Associates Ltd because of the very advantageous price it offered which had altered the scoring pattern obtained in the technical evaluation such that in the end Med. Design Associates Ltd ranked first with a score of 82 while Architecture Project ranked second with 79 and (c) being a single envelope tender, the evaluation board could not overlook the price element,

reached the following conclusions, namely:

1. The PCAB feels that the contracting authority has committed a huge blunder when it ignored the declaration made by one of its appointed members on the evaluation board wherein the latter drew the attention of the authority’s management about possible conflict of interest, which, as it transpired during the hearing, was very obvious, albeit this does not mean that the said member was in any way influenced or that he acted in bad faith or unethically. This Board’s opinion is that, all things being equal, it cannot condone the decision taken by the contracting authority’s administration despite the latter being made fully aware of the anomalous situation and this, being fully aware of the maximum need for a clear manifestation of transparency and level playing field in similar circumstances. This need for transparency in this case is even more evident where it appears that an anomalous situation has been created through the awarding of marks for experience in similar projects.

2. The PCAB opines that the adjudicating board could not do away with the published award criteria which bound both the bidders and the contracting authority just because of the element of price and, along the way, be totally oblivious of the fact that there were other criteria which were being completely overlooked, such as the technical capability of the tenderers, even though this Board has high reservations about the observance of the evaluation criteria the same contracting authority had set out in the first place.

3. The PCAB recognises the fact that, albeit in good faith, yet, it is a fact that both the contracting authority ‘per se’ and, particularly, the evaluation board, acted in an inconsistent manner e.g. (a) not observing its own parameters, (b) giving a ‘zero’ score to the recommended tenderer with regards to relevant experience and then, simultaneously, positively re-evaluate the said tenderer as it was argued that the firm did possess a certain degree of experience even though it did not manage to clearly demonstrate it in its submission, an issue which was not within the prerogative of the evaluation board to decide upon as its remit precludes it from playing the ‘advocate’ in view of impartiality which has to be manifested throughout the entire process and so forth.

4. On the other hand, the PCAB, whilst acknowledging that it is very normal for a participating tenderer to engage other experts in particular related fields aiming at adding more credibility to their bid, yet, in this particular instance, it is not sure as to the extent of the work being assigned to Architect Abela, especially when one considers the tenderer’s own admission in the tender submission, namely that Architect Buhagiar’s firm lacked staff members who “possess the necessary expertise for restoration works”, so much so that this
situation instigated them to appoint “*perit Reuben Abela as the lead consultant for this project...*”

5. Contrary to what has been argued during the hearing by the contracting authority’s representatives, the PCAB fails to understand why evaluation boards should focus more on ‘price’ in tenders which are submitted in single envelopes.

6. The PCAB feels that, overall, in this particular tender, the ‘modus operandi’ of both the contracting authority and the evaluation board, left very much to be desired. This Board is not at all convinced that the way that the process was conducted was in line with normal procurement regulations.

7. As a result of all the above, the PCAB concludes that the adjudicating process has been compromised and it has to recommend that this tender be cancelled and that a fresh call be issued. Needless to say, all effort has to be made by the contracting authority to ensure that there will be no repetition of decisions taken which led to this anomalous scenario.

In view of the above this Board also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza  Anthony Pavia  Carmel J Esposito
Chairman  Member  Member

30 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 210

GHRC/001/2010

Request for Proposals for Insurance Brokerage Services for the Grand Harbour Regeneration Corporation plc and any of its subsidiaries and associated companies

This call for tenders was published in the Government Gazette on 20 January 2010. The closing date for this call for offers was 5 February 2010.

Five (5) tenderers had originally submitted their offers

Mediterranean Insurance Brokers Ltd filed an objection on 15 April 2010 following the decision taken by the Contracts Department to award the tender in question to First United Insurance Brokers Ltd (FUIBL).

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 21 July 2010 to discuss this objection.

Present for the hearing were:

Mediterranean Insurance Brokers (MIB)

Dr. Ron Galea Cavallazzi Legal Representative
Dr. Stephen Decesare Legal Representative
Dr. Henri Mizzi Legal Representative
Mr. Joseph G Cutajar Managing Director
Mr. Tonio Briffa Executive Director
Mr. Ivan Muscat Executive Director
Ms. Fiona Borg Divisional Director

First United Insurance Brokers Ltd (FUIBL)

Dr Roderick Zammit Pace Legal Representative
Dr Mark Refalo Legal Representative
Mr Kevin Galea Pace Representative

Grand Harbour Regeneration Corporation

Dr John Bonello Legal Representative

Adjudicating Board

Mr Antoine Portelli Member
Ms Charmaine Monseigneur Member
Mr Ray Azzopardi Secretary

Department of Contracts

Mr Francis Attard Director General
After the Chairman’s brief introduction, the legal representative of the contracting authority requested the opportunity to make certain preliminary clarifications that would have a bearing on the proceedings of the hearing. Furthermore, the PCAB was informed that Mr Chris Paris and Perit Damian Vella Linecker, chairman and member of the adjudication board, respectively could not be present for the hearing.

Dr John Bonello, legal representative of the contracting authority, GHRC, made the following submissions:

- this was a Request for Proposal (RFP) and although, admittedly, the document contained the usual section that dealt with the right of tenderers to lodge an appeal, he contended that it was not within the competence of the PCAB to preside over this hearing;

- the PCAB was charged to deal with appeals lodged in respect of calls for tenders for supply of goods, services or works as defined in the Public Contracts Regulations whereas bidders for Public Service Concession Contracts did not have an automatic right to appeal but an ‘ad hoc’ arrangement had to be made;

- even if, for the sake of the argument, in this case there was the right of appeal, if one were to refer to clause 15 ‘Appeals’ sub-clause (3) at page 6 of the RFP, one would find that:

  “Complaints in terms of this Part may only be submitted in respect of public contracts awarded by Authorities listed in Schedule 1 whose value exceeds €47,000.”

- this RFP did not have a value attached to it and hence bidders were not entitled to appeal anyway;

- although one could say that the RFP was meant to lead to a kind of selection process, Regulation 16 (1) of the Public Contracts Regulations provided that:

  “These regulations shall not apply to:
  
  (i) public service contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services;”

- as far as he was aware insurance qualified under financial services and, as a consequence, the Public Contracts Regulations were not applicable; and

- the party lodging the appeal could have been misled since the RFP included a section which dealt with appeals and, as a result, Dr Bonello asked the PCAB to consider this aspect in view of the deposit paid by the appellant.

The Chairman PCAB held the view that since the RFP was in itself a selection process then bidders were entitled to the opportunity to appeal.
When requested to state his views by the PCAB, Mr Francis Attard, Director General (Contracts), remarked that one had to establish whether this was the beginning of a process that eventually would lead to the award of a contract and, if that were to be the case, then the right to appeal had to be granted to participating bidders. Mr Attard continued that, on the other hand, if this RFP simply represented an expression of interest and, as such, was only meant to gather information, which process would then be followed by a separate tendering procedure to purchase a service, then it could be that the need for an appeal would not arise.

Mr Antoine Portelli, a member of the adjudicating board, remarked that, considering the extensive nature of the Grand Harbour Regeneration Project (GHRC), the need would eventually certainly arise to undertake a number of insurance covers and, hence, GHRC felt that it should have an insurance broker to manage a number of insurance policies. Mr Portelli declared that the adjudicating board recommended the preferred bidder on the basis on competence according to the scoring sheet and he conceded that, following the outcome of the RFP, the GHRC would avail itself of the services of the selected insurance broker, i.e. FUIBL.

The Chairman PCAB questioned what the contracting authority was going to gain or to establish through this RFP because it was certainly not purchasing a service and, moreover, the GHRC was not getting any inkling of the prices/premiums that were going to be charged by the insurance companies that the selected insurance broker would eventually engage/recommend.

Dr John Galea Cavalazzi, legal representative of the Mediterranean Insurance Brokers Ltd (MIB), the appellant Company, remarked that this was a public service contract so much so that if one were to refer to page 7 of the RFP under ‘Terms of Reference’ – Introduction – one would find the following:

“GHRC intends to appoint a firm as the sole and exclusive insurance broker for GHRC itself, as well as any of its subsidiaries or associated companies, for a period of three years.”

Dr Galea Cavalazzi stressed that GHRC’s intentions could not have been expressed clearer in the sense that a contract was going to be awarded. Dr Galea Cavalazzi stated that Reg. 16 (1) (i) referred to financial services and even specified those financial services and he pointed out that insurance was not considered as a financial service.

The Chairman PCAB remarked that he could not understand the purpose of the RFP because the GHRC should have acted differently in the sense that when the need for insurance cover/s will arise the GHRC would then invite insurance brokers to submit complete and concrete proposals incorporating insurance policies and the relative premiums so that GHRC would be in a position to make a decision based on competence and competitive prices. He added that the futility of this exercise was clearly illustrated in the last paragraph at page 9 of the RFP which stated that:

“This RFP does not constitute an offer and is not binding on the Company. The terms and conditions referred to in the RFP may be amended at any time hereafter and no liability of any nature will attach to the Company as a result
of any such amendment, whether with or without notice, or if this RFP is not acted upon or if the process is otherwise terminated at any stage.”

Mr Joseph Cutajar, managing director of MIB, pointed out that both the notice published in the Government Gazette and the RFP itself referred in very clear terms that this was a tender/contract.

Dr Roderick Zammit Pace, representing First United Insurance Brokers Ltd (FUJBL), contended that the main point was that this RFP did not refer to a contract of a value that exceeded €47,000 and hence, according to clause 15 of the RFP, which in turn reflected Reg. 83 (3) of the Public Contracts Regulations, no complaints could be lodged in such a case. He explained that the purpose of the RFP was to line up an insurance broker to provide insurance covers as and when the needs would arise in connection with this on-going project. Dr Zammit Pace added that, usually, the insurance broker was paid by the insurance company.

Mr Portelli intervened and remarked that, as far as he was aware, insurance brokers would normally be paid on a commission basis by the insurance companies and not by the client, in this case the GHRC, and that was why no value was attached to the RFP.

On his part Mr Cutajar pointed out that at page 8 of the RFP under ‘Objectives’ it was stated that on being awarded the agreement, the insurance broker was expected to, inter alia:

“(d) clearly indicate the brokerage or fee structure that will be used by the broker for the provision of such services.”

Mr Cutajar argued that it was clear that GHRC was going to pay the broker and, in fact, that has always been the case in the insurance market since it was the client that ultimately paid the insurance premium, part of which represented the brokerage fee.

Dr Bonello concluded that although this RFP was issued with good intentions it has turned out that the proposed arrangement was not workable. Therefore, with the benefit of hindsight, Dr Bonello submitted that the GHRC was going to activate the provisions in the last paragraph of the RFP, namely to terminate the RFP process.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26 April 2010 and also through their verbal submissions presented during the hearing held on 21.07.2010, had objected to the decision taken by the pertinent authorities;

• having taken particular note of the contracting authority’s change of heart to pursue with the adjudication process, when, publicly, through its legal advisor, the said authority acknowledged that the initial scope behind the publication of this RFP was no more relevant, so much so that it was thus cancelling the process,
reached the following conclusions, namely:

1. The PCAB acknowledges that during the same hearing the contracting authority informed those present that it was cancelling this Request for Proposals (RFP) in view that the original premise for it deciding to issue the call in the first place was no longer applicable.

2. As a consequence to (1) above, the PCAB considers futile any further deliberation, specifically on this particular appeal and generally on this tender’s adjudication process in general.

In view of the above this Board also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

30 July 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 211


Tender for the Supply of Statin Preparation – Simvastatin Tablets/Capsules (10mg, 20mg, 40mg and 80mg)

This call for tenders was published in the Government Gazette on 19 June 2009. The closing date for this call for offers was 11 August 2009.

The estimated budget for this tender was € 2,417,531.

Nine (9) tenderers had originally submitted their offers

Rodel Ltd acting on behalf of Accord Healthcare Ltd filed an objection on the 12 February 2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was being rejected for being non-compliant since the product is not locally registered and the bank stamp was not included in Annex IX with the consequence that the tender was being recommended for cancellation.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 28 July 2010 to discuss this objection.

Rodel Ltd
Dr Norman Vella Director
Dr Simon Galea Testaferrata Legal Representative
Mr Manoj Prakash Representative of Accord Healthcare Ltd
Mr Samrat Kamdar Representative of Accord Healthcare Ltd

Government Health Procurement Services (GHPS)
Ms Anna Debattista Director

Adjudicating Board
Ms Miriam Dowling Chairperson
Ms Miriam Azzopardi Member

Department of Contracts
Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr Norman Vella, representing Rodel Ltd, the appellant Company, explained that by letter dated 5 February 2010, the Department of Contracts informed his firm that the tender was recommended for cancellation and that his firm’s offer was found non-compliant because the ‘product is not locally registered’ and ‘in Annex IX bank stamp is not included’. Dr Vella added that his firm had reacted to these two issues raised by the Department of Contracts in the reasoned letter of objection dated 18 February 2010.

Dr Vella pointed out that clause 11 of Annex IV to the tender document stated that:

“In the event that the medicinal product being offered does not have a valid Marketing Authorisation, or a valid Article 126 A Authorisation, or a valid Parallel Importation Licence or a Central Authorisation by E.M.E.A. at the closing date for the submission of the offer, I, the Responsible/Qualified Person, accept to undertake

i) to ascertain that the offered medicinal product is duly registered strictly within a 6-week period from the closing date of the respective tender, or otherwise ….”

Dr Vella added that in the covering letter dated 7 August 2009, submitted with envelope 2, it was stated that ‘we can confirm that we have started procedures to register this product in Malta within 6 weeks under article 126A’. He stated that the Medicines Authority issued the licences on the 5 October 2009 to Accord Healthcare Ltd in respect of the 10/20/40/80mg tablets, which licences were forwarded to the GHPS and to the Contracts Department on the 9 December 2009.

Dr Galea Testaferrata, legal representative of Rodel Ltd, submitted that his client had done its part in time to obtain the necessary licences within the 6 week period but the responsibility to issue licences for medicines rested solely with the Medicines Authority. He argued that his client could not be penalised because the Medicines Authority failed to issue the licences within the required 6-week period.

Mr Anthony Pavia, PCAB member, noted that the tender document was quite clear in the sense that the medicinal product offered had to be registered strictly within a 6-week period from the closing date of the respective tender and he, therefore, asked for a chronology of relevant events and the following was established (even following some verifications carried out there and then by Mr Samrat Kamdar - a representative of the foreign principals which Rodel Ltd represents locally - over the phone with officials of his firm):

- Closing date of tender: 11 August 2009
- 6 weeks after that date: 22 September 2009
- Date when licences were issued by Medicines Authority: 5 October 2009
- Date on which the application was sent to MA: 17 August 2009
Mr Manoj Prakash, representing Accord Healthcare Ltd, explained that most companies did not use to register their products in Malta because of the small size of its internal market and, as a result, the Maltese authorities had introduced the 6-week registration period so as to allow for both better competition and better prices. He added that the grant of a licence within a 6-week period applied to a medicinal product in respect of which a marketing authorisation had already been issued in the UK or in another EU member state.

Ms Anne Debattista, director GHPS, remarked that:

- besides the dates indicated above, one had to add that the call for tenders was issued in the Government Gazette and on the department’s website on the 19 June 2009;

- the information she obtained from the Medicines Authority was that the appellant Company had lodged its application to register all four doses of this medicine on the 19 August 2009;

- 6 weeks from the 11 August 2009 would be the 22 September 2009 and the GHPS was informed of the product registrations on the 9 December 2009;

- she agreed with what Mr Prakash had stated that Malta had adopted the 6-week registration period following Malta’s accession to the EU because there was a shortage of registered medicines in Malta, a situation that has improved by time and that it was reflecting itself in wider competition and cheaper prices – e.g. this call for tenders elicited 9 offers;

- one of the offers received, that by S.C. Labormed Pharma S.A., was in fact found to be compliant in all respects by the closing date of the tender and, consequently, recommended for award with regard to item 1 - 10mg capsules/tablets;

- it had been made amply clear to operators in the medicines sector that there should be no direct link between the time the application to register a product in Malta was submitted and the participation in a tendering process but that the two procedures had to be kept distinct from one another; and

- the fee to register a product in terms of Art. 126A was €116.46 (Lm 50).

Dr Galea Testaferrata raised the issue that in the letter of rejection dated 5 February 2010, the Contracts Department had indicated that ‘the product is not locally registered’ when the product was in fact registered on the 5 October 2009, i.e. well before the 5 February 2010. He argued that one might consider that as a very fine line but still it was a very pertinent point so much so that he could not accept the reason for disqualification as presented. Dr Galea Testaferrata stated that he would perhaps have accepted a reason for rejection stating that the product had not been registered as per Art. 126A.
Ms Debattista replied that the adjudicating board assessed the submission according to the specifications and conditions set out in the tender document and when the adjudicating board made that remark it meant that the product was not registered as requested in the call for tenders.

Dr Galea Testaferrata remarked that in previous PCAB decisions it was stated that the GHPS had all the opportunity to carry out its own verifications and that, although it was not a legal obligation on the part of the contracting authority to do that, it was certainly a moral obligation on the part of the contracting authority to check with the applicant or with the Medicines Authority whether the product was in fact registered.

The Chairman PCAB commented that each case had to be considered on its own merits as there were instances when seeking clarifications was either not considered necessary or even not permitted.

Mr Carmel Esposito, a PCAB member, observed that the GHPS did not trace this product on the 28 October 2009 list of product registrations in terms of Art 126A on the Medicines Authority website when the product was in fact registered on the 5 October 2009.

Ms Debattista reiterated that, first of all, the product was not registered as on 22 September 2009, as laid down in the tender conditions, and that, albeit the product was registered on 5 October 2009, it appeared on the Medicines Authority website for the first time on 30 November 2009 and, moreover, the appellant Company had stated that it had informed the GHPS of this registration on 9 December 2009.

Ms Debattista remarked that there has been a development in this respect in the sense that competition has been on the increase in this sector and, as a consequence, it was decided to do away with the clause whereby tenderers could register their product within 6 weeks from the closing date of the tender. Instead, proceeded Ms Debattista, the department was insisting in the tender document that the medicinal product had to be registered as at the closing date of the tender and was being asked that a copy of the registration certificate should be attached. Ms Debattista, however, pointed out that the scenario was different when this call for tenders was issued.

Dr Galea Testaferrata insisted that the hearing had to stick strictly with the reasons for rejection, one of which clearly stated that ‘the product is not registered’ and he claimed that that referred on 5 February 2010. He added that this same kind of medicine was already being supplied to GHPS and, as a result, he questioned why the contracting authority was going to disqualify a good and relatively cheap product for the sake of formalities.

Ms Debattista insisted that the adjudicating board had to evaluate the offer on the documentation submitted. She informed that Government had issued calls for the supply of small quantities of this medicine until such time that the tender under reference was adjudicated and she confirmed that the GHPS did place orders for this product, supplied by the appellant Company since it was duly registered on the closing date and it was the cheapest.
Mr Prakash noted that the other seven tenderers had been found non-compliant at some stage of the tendering process and it appeared that his firm remained the only participating tenderer with regard to items 2 to 4, i.e. 20/40/80 mg tablets and so he questioned the rationale behind the cancellation of this tender for a mere few additional days taken to have the product registered, i.e. from 22 September to 5 October 2009.

Ms Debattista remarked that the other tenderers were rejected for a number of reasons ranging from the delivery period, not quoting for all dosages, product registration, the shelf life and missing information.

Dr Vella remarked that the small format of Annex IX ‘Financial Identification’ as presented in the tender document did not allow for legible printing of the tenderer’s details and so the requisite information was printed on an Accord Healthcare Ltd letterhead, which information was certified as ‘all correct and in order’ by Ms Joanna Lewis, Senior Commercial Manager of HSBC plc and attached thereto were (a) a copy of Ms Lewis’s business card and (b) the bank statement of account no. 68021189. Dr Vella contended that this kind of authentication by the bankers of Accord Healthcare Ltd was by far superior to a bank rubber stamp with no certification.

Dr Galea Testaferrata claimed that the form at Annex IX was rather small for it to be filled in properly and, as a consequence, it was decided that they would submit it, admittedly, in a different format but still with all the requested information. He added that although the letter did not bear the bank’s stamp still there were the certification by Ms J Lewis, HSBC senior commercial manager, and her business card. Dr Galea Testaferrata remarked that it was no justification to disqualify a tender on mere grounds of formality when the things that mattered were in fact submitted.

Ms Debattista remarked that at tender opening stage the Contracts Department had clearly indicated that, with regard to the appellant Company’s submission, Annex IX ‘Financial Identification’ had been found blank.

The Chairman PCAB observed that the adjudicating board did not raise any issue as to the information submitted in the letter but simply stated that the bank’s stamp was not on the document.

Mr Manoj Prakash stated that his firm was informed that it was not the practice at HSBC to issue such information on its letterhead or to stamp such documents because the current practice was to do that electronically.

Dr Galea Testaferrata considered that the certification made by Ms J. Lewis and the reproduction of her business card were adequate substitutes to the bank’s stamp. He continued that his client had adopted this same approach when participating in other tendering processes and no objections had been raised by the contracting authorities.

Ms Debattista emphasised that on Annex IX ‘Financial Identification’ it was clearly indicated that ‘the bank stamp plus signature of bank representative’ and the ‘date plus signature of the account holder’ were all obligatory requirements.
The PCAB noted that with regard to the ‘Financial Identification’ form the appellants submitted the following (a) in the tender submission, a letter bearing the letterhead of Accord Healthcare Ltd signed and dated by the account holder along with the certification by Ms Joanna Lewis HSBC bank manager together with a photocopy of Ms Lewis’s business card and certification and (b) with the reasoned letter of objection dated 18 February 2010, they submitted the ‘Financial Identification’ form on a letterhead of HSBC and signed by Ms Joanna Lewis.

Dr Galea Testaferrata reiterated that one of the reasons why his client lodged the appeal was the statement made on the 5 February 2010 by the Contracts Department that the ‘product is not registered’ and that no mention was made that the product was not registered within 6 weeks from closing date of tender. After pointing out that (i) the product had in fact been registered on the 5 October 2009, (ii) his client had satisfied all the other conditions and (iii) his client was already supplying this medicine to GHPS, Dr Galea Testaferrata questioned the wisdom behind the recommendation of the adjudicating board to reject his client’s offer which would consequently lead to the cancellation of the tender.

As for the missing bank stamp, Dr Galea Testaferrata considered that the requisites stipulated in Annex IX were adequately satisfied even if in a different format.

On his part, Mr Prakash remarked that, due to a few days’ delay in the issue of the product registration, the contracting authority was contemplating the rejection of his tender which would lead to the cancellation of the tendering process and the initiation of a fresh process which would take months to conclude. Mr Prakash, therefore, appealed to the authorities to assess the situation not only from the point of view of the documentation presented but also from a wider perspective.

Ms Debattista highlighted the following facts:

- the call for tenders was published on the 19 June 2009;
- the product had to be registered either by the closing date of the tender, i.e. the 11 August 2009, or, at most, 6 weeks after that date, i.e. 22 September 2009;
- the adjudicating board had to evaluate according to the published tender conditions and it could not take into account the developments that took place at later stages; and
- one tenderer was in fact found entirely compliant with regard to item 1.

Ms Debattista explained that the situation in Malta was changing both with regard to product availability/competition and to prices, which were going down as far as medicine supplied to government was concerned (she also explained that the prices of medicine procured by government were significantly cheaper from prices of medicine purchased from private pharmacies).

At this point the hearing was brought to a close.
This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18 February 2010 and also through their verbal submissions presented during the public hearing held on 28 July 2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of Drs Vella and Galea Testaferrata’s and Mr Prakash’s interventions, particularly, wherein these (a) stated that in their letter dated 7 August 2009, submitted with envelope 2, it was stated that they could confirm that they had started procedures to register this product in Malta within 6 weeks under article 126A, (b) stated that the Medicines Authority issued the licences on the 5 October 2009 to Accord Healthcare Ltd in respect of the 10/20/40/80mg tablets, which licences were forwarded to the GHPS and to the Contracts Department on the 9 December 2009, (c) remarked that the responsibility to issue licences for medicines rested solely with the Medicines Authority and that they could not be penalised because the Medicines Authority failed to issue the licences within the required 6-week period, (d) raised the issue that in the letter of rejection dated 5 February 2010, the Contracts Department had indicated that ‘the product is not locally registered’ when the product was in fact registered on the 5 October 2009, i.e. well before the 5 February 2010, (e) remarked that the small format of Annex IX ‘Financial Identification’ as presented in the tender document did not allow for legible printing of the tenderer’s details and so the requisite information was printed on an Accord Healthcare Ltd letterhead, which information was certified as ‘all correct and in order’ by a Senior official of HSBC plc in England, with the appellant Company’s representative claiming that such document was by far superior to a bank rubber stamp with no certification and that it was no justification for the contracting authority to disqualify a tender on mere grounds of formality when the things that mattered were in fact submitted and (f) informed those present that they had been told that it was not the practice at HSBC plc to issue such information on the Bank’s letterhead or to stamp such documents because the current practice was for all to be carried out electronically;

- having taken into consideration the points raised by Ms Debattista, particularly those relating to the fact that (a) the information she obtained from the Medicines Authority was that the appellant Company had lodged its application to register all four doses of this medicine on the 19 August 2009, (b) six weeks from the 11 August 2009 would have been the 22 September 2009 and the GHPS was informed of the product registrations on the 9 December 2009, (c) the product was not registered by 22 September 2009, as laid down in the tender conditions, and that, albeit the product was registered on 5 October 2009, it appeared on the Medicines Authority website for the first time on 30 November 2009 and, moreover, the appellant Company had stated that it had informed the GHPS of this registration on 9 December 2009, (d) it had been made amply clear to operators in the medicines sector that there should be no direct link between the time the application to register a product in Malta was submitted and the participation in a tendering process but that the two procedures had to be kept distinct from one another, (e) the adjudicating board assessed the tenderers’
submissions according to the specifications and conditions set out in the tender document and that, in the case of the appellant Company’s submission, the product on offer had not been registered as requested in the call for tenders and (f) the adjudicating board had to evaluate the offer on the documentation submitted;

- having also noted Ms Debattista’s remark which referred to the fact that, since competition had increased in this sector, central authorities decided to do away with the clause whereby tenderers had to register their product within 6 weeks from the closing date of the tender and that now the department was insisting in the tender document that the medicinal product had to be registered as at the closing date of the tender and was being asked that a copy of the registration certificate should be attached;

- having also reflected on Ms Debattista’s statement that Government had issued calls for the supply of small quantities of this medicine until such time that the tender under reference was adjudicated and she confirmed that the GHPS had placed orders for this product, supplied by the appellant Company, since it was duly registered on the closing date and it was the cheapest;

- having noticed that the adjudicating board did not raise any issue as to the information submitted in the letter but simply stated that the bank’s stamp was not on the document

reached the following conclusions, namely:

1. The PCAB feels that as regards the rubber stamp required, considering that all information was submitted in the appellants’ original tender submission, albeit in a different format, yet this still included the HSBC plc’s official’s details and certification. This, the PCAB argues, should have instigated at least a request for a formal confirmation by the evaluation board. This Board is aware of the mandatory requirements but it opines that, in this particular instance, there was sufficient scope for a minimal clarification process to be followed by the evaluation board.

2. The PCAB opines that with regards to the registration of the medicinal product within 6 weeks from the closing date of the tender as stated in the tender document, one could be tempted to favour the arguments raised by the appellant Company, namely that it had done so and what happened thereafter was beyond its control. This could be a correct interpretation if the argument were to be dealt with ‘per se’. However, one has to consider all holistically and this approach provides the PCAB with further food for thought in so far as, whilst one could extend the argument in a way as to state that as long as one applies within the six week time frame all is fine then this Board will have to accept the argument that even if one were to apply for such registration on the last day prior to the expiration of the six week time frame then all should be considered in accordance with the tender document’s requirements. This Board feels that, all things being equal, the spirit of the clause governing this condition, as reflected in the tender document, is definitely not contemplating such a scenario. The PCAB has no doubt that the time frame envisaged in the
tender document aims at establishing that the said registration is actually in place by the expiry of the six week time frame. Nevertheless, in this particular instance, the Board notes that, whilst it may be considered to be quite bureaucratic, yet one has to note that whilst there is a six week time frame and the appellant Company was well within the said period of time considering that it had submitted the application for registration one week after the closing date of the tender, yet, this Board agrees with the argument raised by Ms Debattista that, in similar circumstances, there is no direct link between the time the application to register a product in Malta is submitted and the participation in a tendering process as the two procedures have to be kept distinct from one another. If this Board were to accede to appellant Company’s request it could be technically accepting the idea that a tenderer will commence the procedure on the last day preceding the expiry of the six week time frame and this is unacceptable and against the scope of the condition imposed by the tender document itself.

3. The PCAB finds comfort in knowing that similar tender specifications have been updated in a way as to reflect a more precise and unequivocal way of interpretation of the said clause which now states that now the department is insisting in the tender document that the medicinal product has to be registered as at the closing date of the tender and that a tenderer is being asked that a copy of the registration certificate be attached with the submission.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Trigianza  Anthony Pavia  Carmel J Esposito
Chairman  Member  Member

11 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 212


Tender for the Supply of Trimetazidine 20mg Tablets

This call for tenders was published in the Government Gazette on 12 June 2009. The closing date for this call for offers was 4 August 2009.

The estimated budget for this tender was €824,868.55.

One tenderer had originally submitted their offers

Rodel Ltd acting on behalf of Labormed Pharma Ltd filed an objection on the 26.02.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found non-compliant since delivery period was not as required in the tender specifications and conditions and product was not locally registered.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 28 July 2010 to discuss this objection.

Present for the hearing were:

Rodel Ltd

Dr Norman Vella Director
Dr Simon Galea Testaferrata Legal Representative

Government Health Procurement Services (GHPS)

Ms Anna Debattista Director

Adjudicating Board

Ms Miriam Dowling Chairperson
Ms Miriam Azzopardi Member

Department of Contracts

Mr Francis Attard Director General (Contracts)

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

Dr Norman Vella, representing Rodel Ltd, explained that on the 19 February 2010 the Contracts Department informed them that the adjudicating board had recommended the rejection of their bid because the delivery period was not as required in the tender specifications and conditions and because the product was not locally registered with the consequence that the tender was being recommended for cancellation - since it turned out that there were no other participating tenderers.
Dr Vella remarked that, in terms of Annex II, delivery was to be effected within 6 to 8 weeks from confirmation of order at GHPS whereas his firm had indicated at section 9 of Annex IV ‘Delivery Period’: 60 days after receipt of notification on adjudication. The ‘notification on adjudication’ was interpreted by Dr Vella to mean the moment the Contracts Department’s notice board and GHPS website would display the recommended tenderer for the award of the contract. He argued that given (i) that tenderers were allowed 10 days to appeal with regard to the recommended award, i.e. from 19 February to 1 March 2010, and (ii) another few days would be required to issue the letter of acceptance and for GHPS to place the first order, the 4 day difference between the maximum 8 week period (56 days) from confirmation of order indicated in the tender document and the 60 days from the date of the recommended award indicated in his firm’s submission were more than compensated for and hence the delivery period proposed in his submission was well within the period stipulated in the tender. Dr Vella added that, indeed, a supply would be made only following the placing of an order by the contracting authority, however, the supplier was undertaking the tenderer would be in a position to make deliveries as from 60 days following the tender award recommendation by the contracting authority.

Dr Vella conceded that perhaps the terminology used by his principals when compiling the tender submission was not the most appropriate one but he felt that the tender requirements with regard to the delivery period were nevertheless satisfied.

Mr Anthony Pavia, a PCAB member, noted that in the tender document the date of confirmation of order was directly related to the date of delivery, whereas in the appellant Company’s submission there was no such link between the order confirmation and the actual delivery but, as Dr Vella was interpreting it, the appellant Company had set a date, i.e. 60 days after the date of tender award notification, following which the contractor would be in a position to start effecting deliveries.

The Chairman PCAB remarked that he could not make any connection between the terms ‘notification on adjudication’ and the ‘confirmation of order’. He added that an adjudication board should not be expected to decipher what the tenderer had in mind.

Mr Pavia expressed the view that it would appear that the appellant, when compiling the tender submission, had mixed up the delivery period with what was stated under section 8 ‘Period of Validity’ sub-section 8.3 where it was stipulated that:

“The successful tenderer will be bound by his tender offer for a further period of 60 days following receipt of the notification that he has been recommended for award.”

Dr Vella reiterated that in his opinion what happened was that his principals had related the delivery period to the ‘notification on adjudication’ rather than to the ‘confirmation of order’.

Ms Anne Debattista, Director GHPS, informed those present that in the tender document the contracting authority indicated the previous annual consumption of the same medicinal so that the contractor would have a good idea of the quantities involved – in this case the annual consumption was put at 2,990,460 units.
Ms Debattista remarked that the appellant Company’s submission was non compliant in this regard, namely since all deliveries were to be effected upon specific orders raised by GHPS whereas the appellant was referring to the delivery period as being 60 days after receipt of notification on adjudication.

Mr Francis Attard, Director General (Contracts), explained that on the department’s notice board one would only display the fixed rate that the contracting authority would pay for the product and not the global value of the contract.

Dr Vella submitted that the application to register the product was made on the 20 July 2009 and, therefore, well ahead of the closing date of the tender which fell on 4 August 2009. Dr Vella remarked that it was up to the Medicines Authority (MA) to issue the licence and that the appellant had no say as to the time taken by the Medicines Authority to process the registration.

The following timeline was established:

- **a) date tender was published:** 12 June 2009
- **b) closing date of tender:** 4 August 2009
- **c) latest date for product registration in terms of Art. 126A and clause 11 of Annex IV of the tender document (6 weeks after 4 August 2010):** 15 September 2009
- **d) date application for product registration submitted to MA:** 20 July 2009
- **e) date of MA product registration:** 23 December 2009
- **f) date product registration notified by MA:** February 2010

Ms Debattista remarked that, occasionally, the Medicines Authority might have to seek information, e.g. from other regulatory bodies overseas, and that could explain the variation in the time taken to conclude the registration of one medicinal from another.

Dr Simon Galea Testaferrata, legal advisor of Rodel Ltd, raised the issue that the tenderer could only undertake to register the product within 6 weeks from the closing date of the tender and that the tenderer’s obligation was therefore to submit the application to register the product prior to the closing date of the tender since the actual registration process was outside the control of the bidder. Dr Galea Testaferrata observed that, apparently, the contracting authority had noted this anomaly and in subsequent calls for tenders it had decided to do away with the provision at clause 11 of Annex IV. Dr Galea Testaferrata argued that, as far as the bidder was concerned, the words ‘to register’ (a product) should mean ‘to apply’ (for product registration) because the bidder had no say as to the procedure of product registration as that was within the realm of the Medicines Authority. He added that should the PCAB accept this argument then it had only to ascertain whether the tenderer had submitted the application to register the product in a timely manner since the registration process itself lied beyond the bidder’s control and therefore the bidder should not be punished for a shortcoming on the part of the Medicines Authority.

Ms Anne Debattista remarked that the registration of medicines should not be correlated with the issue of specific calls for tenders and she stressed that this point had been made very clear by the Medicines Authority during meetings held on the
topic of product registration, i.e. product registration had to be treated as separate from any specific tendering process. She added that that was all the more so in the case of the medicine that featured in this call for tenders which was one that the GHPS procured on a regular basis.

Ms Debattista pointed out that the tender document clearly indicated that within 6 weeks from the closing date of the tender, the bidder had to have the product registered and not that he had to submit an application to register the product. Ms Debattista remarked that the adjudicating board had to evaluate the offers on the information submitted by the bidders.

The Chairman PCAB could not help note that, in this particular case, it took the Medicines Authority from 20 July 2009 to 23 December 2009 to register this product, a good 5 months, which was well beyond the 6 weeks after the closing date of tender. He added that in this case even if the tenderer had applied on the date the tender was issued, i.e. the 12 June 2009 the licence would have been issued in November, which, again, was well after the 15 September 2009. The Chairman PCAB remarked that, whereas one was imposing stringent timeframes on the tenderer, the Medicines Authority seemed to be left at liberty as to the time it took to issue such licences. The Chairman PCAB observed that this failure on the part of the Medicines Authority could lead to the exclusion of valid offers from bidders who would decide to participate upon noting GHPS’s intention to procure the medicine following the publication of the relevant call for tenders. The Chairman PCAB conceded that medicine registration should not, as a rule, be related to the issue of specific tenders but, on the other hand, perhaps one should not entirely exclude the possibility of having new bidders who would decide to participate on noting that a call for tenders had just been published.

Dr Galea Testaferrata remarked that the tender document did contemplate the possibility of bidders offering a product that was not registered at the closing date of the tender and specifically referred to the provisions of clause 11 of Annex IV to the tender document, which stated that:

“In the event that the medicinal product being offered does not have a valid Marketing Authorisation, or a valid Article 126 A Authorisation, or a valid Parallel Importation Licence or a Central Authorisation by E.M.E.A. at the closing date for the submission of the offer, I, the Responsible/Qualified Person, accept to undertake

   ii) to ascertain that the offered medicinal product is duly registered strictly within a 6-week period from the closing date of the respective tender .....”

Ms Debattista remarked that the provision referred to by the appellant Company was no longer featuring in tender documents and that that provision was included at a time when the situation was such that medicinal product registration in Malta was rather limited. Ms Debattista added that the standard system for medicinal registration was the market authorisation and that the procedure outlined at Art. 126A was an ‘ad hoc’ arrangement worked out between the EU and Malta for the circumstances prevailing in Malta at that particular time.
Dr Galea Testaferrata contended that the system introduced by Art. 126A was meant to be a ‘fast track’ registration system in the case of products already registered in other EU member states. Dr Galea Testaferrata remarked that, unfortunately, the way the Medicines Authority sometimes went about this licensing procedure did not turn out to be a fast track registration system.

Dr Vella stated that a ‘Mutual Recognition Procedure’ (MRP) was registered within a given period whereas there was no time limit for registration in terms of Art. 126A. Dr Vella also questioned why, in the case of grey areas, the contracting authority did not avail itself of the opportunity given in the tender document to seek clarifications, such as on the issue of the delivery period, which, according to him, did satisfy the requirements set out in the tender document even though the wording used was not the most appropriate. Dr Vella also pointed out that, from the outset, the tenderer had undertaken to accept all tender conditions.

The Chairman PCAB expressed the view that the case for a clarification did not arise with regard to the delivery period because the statement made by the appellant Company in its tender submission was quite clear, even though, one might argue that the appellant Company used the wrong terminology to communicate its intentions. He added that one had to be careful to use the right terminology when compiling the tender submission because, in the case of an award, that terminology would be binding when one would come to the settlement of disputes. The Chairman PCAB opined that, the way the appellant Company put it in its tender submission, it could well mean that it would supply the whole consignment within 60 days from the date it received the notification that it was the recommended tenderer. He remarked that although it was true that the tenderer accepted all tender conditions, in this case the tenderer inserted an explicit statement that the delivery period would be 60 days after receipt of notification on adjudication which was not in line with the tender conditions.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 25 February 2010 and also through their verbal submissions presented during the public hearing held on 28 July 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of Drs Vella and Galea Testaferrata’s interventions, especially those relating to the fact that (a) the adjudicating board had recommended the rejection of their bid because the delivery period was not as required in the tender specifications and conditions and because the product was not locally registered with the consequence that the tender was being recommended for cancellation - since it turned out that there were no other participating tenderers, (b) delivery was to be effected within 6 to 8 weeks from confirmation of order at GHPS whereas his firm had indicated at section 9 of Annex IV ‘Delivery Period’: ‘60 days after receipt of notification on adjudication’, (c) the appellant Company had interpreted the phrase ‘notification on adjudication’ to mean the moment the Contracts Department’s notice board and GHPS website would
display the recommended tenderer for the award of the contract, (d) according to the appellants, albeit it was stated that a supply would be made only following the placing of an order by the contracting authority, yet, the supplier was also undertaking that the tenderer would be in a position to make deliveries as from 60 days following the tender award recommendation by the contracting authority, (e) in their opinion, what happened was that the tenderer’s principals had related the delivery period to the ‘notification on adjudication’ rather than to the ‘confirmation of order’ and (f) a tenderer could only undertake to register the product within 6 weeks from the closing date of the tender and that the tenderer’s obligation was therefore to submit the application to register the product prior to the closing date of the tender since the actual registration process was outside the control of the bidder;

- having also taken note of Ms Debattista’s reference to the fact that (a) the appellant Company’s submission was non compliant due to the fact that all deliveries were to be effected upon specific orders raised by GHPS whereas the appellant was referring to the delivery period as being 60 days after receipt of notification on adjudication, (b) occasionally, the Medicines Authority might have to seek information, e.g. from other regulatory bodies overseas, and that could explain the variation in the time taken to conclude the registration of one medicinal from another, (c) the registration of medicines should not be correlated with the issue of specific calls for tenders and she stressed that this point had been made very clear by the Medicines Authority during meetings held on the topic of product registration, i.e. product registration had to be treated as separate from any specific tendering process, (d) the tender document clearly indicated that within 6 weeks from the closing date of the tender, the bidder had to have the product registered and not that he had to submit an application to register the product and (e) the adjudicating board had to evaluate the offers on the information submitted by the bidders;

- having taken into consideration the fact that the appellant Company had submitted the application for the product to be registered on the 20 July 2009 and, therefore, well ahead of the closing date of the tender which fell on 4 August 2009;

reached the following conclusions, namely:

1. The PCAB opines that with regards to the registration of the medicinal product within 6 weeks from the closing date of the tender as stated in the tender document, one could be tempted to favour the arguments raised by the appellant Company, namely that it had done so and what happened thereafter was beyond its control. This could be a correct interpretation if the argument were to be dealt with ‘per se’ and, especially, when one considers that it took the Medicines Authority from 20 July 2009 to 23 December 2009 to register this product, a good 5 months, which was well beyond the 6 weeks after the closing date of tender. Furthermore, the PCAB could also consider the point raised by the appellant Company wherein it was argued that the said Company had applied in time. However, one has to consider all holistically and this approach provides the PCAB with further food for thought in so far as, whilst one could extend the argument in a way as to state that as long as one applies
within the six week time frame all is fine then this Board will have to accept the argument that even if one were to apply for such registration on the last day prior to the expiration of the six week time frame then all should be considered in accordance with the tender document’s requirements. This Board feels that, all things being equal, the spirit of the clause governing this condition, as reflected in the tender document, is definitely not contemplating such a scenario. The PCAB has no doubt that the time frame envisaged in the tender document aims at establishing that the said registration is actually in place by the expiry of the six week time frame. Nevertheless, in this particular instance, the Board notes that, whilst it may be considered to be quite bureaucratic, yet one has to note that whilst there is a six week time frame and the appellant Company was well within the said period of time considering that it had submitted the application for registration quite well prior to the closing date of the tender, yet, this Board agrees with the argument raised by Ms Debattista that, in similar circumstances, there is no direct link between the time the application to register a product in Malta is submitted and the participation in a tendering process as the two procedures have to be kept distinct from one another. If this Board were to accede to appellant Company’s request it could be technically accepting the idea that a tenderer will commence the procedure on the last day preceding the expiry of the six week time frame and this is unacceptable and against the scope of the condition imposed by the tender document itself.

2. The PCAB finds comfort in knowing that similar tender specifications have been updated in a way as to reflect a more precise and unequivocal way of interpretation of the said clause which now states that now the department is insisting in the tender document that the medicinal product has to be registered as at the closing date of the tender and that a tenderer is being asked that a copy of the registration certificate be attached with the submission.

3. The PCAB feels that, albeit it was true that the tenderer accepted all tender conditions, in this case, the tenderer inserted an explicit statement that the delivery period would be 60 days after receipt of notification on adjudication which was not in line with the tender conditions. The PCAB maintains that the said clause was misinterpreted by the appellant Company in spite of the fact that, in its opinion, it was more than evident as to what the contracting authority was really after.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza  Anthony Pavia  Carmel J Esposito
Chairman  Member  Member

11 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 213


Tender for the Supply of Clindamycin HCL 150mg Tablets/Capsules

This call for tenders was published in the Government Gazette on 12.01.2010. The closing date for this call for offers was 26.01.2010.

The estimated budget for this tender was € 16,888.

One (1) tenderer had originally submitted their offers

VJ Salomone Pharma Ltd filed an objection on the 13.05.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found non-compliant since “shelf life offered is not as that stated in the tender specifications and conditions”.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 4 August 2010 to discuss this objection.

Present for the hearing were:

VJ Salomone Pharma
  Dr Albert Grech         Legal Representative
  Ms Vanessa Said Salomone  Representative
  Ms Jackie Mangion       Operations Manager

Government Health Procurement Services (GHPS)
  Ms Anne Debattista  Director

Adjudicating Board
  Ms Miriam Dowling  Chairperson
  Ms Miriam Azzopardi  Member

Department of Contracts
  Mr Francis Attard  Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr Albert Grech, legal representative of VJ Salomone Pharma Ltd, the appellant Company, explained that by letter dated 7th May 2010, the Department of Contracts informed his client that his tender was found non-compliant because the shelf-life offered was “not as that stated in the tender specifications and conditions”. Dr Grech stated that he found it hard to draw up his case in view of the scant information given by the Department of Contracts and, all the more, because his client was contending that he adequately satisfied the product’s self-life requirement and he even went beyond what was requested in the tender document in that regard.

Dr Grech then referred to Annex VI – Technical and Special Conditions – 11 ‘Shelf life’ which stated that:

“The shelf life of the product must be clearly indicated in the Tender document submitted. Goods received at Government Heath Procurement Services must not have their shelf life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services. When five-sixths of the total shelf life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf life will be given preference. The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.”

Dr Grech added that, in the tender submission, his client had indicated that the product it was offering had a shelf-life of 60 months and even entered a note to explain what would happen in certain circumstances that might arise. Dr Grech also mentioned the ruling dated 18th May 2010 given by the PCAB in respect of Case No. 198 CT/2360/09 which concerned the question of the shelf-life of a medicinal product.

Ms Anne Debattista, Director GHPS, remarked that the case being referred to by Dr Grech had quite a different background. She contended that, in this particular instance, the reason for disqualification was the inclusion on the part of the tenderer of certain parameters which did not feature in the published tender document and she went on to quote what the appellant stated in his submissions:

“Please note that the shelf life of the product supplied is dependent on when the official order is confirmed. Manufacturing of this product takes place 2-4 times a year. Since this product has a 60 month full shelf life, the likelihood of expiry should not be an issue and we therefore confirm that we will replace stock in the event of expiry. However, the replacement will be on a pro-rata basis, depending on the short shelf life supplied. A 6-8 week delivery together with a 5/6th remaining shelf life may also be possible if a monthly forecast is given to us. This will enable us to plan our orders with production.”

Ms Debattista maintained that the restriction which read “the replacement will be on a pro-rata basis, depending on the short shelf life supplied” was unacceptable to GHPS.
The Chairman PCAB observed that it appeared that the appellant Company was undertaking to replace any stock that might expire, even though that was unlikely given the long shelf-life of the product.

Ms Vanessa Said Salomone, also representing the appellant Company, offered the following explanations:

- this product was manufactured two to four times a year, which was more or less the normal frequency with which manufacturers produced a medicinal product, and that the manufacturer kept a buffer stock in the warehouse;

- the 6 to 8 weeks delivery period, which was rather difficult when the product was manufactured two to four times a year, was still complied with;

- the moment the product was manufactured, the shelf-life of the product would start its countdown;

- the combination of the 6 to 8 weeks delivery period and the $5/6$th remaining shelf-life was also possible if the contractor would be furnished with a forecast of the orders so as to coordinate the orders with production;

- $5/6$th of 60 months shelf-life worked out at 50 months or over 4 years, which was quite long when considering that the contracting authority was also considering products with a minimum $5/6$th shelf-life of 2 years;

- ‘pro-rata’ replacements meant that if, for some reason, the contractor would supply part of a particular order with a less than the stipulated $5/6$th remaining shelf-life then, if that part of the consignment (or part thereof) were to expire, the contractor was undertaking to replace that expired part of the order which originally did not conform with the $5/6$th remaining shelf-life requirement. Such replacements were to be effected out of new manufactured batches - which normally took place 2 to 3 times a year and

- if the order was placed at the same time that the product was manufactured then the contracting authority would get the product with a 60 month shelf-life and that demonstrated the relationship between the date of placing the order and the shelf-life of the product.

Ms Debattista informed the PCAB that the annual consumption of this product was established at 114,800 capsules (Annex II) and that the GHPS usually put an order for this product every six months.

The Chairman PCAB observed that when one considered that the product had a 60 month shelf-life, the contractor was undertaking to effect replacements on a ‘pro-rata’ basis and that GHPS put orders at a six-monthly interval, then it would appear that there were adequate safeguards that ensured that the contracting authority’s interests were protected.

Ms Debattista explained that the statement that a 6 to 8 week delivery period was difficult to meet was not correct because, in the previous year, there were instances
when VJ Salomone delivered this same product after 4 weeks, after 13 days and even after 2 days after the confirmation of order when the delivery period was fixed at 4 to 14 weeks after order confirmation. She further explained that until such time that the tender in question was awarded, the GHPS had to issue a departmental tender to bridge the gap which tender was awarded to VJ Salomone with the same 6 to 8 weeks delivery period and, in that instance, VJ Salomone did not impose any restrictions on the contracting authority. Ms Debattista confirmed that GHPS did not have any problems with VJ Salomone with regard to deliveries and that was the reason why GHPS became wary of the restriction inserted by the tenderer in the sense that it would make replacements on a ‘pro-rata’ basis.

The Chairman PCAB remarked that rather than a restriction, he considered the proposal put forward by the contractor as a further safeguard in the interest of the contracting authority. He added that it could be the case that the contractor, in the absence of being furnished with a forecast of the dates of orders, felt that one should make provision to cover that element of uncertainty. The Chairman PCAB remarked that given that (a) GHPS would place an order, roughly, every six months, (b) that the product was manufactured between 2 (6-monthly) and 4 (3-monthly) times a year, (c) that the product offered, having a 60 month shelf-life, after manufacture, could be stored for a period of up to 10 months (1/6th of its shelf-life) prior to starting the countdown of its 5/6th remaining shelf-life as requested in the tender, the chances that GHPS would end up with an expired product were quite remote.

Ms Debattista agreed that such an eventuality was rather remote so much so that the last consignment of this product would expire in November 2014. She added that during the execution of the previous contract there were instances during 2008 that the appellant Company delayed deliveries by 113 days, 115 days and 135 days but, on the other hand, during 2009 the appellants honoured three of the orders within 2 days, 13 days and 4 weeks. Ms Debattista confirmed that the appellant Company’s submission was all in order and, in fact, it was identical to the current contract awarded to the same appellants, except for the ‘pro-rata’ replacement restriction. Ms Debattista remarked that, during 2007 an 2008, GHPS placed orders every six months but in 2009 GHPS decided to reduce the stocks it was holding in store and, as a result, placed four orders but for less quantities.

Dr Grech remarked that, occasionally, there were problems on the part of the manufacturer, such as machinery breakdown, which delayed production and, consequently, the delivery of the product. Dr Grech said that such circumstances were beyond the control of his client and, in any case, the contract imposed penalties for such delays.

Ms Said Salomone insisted that it was hard to adhere each and every time to the 6 to 8 weeks delivery period and the 5/6th remaining shelf-life restriction in the absence of a forecast of the dates of orders and that they had spelled out this sense of unease in the tender submission and to put the mind of the contracting authority at ease they were undertaking to make replacements on a ‘pro-rata’ basis. Ms Said Salomone concluded that their proposal ensured that the contracting authority would always end up with a product having a shelf-life in conformity with the tender conditions.

Ms Debattista remarked that although the annual consumption of this product was quite stable, the placement of orders was dependent on when the demand actually
occurred. She added that the GHPS did keep a buffer stock of medicines - even though it had been reduced over the previous 18-month period – and even the supplier and the manufacturer kept buffer stocks. Ms Debattista said that contrary to what the appellant Company was claiming, the 6 to 8 weeks delivery period was quite reasonable considering that certain contracting authorities overseas requested delivery periods of between 2 to 14 days.

Ms Debattista admitted that the contracting authority did not feel the need to ask for clarifications from the tenderer as to what it actually meant by ‘replacements on a pro-rata basis’ for the simple reason that the tender document did not provide for that type of restriction.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18.05.2010 and also through their verbal submissions presented during the public hearing held on 04.08.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s representatives’ points raised, particularly, (a) the fact that the appellants’ bid more than adequately satisfied the product’s self-life requirement considering that the product it was offering had a shelf-life of 60 months, (b) the fact that this product was manufactured two to four times a year, which was more or less the normal frequency with which manufacturers produced a medicinal product, and that the manufacturer kept a buffer stock in the warehouse, (c) the fact that the combination of the 6 to 8 weeks delivery period and the 5/6ths remaining shelf-life was also possible if the contractor would be furnished with a forecast of the orders so as to coordinate the orders with production, (d) the fact that ‘pro-rata’ replacements meant that if, for some reason, the contractor would supply part of a particular order with a less than the stipulated 5/6th remaining shelf-life then, if that part of the consignment (or part thereof) were to expire, the contractor was undertaking to replace that expired part of the order which originally did not conform with the 5/6th remaining shelf-life requirement and (e) the fact that replacements mentioned in ‘d’ were to be effected out of new manufactured batches - which normally took place 2 to 3 times a year, ;

- having also taken note of Ms Debattista’s (a) reference to the fact that , in this particular instance, the reason for disqualification was the inclusion on the part of the tenderer of certain parameters which did not feature in the published tender document, (b) claim that the restriction which read “the replacement will be on a pro-rata basis, depending on the short shelf life supplied” was unacceptable to GHPS, (c) statement wherein, inter alia, she confirmed that GHPS did not have any problems with VJ Salomone with regard to deliveries and that was the reason why GHPS became wary of the restriction inserted by the tenderer in the sense that it would make replacements on a ‘pro-rata’ basis and (d) agreement to the fact that such an eventuality – that of ending up with expired stock - was rather remote so much so that the last consignment of this product would expire in November 2014;
reached the following conclusions, namely:

1. The PCAB opines that, considering the fact that the appellant Company was undertaking to replace any stock that might expire, albeit this was unlikely given the long shelf-life of the product, should have been considered as a positive sign rather than instigating an adverse reaction by the adjudication board.

2. The PCAB also feels that $\frac{5}{6}$ of 60 months shelf-life worked out at 50 months or over 4 years, which was quite longer than the time period of time forming part of the tender document’s specifications’ requirements and the fact that GHPS put orders at a six-monthly interval, the contracting authority has more than adequate safeguards to ensure that it would be receiving supplies according to the terms set out in the tender document.

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

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

13 August 2010
Report on the Working of the GCC, PCAB, and PCRB During 2010

PUBLIC CONTRACTS APPEALS BOARD

Case No. 214


Service Tender for Project Management ( Outsourced) for Bulebel Industrial Estate Phase 2

This call for tenders was published in the Government Gazette on 24.11.2009. The closing date for this call for offers was 19.01.2010.

The estimated budget for this tender was € 60,000 (excluding VAT).

Ten (10) tenderers had originally submitted their offers

Design and Technical Resources Ltd filed an objection on the 09.04.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found to be administratively non-compliant since they had “provided Work Schedule but failed to submit times and duties of employees” in accordance with Art. 4.2 (2) of the ‘Instructions to Tenderers’

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 4 August 2010 to discuss this objection.

Present for the hearing were:

Design and Technical Resources Ltd
Dr Norval Desira Legal Representative
Mr Steve Gambin Representative
Mr Daniel Camilleri Representative

Bezzina & Cole Architects & Civil Engineers
Perit Alex Bezzina Representative
Perit Keith Cole Representative
Perit Sandro Soler Representative

Malta Industrial Parks (MIP)
Perit George Cilia Adviser to the Adjudicating Board
Mr Vincent Rizzo Observer

Adjudicating Board
Dr Katrina Borg Cardona Member
Mr Marco Abela Member
Ms Rita Caruana Secretary

Department of Contracts
Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr Norval Desira, legal representative of Design and Technical Resources Ltd, the appellant Company, informed the PCAB that four similar calls for tenders had been issued by Malta Industrial Parks and that, apart from this objection, his client had also lodged an identical objection in respect of another similar tender. At this point he, therefore, asked the PCAB to consider if it were possible for it to deal with the two cases during this hearing so as not to take up more time than necessary of the PCAB and of the contracting authority.

Architect Alex Bezzina, representing the recommended tenderer, objected to the proposal put forward by Dr Desira claiming that the other case concerned a different project.

Dr Desira explained that by letter dated 30th March 2010, the Department of Contracts informed his client that his tender was disqualified as administratively non-compliant because “tenderer provided Work Schedule but failed to submit times and duties of employees” in accordance with Art. 4.2 (2) of the ‘Instructions to Tenderers’ (page 4 of the evaluation report dated 22nd March 2010 also refers). Dr Desira remarked that, throughout the tender submission, his client maintained that the work contemplated in the tender was going to be performed by the key expert, even though reference was made to two non-key experts who would only be deployed in case the need arose so much so that they were allocated no specific tasks. Dr Desira contended that there was no point in presenting an outline of the times and duties allocated for employees for this contract since the works were going to be carried out entirely by one person, namely the key expert/project manager, who would dedicate all the time necessary to carry out the duties required for the execution of this contract.

Dr Katrina Borg Cardona, a member of the adjudicating board, explained that the remit of the board was to evaluate the tender according to the criteria set out in the tender document. She added that at Annex III ‘Organisation and Methodology’ – Timetable of Activities (page 43 of tender doc.) - the tenderer was requested to submit, apart from a draft work programme, a graphic work schedule (bar chart) which was to indicate the allocation of resources and the times to each employee engaged on this contract who, in the appellant Company’s case, was the project manager. Dr Borg Cardona remarked that section 4 – Content of Tenders – of page 4 of the tender document stipulated in bold print that:

“Failure to respect the requirements in clauses 4.1, 4.2, 4.3 and 8 will result in the rejection of the tender.”

She added that sub-clause (2) of clause 4.3 read as follows:

‘Organisation and methodology (To become Annex III of the contract) to be drawn up by the tenderer using the format in Annex III of the draft contract’

Dr Borg Cardona contended that, once the provisions of clause 4.2 were not satisfied, then the adjudicating board, acting in accordance with its remit, had to recommend the rejection of the tender on grounds of administrative non-compliance. Dr Borg Cardona explained that the importance of Annex III was evident as (i) it was going to
form part of the contract and (ii) it was required for a very specific purpose, namely to assist the adjudicating board to arrive at the ‘Most Economically Advantageous Tender’ (MEAT) by comparing how the tenderers were proposing to carry out the contract in terms of time and resource allocation.

Mr Marco Abela, a member of the adjudicating board, remarked that, whereas the tenderer had an option to either submit a draft work programme or a Gantt chart, the tenderer had no option but to submit the graphic work schedule (bar chart). He added that Malta Industrial Parks issued seven project management contracts and that with regard to two of these calls for tenders none of the tenderers were found administratively compliant. Mr Abela explained that, with regard to administrative compliance, the adjudicating board had no discretion but to deliberate simply and decisively on whether a document was submitted or not.

Dr Desira stated that his client had submitted a bid with regard to all the calls for tenders referred to by Mr Abela and he claimed that his client had made an identical submission in respect of each of these calls for tenders with the result that his client was awarded one of the contracts (CT 2655/2009) in respect of Hal Far Industrial Estate whereas, in this case, his client’s identical bid was rejected.

Both Dr Borg Cardona and Mr Abela stated that they could not tell if they formed part of the adjudicating board that awarded the tender to the appellant Company because they did not have the records of all these service contracts with them at the hearing. However, they said that these tenders were adjudicated by the same pool of officers even though the composition of the adjudicating board was not the same for each one of them. Mr Abela recalled that, at one stage, the tender document was slightly amended and, hence, they were not all identical. Yet, he continued, he could not remember the exact changes effected to the tender document. Dr Borg Cardona maintained that, as far as she was aware, the adjudicating boards she sat on applied the same set of evaluation criteria.

Architect Bezzina drew the attention of the PCAB that one could not assume that all the seven tenders were identical in terms of documentation and in terms of the members sitting on respective adjudicating board.

Dr Desira claimed that his client did provide the bar chart together with the times and duties but, instead of apportioning them among the employees engaged on the contract, his client allocated them all to the key expert, i.e. to the sole person who was going to do all the work. Dr Desira remarked that the adjudicating board should have asked for a clarification on this point and his client would have informed it that all the works were to be undertaken by the key expert and that the non-key experts were going to be on stand-by and that their services would only be utilised in case the need arose. Dr Desira considered that the works contemplated in this tender could be handled by one experienced architect, as was the key expert proposed by his client. Dr Desira could not understand why his client’s submission was dismissed by the adjudicating board and he expressed strong reservations as to whether the adjudicating board acted correctly in disqualifying his client’s bid on the basis of the reason communicated to him. Dr Desira insisted that, if anything, the adjudicating board should have reduced points on this particular aspect if it felt more comfortable with tender submissions that provided a team of employees to carry out these works.
Dr Borg Cardona insisted that the appellant Company was not excluded because it had proposed that the works were going to be carried out solely by the key expert but it was excluded because it only submitted the draft work programme which was totally different from the graphic work schedule (bar chart) showing the times and duties. Mr Abela confirmed that the document submitted by the appellant Company referred to the draft work programme and not to the graphic work schedule.

Dr Desira stated that his client’s submission clearly indicated that the project manager would ensure that the works (as defined in the tender and draft contract) would be completed in a timely and safe manner and within the specified budget, standards and conditions. He conceded that his client in fact submitted only the Gantt chart.

Mr Abela pointed out that the tenderer had to submit also a graphic work schedule which was totally different from the draft work programme. Mr Abela questioned whether the key expert was in fact going to do all the duties, including those normally assigned to, for example, a quantity surveyor or a draughtsman. Mr Abela even stated that the project manager needed not be an architect because the main task of the project manager was to coordinate the various works/duties required to execute this contract. Mr Abela remarked that the contracting authority was expecting the project manager to indicate the various tasks and the respective personnel required to carry them out and the time required. He added that the contracting authority had to monitor the execution of the contract against the graphic work schedule.

*The PCAB was informed that the key expert proposed by the appellant Company was not present at the hearing and so could not give evidence.*

Mr Edwin Muscat, a PCAB member, remarked that to the contracting authority it was not enough for the tenderer to indicate that the key expert was going to do all that it took to execute this contract but it also required to know how the contractor was going to do it, i.e. what resources were going to be applied and the time taken to carry out the tasks.

Dr Desira contended that it was almost useless for the project manager to give certain details regarding the execution of his supervisory role because the actual works that he would be required to supervise had to be actually carried out by another contractor selected by Malta Industrial Parks for the purpose. He added that this was a modest project compared to the regional road bridge project which was supervised by the key expert proposed by his client.

Mr Abela explained that this project included ducting works, paving, roads, lights and the like and that the value of the works was estimated at €1.2 million whereas the estimated value of the service contract was € 60,000. Mr Abela remarked that the project manager was not meant to simply act as a supervisor but his duties were quite onerous as indicated in section 2.1 – ‘Overall objectives’ – at page 47 which stated, among other things, that:

“The Project Manager is to initiate, plan, execute, monitor and control, and closes the processes. The Project Manager is to integrate all inputs by the various actors in project time management, project cost management, project quality control management, project human resources management ...”
Mr Abela argued that the graphic work schedule would indicate, among other things, the key experts required, the time required and the kind of interventions required by the staff to manage the project and all this was critical in ascertaining whether the project management would be capable to match the work programme with the allocation of resources required to implement it.

Dr Borg Cardona stressed that the reason for exclusion was the non-submission of the graphic work schedule which was a mandatory requirement and that for the adjudicating board it was not a question of reducing points as this was solely a question of whether the tenderer complied with the request or not. She further pointed out that the remit of the adjudicating board was to follow the evaluation criteria and, in this case the tender document, stipulated that the non-submission of the document in question would lead to disqualification. Dr Borg Cardona argued that had the appellant submitted the graphic work schedule even featuring one employee, i.e. the project manager, the appellant Company would have been found administratively compliant and then it would have been at the subsequent technical stage that the adjudicating board would have evaluated whether the project manager could perform efficiently and effectively all the tasks by himself or if those tasks could be performed better by a team of employees in which case points would have been deducted accordingly. Dr Borg Cardona added that, at administrative compliance stage, the adjudicating board did not and could not go into the merits as to whether the project manager could undertake all the tasks by himself.

Dr Desira stated that the graphic work schedule was not submitted because the work was going to be performed by one single employee, i.e. the project manager, and, as a result, all the duties were going to be assigned to him and he was going to take all the time necessary to perform the tasks requested in the tender and hence no duties were going to be assigned to other employees. Dr Desira claimed that his client was also undertaking that the project manager was going to execute the contract within the period of time requested in the tender and that there was no need to go into such details as the number of hours required, especially, when it hardly ever happened that a contract was completed within the time stipulated in the tender document.

Mr Muscat interjected to remark that a bidder could not take it upon himself to decide what to submit and what not to submit, especially, without giving any explanation and, all the more, when the information was a mandatory requirement.

Dr Desira agreed with that broad statement but he contended that, in his client’s case, the document that was not submitted was of little or of no relevance at all since the project manager was going to be the sole employee deployed on the contract. He claimed that if his client were to submit the graphic work schedule it would be a photocopy of the Gantt chart.

Mr Abela recollected that out of the ten tenders submitted, nine were excluded at administrative compliance stage and the reasons for exclusion varied from missing signatures to missing documentation as outlined in the evaluation report. He added that administrative compliance was about whether the documentation requested had
been submitted or not and that it did not require the adjudicating board to go into the merits of the validity of the documents submitted.

Dr Desira pointed out that the reason for exclusion communicated by the Contracts Department boiled down to his client having ‘failed to submit times and duties of employees’. He insisted that since there were no other employees involved, apart from the project manager, there was no point in submitting times and duties of non-existent employees which, therefore, meant that, effectively, no document of relevance was omitted by his client and hence the question of administrative non-compliance should not have occurred. He added that if one were to consider all the documents that his client submitted with regard to Annex III one would find clear and repeated references that the project manager was going to handle his contract by himself.

Dr Borg Cardona reiterated that once the adjudicating board noted that the appellant Company did not submit the graphic work schedule, his offer was not considered any further.

Mr Abela confirmed that the recommended tenderer was found fully compliant in all respects and, on checking with the evaluation grid, it was noted that the recommended tenderer was awarded an average of 14 out of 15 points under ‘Timetable of activities’ which included the submission of the graphic work schedule.

Dr Borg Cardona stressed that, in the absence of administrative compliance, the adjudicating board could not move on to the MEAT evaluation process and that was the crux of the matter.

Architect Bezzina, representing the recommended tenderer, made reference to various provisions of the tender document, such as page 3 (d. ii second bullet) which requested a list of the staff proposed for the execution of the contract with the CVs of key staff; Annex I sections 16.1, 16.4, 16.5 and Annex II sections 6.1.1, 6.1.2 and 6.3 which all made reference to staff and other experts. Professionally, he agreed with the view expressed by members of the adjudicating board that this contract could not be carried out by one person and that was why the tender requested the list of staff. Architect Bezzina explained that a Gantt chart showed the physical works that were actually going to be carried out by the ‘other’ contractor along with the time that it would take to implement them whereas the graphic work schedule represented the resource allocation along with the time involved on the part of the project manager.

Mr Abela remarked that, at administrative compliance stage, the board did not question why the list of staff indicated by the appellant Company was made up of one staff member so long as the list was somehow submitted and he added that the appellant Company’s submission was administratively compliant except for the non-submission of the graphic work schedule.

Dr Desira remarked that, apart from the project manager, his client did refer to two non-key experts, even though no specific duties were assigned to them. He even shared the distinction made between the Gantt chart and the graphic work schedule but he still insisted that the latter was not necessary in his client’s case and that Annex III had to be considered in a holistic manner. Dr Desira even mentioned that this was a lump sum contract.
Mr Abela exclaimed that, at administrative compliance stage, the adjudicating board should not be expected to go through all the tender documentation in an effort to ascertain whether the information that should have been submitted in a particular document but that the tenderer chose not to submit in the format requested and that could perhaps be found scattered here and there in the tender submission. Mr Abela insisted that tenderers were not asked to decide if they deemed the graphic work schedule necessary or not but they were simply required to submit it.

In reply to the appellant Company’s legal representative’s query, the Chairman PCAB remarked that one could not ask for a clarification on a document that was not submitted but a clarification could be requested on information already submitted but which perhaps was not communicated in clear or appropriate terms. He added that the bone of contention was not who was going to perform the contract but how the contract was going to be executed.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 09.04.2010 and also through their verbal submissions presented during the public hearing held on 04.08.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of Dr Desira’s (a) explanation regarding the fact that his client’s tender was disqualified as considered administratively non-compliant because the same entity “provided Work Schedule but failed to submit times and duties of employees” in accordance with Art. 4.2 (2) of the ‘Instructions to Tenderers’, (b) emphasis on the fact that his client maintained that the work contemplated in the tender was going to be performed by the key expert, even though reference was made to two non-key experts who would only be deployed in case the need arose so much so that they were allocated no specific tasks, (c) contention that his client saw no point in presenting an outline of the times and duties allocated for employees for this contract since the works were going to be carried out entirely by one person, namely the key expert/project manager, who would dedicate all the time necessary to carry out the duties required for the execution of this contract, (d) claim that his client did provide the bar chart together with the times and duties but, instead of apportioning them among the employees engaged on the contract, his client allocated them all to the key expert, i.e. to the sole person who was going to do all the work, (e) remark that, had the adjudicating board asked for a clarification on this point, his client would have informed the adjudicating board that all the works were to be undertaken by the key expert and that the non-key experts were going to be on stand-by and that their services would only be utilised in case the need arose, (f) opinion relating to the fact that, as far as he is concerned, the adjudicating board should have reduced points on this particular aspect if it felt more comfortable with tender submissions that provided a team of employees to carry out these works, (g) admission that his client in fact submitted only the Gantt chart, (h) contention that it was almost useless for the project manager to give certain details regarding the execution of his supervisory role because the actual works
that he would be required to supervise had to be actually carried out by another contractor selected by Malta Industrial Parks for the purpose, (i) claim on the fact that his client was also undertaking that the project manager was going to execute the contract within the period of time requested in the tender and that there was no need to go into such details as the number of hours required, especially, when it hardly ever happened that a contract was completed within the time stipulated in the tender document, (j) contention that, in his client’s case, the document that was not submitted was of little or of no relevance at all since the project manager was going to be the sole employee deployed on the contract and since there were no other employees involved, apart from the project manager, there was no point in submitting times and duties of non-existent employees which, therefore, meant that, effectively, no document of relevance was omitted by his client and hence the question of administrative non-compliance should not have occurred and (k) that if his client were to submit the graphic work schedule it would be a photocopy of the Gantt chart;

- having also taken note of the contracting authority’s representatives’ (a) reference to the fact that the remit of the adjudication board was to evaluate the tender according to the criteria set out in the tender document, (b) claim that the tenderer was requested to submit, apart from a draft work programme, a graphic work schedule (bar chart) which was to indicate the allocation of resources and the times to each employee engaged on this contract who, in the appellant Company’s case, was the project manager, (c) reference to the fact that, once the provisions of clause 4.2 were not satisfied, then the adjudicating board, acting in accordance with its remit, had to recommend the rejection of the tender on grounds of administrative non-compliance, (d) emphasis on the fact that Annex III was required for a very specific purpose, namely to assist the adjudicating board to arrive at the ‘Most Economically Advantageous Tender’ (MEAT) by comparing how the tenderers were proposing to carry out the contract in terms of time and resource allocation, (e) claim that whereas the tenderer had an option to either submit a draft work programme or a Gantt chart, the tenderer had no option but to submit the graphic work schedule (bar chart) which was totally different from the draft work programme, (f) statement that the appellant Company was not excluded because it had proposed that the works were going to be carried out solely by the key expert but it was excluded because it only submitted the draft work programme which was totally different from the graphic work schedule (bar chart) showing the times and duties, (g) emphasis on the fact that the contracting authority had to monitor the execution of the contract against the graphic work schedule, (h) emphasis on the fact that the project manager was not meant to simply act as a supervisor but his duties were quite onerous as indicated in section 2.1, (i) emphasis on the fact that the reason for exclusion was the non-submission of the graphic work schedule which was a mandatory requirement and that for the adjudicating board it was not a question of reducing points as this was solely a question of whether the tenderer complied with the request or not, (j) reference to the fact that the remit of the adjudicating board was to follow the evaluation criteria and, in this case the tender document, stipulated that the non-submission of the document in question would lead to disqualification, (k) claim that, at administrative compliance stage, the adjudicating board did not and could not go into the merits as to whether the project manager could undertake all the tasks by himself, (l) remark that administrative compliance was about whether the
documentation requested had been submitted or not and that it did not require the adjudicating board to go into the merits of the validity of the documents submitted and (m) remark that, at administrative compliance stage, the board did not question why the list of staff indicated by the appellant Company was made up of one staff member so long as the list was somehow submitted adding that the appellant Company’s submission was administratively compliant except for the non submission of the graphic work schedule;

reached the following conclusions, namely:

1. The PCAB opines that for the contracting authority it was not enough for the tenderer to indicate that the key expert was going to do all that it took to execute this contract but it also required to know how the contractor was going to do it, i.e. what resources were going to be applied and the time taken to carry out the tasks.

2. The PCAB agrees with the contracting authority’s view, namely that the submission of the graphic works schedule, apart from being mandatory, was indispensable to enable the contracting authority to take full cognizance of the key experts required, the time required and the kind of interventions required by the staff to manage the project and all this was critical in ascertaining whether the project management would be capable to match the work programme with the allocation of resources required to implement it.

3. The PCAB also opines that a bidder cannot take it upon himself to decide what to submit and what not to submit, especially, without giving any explanation and, all the more, when such information is a mandatory requirement. In this instance, tenderers were not asked to decide if they deemed the ‘graphic work schedule’ necessary or not but they were simply required to submit it.

4. The PCAB also agrees with the contracting authority when the latter claims that, at administrative compliance stage, the adjudicating board should not be expected to go through all the tender documentation in an effort to ascertain whether the information that should have been submitted in a particular document was either (a) actually submitted by the tenderer in some other format than the one requested or (b) found scattered here and there in the tender submission.

5. The PCAB stands by what it stated during the same hearing, namely, that one could not ask for a clarification on a document that was not submitted but a clarification could be requested on information already submitted but which perhaps was not communicated in a clear or appropriate manner.

As a consequence of (1) to (5) above this Board finds against the appellant Company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

13 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 215

Adv. No. 382/2009; CT/2375/2009; GPS 03.039.T09DC

Tender for the Supply of Piperacillin with Tazobactum 2.25g Injections

This call for tenders was published in the Government Gazette on 25.09.2009. The closing date for this call for offers was 5.11.2009.

The estimated budget for this tender was € 51,209.

Three (3) tenderer had originally submitted their offers

Rodel Ltd acting on behalf of Elpen Pharmaceutical Co Ltd filed an objection on the 30.04.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found non-compliant since “product is not locally registered and package inserts are in Greek” and that the intended award of tender to V J Salomone Pharma Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 11 August 2010 to discuss this objection.

Present for the hearing were:

Rodel Ltd (obo Elpen Pharmaceutical Co Ltd)
   Dr Norman Vella    Director

V J Salomone Pharma Ltd
   Ms Jackie Mangion   Representative

Government Health Procurement Services (GHPS)
   Ms Anna Debattista  Director

Adjudicating Board
   Ms Miriam Dowling   Chairperson
   Ms Miriam Azzopardi  Member

Department of Contracts
   Mr Francis Attard    Director General (Contracts)

After the Chairman’s brief introduction the appellant Company’s representative was invited to explain the motive/s of the objection.

Dr Norman Vella, representing Rodel Ltd, explained that on the 23\textsuperscript{rd} April 2010 the Contracts Department informed them that the offer they submitted was found non-compliant since the product in question was not locally registered and package inserts
were in Greek. Furthermore, the same appellant Company was informed that it was being recommended that the tender be awarded to V J Salomone Pharma Ltd.

At this point Dr Vella contended that the offer submitted by his firm was the cheapest and, in his view, it was also fully compliant.

Dr Vella submitted that, contrary to what it was stated by the Contracts Department, the product was in fact registered locally so much so that the application to register the product was lodged with the Medicines Authority (MA) prior to the closing date of the tender.

Ms Anne Debattista, Director GHPS, furnished the following chronology of events relevant to the product registration:

<table>
<thead>
<tr>
<th>Event Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>g) date tender was published</td>
<td>25 September 2009</td>
</tr>
<tr>
<td>h) date application for product registration was drawn up by appellant</td>
<td>8 October 2009</td>
</tr>
<tr>
<td>i) date application for product registration was received by the MA</td>
<td>13 October 2009</td>
</tr>
<tr>
<td>j) closing date of tender</td>
<td>5 November 2009</td>
</tr>
<tr>
<td>k) latest date for product registration in terms of Art. 126A and clause 9 of Annex IV of the tender document (6 weeks after the 5th November)</td>
<td>17 December 2009</td>
</tr>
<tr>
<td>l) date of MA product registration</td>
<td>2 February 2010</td>
</tr>
<tr>
<td>m) date appellants were notified of product registration</td>
<td>12 March 2010</td>
</tr>
</tbody>
</table>

Ms Debattista remarked that this clearly demonstrated that the product was not registered by the closing date of the tender and not even six weeks after that, i.e. by the 17th December 2009.

The Director GHPS stated that this product was registered under the provisions of clause 9 of Annex IV to the tender document, which stated that:

“In the event that the medicinal product being offered does not have a valid Marketing Authorisation, or a valid Article 126 A Authorisation, or a valid Parallel Importation Licence or a Central Authorisation by E.M.E.A. at the closing date for the submission of the offer, I, the Responsible/Qualified Person, accept to undertake
iii) to ascertain that the offered medicinal product is duly registered strictly within a 6-week period from the closing date of the respective tender ...”

Ms Debattista stressed that the registration of medicines was to be treated independently of and separately from the issue of specific calls for tenders.

Dr Vella explained that, along with Annex IV of the tender submission, his firm had also submitted the English version of the ‘Instructions Leaflet’ and he added that on the basis of that document, the Medicines Authority had issued the appropriate licence.

Ms Debattista referred to clause 7.1 of Annex VI which, inter alia, read as follows:

“The Tenderer must ensure that the following is submitted with each offer:

(iii) original/true copy of the package insert in one of the official languages of Malta.”

Ms Debattista remarked that (i) the instruction leaflet supplied with the sample was all in Greek; (ii) in its tender submission the appellant Company furnished a untitled document which she considered to be the ‘Summary of Product Characteristics’ (SPC); the package insert submitted to the Medicines Authority with the appellant Company’s application for product registration was an English translation of the Greek package insert – the GHPS obtained this from the Medicines Authority.

Ms Debattista pointed out that the adjudication board had to carry out its evaluation on the documents presented in the tender submission and that it did not have access to documents that the appellant Company had submitted to the Medicines Authority or elsewhere.

Dr Vella remarked that, at tendering stage, his firm could only submit the translation in English of the package insert since the Greek supplier was not at that time oriented towards the international export market. He added that the Medicines Authority had, nevertheless, approved the licence on the basis of the translation submitted. Dr Vella stated that on the 20th July 2010 they were awarded a tender by GHPS for the supply of this product.

The Chairman PCAB remarked that the adjudicating board had to evaluate the tender under review on the basis of the documentation submitted by the closing date of the tender (and also 6 weeks after that in the case of an Art. 126A licence). He added that it appeared to him that the appellant Company had been awarded a contract on the 20th July 2010 for the supply of this product because by that date the appellant Company had everything in order, including the product registration which was issued on the 2nd February 2010. He added that it was evident that the appellant Company submitted certain information to the Medicines Authority which it did not submit to the GHPS.

Ms Debattista informed those present that Elpen Pharmaceutical Co. Ltd was not new to the GHPS and that it was well versed in the procedures adopted in Malta. She confirmed that the bridging contract for the supply of this product was awarded to the
appellant Company in July 2010 by which time the appellants were fully compliant. She explained that, with regard to an Art. 126A licence, the Medicines Authority usually sought clarifications from the regulatory body from where the appellant Company had already obtained a licence for the product. Ms Debattista remarked that the information furnished by the same appellants to the GHPS was different from what it had submitted to the Medicines Authority. Ms Debattista concluded that the onus to submit a compliant tender rested with the tenderer and that, in this case, there was another participating bidder who furnished a fully compliant submission.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 5 May 2010 and also through their verbal submissions presented during the public hearing held on 11 August 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of Dr Vella’s (a) contention that the offer submitted by his firm was the cheapest and, in his view, it was also fully compliant, (b) statement that contrary to what it was stated by the Contracts Department, the product was in fact registered locally so much so that the application to register the product was lodged with the Medicines Authority (MA) prior to the closing date of the tender, (c) reference to the fact that, along with Annex IV of the tender submission, his firm had also submitted the English version of the ‘Instructions Leaflet’ adding that, on the basis of that document, the Medicines Authority had issued the appropriate licence, (d) remark that, at tendering stage, his firm could only submit the translation in English of the package insert since, at the time, the Greek supplier was not oriented towards the international export market and (e) reference to the fact that the Medicines Authority had approved the licence on the basis of the translation submitted;

- having also taken note of Ms Debattista’s reference to the (a) chronological sequence of events relevant to the product registration, (b) the fact that it was amply clear that the product supplied by appellant Company was not registered by the closing date of the tender and not even six weeks after that, i.e. by the 17th December 2009, (c) fact that the registration of medicines was to be treated independently of and separately from the issue of specific calls for tenders, (d) fact that the appellant Company’s instruction leaflet supplied with the sample was all in Greek, (e) the fact that the package insert submitted to the Medicines Authority - the GHPS obtained this from the Medicines Authority - with the appellant Company’s application for product registration was an English translation of the Greek package insert, (e) fact that the adjudication board had to carry out its evaluation on the documents presented in the tender submission and that during the evaluation stage it did not have access to documents that the appellant Company had submitted to the Medicines Authority or elsewhere and (f) fact that the bridging contract for the supply of this product was awarded to the appellant Company in July 2010 by which time the appellants were fully compliant;
reached the following conclusions, namely:

1. The PCAB opines that with regards to the registration of the medicinal product within 6 weeks from the closing date of the tender as stated in the tender document, one could be tempted to favour the point raised by the appellant Company wherein it was argued that the said Company had applied in time. However, one has to consider all holistically and this approach provides the PCAB with further food for thought in so far as, whilst one could extend the argument in a way as to state that as long as one applies within the six week time frame all is fine then this Board will have to accept the argument that even if one were to apply for such registration on the last day prior to the expiration of the six week time frame then all should be considered in accordance with the tender document’s requirements. This Board feels that, all things being equal, the spirit of the clause governing this condition, as reflected in the tender document, is definitely not contemplating such a scenario. The PCAB has no doubt that the time frame envisaged in the tender document aims at establishing that the said registration is actually in place by the expiry of the six week time frame. Nevertheless, in this particular instance, the Board notes that, whilst it may be considered to be quite bureaucratic, yet one has to note that whilst there is a six week time frame and the appellant Company was well within the said period of time considering that it had submitted the application for registration quite well prior to the closing date of the tender, yet, this Board agrees with the argument raised by Ms Debattista that, in similar circumstances, there is no direct link between the time the application to register a product in Malta is submitted and the participation in a tendering process as the two procedures have to be kept distinct from one another. If this Board were to accede to appellant Company’s request it could be technically accepting the idea that a tenderer will commence the procedure on the last day preceding the expiry of the six week time frame and this is unacceptable and against the scope of the condition imposed by the tender document itself.

2. The PCAB feels that the adjudicating board had to evaluate the tender under review on the basis of the documentation submitted by the closing date of the tender (and also 6 weeks after that in the case of an Art. 126A licence). Whilst acknowledging that the appellant Company had been awarded a contract on the 20th July 2010 for the supply of this product (because by that date the appellant Company had everything in order, including the product registration which was issued on the 2nd February 2010), yet one had to acknowledge that all this happened after the adjudication process had been brought to a close.

3. The PCAB recognises the fact that it was evident that the appellant Company submitted certain information to the Medicines Authority which it did not submit with its offer.

4. The PCAB feels that the appellant Company’s representative’s own admission during the hearing wherein he stated that, at tendering stage, his firm could only submit the translation in English of the package insert since, at the time, the Greek supplier was not oriented towards the international export market, is enough proof that the Company was not compliant with the tender specifications at the time it submitted its offer.
As a consequence of (1) to (4) above this Board finds against the appellant Company.

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito  
Chairman  Member  Member

_13 August 2010_
PUBLIC CONTRACTS APPEALS BOARD

Case No. 216


Tender for the Supply of Teicoplanin 200mg Vials

This call for tenders was published in the Government Gazette on 16 June 2009. The closing date for this call for offers was 25 August 2009.

Two (2) offers were received from the same tenderer.

Charles de Giorgio Ltd filed an objection on the 20 November 2009 following notification received from the Contracts Department wherein the tenderer was informed that (a) its offer was rejected on being found non-compliant since “Form D was not filled and signed” and (b) the tender had been cancelled since none of the tenders were fully compliant with tender specifications and conditions.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 11 August 2010 to discuss this objection.

Present for the hearing were:

Charles de Giorgio Ltd

Dr Antoine Cremona Legal Representative
Dr Julianne Portelli Demajo Legal Representative
Mr David Stellini Managing Director
Mr Ivan Laferla Representative

Government Health Procurement Services (GHPS)

Ms Anne Debattista Director

Adjudicating Board

Ms Miriam Dowling Chairperson
Ms Sharon Zerafa Member

Department of Contracts

Mr Francis Attard Director General (Contracts)

After the Chairman’s brief introduction the appellant was invited to explain the motive/s of the objection.

Dr Antoine Cremona, legal advisor of Charles de Giorgio Ltd, the appellant Company explained that his client had submitted two tenders, referred to as T1 and T2 in the
Evaluation Report, and that this appeal had to do with tender T1. He added that, according to the Contracts Department letter dated 11th November 2009, his client’s bid had been rejected because Form D was not filled in and signed. Dr Cremona pointed out that at the very beginning of Form D there was clearly indicated that this form had ‘TO BE INSERTED IN ENVELOPE 3’ and he agreed that it had to be included in envelope 3 since it contained details about the prices quoted. Dr Cremona stated that that was the reason why his client did not insert it in envelope 2 and that was the reason why the adjudicating board did not find it in envelope 2.

Dr Cremona remarked that his client felt that this was some kind of genuine mistake on the part of the Department of Contracts or of the adjudicating board and, as a result, he tried to sort it out through a clarification but the Department of Contracts insisted that in case of disagreement with its decision the bidder had to lodge an appeal.

Ms Anne Debattista, Director Government Health Procurement Services (GHPS), confirmed that there was an administrative oversight in the evaluation report because Form D had in fact to be submitted in envelope 3. She stated that this issue concerned administrative compliance. Ms Debattista remarked that this was one of the first tenders issued in the new format and that could have contributed to the oversight on the part of the adjudicating board.

Ms Debattista remarked that, according to the GHPS, apart from the admittedly erroneous reason relating to the non-submission of Form D, there was another reason for exclusion at technical evaluation stage concerning the shelf-life of the product.

Dr Cremona objected stating that his client had only been informed by the Contracts Department of the non-submission of Form D and that the issue concerning the shelf-life was only being raised then at the hearing. He insisted that this hearing should only deliberate on the reason for exclusion communicated to his client, i.e. the alleged non-submission of Form D, and that no other issues should be raised at that stage.

Ms Debattista remarked that it was the Department of Contracts which communicated the reason/s for exclusion to appellants. However, as far as the GHPS was concerned, the shelf-life issue had been made quite clear in the evaluation report. Ms Debattista even quoted from page 3 of the evaluation report:

“After discussing the individual conclusions of the Evaluators, the Evaluation Committee concluded that the following tenders – T1 and T2 - were technically non-compliant and should not be considered further.”

Mr Francis Attard, Director General Contracts, remarked that, unfortunately, it was often happening that following a call for tenders no tenders were being found compliant with the consequence that the tender would have to be cancelled and, if the tender concerned the provision of urgent/essential supplies or services, one had to resort to the negotiated procedure. Mr Attard added that the negotiated procedure would be undertaken if no appeal were lodged or, in the case of an appeal being made, following the decision of the PCAB, whereby all the bidders would be given a new tender document and they would be invited to submit a new offer within 25 days taking care not to repeat the original shortcomings.
Mr Attard informed the PCAB that the Contracts Department, at the request of the bidder, would only provide the part of the evaluation report that dealt with his offer but would not provide the bidder with the full evaluation report.

After verification it turned out that (i) the appellant Company was given the extract from the evaluation report that only dealt with the evaluation of its offer and (ii) in this case the appellant Company was the only tenderer – it submitted both offers, T1 and T2.

Ms Debattista reiterated that, as far as GHPS was concerned, i.e. irrespective of what the Contracts Department informed the appellant Company, there was the technical issue about the shelf-life of the product which was clearly indicated in the evaluation grids compiled by each of the three evaluators. The Director GHPS added that the technical non-compliance also emerged from page 3 of the evaluation report quoted earlier on.

Dr Cremona contended that during the hearing it had been established that the only reason for exclusion communicated to his client was the non-submission of Form D, which allegation turned out to be unfounded. As a consequence, he insisted that his client’s bid should be reinstated in the tendering process and considered further for the award of the contract.

Ms Debattista referred to Annex VI – Technical and Special Conditions – clause 11 ‘Shelf life’ which stated that:

“The shelf life of the product must be clearly indicated in the Tender document submitted. Goods received at Government Health Procurement Services must not have their shelf life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services. When five-sixths of the total shelf life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf life will be given preference. The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.

In case of medicinals containing blood products, the shelf-life must not be more than two-thirds expired.”

Ms Debattista added that, according to the package insert and to the product registration, the sample presented with the appellant Company’s offer had a shelf-life of 36 months unopened whereas in his tender submission the appellant Company had clearly indicated that it would be delivering at the GHPS the product with a 12 month remaining shelf-life, which worked out at 1/3 of the product’s full shelf-life whereas the tender specifications requested 5/6 remaining shelf-life. Ms Debattista remarked that the declaration of 12 months remaining shelf-life made by the appellant Company was manifestly in contravention of tender conditions – one third versus five-sixths remaining shelf-life - and that it left no room for any other interpretation and hence no need was felt for any clarifications in this respect.
Mr Stellini explained that on realising that the reason for exclusion was unfounded he had approached the Department of Contracts to revisit this case with a view to avoiding the filing of an appeal but his request was not met.

The Chairman PCAB observed that in this case (i) only one tenderer participated in the call for tenders and (ii) the issue of the shelf-life had not been communicated to the tenderer by the Contracts Department. He expressed the view that the contracting authority could have sought a clarification because, in any case, if, at a later stage, one were to resort to the negotiated procedure, as recommended in the conclusion of the evaluation report (page 6), then one would be dealing only with the appellant Company since it was the sole participating tenderer. The Chairman PCAB remarked that albeit the negotiated procedure should always be the last resort yet it was being observed that extensive use was being made of the negotiated procedure, which practice was rather disturbing.

Ms Debattista concluded that the GHPS had to evaluate tenders on the information submitted against the published tender specifications and conditions.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 20 November 2009 and also through their verbal submissions presented during the public hearing held on 11 August 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the points raised by the appellants’ representatives, especially, (a) the fact that their bid had been rejected because Form D was not filled in and signed and this despite that this form had ‘TO BE INSERTED IN ENVELOPE 3’ since it contained details about the prices quoted, (b) the fact that they did not include this Form in envelope 2 when it was meant to be submitted in envelope 3 in view of the fact that it contained details about prices quoted, (c) the fact that, albeit the appellant Company tried to sort the issue out through a clarification, yet the Department of Contracts insisted that in case of disagreement with its decision the bidder had to lodge an appeal and (d) their objection to the fact that they had only been informed by the Contracts Department of the non-submission of Form D and that the issue concerning the shelf-life was only raised at the hearing;

• having also taken note of Ms Debattista’s (a) admission that there was an administrative oversight in the evaluation report because Form D had in fact to be submitted in envelope 3, as stated by the appellants, (b) claim that there was another reason for the appellant Company’s exclusion at technical evaluation stage concerning the shelf-life of the product, (c) remark that it was the Department of Contracts which communicated the reason/s for exclusion to appellants and that, as far as the GHPS was concerned, the shelf-life issue had been made quite clear in the evaluation report, (d) claim that according to the package insert and to the product registration, the sample presented with the appellant Company’s offer had a shelf-life of 36 months unopened whereas in
its tender submission the appellant Company had clearly indicated that it would be delivering at the GHPS the product with a 12 month remaining shelf-life and (e) remark that the declaration of 12 months remaining shelf-life made by the appellant Company was manifestly in contravention of tender conditions – one third versus five-sixths remaining shelf-life - and that it left no room for any other interpretation and hence no need was felt for any clarifications in this respect;

• having taken note of Mr Attard’s statement wherein he said that, unfortunately, it was often happening that, following a call for tenders, no tenders were being found compliant with the consequence that the tender would have to be cancelled and, if the tender concerned the provision of urgent/essential supplies or services, one had to resort to the negotiated procedure.

reached the following conclusions, namely:

1. The PCAB agrees with the appellant Company’s decision not to submit ‘Form D’ in envelope 2 as this should have been inserted in envelope 3. The fact that the same contracting authority has admitted its error during the hearing supports the stand taken by this Board.

2. The PCAB feels that the fact that the issue concerning the shelf-life had not been communicated to the tenderer by the Contracts Department - thus depriving the said appellant Company from the right to adequately prepare itself for this hearing – should, normally, suffice for this Board to ignore the points raised on issues presented solely at this juncture. However, this Board feels that, regardless, the contracting authority could have, in the light of the way things transpired in this particular instance, sought a clarification from tenderer because it had two different claims made on the same issue by a tenderer in the same document.

It is becoming increasingly evident that adjudicating panels are regularly reneging on their right to seek legitimate clarifications, thus, instead of contributing towards the smooth and effective running of a tendering procedure they end up stalling progress unnecessarily and causing huge financial and human capital problems amongst participating tenderers. Furthermore, rapidly taken decisions are leading to cancellations and negotiated procedures when, through a simple clarification exercise, the adjudicating process would be able to proceed in a smooth manner without tenderers having to lodge an appeal to justify what could be simply stated in a clarification note. This Board expects all parties to serve as ‘gate keepers’ and not simply seek the easiest way out without challenging anything.

3. The PCAB feels strongly about the fact that it seems to be turning into a quick fix solution for the General Contracts Committee to opt for cancellation of tenders and for the process to follow a negotiated procedure. This Board strongly points out that a negotiated procedure should always be seen as a last resort and not as a normal procedure and this in view of the fact that it could be wrongly interpreted with serious doubts being cast on one of the ultimate objectives, namely that of ‘transparency’, which should sustain all public procurement initiatives.
As a consequence of (1) to (3) above this Board finds in favour of the appellant Company.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 217

DG/90/2009; DH/1196/2008
Tender for the Supply of Negative Pressure Therapy Unit

This call for tenders was published in the Government Gazette on 1 September 2009. The closing date for this call for offers was 14 October 2009. The estimated budget for this tender was €52,800 for two years.

Three (3) tenderer had originally submitted their offers

Charles de Giorgio Ltd filed an objection on the 27 April 2010 against the intended award of the tender in caption to Cherubino Ltd claiming that the recommended tender was not compliant

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 11 August 2010 to discuss this objection.

Present for the hearing were:

Charles de Giorgio Ltd

Mr David Stellini Managing Director
Mr John Mallia Representative
Mr Mark Bondin Representative

Cherubino Ltd

Dr Adrian Delia Legal Representative
Dr John Gauci Legal Representative
Mr David Cherubino Representative
Dr Francis Cherubino Representative
Mr Nigel Louis Representative of Smith and Nephew

Contracting Authority

Health Division
Ms Phyllis Mercieca Representative
Ms Rita Tirchet Representative

Mater Dei Hospital
Eng. Karl Farrugia Dir. Material Management & Logistics
Ms Stephanie Abela Representative

Adjudicating Board
Ms Corinne Ward Member
Ms Marylyn Desira Member
Mr Marnol Sultana Member

Department of Contracts

Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction, the appellant Company was invited to explain the motive/s of the objection.

Mr David Stellini, representing Charles de Giorgio Ltd, the appellants, explained that these units were costly items but very effective in the treatment of patients and, as a result, the Department of Health was at first resorting to the hire of these units and to the purchase of the dressings. He added that, since the demand for this rather new and innovative service was on the increase, the department decided to issue a call for tenders. Mr Stellini remarked that the tender was awarded on the basis of one global amount of €58,944 when in the tender document one was requested to quote for a list of 16 items and hence he had asked the Contracts Department for a breakdown of the price of the recommended offer, which information was not forthcoming.

Mr Stellini added that, on checking with his supplier in the United States, he was informed that there were certain specialised silver and heel dressings which the competing tenderer did not have in its range of products and therefore the recommended tender could not have been compliant. Mr Stellini claimed that his supplier was in the forefront in the development of this new technology.

Mr Stellini remarked that, in the light of the training given to hospital staff in the use of the items supplied by his firm, the tender specifications and conditions were issued to reflect the service and supplies that were already being provided to the department. He noted, however, that the specifications had been altered in subsequent departmental tenders such that the silver and heel dressings were being left out which, in his view, clearly demonstrated that the other suppliers were unable to provide them.

Mr Marnol Sultana, a member of the adjudicating board, confirmed that Mater Dei Hospital had been contracting this service by direct order from Charles de Giorgio Ltd and that, since this service was proving very beneficial to patients, the demand was on the increase such that it was considered opportune to procure this service through a public call for tenders. Mr Sultana explained that, until such time that this tender would be awarded, the department had to continue issuing departmental tenders and since this was a new and developing technology the tender specifications had to be modified from time to time to cater for developments.

Mr Sultana stated that three tenderers participated in this call for tenders and that the adjudicating board recommended the cheapest compliant tender.

Ms Corinne Ward, member of the adjudicating board, remarked that (i) one of the tenderers was not technically compliant and, as a result, was discarded, (ii) the appellant Company had already supplied this service to the department and (iii) the third bidder, Cherubino Ltd, was a new entity to them in the provision of this service and, as a consequence, the adjudicating board sought clarifications on the service and products offered and the answers they received were satisfactory from a practitioner’s point of view and in line with what was being requested in the tender.

Mr Stellini drew a distinction between what was requested in the tender specifications and what was acceptable from a practitioner’s point of view because it could be the case that although the end result would be similar, the offer submitted by the recommended tenderer was not up to specifications. Mr Stellini claimed that, according to his supplier, items 5,6,7 and 10 that featured in the ‘Schedule of Prices’
were not available in the range offered by the recommended tenderer and he, therefore, wished to know what his competitor offered with regard to these specific items.

Ms Ward remarked that Cherubino Ltd had satisfied the adjudicating board that it could provide the foam silver dressing referred to in items 5 to 7. Ms Ward pointed out that they were provided with samples of the dressings and they were even given a demonstration as to how the proposed machine/unit functioned. Ms Ward explained that Mr Stellini was in a way correct to state that the recommended tenderer’s range did not include the foam silver dressing as such but, on the other hand, Cherubino Ltd had foam dressing and silver dressing which, when put together, formed a foam silver dressing acceptable to the department.

Dr Adrian Delia, legal advisor of Cherubino Ltd, stated that, contrary to what the appellant Company claimed, his client was going to provide items 5 to 7 to the satisfaction of the adjudicating board. He added that these items were already being used in public hospitals (later on it was clarified that Cherubino Ltd started supplying this service to the department after the issue of this call for tenders). Dr Delia remarked that since the appellant Company was claiming that the recommended bid was not compliant then it was up to the appellants to prove their claim. Dr Delia referred to the four points raised by the appellant Company in its letter dated 28th April 2010 which were satisfactorily answered and explained by the adjudicating board as per emails sent to Mater Dei and the Department of Contracts on the 4th June 2010. Dr Delia stressed that the items offered by his client did not have to be identical to those offered by the appellants so long as they satisfied the requirements of the department, e.g. the appellants provided a foam silver dressing whereas his client provided two separate foam and silver items which when put together would provide one item in the form of a foam silver dressing.

When the Chairman PCAB requested the prices quoted by the two compliant tenderers, Ms Ward and Mr Sultana explained that the sum of the prices of the items contained in the schedule of prices was €541.24 in respect of Cherubino Ltd and €591.11 in respect of Charles de Giorgio Ltd. Dr Delia pointed out that this calculation was in line with the adjudication criteria of the tender document which stated:

“The adjudication of the offers will be based on the cheapest compliant offer. The total cost of the schedule of prices will be taken into consideration in calculating the cost of each offer.

At this stage an exercise was undertaken on the addition of the respective list of items offered where it was noted that, although item 11 had been removed from the list by way of a clarification communicated to all tenderers, the cost of item 11 as added up in calculating the cost of the items offered by Charles de Giorgio Ltd and therefore the respective total schedule price should read €553.41 and not €591.11 even though that was still higher than the €541.24 quoted by Cherubino Ltd. It was also noted that in the list submitted by Cherubino Ltd items 10, 14 and 16 were not priced because they were included under others items since they represented part/s of a kit. Moreover, in the case of Cherubino Ltd, besides the 16 items on the schedule at pages 1
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Dr Delia submitted that the appeal made no reference to prices and, hence, the question of price was beyond the purpose of the hearing although he acknowledged that the PCAB was free to seek information on any aspect of the tendering process.

Mr Stellini pointed out that the letter dated 21st April 2010 drawn up by the Contracts Department stated that the evaluation board recommended that the contract should be awarded to Cherubino Ltd for the amount of €58,944 and he complained that his request to the department to furnish him with a breakdown of this figure was not met and due to this lack of information he could not include the price issue in his appeal.

Ms Ward, under oath, stated that, although she was a practitioner, she did ask her colleagues on the adjudicating board to delve further into the pricing aspect of the offers because, for example, Cherubino Ltd offered many more items, e.g. the gauze dressing, than the appellant Company and, hence, it was at a disadvantage compared in that regard. Ms Ward remarked that, to do justice, the adjudicating board took into consideration two scenarios represented in Table 2.1 and Table 2.2 which reflected the therapy for one patient for 7 days (one using a small dressing and the other using a medium dressing) and from this like with like comparison the following costs emerged: €80.32 and €85.95 offered by Cherubino Ltd and €171.95 and €184.95 offered by Charles de Giorgio Ltd respectively. Ms Ward stressed that the main difference between the two offers resulted in the rental of the unit where Cherubino Ltd quoted €7.52 whereas Charles de Giorgio Ltd quoted €82.25.

To a query raised by Mr Stellini, Ms Ward confirmed that the prices of Cherubino Ltd for items 5, 6 and 7 were GBP 3.67, GBP10.18 and GBP 93.63 respectively and that those same items were available and already being used in government hospitals.

Mr Stellini complained that had his Company been given the details of the prices he probably would not have lodged an appeal but, unfortunately, his requests for information were not met and instead he was advised by the Contracts Department to make an objection. Mr Stellini claimed that the prices should have been in the public domain so that one could check them out even for any errors such as the one discovered during the hearing where item 11, which had been deleted from the list, was added up in the pricing of his offer (here one could observe that the appellant Company included item 11 when the item had been deleted). He stated that he had the duty to inform his principals overseas as to the outcome of this tendering process. Although Mr Stellini considered the difference of almost GBP 90 between the small and the large dressing very much on the high side, Dr Delia confirmed the difference while adding that even the difference in the size from 5cm to 40cm was a considerable one.

Mr Francis Attard, Director General (Contracts), explained that it was standard practice that a tenderer would not be given access to the bid of the other tenderers and that was so for various reasons, among them, confidentiality. The Chairman PCAB added that one had also to avoid any fishing expeditions on the part of competing bidders.
Mr Stellini contended that, in his view, the recommended tender was not compliant with the published tender specifications and he, therefore, called for the cancellation of the tender and its re-issue with amended specifications.

Dr Delia remarked that the appeal was not lodged for the PCAB to consider the cancellation of the tender and, in any case, nothing emerged during the hearing that justified the cancellation of this tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28 April 2010 and also through their verbal submissions presented during the public hearing held on 11 August 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives (a) claim that on checking with the Company’s supplier in the United States, he was informed that there were certain specialised silver and heel dressings which the competing tenderer did not have in its range of products, claiming that, as a result, the recommended tender could not have been compliant, (b) claim that the specifications had been altered in subsequent departmental tenders such that the silver and heel dressings were being left out which, in his view, clearly demonstrated that the other suppliers were unable to provide them, (c) claim that, according to his supplier, items 5, 6, 7 and 10 that featured in the ‘Schedule of Prices’ were not available in the range offered by the recommended tenderer and (d) claim wherein he stated that had his Company been given the details of the prices he probably would not have lodged an appeal but, unfortunately, his requests for information were not met and instead he was advised by the Contracts Department to make an objection;

- having also taken note of Mater Dei’s representatives’ (a) statement relating to the fact that three tenderers participated in this call for tenders and that the adjudicating board recommended the cheapest compliant tender, (b) explanation that Mr Stellini was in a way correct to state that the recommended tenderer’s range did not include the foam silver dressing as such but, on the other hand, Cherubino Ltd had foam dressing and silver dressing which, when put together, formed a foam silver dressing acceptable to the department, (c) remark that Cherubino Ltd had satisfied the adjudicating board that it could provide the foam silver dressing referred to in items 5 to 7 and that, apart from being provided with samples of the dressings, they were even given a demonstration as to how the proposed machine/unit functioned and (d) emphasis on the fact that the main difference between the two offers resulted in the rental of the unit where Cherubino Ltd quoted €7.52 whereas Charles de Giorgio Ltd quoted €82.25;

- having also taken cognizance of Dr Delia’s (a) claim that, contrary to what the appellant Company had stated, his client was going to provide items 5 to 7 to the satisfaction of the adjudicating board and that, as a matter of fact, these
items were already being used in public hospitals as Cherubino Ltd had already started supplying this service to the department after the issue of this call for tenders through a direct order, (b) emphasis on the fact that the items offered by his client did not have to be identical to those offered by the appellants so long as they satisfied the requirements of the department, e.g. the appellants provided a foam silver dressing whereas his client provided two separate foam and silver items which when put together would provide one item in the form of a foam silver dressing and (c) argument that the appeal made no reference to prices and, hence, the question of price was beyond the purpose of the hearing,

reached the following conclusions, namely:

1. The PCAB opines that the claims made by the appellant Company – in respect of prices, quality, availability of pertinent sizes, etc. - were not adequately corroborated by supporting documentation. It seems evident that all claims were made based upon baseless declarations made by the appellants’ suppliers.

2. The PCAB agrees with DG Contracts’ statement wherein it was claimed that it is common practice for a tenderer not to be given access to the bid of the other tenderer/s and this for various reasons, among them, confidentiality. Furthermore, this Board feels that, in this particular instance, the appellant Company wanted to embark on a ‘fishing expedition’ in the absence of proper documentation in hand which could have perhaps assisted the said Company to formally corroborate claims made.

3. The PCAB also notes that it seemed evident that the appellant Company remained with the impression that, given that it had originally introduced this highly successful product / service in Malta, it felt that it had some kind of monopolistic stand on the quality standard and type of product/service available. Needless to say that this kind of reasoning is not acceptable, especially, in this day and age, where technology enables leading and smaller manufacturers to not only copy their competitors but, very often, ameliorate upon standards and pricing structures attained up at any given time.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman       Member       Member

18 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 218

CT/2581/2009; TD/T/24/2009
Service Tender for the Supply of Hydraulic Platforms mounted on Chassis Cab (Enemalta)

This call for tenders was published in the 24 November 2009.

Eight (8) tenderers submitted their offers.

Burmarrad Commercials Ltd filed an undated ‘letter of complaint’ (received at the Contracts Department on 04.05.2010) against the decision by the Contracts Department to reject its offer for being administratively non-compliant because in the self-declaration concerning the ‘Commercial Warranty and Performance Guarantee’ it declared that the units carried a warranty of 4 years against rust and under-sealing when the tender document specified that a minimum guarantee of 6 years was mandatory.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 16 August 2010 to discuss this objection.

Present for the hearing were:

**Burmarrad Commercials Ltd**
- Dr Ronald Aquilina Legal Representative
- Mr Mario Gauci Representative

**SR Services Ltd**
- Mr David Muscat Representative

**Enemalta Corporation (Enemalta)**
- Mr Ivan Bonello Representative

**Adjudicating Board**
- Engineer Ramon Tabone Member
- Engineer Silvan Mugliett Member

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant Company was invited to explain the motive/s of the objection.

Dr Ronald Aquilina, representing Burmarrad Commercials Ltd, the appellants, remarked that his client disagreed with the conclusions reached by the Contracts Department, namely that his firm offered 4 instead of 6 years warranty against rust and under-sealing and submitted the following arguments:
- at Annex II ‘Technical Specifications’ section 2.12 at page 62 of the tender document his client had answered in the affirmative that a minimum of 6 years guarantee for rust proofing and under-seal would be provided;

- over and above the documentation included in the tender submission, his client submitted also a declaration titled ‘Commercial Warranty and Performance Guarantee’ which provided 2 years comprehensive cover against any defect caused by a manufacturing or assembly fault which included parts and labour costs, and, in addition, a 4 year warranty against rust and under-sealing for these units;

- these two documents had to be taken into consideration together and not each on its own such that the 4 years guarantee against rust and under-sealing was in addition to the 2 year comprehensive cover, i.e. the 4 years would start running after the expiry of the 2 year comprehensive cover, and therefore the rust and under-sealing cover would effectively add up to 6 years which matched the other declaration made at Annex II section 2.12;

- it was not correct to quote part of the documentation in isolation but one had to consider both declarations holistically such that one corroborated the other and stress was laid on the term ‘in addition’.

Dr Aquilina further explained that the truck and the platform formed one unit and the warranties covered the whole unit such that the units were comprehensively guaranteed for 2 years, including the rust proof and under-sealing, and the same units were then covered by a further 4 years only with regard to rust and under-sealing.

Mr Edwin Muscat, member of the PCAB, argued that the declaration, as presented, seemed to provide a warranty of 2 years against any manufacturing or assembly defect and another warranty of 4 years against rust and under-sealing.

Dr Aquilina insisted that one could not ignore the statement made at Annex II section 2.12 and added that the declaration did not indicate that the two warranties would start concurrently but that one was in addition to the other and, as a consequence, a 4 year warranty would take off on the expiry of the 2 year guarantee. He remarked that, in his opinion, the proper terms had been used in this statement.

Eng. Ramon Tabone, a member of the adjudicating board, explained that at Annex II Enemalta Corporation requested two guarantees, namely:

- under section 2.9 a minimum of two years full guarantee which in the automobile sector is known as parts and labour (electrical and mechanical) warranty; and

- under 2.12 a minimum of 6 years guarantee for rust proofing and under-seal

Eng. Tabone remarked that the adjudicating board interpreted the other declaration submitted by the tenderer, which declaration was not requested in the tender document but the bidder submitted it out of his own free will, to mean 2 years in respect of Annex II section 2.9 and 6 years in respect of section 2.12.

The Chairman PCAB remarked that, albeit he understood the line of thinking of the adjudicating board, yet he also felt that, faced with two rather conflicting statements made by same bidder, the adjudicating board should have sought a clarification to clear the air.

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Mr Bonello, representing Enemalta Corporation, remarked that the declaration made by the bidder was interpreted as a sort of statement to qualify what he indicated in Annex II.

Eng. Tabone stated that the indication given by the tenderer at Annex II would have sufficed but the adjudicating board could not ignore the declaration submitted by the tenderer. He added that the contacting authority considered the warranty against electrical and mechanical defects as separate from the rust proofing and under-seal guarantee so much so that it provided for them in separate sections at Annex II, i.e. sections 2.9 and 2.12 respectively, and that was the norm when one purchased a vehicle. Eng. Tabone contended that, in normal practice, the warranty for parts and labour did not cover rust proofing and under-seal.

Dr Aquilina claimed that, according to EU law in force, one had to provide a minimum guarantee of 2 years on a product.

The Chairman PCAB did not blame the adjudicating board for having interpreted the separate declaration submitted by the appellant Company the way it did because the said appellants should have used more appropriate terms to convey the message that the rust proofing and under-seal warranty covered a period of 6 years. The Chairman PCAB stated that, on the other hand, the adjudicating board could not ignore the fact that in Annex II the appellant Company had formally confirmed that the rust proofing and under-seal guarantee would cover a minimum period of 6 years and, considering that this was in conflict with the board’s interpretation of the separate declaration that this same warranty covered only a 4 year period, then the adjudicating board should have sought a clarification to establish without any doubt the period that this warranty actually covered. He stressed that such a ‘clarification’ would have amounted to ‘negotiation’ but it would have been interpreted as an explanation of information already submitted.

Eng. Tabone remarked that the responsibility to present a correct and unambiguous bid rested with the tenderer. He added that, normally, a tenderer would submit an additional declaration for the purpose of elaborating or substantiating information already provided in the tender document.

Mr Mario Gauci, also representing Burmarrad Commercials Ltd, explained that, in the past, it was the practice that on purchasing a vehicle which carried a rust proofing and under-seal guarantee for, say, 2 years, one would then apply a further rust proof coating thereby extending the guarantee up to, say, 10 years.

The PCAB expressed the view that had the appellant Company failed to fill in section 2.12 of Annex II and instead submitted the separate declaration as it was, then the adjudicating board would have been correct to reject the offer but once the appellant Company did fill in Annex II provided in the tender document in a way that satisfied the tender specifications and, at the same time, presented a separate declaration which in a way contradicted its indication at Annex II, then the adjudicating board should have sought a clarification from the bidder to eliminate its ambiguity.

At this point the hearing was brought to a close.
This Board,

- having noted that the appellants, in terms of their undated ‘letter of complaint’ (received at the Contracts Department on 4 May 2010) and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Aquilina’s submission;
- having also taken note of Enemalta Corporation’s reasons as to why they decided against the appellant Company’s offer;

reached the following conclusions, namely:

1. The PCAB expresses the view that had the appellant Company failed to fill in section 2.12 of Annex II and instead submitted the separate declaration as it was, then the adjudicating board would have been correct to reject the offer.

2. The PCAB feels that, albeit it understands the line of thinking of the adjudicating board, yet it also feels that, the adjudicating board could not ignore the fact that in Annex II the appellant Company had formally confirmed that the rust proofing and under-seal guarantee would cover a minimum period of 6 years and, considering that this was in conflict with the board’s interpretation of the separate declaration that this same warranty covered only a 4 year period, then the adjudicating board should have sought a clarification to establish without any doubt the period that this warranty actually covered.

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

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

20 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 219

CT/4014/2010; CT/WSC/T/12/2010
Tender for the Supply and Delivery of Submersible Pumps and Accessories

This call for tenders was published in the Government Gazette on 16.03.2010. The closing date for this call for offers was 22.04.2010.

Five (5) tenderers - submitted their offers

AFS Ltd filed an objection on the 7 May 2010 against decision by the Contracts Department to cancel the tender in caption because the tendering process had been compromised since one of the submitted offers was inadvertently left unopened.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 16 August 2010 to discuss this objection.

Present for the hearing were:

AFS Ltd
  Mr Joseph. P. Attard  Managing Director

Water Services Corporation (WSC)
  Mr Anthony Camilleri  Representative
  Ms Violet Borg  Representative

Department of Contracts
  Mr Mario Borg  Assistant Director

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant Company was invited to explain the motive/s of the objection.

Mr Joseph Attard, representing AFS Ltd, the appellant Company, expressed his disappointment with the decision taken by the Contracts Department to cancel the tender because it appeared to him that the unopened offer was not submitted after the closing date/time of the tender but that it was left unopened through a genuine oversight on the part of the department. As a consequence, Mr Attard felt aggrieved by the recommendation for this tender to be cancelled since his firm had submitted the cheapest offer and, as a result, if the tender were to be reissued, his firm would find itself at a disadvantage once the other bids had been opened and the prices made public.
Mr Mario Borg, Assistant Director at the Contracts Department, recalled that on that occasion, five tenders were found in the tender box, the details of which were published in the schedule of tenders. He added that, later in the day, Messrs JP Baldacchino Ltd had informed him that the tender it had submitted did not feature on the schedule of tenders. Mr Borg explained that, whenever a tender submission could not go through the aperture of the tender box - as was the case in question - it was the custom to attach a note (in a plastic cover) to the tender box indicating that a tender was being held in the strong room, which tender had to be opened on a given date. Mr Borg further explained that the officer receiving the tenders on that day, namely Ms Michelle Lunetti, was unaware of this practice and, therefore, she did not attach an appropriate note to the tender box. However, Mr Borg stated that Ms Lunetti had confirmed that J.P. Baldacchino Ltd had submitted the tender in time.

Mr Edwin Musct, a member of the PCAB, suggested that in such a case one should perhaps insert an envelope in the tender box indicating that an offer in respect of that particular call for tenders had been deposited in the strong room since it could not get through the aperture of the tender box.

The Chairman PCAB also suggested that Ms Lunetti ought to make a declaration or take an affidavit registering the fact that the tender submitted by JP Baldacchino Ltd had reached the Contracts Department in time and to forward that declaration to the Secretary of the PCAB. The Chairman PCAB remarked that it was not fair on those who submitted an offer to cancel the tendering process because of a genuine oversight on the part of the department.

Mr Mario Borg, assistant director (Contracts Department), and Mr Anthony Camilleri, a representative of the Water Services Corporation, under oath, both declared that Ms Michelle Lunetti had confirmed to them that the tender by JP Baldacchino Ltd had been delivered at the Contracts Department in time.

The Chairman PCAB remarked that, for justice to be served to the tenderers who participated in this process, the unopened tender submitted by Messrs JP Baldacchino should be opened and considered along with the rest so that, instead of being cancelled, the tendering process would continue its course.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 31 May 2010 and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of Mr Attard’s submission;

- having also taken note of Mr Borg’s explanation of how things developed and his confirmation of Ms Lunetti’s genuine mistake;

- having also taken cognizance of the fact that, under oath, both Mr Borg and Mr Camilleri, declared that Ms Michelle Lunetti had confirmed to them that the tender by JP Baldacchino Ltd had been delivered at the Contracts Department in time,
reached the following conclusions, namely:

1. The PCAB (a) suggests that, in similar circumstances in the future, Contracts Department officials should insert an envelope in the pertinent tender box indicating that an offer in respect of that particular call for tenders has been deposited in the strong room in view of the fact that it could not get through the aperture of the tender box and (b) requires that Ms Lunetti takes an affidavit registering the fact that the tender submitted by JP Baldacchino Ltd had reached the Contracts Department in time with a copy of this affidavit to be forwarded to the Secretary of the PCAB.

2. The PCAB argues that it is not fair on those who submit an offer for a tender process to be cancelled due to a genuine oversight on the part of the department.

3. The PCAB feels that, for justice to be served to the tenderers who participated in this process, the unopened tender submitted by Messrs JP Baldacchino should be opened and considered along with the rest so that, instead of being cancelled, the tendering process would continue its course.

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company.

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

Alfred R Triganza Edwin Muscat Carmel J Esposito
Chairman Member Member

20 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 220

Adv. CT/N/012/2010; CT/2145/2010
Negotiated Tender for the Construction of a Green Roof at Animal After Care Centre, Tá Qali

The closing date for this call for offers was 10 June 2010.

Two (2) tenderer submitted their offers.

Derek Garden Centre Lt filed an objection on the 16 July 2010 against the decision by the Contracts Department to reject its offer because “16.1 (f) (iii): (Volume 4 – Bill of Quantities): Breakdown of the overall price not submitted” and to cancel the tender “since none of the submitted offers were fully compliant with the tender’s specifications and conditions”.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 16 August 2010 to discuss this objection.

Present for the hearing were:

Derek Garden Centre Ltd

Dr Peter Fenech Legal Representative
Perit Frank Muscat Project Manager
Mr Melosaul Balzan Managing Director

Works Division (Design and Implementation Department)

Dr Franca Giordemaina Legal Representative

Adjudicating Board

Perit Ray Farrugia Chairman
Mr Joseph Vella Member

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant Company was invited to explain the motive/s of the objection.

Dr Peter Fenech, legal representative of Derek Garden Centre Ltd, the appellants, explained that this appeal concerned

(i) the disqualification of his client’s offer because the Company did not submit the breakdown of the overall price in the form provided in Volume 4 (Bill of Quantities) as per clause 16.1 (f) (iii)
and

(ii) the recommendation to cancel the tender

Dr Fenech submitted that:

- whilst there were several instances in the tender document that referred to the global contract price, yet, admittedly, there were other instances where the tender document requested the breakdown of the global price;

- no quantities were indicated in the bill of quantities under ‘A - Preliminaries’ (page 88 of the tender document), and, to a certain extent, one could understand why because when one considered the nature of the items involved, e.g. (1) ‘Compliance with conditions of contract’ or (6) ‘Allow for the protection of works and site as required and as deemed necessary’ one would immediately realise that the bidder could not quantify them and hence a lump sum was requested;

- with regard to part B of the bill of quantities (page 89 of the tender document), albeit quantities were specified against each of the nine items, yet, when his client carried out a survey, it emerged that, in actual fact, less quantities were required than those featured in the bill of quantities in the tender document. The resultant variations had been listed in his client’s letter of objection dated 26th July 2010 where, for example, under item H1 ‘graded gravel’ his client found out that only 10 cbm were actually required and not 140 cbm. Dr Fenech argued that, had his client taken into account the quantities indicated in the tender document, the said Company would have submitted an inflated global price. Yet, his client calculated the global sum on the outcome of the survey it conducted so as to quote a more realistic and a more competitive price.

Architect Frank Muscat, also representing Derek Garden Centre Ltd:

- explained that originally an (open) call for tenders was issued without the bill of quantities, which shortcoming was eventually rectified, and without the drawings, which were not forthcoming because, according to the Department of Contracts and the contracting authority, the drawings would only be given to the successful tenderer;

- also placed emphasis on the fact that, since none of the three bidders was found to be fully compliant - his firm having failed at administrative evaluation stage - the department resorted to the negotiated procedure,

- stated that in the negotiated procedure the document remained in place except for the introduction of (a) new conditions for lodging an appeal and (b) the environmental monitoring, which was a costly exercise;

Furthermore, Architect Muscat also argued that in this new procedure:

- bidders were given 15 days to submit their offers and his firm quoted a lump sum which catered for all the works requested in the tender;
the quantities given in the bill of quantities in the tender document were misleading and that was the reason why his firm did not quote the rates in respect of each item; and

had they been provided with the drawings in the first place he would have taken up with the department the issue of the variations between the quantities given in the tender document and the quantities that resulted following the survey carried out by his firm.

Dr Fenech defended the lump sum price quoted by his client as against the breakdown of the global sum or the rates in the light of the significant differences that emerged between the quantities given in the tender and those that resulted from their survey.

Dr Fenech argued that it was correct to quote a lump sum given the provisions of clause 17.1 (page 11 of the tender document) which read as follows:

“The tender price must cover the whole as described in the tender documents.

Dr Fenech was however quick to admit that the subsequent clause 17.2 provided that: The tenderer must provide a breakdown of the overall price in Euro (€).”

Dr Fenech asked whether the issue, i.e. to quote a lump sum instead of giving the breakdown of the global amount, amounted to a clarification and not to a rectification. He added that since the global sum was given it could not be altered and, as a result, he contended that since the department did not see the necessity to request his client for a breakdown of the global sum already submitted the Company could only present a breakdown that added up to that global amount. That, opined Dr Fenech, should have certainly represented a clarification and not a rectification. Dr Fenech concluded that the contracting authority should have asked for a clarification and not resort to outright disqualification. He pointed out that, according to the amended regulations, tenderers were going to be allowed to provide certain documents or information within 48 hours of the closing date/time of the tender subject to the payment of a fine of €50.

Dr Franca Giordemaina, legal representative of the contracting authority, explained that:

- a lump sum for each item was requested with regard to the preliminaries because when one considered the nature of these items one would realise that they could not be quantified;

- instead of a lump sum, rates were requested with regard to the nine items quantified in section B of the bill of quantities and that these rates were required (i) to draw up and to issue payments in respect of the works carried out by the contractor, (ii), if the case arose, to deduct payment in case the contractor failed to perform the works as requested and (iii) to quantify extra works performed by the contractor, since most contracts ended up with an element of extra works;
article 3 at page 57 provided that: “The contract is made up of the following documents, in order of precedence... (f) the bill of quantities (after arithmetical corrections)/breakdown”;

clause 1.1 ‘Quantity of Items’ in the section titled ‘Unit-Price Contracts’ heading of Volume 4 at page 85 of the tender document read as follows:

“The quantities set forth against the items in the bill of quantities are an estimate of the quantity of each kind of the work likely to be carried out under the contract and are given to provide a common basis for bids. There is no guarantee to the Contractor that he will be required to carry out the quantities of work indicated under any one particular item in the bill of quantities or that the quantities will not differ in magnitude from those stated”;

the quantities featured in the bill of quantities of the tender document were meant for the adjudicating board to compare bids on a like with like basis and not to allow each and every tenderer to quote prices relating to different quantities;

the position paper dated 10 August 2010 submitted by the contracting authority to the Contracts Department listed six instances in the tender document where the request for the breakdown of the global price was mandatory;

clause 1.3 at page 5 of the tender document stated that: “This is a unit-price (Bill of Quantities) contract” whereas the preamble on page 85 of the tender document provided that: tenderers “must price each item in the bill of quantities separately and follow the instructions regarding the transfer of various totals in the summary”; and

albeit the appellant Company did provide the breakdown of the global amount in the open tender procedure, yet, it failed to provide the same in the negotiated procedure.

Architect Ray Farrugia, Chairman of the adjudicating board, explained that:

in the course of the negotiated procedure the appellant Company had presented seven requests for clarifications and that they were all answered in time and, therefore, the same appellant Company could have even asked about the variations in the quantities;

while admitting that the request for the drawings was turned down, he also pointed out that the request for the drawings was made during the first call for tenders and not during the negotiated tender process, insisting that these were two separate processes; and

once the breakdown of the global amount was a mandatory requirement, the adjudicating board saw no need to seek a clarification in that regard.

Dr Fenech conceded that the tender document requested the breakdown of the global amount but he insisted that on page 21 clause 3 under the ‘Tenderer’s Declaration’ the
request was for the ‘Total Price’ and, he argued that, at the end of the day, it was the global price that was binding and that the global price could not be altered.

The Chairman PCAB remarked that the fill-in spaces in the schedules in tender documents are provided for a specific purpose and that it was not up to the tenderer to ignore filling up the spaces provided, e.g. the spaces at page 89 of the tender document were clearly provided to fill in the rates, all the more in the absence of satisfactory explanations.

Mr Edwin Muscat, a PCAB member, remarked that the intention of the contracting authority behind the provision of an estimate of the quantities involved was for all tenderers to quote for the same quantities and thus the adjudicating board would be in a position to compare bids like with like.

Dr Fenech argued that it was in the interest of his client to quote a competitive price and to do that the bidder had to base its calculations on the realistic quantities that emerged from the survey carried out by his client and not on the inflated quantities given in the tender document.

On his part, Architect Farrugia stated that payments to contractor were calculated by applying the contract rates to the amount of work carried out. He claimed that none of the tenderers had questioned the department’s request for rates in the tender document and that it was not unheard of to rectify mistakes detected in the tender documents by way of addenda communicated to all tenderers. Architect Farrugia emphasised that, in this case, the letter of acceptance would have been issued on the basis of the rates in the bill of quantities and not on a lump sum basis. The Chairman of the adjudicating board stressed that this was one of the fundamentals in the issue of works contracts so much so that such tender documents even allowed for a variation of up to 20% over and above the contract value, something which one would not be able to do if one were to stick to the lump sum.

Architect Muscat explained that, in this case, tenderers had to submit the tender documentation within 15 days, which included 5 days to submit clarifications together with the site visit. He conceded that during the open tender procedure his firm had quoted rates on the basis of the quantities provided in the tender document, which were the same quantities that featured in the negotiated procedure, and that it was following the results of their survey that they opted to quote a lump sum with a view to enhance their price competitiveness. Architect Muscat claimed that, notwithstanding the discrepancies that emerged from the survey carried by his firm, the lump sum quoted in the latter’s tender submission covered the quantities indicated in the tender document. He reiterated that, had the contracting authority made the drawings available, he would have checked the results of his survey against those drawings and if his findings were confirmed then he would have taken up the issue of quantity variations with the contacting authority.

The Chairman PCAB observed that the appellant Company’s tender submission, both with and without the root barrier, was based on the quantities provided in the tender document.
Dr Giordemaina insisted that the quantities given in the tender document were meant to provide a level playing among tenderers and that the contracting authority could not arrive at the applicable rates from the lump sum quoted by the appellant Company.

The Chairman PCAB observed that it would appear that the appellant Company had worked out the global amount according to quantities that emerged from the survey it carried out and then it applied that same global amount to the quantities given in the tender’s bill of quantities, even if the quantities differed.

Architect Muscat remarked that the other two tenderers were technically non compliant whereas the appellant Company submitted a compliant bid except for the breakdown of the global amount. He further declared that the global amount quoted in the appellants’ tender submission represented the amount that it would charge in order to execute the entire contract.

Mr Muscat, the PCAB member, remarked that, at the end of the day, the contracting authority had to measure and quantify the work carried by the contractor and to apply the contract rates in order to issue the relative payment(s) - something that the bidder only quoted a global sum without indicating the relative rates.

Dr Fenech reiterated his stance, namely that the issue should have been settled through a clarification on the part of the contracting authority, which clarification was permissible by regulations. He claimed that his client’s bid should not have been excluded.

Architect Farrugia explained that the adjudicating board did not consider that the point at issue warranted a clarification and he even remarked that it was the desire and the intention of the department to award tenders so as to get things done rather than to have tenders cancelled or to have tenders that got stalled in the process.

Dr Giordemaina referred to note 3 of clause 11 (f) (page 22) where it was stated that no “rectification shall be allowed. Only clarifications on the submitted information may be requested.”

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26 July 2010 and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant Company’s representatives submissions, particularly those relating to (a) instances where document required the breakdown of the global price and other instances where it did not, (b) the fact that no quantities were indicated in the bill of quantities, (c) the fact that, according to the appellants, when the said appellant Company carried out a survey, it emerged that, in actual fact, less quantities were required than those featured in the bill of
quantities in the tender document, (d) the fact that had the appellant Company taken into account the quantities indicated in the tender document, the said Companywould have submitted an inflated global price, (e) the fact that the call for tenders was issued without the drawings as these were only going to be given to the successful tenderer, (f) the fact that in the negotiated procedure only 15 days were given to tenderers to submit their offers (g) the fact that the appellant Company only quoted a lump sum which catered for all the works requested in the tender in line with the provisions of clause 17.1 (page 11 of the tender document), (h) the fact that quoting a lump sum instead of giving the breakdown of the global amount, should not only have given rise to a clarification instead of a rectification but also that the contracting authority should have asked for a clarification and not resort to outright disqualification, (i) the contention that it was in the interest of the appellants to quote a competitive price and to do that the bidder had to base its calculations on the realistic quantities that emerged from the survey carried out by the same appellant Company and not on the inflated quantities given in the tender document, (j) the admission made by Architect Muscat who conceded that, during the open tender procedure, his firm had quoted rates on the basis of the quantities provided in the tender document, which were the same quantities that featured in the negotiated procedure, and that it was following the results of their survey that they opted to quote a lump sum with a view to enhance their price competitiveness and (k) the fact that the appellants claimed that, notwithstanding the discrepancies that emerged from the survey carried by the same appellant Company, the lump sum quoted in its tender submission covered the quantities indicated in the tender document;

- having also taken note of the contracting authority’s legal and other representatives who, *inter alia*, (a) claimed that a lump sum for each item was requested with regard to the preliminaries because when one considered the nature of these items one would realise that they could not be quantified, (b) stated that rates were required to enable the contracting authority to issue payments in respect of the works carried out by the contractor and, if the case arose, to deduct payment in case the contractor failed to perform the works as requested, as well as, quantifying extra works performed by the contractor, (c) argued that clause 1.1 ‘Quantity of Items’ in the section titled ‘Unit-Price Contracts’ heading of Volume 4 at page 85 of the tender document clearly stated that “The quantities set forth against the items in the bill of quantities are an estimate of the quantity of each kind of the work likely to be carried out under the contract and are given to provide a common basis for bids”, (d) stated that the quantities featured in the bill of quantities of the tender document were meant for the adjudicating board to compare bids on a like with like basis and not to allow each and every tenderer to quote prices relating to different quantities, (e) stated that, albeit the appellant Company did provide the breakdown of the global amount in the open tender procedure, yet, it failed to provide the same in the negotiated procedure, (f) claimed that, in the course of the negotiated procedure, the appellant Company had presented seven requests for clarifications and that they were all answered in time and, therefore, the same appellant Company could have even asked about the variations in the quantities, (g) stated that once the breakdown of the global amount was a mandatory requirement, the adjudicating board saw no need to seek a clarification in that regard, (h) stated that payments to the contractor were calculated by applying the contract rates to the amount of work carried out and (i) stated that, in this case, the letter of acceptance would have been issued on the basis of the rates in the bill of quantities and not on a lump sum basis;
reached the following conclusions, namely:

1. The PCAB opines that the fill-in spaces in the schedules in tender documents are provided for a specific purpose and that it was not up to the tenderer to ignore filling up the spaces provided, e.g. the spaces at page 89 of the tender document were clearly provided to fill in the rates, all the more in the absence of satisfactory explanations.

2. The PCAB accepts the fact that the intention of the contracting authority behind the provision of an estimate of the quantities involved was for all tenderers to quote for the same quantities thus enabling the adjudicating board to be in a position to compare bids like with like.

3. The PCAB has no doubt whatsoever that, at the end of the day, the contracting authority had to measure and quantify the work carried out by the contractor and to apply the contract rates in order to issue the relative payment(s) - something that the contractor could not arrive at if the bidder only quoted a global sum without indicating the relative rates.

4. The PCAB cannot accept the appellant Company’s total disregard to the contracting authority’s quantities as mentioned in the tender document opting to quote a lump sum with a view to enhance its price competitiveness ignoring a basic principle in public procurement, namely that of placing all bidders on a level playing field.

As a consequence of (1) to (4) above this Board finds against the appellant Company.

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

Alfred R Triganza            Edwin Muscat            Carmel J Esposito
Chairman                    Member                      Member

18 August 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 221

Adv No CT/183/2009; CT/2135/2009; GPS 14083T08AS
Tender for the Supply of Intracoronary Stents Drug Eluting

This call for tenders was published in the Government Gazette on 8 May 2009. The closing date for this call for offers was 30 June 2009.

The estimated budget for this tender was €2,442,544.

Eight (8) tenderer had originally submitted their offers

Technoline Ltd filed an objection on the 14 May 2010 against the recommendation of the General Contracts Committee to cancel the tender in caption.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 18 August 2010 to discuss this objection.

Technoline Ltd

Dr Nicolai Vella Falzon Legal Representative
Mr Ivan Vassallo Representative
Mr Simon Cusens Representative
Ms Damaris Lofaro Representative

Medical Supplies Ltd

Dr John Refalo Legal Representative

Government Health Procurement Services (GHPS)

Ms Anne Debattista Director

Mater Dei Hospital

Prof. Albert Fenech Head Cardiology Department

Adjudicating Board

Ms Miriam Dowling Chairperson

Department of Contracts

Mr Anthony Cachia Director (Operations)
Mr Mario Borg Assistant Director

After the Chairman’s brief introduction the appellant Company was invited to explain the motive/s of the objection.
Dr Nicolai Vella Falzon, legal representative of Technoline Ltd, explained that the filing of this appeal took place in rather unusual circumstances in the sense that the recommendation to cancel the tender was made after this tendering process had been concluded, namely after the contract had been awarded. Dr Vella Falzon put forward the following main arguments to back his claim that the recommended cancellation was illegal:

(i) at the time the recommendation to cancel the tender was made the tendering process had been concluded and a contract had been effectively awarded. The chronology of events was as follows:

- the closing date of the tender was the 30th June 2009;
- the adjudication process took about seven and a half months, an inordinately long time;
- on the 23rd April 2010 his client was informed that he had been awarded 50% of this contract;
- the deadline for the receipt of objections against the intended award/s was the 3rd May 2010, and, since by that date no objection was lodged the tender award was automatically confirmed and the tendering process concluded; and
- on the 5th May 2010 his client received a letter from the Contracts Department informing him that the tender was going to be cancelled without any reason being given.

(ii) in terms of clause 23 of the tender document titled ‘Cancellation of the tender procedure’ the cancellation could occur on specific grounds as outlined in the five respective bullets and a reason had to be given for the cancellation, however, as already stated, the Department of Contracts gave no reason for cancellation in its letter dated 5th May 2010;

(iii) on the 10th May 2010 his client had requested the Contracts Department in writing to explain on what grounds the tender was being cancelled, which letter remained unanswered up to the 17th May 2010, i.e. the deadline for Technoline Ltd, the appellant Company, to lodge its objection against the cancellation, and, as a consequence, his client had to file his objection against a deposit of €24,425 without even having been informed of the reason for cancellation. At this point the PCAB was requested to take into account this aspect when considering whether the deposit made by Technoline Ltd ought to be forfeited or not since, in the circumstances, his client had no other option but to lodge an appeal by the 17th May 2010 even though the appellants had been kept in the dark as to the reason for cancellation;

(iv) via email dated 18th May 2010, namely one day after the closing date for the filing of appeals to contest the tender cancellation, the Contracts Department informed his client as follows:
“You may now wish to note that information was received that the prices of Drug Eluting Intracoronary Stents were decreasing. Consequently the Ministry of Finance, the Economy and Investment instructed the Department of Contracts to cancel the tender and publish a fresh call for tenders”.

Witnesses would testify that it was not true that there was any abnormal decrease in the price of the product in question;

(v) in this case there occurred what one legally referred to as an ‘unlawful interference’ whereby someone, most probably a participating tenderer, had sent a letter to the Ministry of Finance wherein this person alleged that he could supply the product in question at a cheaper price or that there had been a significant decrease in its price. The appellants’ legal advisor argued that if the person who made this allegation was a participating tenderer then he should have paid the deposit and filed an appeal against the intended award/s of the tender. It was rather odd that the Department of Contracts was not aware of any changes in the price of the product in question during the seven month period that the tender was being adjudicated and that the issue of price increase had been raised only two days after the tender was awarded to his client and following the publication of the prices. It was almost certain that the person making this allegation was not offering the same product offered by his client but a different and a clinically inferior one; and

(vi) the delay in the award of this tender and even worse, its cancellation, were putting the Cardiology Department of Mater Dei Hospital in a very difficult situation with regard to the treatment of patients with particular cardiac conditions.

Dr Vella Falzon stated that he did not have a copy of the letter that was sent to the Ministry of Finance. He expressed the view that a contract was entered into the moment a willing seller and a willing buyer reached an agreement on the product and its price, especially when, as in this case, the offer was made in writing and the acceptance was likewise made in writing and in the absence of any objections having filed within the time stipulated by regulations. Dr Vella Falzon argued that, in the prevailing circumstances, the contracting authority was obliged to sign the contract in the same way that his client had the obligation to sign the contract otherwise the Company stood to give up its deposit.

Dr Vella Falzon remarked that although he was contending that, at the time that the cancellation of the tender was recommended, technically speaking, there was no tender to cancel because the tendering process had been terminated and the process moved on to contract stage, he insisted that the PCAB still had jurisdiction to decide upon the administrative decision taken by the Department of Contracts, e.g. whether the decision was taken in time and whether it was appropriately motivated according to rules laid down in the tender document keeping in mind also that no reason had been communicated to his client for the cancellation prior to the closing time for filing appeals.
Dr John Refalo, legal representative of Medical Supplies Ltd which had been awarded 30% of the contract, requested the opportunity to air his views in this case as an interested party in terms of Reg. 83 (2) (c) of the Public Contracts Regulations which stated that:

“Within three working days of the expiry of the ten-day period allowed for the filing of a notice of objection, any other tenderer and any person having or having had an interest involved in the call for tenders may register an interest in the proceedings. The registration of interest shall only be valid if accompanied by a deposit amounting to the deposit paid under subregulation (1). The tenderer who had been indicated in the adjudication decision of the Director or the contracting authority as the one to whom the contract was to be awarded, shall be deemed to have registered an interest but does not need to pay a deposit.”

Dr Vella Falzon did not raise any objection to the proposed intervention by the legal representative of Medical Supplies Ltd.

Dr Refalo remarked that the tendering process had been exhausted and that the award of the tender became effective when no appeal was filed by the date stipulated for the lodging of appeals. Dr Refalo argued that one had to make a distinction between those formalities that needed to be taken ‘ad validatem’ and those formalities that had to be made to record what had taken place during the tendering process. He stated that the tendering process, as such, had been concluded and what was still required was to put what had been agreed upon in writing in the form of a contract. Dr Refalo claimed that, at that stage, the Contracting Authority was obliged to sign the contract.

Dr Vella Falzon interjected to state that had the case been the other way around, namely had Technoline Ltd been awarded the tender and then it did not turn up to sign the contract then it would have been liable to give up the deposit and to other financial sanctions. He added that level playing meant that both contracting parties had to respect their obligations and responsibilities.

Dr Refalo then raised the issue that the reason for cancellation was irrational and even illegal because, according to the information that reached his client, following the award of the tender, an unsuccessful tenderer had claimed that he could furnish these stents at a lower price. Dr Refalo explained that since the adjudication of this tender took about one year to reach its conclusion, in the meantime the Government Health Procurement Services had to resort to the issue of a number of departmental tenders, each with a value of €47,000, to meet the demand for these essential items.

The Chairman PCAB remarked that it did not matter much as to who passed on the information to the Ministry of Finance because, as far as the PCAB was concerned, anyone could pass on such information. He continued that the main concern of the PCAB was whether the Ministry of Finance, through the Contracts Department, was legally correct to take the decision to cancel the tender at that point in time. The Chairman PCAB added that one might argue that government had the responsibility to make the best use of public funds but, on the other hand, all parties had to act within the parameters of the law.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Dr Vella Falzon insisted that it was not correct for a participating tenderer to desist from taking the measures permissible by regulations, e.g. to lodge an appeal to contest the recommended award against the payment of a deposit, and instead resort to writing directly to the Ministry concerned for the purpose of obstructing the process. Dr Vella Falzon remarked that, as Prof. Albert Fenech would later on explain there was a range of stents which varied in quality, price and use. He claimed that the stents proposed by the entity which lodged the complaint with the Ministry of Finance might be cheaper but they were also third, second or even first generation products. He remarked that the state of affairs at the Cardiology Department was such that with the type and quality of stents that were being supplied through departmental tenders it could not undertake the range of operations that were required for the treatment of patients.

Mr Anthony Cachia, Director (Operations) Contracts Department, under oath, gave the following evidence:

(i) clause 23 of the tender document outlined the five circumstances under which a tender could be cancelled and that the Department considered that the case illustrated at bullet number 2 was applicable to the case in hand in view of the change in prices. Clause 23, among other things, provided that a tender might be cancelled if “the economic or technical parameters of the project have been fundamentally altered”;

(ii) he questioned whether it was legally correct for Prof. Albert Fenech to give evidence as a witness to the appellant Company given that he sat on the board that adjudicated this tender and that he had also signed the pertinent confidentiality form (Dr Vella Falzon interjected that the issue of confidentiality did not arise in this case since the details had already been published in ‘The Times’ newspaper);

(iii) he confirmed that the tendering process took some time to conclude;

(iv) the Contracts Department considered that a contract came into force upon its signing otherwise there was no contract but simply a recommendation for award;

(v) he opined that government could cancel the tender on the grounds outlined in clause 23 of the tender document between the date of issue of the award recommendation and the date of actual signing of the contract but he could not quote any specific legal provisions to that effect;

(vi) a tenderer could, in fact, refuse to sign the contract in which case the tenderer stood to lose one’s deposit and, on the other hand, if the contracting authority did not sign the contract then the recommended tenderer was free to take legal action;

(vii) he confirmed that no reason for cancellation had been given in the Department of Contracts letter dated 5th May 2010; and

(viii) he stated that the Department of Contracts did not investigate the allegation about the drop in the price of these products.
Mr Edwin Muscat, a PCAB member, remarked that it could be the case that the Ministry of Finance carried out its own investigations into the allegation.

Dr Vella Falzon claimed that, at that at the time of cancellation, it was no longer a recommendation for award because the General Contracts Committee had accepted that recommendation as clearly shown in the Department of Contracts’ letter dated 23\textsuperscript{rd} April 2010 which, inter alia, stated that:

“The General Contracts Committee has accepted the recommendation for award of the above captioned tender for 50% of the quantity (800) in your favour.”

Mr Cachia remarked that, in certain instances, a letter of intent was issued which, in itself, did not amount to a contract.

Dr Vella Falzon contended that the tendering process had been concluded whereas Mr Cachia insisted that a tendering process reaches its conclusion with the signing of the contract.

At that stage Dr Refalo asked if any other formalities were required on the part of the tenderer and on the part of the contracting authority between the date the tender was awarded and the date the contract was signed.

Ms Anne Debattista, Director Government Health Procurement Services, under oath, gave the following evidence:

(j) she confirmed that the tender specifications and conditions were fully met by the appellant Company;

(ii) she stated that, given the element of competition in the tendering procedure and that the current international economic situation was not a rosy one, the general trend was for the prices of a number of items to go down and, to this effect, she then referred to the publication ‘Drug Eluting Stents for the Treatment of Coronary Arterial Disease’ issued in April 2009 by the National Institute for Health and Clinical Excellence (NICE) of the UK which indicated that the prices for drug eluting stents and other items were driven by a number of factors including the market conditions at the time of contracting, contract period, renewal of contracting arrangements and that the most recent contracts showed a significant decrease in the price;

(iii) she also stated that the Government Health Procurement Services issued tenders for the supply of stents on an annual basis so as to benefit from the latest innovations and from the best prices since this area of medicine was in continuous evolution;

(iv) she drew the attention of those present that, when one compared the prices quoted in this tender with the prices of the awarded tenderers’ offer in the previous tender, one would note a 35% decrease in the price offered by Sidroc Services Godrico Ltd, 24% decrease on that offered by Medical Supplies Ltd
and 21% decrease on the price offered by Technoline Ltd (i.e. USD 1466.67 versus USD 1161.08)

(v) she also argued that the price submitted by Technoline Ltd for this particular product was USD 1161.09 per stent or €821.61 (the rate of exchange applicable was the Central Bank middle rate on the date the financial offers were opened);

(vi) she informed those present that Technoline Ltd was awarded a small departmental tender in November 2009 at the same price of USD1161.09 per stent;

(vii) she also claimed that, prior to the date of the hearing, the Government Health Procurement Services had issued a request for information (RFI) for the purchase of stents where Technoline Ltd quoted €965.45 per stent while the said department was purchasing stents at €589 per stent from Sidroc Services Godrico Ltd. She clarified that the stents offered by Technoline Ltd were different from those offered by Sidroc Services Godrico Ltd.

The Chairman PCAB made it clear that when comparing prices he wished comparisons to be made like with like since there was a range of stents which differed in type, quality and use.

Mr Ivan Vassallo, also representing Technoline Ltd, remarked that the product the Company was offering was a new product and, in such cases, prices for the first 6 to 12 months tended to be on the high side. He added that this was the reason there was no significant decrease in the price of the product he offered (‘Resolute’) which was required for particular types of treatment and that demonstrated that the tender should not be adjudicated solely on the basis of price but account had also to be taken of the type, quality and use.

Dr Refalo argued that Ms Debattista had explained that this particular tender was issued annually instead of every, say, 3 years, because the prices of stents tended to go down and it, therefore, followed that, once the tender process in question took almost a year to conclude, then it was only normal to experience a change in prices and, perhaps, even an improvement in the quality of the product itself. Given that, in the meantime, the Government Health Procurement Services awarded about 10 small tenders for the supply of these items, Dr Refalo said that the Government Health Procurement Services should have been aware of the price fluctuations.

Prof. Albert Fenech, Head of the Cardiology Department at Mater Dei Hospital, made it clear that he was giving evidence in his role of Director of the Cardiology Department at Mater Dei Hospital and that he had no intention of divulging any confidential information that he obtained as one of the members of the adjudicating board. Prof. Fenech, under oath, he stated that:

(i) the delay in the adjudication of a tender like the one under reference and its cancellation had very serious negative consequences on the treatment of patients;
(ii) the Cardiology Department had reckoned that it would require about 1,600 stents over a year and that these stents had to be of different types since one had to take into account the length, diameter and shape of the artery together with the particular condition of the patient. He explained that some stents could easily bend to adjust according to the shape of the artery and he even recalled a particular case that required 55 stents of different types;

(iii) the tender was issued in June 2009 and it was reckoned that it would have been awarded by January 2010 and thus his department would have secured a year’s supply of stents. Since these stents also contained medicinal matter in them they did not put a year’s supply in one order but they ordered according to turnover so that the items would not expire. The delay in the adjudication of the tender seemed to stem from a change in the tendering procedure;

(iv) given that his department had ran out of stents, the Government Health Procurement Services had to issue departmental tenders on a monthly basis, each worth €47,000, for the provision of between 62 and 66 stents. The situation that developed was such that it restricted the operational capacity of his department so much so that only emergency cases were being treated leaving other cases on the waiting list because 62 stents met requirements for only 15 days. Moreover, given that the monthly purchase of €47,000 worth of stents was very restrictive the recommendation was to go for the cheapest kind of stent so as to purchase as many stents as possible but, on the other hand, that practice restricted the availability of stents in terms of quality and type and, as a consequence, certain types of operations had to be postponed;

(v) this situation persisted up to April 2010 when the decision was taken to cancel this tender for the supply of such essential items - which were already short supplied for a number of months - without whoever was taking such decisions even informing his department or Government Health Procurement Services or the Director General (Health) or the Minister of Health let alone consulting on the repercussions that such a cancellation would have on patients. He complained that the Ministry of Health was kept in the dark about the cancellation of the tender regardless of the fact that the consequences of that action eventually had to be faced by the Ministry of Health or, better still, by his department;

(vi) apart from the fact that about 350 operations had to be cancelled due to the non-availability of stents, operational constraints which ensued also raised certain moral issues;

(vii) such tenders should not take more than 3 months to adjudicate and in case of cancellation the department concerned should be consulted about the consequences that might ensue. Alternatively, one might perhaps have decided to award this tender and to avail oneself of, say, 500 instead of 1,600 stents thus providing a 4-month supply which would have safeguarded the patients requiring this kind of treatment and during those 4 months a fresh tender could have been issued and awarded to tackle the price issue that arose;

(viii) the development of new and more clinically efficient stents and the fluctuations in their price had induced the department to issue annual tenders
instead of, say, 3 year contracts so as to benefit from the latest technology and the best prices;

(ix) the type of stent offered by the appellant Company was meant for patients with a particular condition and none were being purchased as current arrangements constrained them to procure only one type of stent; and

(ix) one had to appreciate that the least that a patient with cardiac problems wished for was the anxiety arising from denying him or her treatment for lack of medical items.

Ms Debattista explained that orders for supplies under this kind of contract were made against requisitions according to the needs of the department and as such it was similar to a period contract whereby one had to get the annual supplies from the awarded tenderer unless the said tenderer was in breach of contract conditions or else an emergency arose.

Dr Vella Falzon observed that it was emerging quite clear that it was the normal trend for the prices of such items to go down over time, except for innovative products, and he, therefore, asked if there were any abnormal or drastic circumstances during the time taken to adjudicate the tender that warranted the cancellation of the tender. Prof Fenech could not recall that, during the period in question, there were any abnormal or drastic circumstances that merited that kind of action.

The Chairman PCAB remarked that it was not acceptable that such a tendering process should take a year to adjudicate and enquired what action was being taken to rectify the situation so as to avoid the recurrence of a similar event.

Ms Debattista regarded the change in the tendering procedure as the main cause for the delay and that she had anticipated such problems so much so that she had even informed her superiors accordingly. She added that the whole format of the tender documentation was updated with the result that there was more paperwork to be dealt with. Ms Debattista was not against such periodical updating by the Contracts Department except that the change was quite drastic, abruptly introduced and without due consultation with her department. Ms Debattista informed the PCAB that the proposed cancellation was to apply to all four awarded tenderers.

Dr Refalo concluded that (a) the tenderers had abided by the tender conditions and specifications, (b) there were no objections to the awards and, as a result, it was not fair to penalise the awarded tenderers because of the delay on the part of the contracting authority in the adjudication of the tender or on the pretext that there was a sharp decrease in the price of the items as quoted by the closing date of the tender, namely June 2009.

Dr Vella Falzon pointed out that, according to the Contracts Department, the reason for cancellation was that “the economic or technical parameters of the project have been fundamentally altered”. Dr Vella Falzon stated that the question of fundamental changes to the technical parameters did not arise as his client’s offer was adjudicated technically compliant. He then argued that the evidence given by Prof. Fenech and Ms Debattista demonstrated in a clear way that the decrease in prices over time was a general trend in the case of such items and, as a consequence, it was a
foreseeable change but it was certainly not a fundamental economic change as required in clause 23 of the tender document which refers to valid changes which could give rise for cancellation of a tender. Dr Vella Falzon reiterated that, prior to the closing date for the filing of appeals, his client had not been given the reason for tender cancellation and, as a consequence, the PCAB should keep that in mind when deliberating on whether government should forfeit the deposit made by his client in order to file the appeal.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 19 May 2010 and also through their verbal submissions presented during the public hearing held on 18 August 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellants’ representatives (a) claim that the filing of this appeal took place in rather unusual circumstances in the sense that the recommendation to cancel the tender was made after this tendering process had been concluded, namely after the contract had been awarded, (b) claim that at the time the recommendation to cancel the tender was made the tendering process had been concluded and a contract had been effectively awarded, (c) argument which placed emphasis on the fact that, in terms of clause 23 of the tender document titled ‘Cancellation of the tender procedure’ the cancellation could occur on specific grounds as outlined in the five respective bullets and a reason had to be given for the cancellation, (d) reference to the fact that, via email dated 18th May 2010, namely one day after the closing date for the filing of appeals to contest the tender cancellation, the Contracts Department informed the said appellants that following receipt of information “that the prices of Drug Eluting Intracoronary Stents were decreasing ... the Ministry of Finance, the Economy and Investment instructed the Department of Contracts to cancel the tender and publish a fresh call for tenders”, (e) claim that in this case there occurred what one legally referred to as an ‘unlawful interference’, (f) claim that it was almost certain that the person making this allegation was not offering the same product offered by the appellant Company but a different and a clinically inferior one, (g) argument that a contract was entered into the moment a willing seller and a willing buyer reached an agreement on the product and its price, especially when, as in this case, the offer was made in writing and the acceptance was likewise made in writing and in the absence of any objections having filed within the time stipulated by regulations, (h) contention that, in the prevailing circumstances, the contracting authority was obliged to sign the contract in the same way that the appellant Company had the obligation to sign the contract otherwise the Company stood to give up its deposit, (i) state that there is a range of stents which varied in quality, price and use and that the stents proposed by the entity which lodged the complaint with the Ministry of Finance might be cheaper but they are also third, second or even first generation products, (j) claim that the tender should not be adjudicated solely on the basis of price but account had also to be taken of the type, quality and use and (k) argument whereby it was stated that it emerged quite clear that it was the normal
trend for the prices of such items to go down over time, except for innovative products and, therefore, appellants argued whether any abnormal or drastic circumstances during the time taken to adjudicate the tender existed that warranted the cancellation of the tender;

• having also taken note of the fact that the delay in the award of this tender and even worse, its cancellation, were putting the Cardiology Department of Mater Dei Hospital in a very difficult situation with regard to the treatment of patients with particular cardiac conditions;

• having also heard Medical Supplies Ltd’s (an interested party which had been awarded 30% of the contract) representatives’ views on subject matter which concurred with those expressed by appellants’ representatives, particularly with regard to issues concerning the fact that (a) the tendering process had been exhausted and that the award of the tender became effective when no appeal was filed by the date stipulated for the lodging of appeals, (b) at that stage, the Contracting Authority was obliged to sign the contract, (c) the reason for cancellation was irrational and even illegal, (d) given that, in the meantime, the Government Health Procurement Services awarded about 10 small tenders for the supply of these items the Government Health Procurement Services should have been aware of the price fluctuations and (e) it was not fair to penalise the awarded tenderers because of the delay on the part of the contracting authority in the adjudication of the tender or on the pretext that there was a sharp decrease in the price of the items as quoted by the closing date of the tender, namely June 2009;

• having taken note of the fact that, in the meantime, (a) the Government Health Procurement Services had to resort to the issue of a number of departmental tenders, each with a value of €47,000, to meet the demand for these essential items and (b) the state of affairs at the Cardiology Department was such that with the type and quality of stents that were being supplied through departmental tenders it could not undertake the range of operations that were required for the treatment of patients;

• having taken into consideration Mr Cachia’s intervention, especially, the fact that (a) the Contracts Department considered that a contract came into force upon its signing otherwise there was no contract but simply a recommendation for award, (b) government could cancel the tender on the grounds outlined in clause 23 of the tender document between the date of issue of the award recommendation and the date of actual signing of the contract, (c) a tenderer could, in fact, refuse to sign the contract in which case the tenderer stood to lose one’s deposit and, on the other hand, if the contracting authority did not sign the contract then the recommended tenderer was free to take legal action, (d) the Department of Contracts did not investigate the allegation about the drop in the price of these products and (e) in certain instances, a letter of intent was issued which, in itself, did not amount to a contract;

• having taken cognizance of Ms Debattista’s (a) confirmation that the tender specifications and conditions were fully met by the appellant Company, (b) remark that the general trend was for the prices of a number of items – drug
eluting stents - to go down, (c) statement that the Government Health Procurement Services issued tenders for the supply of stents on an annual basis so as to benefit from the latest innovations and from the best prices since this area of medicine was in continuous evolution, (d) explanation regarding prices, particularly the fact that, prior to the date of the hearing, the Government Health Procurement Services had issued a request for information (RFI) for the purchase of stents where Technoline Ltd quoted €965.45 per stent while the said department was purchasing stents at €589 per stent from Sidroc Services Godrico Ltd albeit it was later established that the stents offered by Technoline Ltd were different from those offered by Sidroc Services Godrico Ltd as they were needed for more complex surgical interventions, (e) remark that she regarded the change in the tendering procedure as the main cause for the delay and that she had anticipated such problems so much so that she had even informed her superiors accordingly and (f) statement that the proposed cancellation was to apply to all four awarded tenderers;

- having paid particular attention to Prof Fenech’s intervention,

reached the following conclusions, namely:

1. The appellant Company argued that on the 5th May 2010 the tender procedure had been finalised and completed and, therefore, the Director of Contracts could no longer cancel the tender. The same appellant Company also argued that all the legal conditions for a contract to be valid and binding (capacity, subject-matter, consideration and consent of the parties) existed as of the 23rd April 2010 and that, as a result, there was no tender to cancel. The PCAB opines that this is not entirely correct. As a matter of fact, Article 21.2 of the tender document clearly specifies that:

   “Within 15 days of receipt of the contract already signed by the Contracting Authority, the selected tenderer must sign and date the contract and return it, with the performance guarantee, to the Contracting Authority. On signing the contract, the successful tenderer will become the Contractor and the contract will enter into force.”

It is therefore clear that until the (written) contract is signed by both parties such contract would have not entered into force and, as a result, until then, the Director of Contracts may cancel the tender, provided of course that the grounds for cancellation are justified.

The crux of the matter remains whether the Public Contracts Appeals Board feels that (a) the price of stents had really dropped and (b) such drop could be considered as a ‘fundamental alteration of the economic parameters of the project’.

2. The PCAB opines that, according to what transpired during the hearing, it seems that it is a general trend for prices of a number of related items to go down, so much so that the Government Health Procurement Services issued tenders for the supply of stents on an annual basis so as to benefit from the latest innovations and from the best prices since this area of medicine was in
continuous evolution. It seems that, in this particular instance, pricing comparisons were not entirely made like for like especially when one considers that there was a range of stents which differed in type, quality and use.

This Board found no sufficient evidence, both written and verbal, as it transpired during the hearing, which demonstrates that the Minister was, in any way, advised regarding the difference between types of stents and their relative usage. In this context, the decision to cancel this tender remained purely based on financial considerations as, technically, it seems that the Government Health Procurement Services and the General Contracts Committee decided to move on with the Minister’s decision without drawing the Minister’s attention – as confirmed by the Department of Contracts’ representative’s own admission during the hearing wherein, inter alia, he stated that the Department of Contracts did not investigate the allegation about the drop in the price of these products - (a) as to the non-homogeneity of the products under review, (b) to the actual critical scope of their respective usage and (c) the potential adverse repercussions on specific patients as a result of the cancellation of the said tender.

3. The PCAB feels that it does not matter much as to who passed on the information to the Ministry of Finance because, as far as this Board is concerned, anyone could pass on such information. However, the Board also feels that its main concern remains whether it was justified for the authorities to take the decision to cancel the tender at that point in time whilst, naturally, keeping in mind that government has the responsibility to make the best use of public funds.

At this juncture, the main issue to be addressed by the PCAB is whether the appellant Company has been discriminated against and whether the process in this case has been sufficiently transparent in terms of Article 4 of the Public Contracts Regulations.

The Regulations set out a specific procedure for an unsuccessful applicant to appeal decisions taken during the various stages of the tender award process. Practically, all decisions taken are subject to the review of the PCAB to ensure that all tenderers are treated equally. In this particular case, it appears, that one of the unsuccessful tenderers chose not to appeal the award since it felt that an objection would not be successful (because the successful tenderer was technically and economically compliant) but, instead, decided to email the Minister alleging that the tender was going to be awarded at a price significantly higher than the current market prices. Naturally, bearing in mind the national interest, the Minister ordered the cancellation of this tender.

4. The PCAB agrees that the delay in the award of this tender and, even worse, its cancellation, were putting the Cardiology Department of Mater Dei Hospital in a very difficult situation with regard to the treatment of patients with particular cardiac conditions. Furthermore, the PCAB acknowledges that the situation that developed was such that it restricted the operational capacity of the said Cardiology Department so much so that only emergency cases were being treated leaving other cases on the waiting list. In this context, the
PCAB acknowledges that the type of stent offered by the appellant Company was meant for patients with a particular condition and that, at the moment, none were being purchased by the Government Health Procurement Services as current arrangements constrained the latter to procure only one type of stent.

5. Also, the PCAB agrees with the fact that, as it was revealed during the hearing, given that the monthly purchase of €47,000 worth of stents was very restrictive, the Department’s strategy to go for the cheapest kind of stent so as to purchase as many stents as possible restricted the availability of stents in terms of quality and type and, as a consequence, certain types of operations had to be postponed.

6. It is important that, in future cases, a proper and transparent investigation is carried out by the Director of Contracts through the Government Health Procurement Services (preferably including other directly interested departments as should have been this time round with the Cardiology Department - Mater Dei Hospital) to establish the actual prices of the stents, and the General Contracts Committee should, in such circumstances, formally re-convene to give a detailed explanation prior to any decisions are made such as the one for a tender to be cancelled.

7. The PCAB argues that, under no circumstance, it is acceptable that such a tendering process should take a year to adjudicate.

As a consequence of (1) to (7) above this Board finds

a. against the appellant Company in so far as the argument raised which contended that, at the time that the cancellation of the tender was recommended, technically speaking, there was no tender to cancel because the tendering process had been terminated and the process had moved on to contract stage.

b. in favour of the appellant Company with regards to the argument raised in connection with the fact that, comparing the various types of the said stents, the drop in price was not all that significant to all the types of stents albeit, undoubtedly, so with respect to the general type of stents.

Furthermore, considering the circumstances, the PCAB recommends that being fully cognizant of the urgency of the stock in question, one could take into perspective the recommendation made during the hearing by the Head of the Cardiology Department of Mater Dei Hospital, namely, where it was suggested that one could avail oneself of, say, 500 instead of 1,600 stents (preferably bought at a reduced spot price as supplied by tenderers) thus providing a 4-month supply which would, at least, safeguard the patients requiring this special kind of treatment.

Also, this Board recommends that, during the said 4 months, a fresh tender could be issued and awarded (a) according to existing pricing terms and conditions, as well as (b) taking into consideration any new salient developments in the industry. In this manner all parties concerned would ensure that all is being considered in the national interest.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

16 September 2010

Addendum

Albeit Mr Anthony Pavia, one of the PCAB’s members had already verbally agreed with the other members on the way the PCAB had to proceed with its decision relevant to this particular case, yet, unfortunately, Mr Pavia passed away on the 8th September 2010 whilst this decision was still being drafted.
PUBLIC CONTRACTS APPEALS BOARD

Case No. 222

Adv No CT/A/007/2010; CT/3015/2010


This call for tenders was published in the Government Gazette on 5 February 2010. The closing date for this call for offers was 18 March 2010.

The estimated budget for this tender was € 1,866,296 (excl. VAT).

Three (3) tenderer had originally submitted their offers.

Deemedia.tv Ltd & Somos Broadcast Media Zrt – Joint Venture filed an objection on the 15 June 2010 against decision taken by the Contracts Department that its tender was not compliant since the ‘documentation was deemed to be incomplete’ and the ‘technical capacity was not substantiated’.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Wednesday, 18 August 2010 to discuss this objection.

Deemedia.tv Ltd & Somos Broadcast Media Zrt – Joint Venture (The Joint Venture)

Dr Peter Fenech Legal Representative
Mr Nick de Giorgio Representative of Deemedia.tv Ltd
Mr Niklos Kenderessy Representative of Somos Broadcast Media Zrt
Ms Agnes Lukacs Interpreter

DAB Electronica Co. Ltd (DAB Ltd)

Mr Joseph Vella Managing Director
Mr Alan Gatt Technical Support Manager
Dr Steve Decesare Legal Representative

Malta College of Art, Science and Technology (MCAST)

Dr Peter Borg Costanzi Legal Representative

Adjudicating Board

Architect Deborah Borg Chairperson
Mr Paul Camilleri Member
Mr Andrew Psaila Member
Mr Stephen Vella Member
Ms Crisania Gatt Secretary

Department of Contracts

Mr Anthony Cachia Director (Operations)
Mr Mario Borg Assistant Director
After the Chairman’s brief introduction the appellant Company was invited to explain the motive/s of the objection.

*It was agreed that, basically, the proceedings would be held in the Maltese language. Yet, it was also agreed that one was free to express certain technicalities in English for the benefit of Mr Niklos Kenderessy, a Hungarian national but who had a working knowledge of the English language.*

Dr Peter Fenech, legal representative of the Joint Venture, complained from the start that the specifications of the tender in question were drawn up in such a way that they referred to the products of a particular brand/importer such that it restricted competition and, as a consequence, these did not guarantee MCAST the best value for money. Dr Fenech informed the PCAB that he would be tackling the case point by point as indicated in the letter of rejection and in his reasoned letter of objection dated 18th June 2010.

**Blue Ray Disc and HDD Recorder**

Dr Fenech stated that according to Contracts Department’s letter of refusal dated the 9th June 2010 the technical literature with regard to the Blue Ray Disc and HDD Recorder had not been submitted. Dr Fenech rejected this allegation and insisted that that his client had, in fact, submitted the relevant mandatory documentation in its original tender submission and that these items were even included in the list of contents.

The Chairman PCAB requested the adjudication board to go through the appellants’ original tender submission to verify whether this technical documentation had been submitted or not.

Architect Deborah Borg, Chairperson of the adjudicating board, under oath, remarked that she was not a technical person but during the adjudication process she was assisted by two technical members, namely Mr Stephen Vella and Mr Paul Camilleri.

Mr Vella and Mr Camilleri, technical members of the adjudicating board went through the original documentation and under oath they confirmed that in fact the documentation with regard to the Blue Ray Disc and HDD Recorder was submitted as requested.

**Lighting Grid**

Dr Fenech explained that, with regard to the lighting grid, his client had requested information as per Question Nos. 1 to 3 in Clarification Letter No. 6 dated 16th March 2010 as to the condition of the ceiling and its maximum allowable load per square metre. Dr Fenech added that his client was informed that the studio’s ceiling was an old metal trusses/corrugated sheeting roof structure and that no data was available as to the load allowable per square metre. Dr Fenech claimed that, in the absence of the requested information, his client could not submit specifications about the lighting grid as, otherwise, the proposed grid could have been a hazard in terms of health and safety should the ceiling not be fit to support it. Dr Fenech remarked that his client
had indicated that a solution would be provided once the site was inspected and that the solution that would be selected was covered in the global price quoted. Dr Fenech conceded that his client did not submit any drawings of the lighting grid.

Mr Vella remarked that the two other bidders had complied with the request for the design, supply, installation and commissioning of the lighting grid according to the information given in the tender document giving as an example the clarification and the drawing at the last page of the tender document. Mr Vella stated that the bidders were not constrained in any way to submit a particular lighting grid but they were left free to submit their own design and they were not even compelled to design a grid that had to be suspended from the ceiling (section 4.3.1 page 81). Mr Vella explained that there were various ways as to how one could put up a lighting grid, e.g. it could be wall mounted or one could erect metal columns to rest the grid thereon as was usually done on stages for open-air activities such as those held at the Floriana Granaries. Mr Vella stated that the adjudicating board could not evaluate this aspect of the tender submission in the absence of technical specifications. Mr Vella also referred to section 6.4 ‘System Drawings’ at page 93 of the tender document which, *inter alia*, stipulated that:

> “Bidders will be disqualified if diagrams do not have enough details to show an understanding of the whole system and/or due diligence on the part of the tenderers.”

Both Mr Vella and Ms Borg remarked that bidders had to take into account the data given regarding the state of ceiling and, in the circumstances, it was logical to avoid proposing a solution whereby the lighting grid had to be suspended from the ceiling and to provide viable alternatives.

Mr Vella stated that, in this regard, the adjudicating board did not have anything to clarify because no documentation had been submitted in the first place.

Mr Niklos Kenderessy, representing Somos Broadcast Media Zrt, remarked that, in the absence of technical data on the building, one could have proposed from four to five alternatives but the selection was dependent on the condition of the structure. He added that the joint venture did indicate that it would provide a functioning and a safe lighting grid covering the area indicated of 175 sq metres.

Mr Vella intervened to remark that the adjudication board had to assess on the designs and specifications provided in the tender submission and not on whatever the tenderer would decide to install after being awarded the tender. Ms Borg stated that (a) albeit the tender document did not provide for site visits, yet it was always possible for site visits to be acceded to on specific requests and (b) a clarification had to be sought for the purpose of explaining information already submitted and not for one to submit missing or fresh information.

Dr Peter Borg Costanzi, representing the Malta College of Art, Science and Technology (MCAST), the contracting authority, argued that tenderers were at liberty to come up with whatever design they reckoned was suitable to the existing building and, as Mr Kenderessy had already indicated, there were several alternative ways as to how one could put up a lighting grid but, notwithstanding, the appellants opted to
submit none of these solutions. He concluded that, in the absence of a submission in this regard, the adjudicating board could not exercise its evaluation function.

Dr Fenech insisted that the contracting authority should have sought a clarification on this matter prior to rejecting his client’s offer especially since the information given in clarification letter no. 6 was not sufficiently clear.

Mr Joseph Vella, representing DAB Electronica Co. Ltd (DAB Ltd), an interested party, remarked that if a tenderer did not have any assurance that the ceiling could take the load then the tenderer had to propose alternatives to ceiling mounted lighting grids like the ones used for staging open air activities but, surely, the tenderer could not desist from making any submission with regard to the lighting grid.

Mr Vella informed the PCAB that the lighting grid was estimated to cost about €130,000.

**Stage Boxes and Cabling**

Dr Fenech remarked that his client considered it superfluous to submit documentation in respect of a stage box/wall box with connectors attached to it whose value did not exceed €10 each. The appellants’ legal advisor stated that this was a standard item and what his client might have done was to provide an illustration of the wall box.

Dr Fenech claimed that the cables were standard industry cables and that the wiring was clearly indicated in the diagrams submitted by his client. Dr Fenech maintained that there were no variants to these cables and if the adjudicating board considered this information as essential then it could have easily asked his client for a clarification.

Mr Vella referred to page 77 of the tender document specifically to clauses:

‘4.2.4 – Stage Boxes – Quality 6 – Stage boxes with minimum 8 inputs on 10 metre cable in a compact housing 15m;’ and

‘4.2.5 – Cabling – Appropriate cabling is to be supplied and installed to have the whole audio system work in a seamless manner and linked to the TV main studio.’

Dr Fenech argued that there were no technical details with regard to wall (stage) boxes because all that it consisted of was a plastic box with a couple of holes in it and that his client considered them as part of the cabling works in respect of which his client did make a submission.

Mr Anthony Pavia, a PCAB member, intervened to remark that tenderers had to provide the information requested in the tender document no matter how trivial it might appear to tenderers or else they had to explain in an exhaustive manner why that information could not be provided.

Mr Vella remarked that the appellants submitted no literature whereas the other bidders did submit literature relative to stage boxes and cabling.
Mr Joseph Vella remarked that it was true that there was a wide choice of junction boxes and cables yet he claimed that a connector without the proper contacts would produce distortions in the audio and he considered the quality of the cables as a very important aspect.

**Technical Literature for the Virtual Studio Hardware and Software and the Camera Crane with Sensors**

Mr Vella referred to the appellants’ submission with regard to section ‘4.1.3 – Virtual Studio Hardware & Software’ insisting that the hardware had to be supplied with the appropriate cabling for installation and commissioning purposes.

Dr Fenech claimed that, according to the tender document, all the installation was catered for under section 3 ‘General Utility Needs’ (page 59) whereas section 4.1.3 (page 66) referred only to ‘virtual studio hardware and software’.

Dr Fenech rebutted the allegation that the documentation was not comprehensive and that it did not include all the information requested to substantiate the characteristics requested. He insisted that all relevant literature was in fact included in the tender bid together with the proposed equipment which was top of the range equipment. Dr Fenech added that his client had also submitted two plans (Mr Vella claimed that one was without a legend) and about 3 to 4 pages of literature besides the list of equipment. Dr Fenech conceded that the language used in his client’s submission could perhaps have been clearer but, again, he insisted that, in this case, the adjudicating board could have asked for a clarification.

Mr Vella quoted the requirements set out in section 4.1.3 (page 66) of the tender document with regard to virtual studio hardware and software and he added that all that the appellant joint venture submitted were six brochures which were insufficient. Mr Vella stated that this equipment was estimated to cost about €250,000.

Ms Borg stated that the adjudicating board first had to check the submission against the list of requirements and then it had to move on to check that the information submitted was in fact comprehensive enough for the adjudicating board to carry out a proper evaluation. She added that, in this particular case, it turned out that the information submitted was insufficient and that the guidelines she received on previous occasions, invariably, indicated that the contracting authority could not request additional or fresh information.

At this point the Chairman PCAB intervened and observed that there was a difference between (i) a non-submission and a submission of facts which could be slightly beefed up and (ii) a request asking for additional explanations to be made relating to information already submitted. He remarked that judging what was sufficient or not was rather subjective. The Chairman PCAB pointed out that the regulations did allow the adjudicating board to seek clarifications to help it understand better the tender submission and one should not keep back from doing so.
Technical Capacity Was Not Substantiated

Dr Fenech refused the claim that the technical capacity was not substantiated and argued that, in case of any doubt, the adjudicating board should have sought clarifications in accordance with regulations rather than to, hurriedly, disqualify his client’s bid.

Dr Fenech quoted from his letter of objection dated 18th April 2010 which reflected the reasons given by the contracting authority, namely:

“The joint venture has not substantiated the technical capacity in relation to the delivery of similar supplies over the past three years. From the Memorandum and Articles of Association submitted, the Evaluation Committee noted that DeeMedia.tv Ltd does not have any experience in the delivery of similar supplies whilst Somos Broadcast Media ZRT has only been in operation for one year. In fact the tenderer was expected to submit a list of (at least 2) similar supplies delivered over the past three years (refer to clause 3.6.2 b of the ITT). DeeMedia.tv Ltd submitted a list of main productions; Somos Broadcast Media zrt did not submit a list but submitted two certificates of two projects which were certified during 2010.

Furthermore, in the offer it is stated that DeeMedia.tv Ltd will give first level technical and service support. However, in accordance to the summary on technical and financial competence, the company does not have any related experience in terms of technicians. From information received in this offer, DeeMedia.tv Ltd proposed a consultant who is not employed with the company, for technical support.”

Dr Fenech submitted that:

a. the Memorandum and Articles of a Limited Liability Company did not substantiate the company's experience in the sector it operated but it rather indicated the type of activities it was going to undertake;

b. to his client’s knowledge, nobody in Malta had any experience with regard to virtual studios and that was precisely why DeeMedia.tv Ltd, not having the technical capacity within its own resources, entered into a joint venture with Somos Broadcast Media. The consortium was made up of Somos Broadcast Media, to provide first level technical and service support, and DeeMedia.tv Ltd, a locally registered company, having the advantage of knowing the local scene, with a strong financial base and with a very good reputation with regard to productions for local television; and

c. with regard to the reservations regarding the technical experience and capabilities of Mr Bryan Schembri in the setting up of a project as that contemplated in this tender, his client had submitted in its bid the CV of Mr Schembri which clearly proved that he was one of Malta's most experienced technicians in the broadcasting industry and, specifically, in television broadcasting. It was common practice that, on being awarded a large contract, one would employ additional personnel to execute that contract and that, in addition to the expertise of the foreign partner, Somos Broadcast Media.
Mr Vella stated that, contrary to what the appellants were saying, there were three virtual studios in Malta, among them, One Television and Smash TV. Mr Vella stressed that the contracting authority wanted to avoid being used as a guinea pig and it, therefore, wanted to ensure that the contract would be awarded to a consortium that had the expertise required to deliver what was requested. He added that the contracting authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy because the tender document stipulated that the tenderer had to provide the expertise.

The Chairman PCAB remarked that it was evident that the tender document did not specify that experts had to be in full employment with the tenderer and, even if they were, there was no guarantee that those experts would remain in employment with the tenderer throughout the contract period. The Chairman PCAB also noted that highly qualified personnel often offered their services on a consultancy basis.

Mr Vella remarked that one had to appreciate that Deemedia.tv Ltd did not have the technical knowhow whereas the foreign partner in the joint venture had only been established since the 10th March 2009, i.e. about one year prior to the closing date of this tender. He added that instead of submitting a list of at least 2 similar projects over the past 3 years in respect of both partners in the joint venture, only Somos Broadcast Media, the foreign partner, submitted two very similar, and at times identical, projects which were certified in 2010.

Ms Borg stated that, from the tender submission, it emerged that Deemedia.tv Ltd did not employ anyone who could provide technical support but that it was going to avail itself of the services of a consultant. Ms Borg remarked that, although it was not stipulated that the person providing technical support had to be a full-time employee with the tenderer, on the other hand, the fact that he was not employed with the bidder did not provide the adjudicating board with the peace of mind that the tenderer would in fact be in a position to provide first level support.

Mr Mr Niklos Kenderessy, obo of Somos Broadcast Media, explained that:

(i) Somos Video/Group was one of the leaders in the broadcasting industry in Hungary and that during its ten years in operation it had undertaken various projects;

(ii) at one point Somos Video had decided to embark on an expansion programme by setting up other companies, one of them Somos Broadcast Media, so as to have more capital to undertake larger projects; and

(iii) the two projects undertaken by Somos Broadcasting Media, namely the upgrade to HD Studio at ATV, one of the top non-governmental commercial TV channels in Hungary (reference dated 1st February 2010) and the MCR upgrade, worth about €482,000, at TV2, another top non-governmental commercial TV channels in Hungary (reference dated 10th March 2010) – were sent to Contracts Department and it was, therefore, unfair for the adjudicating board to state that Somos Broadcasting Media did not have the necessary knowhow.
Dr Fenech remarked that the CVs of the technical directors included the projects that had been carried out.

The Chairman PCAB remarked that the fact that the two certificates were rather similar did not matter much but what mattered most was the track record of the tenderer. He opined that the adjudicating board should have sought clarifications on the documentation submitted.

Mr Vella pointed out that, in the event of award, the legal entity that would be a signatory to this contract was Somos Broadcast Media and not Somos Video or Somos Group. Mr Vella stated that the adjudicating board did some research on Somos Broadcasting Media and it transpired that it was set up on the February 2009, its trading profit was €20; the value of wages of employees was €1,393, whereas the number of employees was indicated as not applicable.

However, it was established that net profit before tax of Somos Broadcast Media was 5.3 million Hungarian Forints equivalent to about €19,000.

Dr Fenech conceded that this client could have been more explicit in making the connection between Somos Video Ztr, which had been established for a number of years, and Somos Broadcast Media Ztr, which was established in 2009. He added that one of the projects in progress was valued at €2.2m and that most of it had already been completed. Dr Fenech insisted that the adjudicating board should have sought a clarification in case it had any doubts.

Mr Nick de Giorgio, representing Deemedia.tv Ltd, remarked that as far as Deemedia.tv Ltd was concerned, although it might be lacking in terms of technical capability, which aspect was being addressed by the inclusion of a foreign partner expert in this line of business, it was the lead bidder and it had an undisputed sound financial base.

**Financial and Economic standing of the Joint Venture were not substantiated**

Ms Borg remarked that, whilst the tender document requested the submission of the audited accounts for the last three years, yet Deemedia.tv Ltd submitted the accounts for 2 years instead of 3 years while Somos Broadcast Media submitted the accounts in respect of one year.

Dr Fenech stated that it was true that Deemedia.tv Ltd had in fact submitted the accounts for the years 2006/2007 and 2007/2008, however, he pointed out that the accounts of one financial year were presented in comparison with those of the previous financial year and, as a result, in submitting the accounts for two financial years his client had, effectively, submitted the accounts for three consecutive financial years. Dr Fenech agreed that Somos Broadcast Media only submitted the accounts in respect of one year for the simple reason that the company had only been set up for one year while Somos Video/Group had been established for a number of years.

The Chairman PCAB agreed that once the set of accounts in respect of one year was presented in comparison with the accounts of the previous year then the contracting authority effectively had the company’s accounts for the 3-year period requested.
Tender Specifications were clearly copied from particular specifications thereby preventing fair competition in a transparent fashion

Dr Fenech submitted that:

a. most of the equipment specifications included in the tender documentation was clearly a ‘cut and paste’ job taken from the technical literature of products represented by a particular local company and a participating tenderer which had exclusive rights in Malta;

b. with reference to page 64, which dealt with the ‘Input/output connectors’, the details matched the product supplied by one of the participating tenderers;

c. the ‘General Specifications’ of the ‘Compact HD Studio Lenses’ at page 63 were also deemed too specific to suit a particular make;

d. the contracting authority went into such details that the speakers had to be round edged; and

e. when his client complained about this issue with the Contracts Department, the answer he got was that once we were in the EU one could get such products himself from various overseas sources. Nevertheless, continued Dr Fenech, the fact remained that one had to go through the local distributor

Mr Kenderessy remarked that, for example, with regard to the lens, the contracting authority went into a lot of detail so much so that the choice was limited to, possibly, one supplier when other lenses could have been just as good.

Mr de Giorgio remarked that his firm would have preferred for the appellant joint venture to be able to offer ‘Sony’ equipment but the tender specifications did not allow that and so they had to offer the particular items described in the tender dossier.

The Chairman PCAB pointed out that the contracting authority had to ensure that the specifications were not tailor-made for anyone in particular but that the specifications had to allow for as wide a competition as possible. The Chairman PCAB asked the adjudicating board to confirm whether or not the tender specifications were drawn up in a way as to permit open competition.

Mr Pavia drew the attention of the appellants that, in spite of their adverse remarks with regard to the tender specifications, yet they did in fact make a submission. Mr Pavia proceeded by saying that in spite of everything, it seems that it was still possible for the appellants to participate.

Mr Vella submitted that:

(i) the specifications included in the tender dossier emerged from various sources, e.g. from literature available locally because the contracting authority had to keep in view the local scenario because, as a teaching institution, the Malta College of Art, Science and Technology (MCAST) had to train students for the local market;
(ii) the tender specifications were drawn up from literature of products pertaining
to different suppliers. For example, in the case of computers, they required
‘Mac’ which, although it referred to a particular brand, one could procure
‘Mac’ computers in Malta from different suppliers and, as a result, he refused
the allegation that the said items could be purchased only from one source;

(iii) when it came to software, albeit one had to refer to particular types/names of
software, yet, on the recommendation of the Contracts Department they
included the phrase ‘or equivalent’;

(iv) the other indicated tenderer did not import the whole lot of items requested in
the tender and insisted that the specifications were ‘open’ so much so that the
three participating tenderers did submit offers which were technically valid;

(v) this tender was EU financed and that it was being issued for the second time.
In the original tender the contracting authority had issued specifications to even
fit the ‘Sony’ brand, considered to be the best, and in fact the two bidders did
offer ‘Sony’ equipment. Yet, continued Mr Vella, in terms of price, they were
well above the budget, in fact, one of the bids was 58% over the budget which
was unacceptable. The contracting authority realised that it was useless to
issue tenders with high specifications when that equipment was beyond its
means and, as a consequence, they had to degrade the specifications with
regard to various aspects so as to fit the budget; and

(vi) prior to coming up with this set of specifications, the Malta College of Art,
Science and Technology (MCAST) took into account the local scenario,
attended fairs overseas and also considered the contracts it had with teaching
institutions abroad, such as, St John University New York and Adam Smith
College, with whom they operated an exchange of students.

The Chairman PCAB asked the adjudicating board (i) if the fact that the majority of the
equipment fitted the specifications of the products imported by a particular firm
constituted an advantage over the other competing firms and (ii) was the contracting
authority conditioned by the financial constraint to the extent that it requested a
particular kind of equipment.

Mr Vella replied that all tenderers had the opportunity to propose their own system and
products because the tender conditions included the wording ‘or equivalent’ which
term was introduced on the advice of the Contracts Department as stated earlier on. Mr
Vella agreed that the tender specifications did reflect the budgetary constraint of the
contracting authority but he disagreed that the specifications fitted only one particular
brand because it was made quite clear that equivalents were acceptable. He added that
the three participating tenderers submitted valid offers. Mr Vella explained that:

(a) the computer component of the tender was valued at about €240,000 and
although it had to be ‘Mac’ (Macintosh) it could definitely be acquired from
more than one supplier;

(b) with regard to film editing systems, which formed a good part of the contract,
there were about 8 international firms that could offer the hardware and
software and although the Malta College of Art, Science and Technology
(MCAST) used two film editing software systems, among them Premier, the
intention was to start teaching even on the software known as Final Cut Pro, and so make use of the three main products which had different suppliers;

(c) the contracting authority opted for round edged speakers to avoid sharp edges as a measure of safety;

(d) the allegation that the specifications of all or of the majority of the items fitted the products of only one supplier was unacceptable;

(e) the appellant joint venture could have obtained the items on the Hungarian market; and

(f) the contracting authority drew up the specifications from information and brochures obtained from local agents, like DAB Ltd, Forestals Ltd and iCentre, from fairs and teaching institutions overseas and from visits to the local TV studios like PBS, Smash and that known as ‘Father Ġiġi’, but they were not meant for any particular local firm so much so that bidder no. 3 from Spain submitted an offer according to the published specifications.

Mr Joseph Vella described as totally incorrect the allegation made by the appellants that all the specifications pertained to items supplied by his firm so much so that:

(i) one of his sub-contractors in this tender was one of his main competitors, namely, Forestals Ltd, the agent for Sony in Malta, because part of the equipment had to be supplied by Sony;

(ii) although his flagship was Apple, the contracting authority requested Apple with Macintosh and Final Cut Pro and he had to obtain that from one of his most fierce competitors and the same applied to Adobe Director and Adobe Premier;

(iii) he had to source out other items, such as, the Ikegami camera which he got from a Greek dealer, for the lighting he had to rely on Techno as a subcontractor; the same applied for the speakers. He went through all that, Mr Joseph Vella argued, because the contracting authority requested those items and he, therefore, had to provide them; and

(iv) although he was critical about the type of crane requested by the contracting authority because it was too long, he included it in his submission and then he also offered an alternative

Dr Fenech claimed that, contrary to what Mr Joseph Vella said, with regard to the crane, no variant (alternative) solutions were allowed according to clause 20.5 (page 12) and, as a result, his tender ought to have been disqualified. Dr Fenech could not trace any reference in the tender document to the term ‘or equivalent’ and he submitted ten documents/brochures that he claimed demonstrated how the specifications at, for example, pages 64 and 67 of the tender document matched the items of the JVC brand. Dr Fenech contended that that stifled competition.

Dr Borg Costanzi submitted the following;
(a) the fact that the appellants managed to identify the sources/brochures from where the specifications in the tender document were extrapolated did not, in any way, mean that there was no level playing field. His client had gathered the technical information from various sources to, finally, come up with a set of specifications that fitted the required product within the budget available. On the contrary, that ought to have assisted the appellants to procure or to source out the products requested in the tender and, in fact, that was what the appellants did in their submission;

(b) the missing information about the stage boxes and the cabling was important because there were many on the market which varied in type and quality;

(c) the financial issue had been resolved with regard to Demedia tv however with regard to Somos Broadcast Media the appellants’ submission did not explain or elaborate that this firm was born out of some larger company and that it had a whole set-up backing it;

(d) the appellants’ tender was not disqualified because of the financial shortcomings but because of technical deficiencies, such as, the non-submission of technical literature regarding the lighting grid, the stage boxes and cabling together with the lack of comprehensive information on the camera crane with sensors and virtual studio hardware and software which were all major items of the project; and

(e) the adjudicating board could not have asked for a clarification in those instances where no submission was made.

Dr Steve Decesare, also representing DAB Ltd, pointed out that the contracting authority was concerned with the financial and technical resources of Somos Broadcast Media, which, ultimately, was going to be party to this contract, and that the technical expertise and financial resources attributed to Somos Group were of no relevance to this case since the latter was not going to be a signatory on the contract.

Dr Fenech argued that a contracting authority could not throw out an offer for a tender with an estimated value of €1.8m on mere trivialities because, after the clarifications given at the hearing, it turned out that the only two outstanding issues were the stage boxes and the lighting grid.

Dr Fenech conceded that his client did manage to submit an offer on the basis of the published specifications but he insisted that his client could have offered other items at a better price. As it happened, the tender specifications narrowed the choice of items and compelled his client to procure them from other suppliers at a higher price and, as a result, there was no level playing field.

Dr Fenech maintained that the link between Somos Video/Group and Somos Broadcast Media was evident and if the contracting authority had any doubts in that regard it should have sought a clarification.

Dr Fenech concluded that the issues raised by the adjudicating board could and should have been resolved through clarifications which were allowed by regulations and therefore his client’s bid ought to be reinstated in the tendering process because the said joint venture has submitted a compliant offer.
At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 15 June 2010 and also through their verbal submissions presented during the public hearing held on 18 August 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ submissions and arguments relating to the following issues, namely (1) Blue Ray Disc and HDD Recorder, (2) Lighting Grid, (3) Stage Boxes and Cabling, (4) Technical Literature for the Virtual Studio Hardware and Software and the Camera Crane with Sensors, (5) Technical Capacity Was Not Substantiated, (6) Financial and Economic standing of the Joint Venture were not substantiated, (7) Tender Specifications were clearly copied from particular specifications thereby preventing fair competition in a transparent fashion;

- having also taken particular note of the fact that (a) the documentation with regard to the Blue Ray Disc and HDD Recorder was submitted as requested, (b) whilst the appellant Joint Venture claimed that, in the absence of pertinent information, they could not submit specifications about the lighting grid as, otherwise, the proposed grid could have been a hazard in terms of health and safety should the ceiling not be fit to support it, the contracting authority argued that (i) two other bidders had complied with the request for the design, supply, installation and commissioning of the lighting grid according to the information given in the tender document giving as an example the clarification and the drawing at the last page of the tender document and (ii) the adjudicating board could not evaluate this aspect of the tender submission in the absence of technical specifications and that they had acted according to section 6.4 ‘System Drawings’ at page 93 of the tender document which, inter alia, stipulated that “Bidders will be disqualified if diagrams do not have enough details to show an understanding of the whole system and/or due diligence on the part of the tenderers” and (iii) the adjudicating board did not have anything to clarify because no documentation had been submitted in the first place and the adjudication board had to assess on the designs and specifications provided in the tender submission and not on whatever the tenderer would decide to install after being awarded the tender (iv) tenderers were at liberty to come up with whatever design they reckoned was suitable to the existing building and that there were several alternative ways as to how one could put up a lighting grid but, notwithstanding, the appellants opted to submit none of these solutions, (c) the appellant Joint Venture’s representative admission that it considered it superfluous for one to submit documentation in respect of a stage box/wall box with connectors attached to it whose value did not exceed €10 each as this is a standard item albeit cables and wiring were clearly indicated in the diagrams as submitted by appellants and the contracting authority’s claim that whilst it was true that there was a wide choice of junction boxes and cables yet it was equally true that a connector without the proper contacts would produce distortions in the audio thus rendering the quality of the cables as very important, hence the
need for some kind of literature support, (d) whereas the contracting authority required that the Virtual Studio Hardware & Software had to be supplied with the appropriate cabling for installation and commissioning purposes and that all that the appellant joint venture submitted were six brochures which were insufficient, the appellants’ representatives, whilst conceding that the language used in the appellants’ submission could perhaps have been clearer, yet rebutted the allegation that the documentation submitted by the appellants was not comprehensive and that it did not include all the information requested to substantiate the characteristics requested especially when one considers that all relevant literature was included in the tender bid together with the proposed equipment which was top of the range equipment, (e) whereas, whilst the appellant joint venture refused the claim that the technical capacity was not substantiated arguing that, in case of any doubt, the adjudicating board should have sought clarifications in accordance with regulations rather than to, hurriedly, disqualify them, especially when (i) the Memorandum and Articles of a Limited Liability Company did not substantiate the company's experience in the sector it operated but it rather indicated the type of activities it was going to undertake and (ii) nobody in Malta had any experience with regard to virtual studios and that was precisely why Deemedia.tv Ltd, not having the technical capacity within its own resources, entered into a joint venture with Somos Broadcast Media, the contracting authority argued that contrary to what the appellants were saying, there were three virtual studios in Malta, among them, One Television and Smash TV and apart from the fact that the same Deemedia.tv Ltd did not have the technical knowhow, its foreign partner in the joint venture had only been established since the 10th March 2009, i.e. about one year prior to the closing date of this tender, (f) albeit the contracting authority was claiming that whilst the tender document requested the submission of the audited accounts for the last three years, yet Deemedia.tv Ltd submitted the accounts for 2 years instead of 3 years while Somos Broadcast Media submitted the accounts in respect of one year, it was established that (i) Deemedia.tv Ltd had in fact submitted the accounts for the years 2006/2007 and 2007/2008 but that the accounts of one financial year were presented in comparison with those of the previous financial year and (ii) Somos Broadcast Media only submitted the accounts in respect of one year for the simple reason that the company had only been set up for one year while Somos Video/Group had been established for a number of years, and (g) whereas the appellant joint venture (i) argued that most of the equipment specifications included in the tender documentation was clearly a ‘cut and paste’ job taken from the technical literature of products represented by a particular local company and a participating tenderer which had exclusive rights in Malta and (ii) insisted that in spite of the fact that it did manage to submit an offer on the basis of the published specifications yet the tender specifications narrowed the choice of items and compelled it to procure them from other suppliers at a higher price and, as a result, there was no level playing field, the contracting authority contended that the specifications included in the tender dossier emerged from various sources and the fact that, for example, in the case of computers, albeit the Malta College of Art, Science and Technology (MCAST) required ‘Mac’ which, per se, referred to a particular brand, yet, one could procure ‘Mac’ computers in Malta from different suppliers and, as was the case with software, albeit one had to refer to particular types/names of software, yet, on the recommendation of the Contracts Department they included the phrase ‘or equivalent’;
having considered DAB Electronica Co. Ltd’s (DAB Ltd) Managing Director’s intervention;

having taken into consideration Ms Borg’s claim that the information submitted was insufficient and that the guidelines she received on previous occasions, invariably, indicated that the contracting authority could not request additional or fresh information;

having taken cognizance of the fact that the contracting authority’s representatives claimed, *inter alia*, that (a) the authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy because the tender document stipulated that the tenderer had to provide the expertise and (b) although it was not stipulated that the person providing technical support had to be a full-time employee with the tenderer, on the other hand, the fact that he was not employed with the bidder did not provide the adjudicating board with the peace of mind that the tenderer would in fact be in a position to provide first level support;

having considered Mr Kenderessy’s intervention, particularly his explanation in respect of the way the Somos Group is set up, the way it has evolved over time, the capitalisation programme and its vast experience in the media industry,

reached the following conclusions, namely:

1. The PCAB opines that it is a fact that, under normal circumstances, in the absence of pertinent explanations, tenderers have to provide the information requested in a tender document no matter how trivial it may appear to them.

2. The PCAB recognises the fact that, in spite of its adverse remarks with regard to the tender specifications, yet the appellant joint venture still proceeded with its participation thus demonstrating that it was possible for anyone to participate.

3. The PCAB feels that there is a strong difference between (i) a non-submission and a submission of facts which could be slightly beefed up and (ii) a request asking for additional explanations to be made relating to information already submitted. In this respect the PCAB feels that the adjudicating committee could have exercised its discretion more rather than, hastily, reneging on ensuring that all was clear enough. For example, the fact that two certificates were rather similar did not matter much but what mattered most was the track record of the tenderer. As a result, the PCAB feels that the adjudicating board should have sought further clarifications on the documentation submitted.

4. The PCAB disagrees with the adjudication board’s stand relating to the scope behind the use of external consultants. This Board feels that that the tender document did not specify that experts had to be in full employment with the tenderer and, as a consequence, it cannot accept one of the arguments raised by one of the adjudication board’s representatives, namely that the authority expected Deemedia.tv Ltd to provide the required level of expertise in-house and not to obtain it by way of consultancy.
5. The PCAB argues that with the claim made by the adjudication board relating to the fact that, according to its members, the appellant joint venture’s submission did not substantiate its financial and economic standing as it was required to do, this Board feels that (a) once the set of audited accounts in respect of one year was presented in comparison with the accounts of the previous year then the contracting authority effectively had the company’s accounts for the 3-year period requested and (b) no proper professional effort was made for the adjudication board to establish the intra-company relationship as far as the Somos Group is concerned.

The PCAB concludes that, in terms of what was submitted in writing and during the hearing, it feels that, prior to it proceeding with the adjudication process, in view of the fact that this Board feels that, in its opinion, in a few pivotal instances, the adjudication board either (i) simply refrained from clarifying areas which warranted such clarifications or (ii) with regards to a few specific issues, it did not conduct a proper thorough analysis of some of the content of the appellants’ submission, this Board recommends that a more thorough analysis of the appellants’ submission should be conducted to enable it to reach a more informed opinion.

As a consequence of (1) to (5) above this Board finds in favour of the appellant joint venture.

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

Alfred R Triganza  Anthony Pavia  Edwin Muscat
Chairman  Member  Member

13 September 2010

Addendum

Albeit Mr Anthony Pavia, one of the PCAB’s members had already verbally agreed with the other members on the way the PCAB had to proceed with its decision relevant to this particular case, yet, unfortunately, Mr Pavia passed away on the 8th September 2010 whilst this decision was still being drafted.
PUBLIC CONTRACTS APPEALS BOARD

Case No. 223

Advert No. CT 466/2009 – CT 2679/2009
Tender for Restoration Works to Valletta Land front Fortifications – VLT 12 –
Tender for the restoration of St James’ Counterscarp and Bridge

This call for tenders was published in the Government Gazette on 11 December 2009. The closing date for this call for offers was 28 January 2010.

Five (5) tenderers - submitted their offers.

The budget available for this tender was Euro 273,947 (excluding VAT).

De La Valette Joint Venture filed an objection on the 21 June 2010 against decision by the Contracts Department in respect of the tender in caption which has been recommended for award to C.A.V.V. Allieri Joint Venture.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr Anthony Pavia and Mr. Edwin Muscat as members convened a public hearing on Monday, 6th September 2010 to discuss this objection.

Present for the hearing were:

De La Valette Joint Venture
   Dr. David Wain          Legal Representative
   Ms. Denise Xuereb
   Mr Angelo Xuereb

C.A.V.V. Allieri Joint Venture
   Dr. Franco Galea        Legal Representative
   Mr. Brian Miller
   Mr. Ivan Farrugia
   Mr. Joe Farrugia

MRRA – Project Design and Implementation Division
   Dr Franca Giordmaina    Legal Representative
   Arch Ray Farrugia       Director General (Works)

Evaluation Board
   Mr Joseph Casaletto     Secretary
   Mr Hermann Bonnici     Evaluator
   Ms Mireille Fsadni     Evaluator
   Ms Mark Azzopardi      Evaluator

Department of Contracts
   Mr Francis Attard      Director General (Contracts)
After the Chairman’s brief introduction as to how the PCAB was going to conduct the hearing, the appellant joint venture was invited to explain the motives of the objection.

Dr David Wain, representing De La Valette JV, the appellants, started by making reference to the Department of Contracts’ letter dated 11 June 2010 whereby his clients were informed that their bid was disqualified because it was considered as administratively non-compliant on the grounds that “One of the project is not within the last 5 years as requested under Article 14.3.2.12 and 4.2 and has expired by around 4.5 months.” He contended that this was not an issue of an administrative nature. The lawyer argued that the fact that the clarifications sought by the Adjudicating Committee were of a technical nature showed that they had already passed the administrative stage.

In reply to a specific question by the PCAB, Dr Wain said that the articles referred to earlier stipulated that tenderers had to submit information about three projects carried out over the past five years and each had to be valued at not less than €40,000. He claimed that it appeared that they were not satisfied with the information provided in respect of some of the projects carried out by the companies forming the Joint Venture.

When asked by the PCAB to state whether there was any material change in the company that carried out this project, the reply given by Dr Wain was in the negative. He further said that the Joint Venture was strengthened as there was an increase in resources and also included a renowned Italian restorer as a key expert.

Dr Franca Giordmaina, legal representative of the Contracting Authority, in her response said that the appellants had submitted four projects, two of which were accepted, one was not completed within the last five years and the other project was not accepted because they did not submit the necessary details as requested in the tender dossier.

She said that Clause 4.2.6 (page 9 of the tender document) specified that:

“They must provide a list of related works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Tenderers shall prove the satisfactory completion of at least three restoration intervention projects on masonry structures carried out by the bidders during the last five years. The value of each of these three projects shall not be less than €40,000.”

The Contracting Authority’s lawyer pointed out that this clause was mandatory and that bidders were not requested to provide only a list of projects but to provide also relative details.

Dr Giordmaina even quoted the following from Clause 4.6.4.2 in ‘Form 4.6.4 Experience as Contractor’ (page 54 of the tender dossier):
• Attach here available references and certificates from the relevant Contracting Authorities proving the satisfactory completion of at least three restoration intervention projects on masonry structures carried out by the bidders during the last five years. The value of each of these three projects shall not be less than €40,000. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed.

• Attach here a dossier of not more than 20 A4 size pages containing description including photographs of at least three restoration intervention projects on masonry structures carried out by the bidder/s during the last five years. The value of restoration works of each of the three projects listed shall not be less than € 40,000. The dossier must be accompanied by a written declaration signed by the bidder confirming that personnel with similar or better qualifications and/or experience will be engaged on this contract to carry out specialised restoration works as specified in this tender document.

• Attach here references from previous clients for at least the three projects mentioned above, clearly indicating: works carried out, location of works, value of works carried out, whether works were carried out to client’s satisfaction and within established timeframes.

Dr Giordmaina said that, contrary to what was stated by Dr Wain, the appellants’ offer was rejected on the basis of the fact that they did not satisfy the requirement in the 5th column of the Administrative Compliance Grid (Proof of the Qualifications/Selection criteria as per Clause 4 of the ITT) and not because of technical issues. Furthermore, she pointed out that this was a single package tender. The PCAB said that such tenders were adjudicated holistically and, as a result, the issue raised by the appellants was considered irrelevant.

Architect Mireille Fsadni, a member of the Evaluation Committee, gave the following information regarding the projects submitted by De La Valette Joint Venture:

<table>
<thead>
<tr>
<th>Project</th>
<th>Value</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valletta Waterfront</td>
<td>€592,410</td>
<td>Exceeded 5 years by 4.5 months from closing date of tender.</td>
</tr>
<tr>
<td>Villa Cagliares</td>
<td>€250,000</td>
<td>Accepted</td>
</tr>
<tr>
<td>Fort Rinella</td>
<td>€500,000</td>
<td>Accepted</td>
</tr>
<tr>
<td>St Cecilia Chapel</td>
<td>€87,000</td>
<td>Only pictures were submitted and no references were provided.</td>
</tr>
</tbody>
</table>

She confirmed that the appellants had indicated other projects (such as Capua Palace and Capua Hospital) but these could not be considered because they exceeded the completion period of the last five years substantially.
Architect Fsadni contended that as an Adjudicating Board they had to abide by the conditions of the tender. When her attention was drawn that in their first adjudicating report they had recommended the award of the tender to De La Valette JV, she responded by stating that this was due to the fact that such an offer was considered acceptable but they also reported the fact that one of the projects was not completed within the last five years as it expired by 4.5 months. At this point, Dr Giordmaina intervened by stating that the Department of Contracts had, subsequently, informed the Adjudicating Board that, once this offer was not in strict compliance with the requirements of the tender dossier, then it could not be considered as valid.

The Chairman PCAB pointed out that the issue did not concern something of pivotal importance as, for example, a ‘Bank Guarantee’ but an evidence of works carried out. The PCAB stated that, in similar circumstances, one had to consider the relevance of the matter at hand.

Architect Fsadni said that she understood the PCAB’s concern about the fact that the completion period of the last five years was exceeded by only 4.5 months, however, for evaluation purposes, the Adjudicating Board had to take into consideration the ‘shall’ and ‘must’ of each clause. She reiterated that they had sought guidance and the Department of Contracts gave a ruling on this matter.

With regard to clarifications, Architect Fsadni said that these were sought after obtaining the necessary approval from the Department of Contracts and that they were not allowed to ask bidders to submit information that was missing from the original offer.

Ms Denise Xuereb, representing De La Valette JV, said that, in reply to a clarification sought by the Adjudication Board during the evaluation process, they confirmed that Mr Lawrence Buhagiar and Professor Gasparoli were going to be directly involved on this project as ‘Master Mason’ and ‘Key Expert’ respectively.

Ms Xuereb said that it did not appear that in the tender document it was indicated that the certificates had to be issued by year and month. She argued that had the VISET certificate been issued by year only it would have qualified. Dr Wain confirmed that even if it was indicated December 2004 it would have been compliant. Architect Fsadni said that they did not ask the tenderer to indicate the date - it was VISET which had indicated that the project under reference was completed in July 2004. However, Dr Franco Galea, legal representative of C.A.V.V. Allieri JV, intervened to clarify that in the tender document it was specifically requested that the certificate had to include the date, value and site of works and, as a consequence, this showed that the date was important.

At this point, Dr Giordmaina and Architect Fsadni pointed out that the objector had attached a new certificate issued by VISET with a different completion date and that this was not at the disposal of the Adjudication Board for evaluation purposes.

In reply to specific question by the PCAB, Architect Fsadni said that an architect would consider a project as complete from the ‘date of practical completion’, that is, on completion of 99% of the works required by a contract. She said that, finally, a ‘handover certificate’ would be issued.
Mr Angelo Xuereb, also representing De La Valette JV, the appellants, said that the other partners had a large number of other projects and that Professor Gasparoli was a renowned partner.

Dr Giordmaina sustained that if Professor Gasparoli was a partner of the Joint Venture there was a procedure that had to be followed, including the signing of the tender document or the authorization of the other partners to sign on his behalf and the filling in of the necessary forms regarding projects according to the requirement of the tender. She pointed out that in the reply to the clarification it was confirmed that he was a ‘Key Expert’.

Architect Fsadni explained that De La Valette JV was formed by three partners, namely, Baron Contractors, The Construction Ltd and AX Construction Ltd (as lead partner). She said that whenever they evaluated a bid of a Joint Venture they evaluated the projects carried by the companies forming the Joint Venture and not the capabilities of the key experts. She remarked that a tender submitted by a Joint Venture must fulfill various requirements, which inter alia had to include a preliminary agreement by all partners and the tender had to be signed by each partner. Architect Fsadni maintained that the tender was not signed by Professor Gasparoli and the agreement did not include Professor Gasparoli as a partner of the Joint Venture. She contended that, in the prevailing circumstances, his experience could not be considered for the purpose of projects carried out by the Joint Venture even though he was a valid person in restoration. Architect Fsadni declared that De La Valette JV did not include any of Professor Gasparoli’s projects in the list of projects carried out by the Joint Venture.

At this point, Dr Wain made reference to Regulation 51 (3) which specified that:

“An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.”

The appellants’ lawyer said that his clients had included such experts because the document stipulated that they could make use of the experience of other operators provided that they produced their undertaking. He said that, in spite of this, they were of the opinion that it did not make sense to disqualify a tender for just 4.5 months.

Architect Fsadni reiterated that Professor Gasparoli was accepted as ‘Key Expert’ but it could not then be stated that he was a partner of the Joint Venture. The Chairman of the PCAB intervened to draw her attention that the issue under consideration was about the 4.5 months.

Architect Ray Farrugia, Director General Works, said that an Evaluation Board adjudicated a tender on documents submitted and it was not expected to interpret the tender document by arguing that the completion period was exceeded by a few
months because they had to abide strictly by the tender conditions. Mr Farrugia maintained that he considered the PCAB’s interpretation as dangerous.

The Chairman PCAB responded by pointing out that the 5 years was not arrived at scientifically but was a guideline. He sustained that in the case of, say, a ‘Bank Guarantee’ time limits were mandatory but in the case under reference the issue concerned 5.5 years of a works project that took 10 years to complete.

Architect Fsadni insisted that an Adjudication Board was not allowed to change the goal posts and that, for fairness sake, they had to abide by what was stipulated in the tender documents.

Dr Franco Galea, legal representative of C.A.V.V. Allieri JV, said that the first page of the tender dossier stipulated that, in submitting a tender, every tenderer accepted in full and without restrictions all conditions governing the contract.

He said that, apart from the clauses mentioned by the legal representative of the Contracting Authority, there was also clause 4.1.5 which was mandatory on all tenderers wherein, *inter alia*, this stipulated that:

“Provided that bidders that cannot prove the satisfactory completion of at least 3 restoration intervention projects on stone/ masonry structures carried out by the bidder/s during the last five years the value of which is not less than €40,000 per project, will be disqualified”

With regard to the appellants’ lawyer’s argument regarding the administrative issue, Dr Galea said that this had no relevance because it was a single package tender.

Dr Galea said that, as far as Professor Gasparoli was concerned, they tried to rely on communication exchanged with the Department of Contracts, but if anything, this satisfied the requirement under Clause 4.2.7 which stated that:

‘They must provide an indication of the technicians and technical bodies whether or not beginning directly to the economic operator’s undertaking, especially those responsible for quality control and those upon whom the contractor can call in order to carry out the work’

At this point, when Dr Galea asked whether the projects indicated were all carried out by the companies forming part of De La Valette JV, Architect Fsadni replied that they had no reason to believe that what was declared in the references was not the truth.

Continuing, Dr Galea said that, if the appellants had any doubt on whether such a project qualified within the stipulated time-frame, they could have sought a clarification and this would have been forwarded to all other bidders.

Dr Wain intervened by stating that there was nothing in the tender document which precluded tenderers from including all projects carried out. However, Dr Galea contended that the most important thing was that the bidders had to provide evidence that they satisfied the requirements of the three projects.
During the proceedings, Dr Galea made reference to para No1 of the Analysis Report wherein it was stated that ‘In fact, Dr Wain lists the four projects and points to the fact that Article 14.3.2.12 did not indicate that the projects indicated in furtherance to the article had to be complete projects, but it mentions “intervention projects on masonry structures carried out by the bidder/s during the past five years”’ He requested the appellants to clarify their position because if the indicated projects were not complete then their bid should have been disqualified also for this reason. Architect Fsadni confirmed that the accepted projects were all complete and were not works in progress.

Dr Galea said that he still had doubts about the validity of the appellants’ certificates and invited the Appeals Board to analyse them. His attention was drawn by the PCAB that the objection was about timing and not on technical issues and that they would be deliberating on whether the 4.5 months was to be considered as a substantial deviation for a tender to be rejected irrespective of the value and duration of project. Furthermore, it was stated that the PCAB was not replacing the Adjudication Board.

In his concluding remarks Dr Galea pointed out that it was not the tenderer who had to decide what was arbitrary or mandatory or an acceptable deviation and that the other tenderers submitted their offer in accordance with the requirements of that particular clause of the tender.

Architect Fsadni felt that, for a level playing field and fairness sake, if the goal posts were going to change, they should also re-consider the other tenders because there could be others that were disqualified for the same reason. The PCAB drew her attention that all aggrieved bidders had a right to appeal.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 21 June 2010 and also through their verbal submissions presented during the public hearing held on 6 September 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ (a) claim that it did not appear that in the tender document it was indicated that the certificates had to be issued by year and month and that had the VISET certificate been issued by year only it would have qualified (b) claim that there was nothing in the tender document which precluded tenderers from including all projects carried out and (c) reference to the fact that the appellant joint venture had included such experts because the document stipulated that it could make use of the experience of other operators provided that it produced their undertaking;

- having also taken note of the contracting authority’s representatives who, inter alia, (a) stated that the appellants had submitted four projects, two of which were accepted, one was not completed within the last five years and the other project was not accepted because they did not submit the necessary details as
requested in the tender dossier, (b) stated that Clause 4.2.6 (page 9 of the tender document) was mandatory and that bidders were not requested to provide only a list of projects but to provide also relative details, (c) stated that, contrary to what was stated by Dr Wain, the appellants’ offer was rejected on the basis of the fact that they did not satisfy the requirement in the 5th column of the Administrative Compliance Grid (Proof of the Qualifications/Selection criteria as per Clause 4 of the ITT) and not because of technical issues, (d) stated that the appellants had indicated other projects (such as Capua Palace and Capua Hospital) but these could not be considered because they exceeded the completion period of the last five years substantially, (e) contended that as an Adjudicating Board they had to abide by the conditions of the tender, (f) argued that whenever an adjudication board evaluated a bid of a Joint Venture such board would be evaluating the projects carried by the companies forming the Joint Venture and not the capabilities of the key experts and (g) argued that for fairness sake, if the goal posts were going to change, they should also reconsider the other tenders because there could be others that were disqualified for the same reason;

- having also taken cognizance of the fact that (a) Architect Fsadni stated that the PCAB was correct to remark that in their first adjudicating report they had recommended the award of the tender to De La Valette JV and that this was due to the fact that such an offer was considered acceptable albeit they had also reported the fact that one of the projects was not completed within the last five years as it expired by 4.5 months and (b) Dr Giordmaina stated that the Department of Contracts had, subsequently, informed the Adjudicating Board that, once this offer was not in strict compliance with the requirements of the tender dossier, then it could not be considered as valid;

- having also heard Dr Galea’s intervention, particularly that relating to (a) the fact that he maintained that in the tender document it was specifically requested that the certificate had to include the date, value and site of works and, as a consequence, this showed that the date was important, (b) the fact that the first page of the tender dossier stipulated that, in submitting a tender, every tenderer accepted in full and without restrictions all conditions governing the contract, (c) the fact that, if the appellants had any doubt on whether such a project qualified within the stipulated time-frame, they could have sought a clarification and this would have been forwarded to all other bidders and (d) the fact that it was not the tenderer who had to decide what was arbitrary or mandatory or an acceptable deviation and that the other tenderers submitted their offer in accordance with the requirements of that particular clause of the tender,

reached the following conclusions, namely:

1. The PCAB feels that members of an adjudicating board should be more pragmatic (as well as be guided in a similar way by the pertinent administrative authority) and make themselves in a position to take responsible decisions (a) within the context of the ‘spirit’ of the parameters governing certain specifications found in a tender document and (b) the overall substantiality of the detail one places focus on vis-a-vis the entire picture. Certain time frames, such as that listed in Clause 4.2.6 relating to works
Report on the Working of the GCC, PCAB, and PCRB During 2010

carried out over the past five years, are primarily meant to serve solely as a guideline. In other words, a less than a handful of months here or a less than a handful of months there are not going to make a difference, especially when one was asked to provide evidence of projects the value of which “shall not be less than €40,000” and a participating tenderer, in this case the appellant joint venture, provided evidence of a project worth €592,410. It is inconceivable for the PCAB to accept that an adjudication board, in its search to establish the financial and operational solidity of a participating tenderer, ends up being more focused on the mere fact that a project, as presented, has exceeded the arbitrary ‘guideline’ set (5 years) by a less than a handful of months rather than the financial strength or the technical and operational expertise of the bidder.

2. The PCAB seems rather confused as to how tenderers participating in this tender were expected to present projects whose value should not have been less than €40,000 – considered by the PCAB to be rather low - considering that the estimated value of this tender in question is Euro 273,947 (excluding VAT)!

3. The PCAB opines that time frames, as contemplated in a tender document, should be strictly adhered to when it comes to issues like ‘bank guarantees’, dates of documents and certificates presented and so forth. This Board argues that there is a difference between a time frame intended to serve as a guideline – not scientifically arrived at - and a time frame aimed at serving as a ‘cut off’ date with no reason for the adjudicating process to be flexible at all. Whilst (a) ‘guidelines’ should serve adjudicators as further proof of a tenderers’ submission, (b) ancillary proof via third party evidence or officially supported listing of personal financial commitments are requested to support operational and financial commitment being entered into as well as a bidders’ financial standing (financial statements, bank statements, guarantees, bid bonds, etc.). There is no doubt that, in the latter’s case, rigidly observed ‘cut off’ dates / specific deadlines are important as these would be considering all submissions at par and reflecting a ‘snap shot’ scenario at a specific moment in time applicable to all parties’ concerned.

4. The PCAB, whilst in full agreement with the point raised by an interested party’s representative wherein, inter alia, it was argued that it is not the tenderer who has to decide what is arbitrary or mandatory or an acceptable deviation, yet, one has to acknowledge that the argument would have remained valid had the tenderer reneged on submitting proof. In this instance the PCAB argues against the scope behind excluding a tenderer’s submission for exceeding a guideline arrived at in an arbitrary manner and which is, supposedly, solely introduced to facilitate an adjudicating process.

As a consequence of (1) to (4) above this Board finds in favour of the appellants and recommends that the appellants’ submission be evaluated further.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza  Anthony Pavia  Edwin Muscat
Chairman  Member  Member

17 September 2010

Addendum

Albeit Mr Anthony Pavia, one of the PCAB’s members had already verbally agreed with the other members on the way the PCAB had to proceed with its decision relevant to this particular case, yet, unfortunately, Mr Pavia passed away on the 8th September 2010 whilst this decision was still being drafted.
PUBLIC CONTRACTS APPEALS BOARD

Case No. 224

Adv CT 411/2009 - CT 2465/2009 – DH 158/06
Purchase of an Ultrasound Machine for Mater Dei Hospital

This call for tenders was published in the Government Gazette on 23rd October 2009. The closing date for this call for offers was 3rd December 2009.

The estimated value of this tender was Euro 150,000.

Five (5) tenderers - submitted nine (9) options.

Jamesco Trading Ltd filed an objection on the 14th June 2010 after being informed that ‘since none of the submitted offers were fully compliant with the tender’s specifications and conditions, this tender is to be cancelled’ and that their ‘offer was rejected because they did not include the necessary financial standing to safely and reliably enter into and perform a contract of this nature and magnitude as requested under the Selection Criteria in point 1’.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 15 September 2010 to discuss this objection.

Present for the hearing were:

Jamesco Trading Co Ltd
Dr Nadia Vella B.A., LL.D, Legal Representative
Mr. Luke Vella
Mr. Philip Chircop.

Mater Dei Hospital
Ms Stephanie Abela
Mr Marnol Sultana

Adjudicating Board
Mr Rosario Attard, Chairperson
Ms Marlene Gauci, Secretary
Dr Edward Melililo, Evaluator
Dr David Gatt, Evaluator

Department of Contracts
Mr Francis Attard, Director General (Contracts)

After the Chairman’s brief introduction as to how the proceedings were going to be conducted, the appellant company’s representative was invited to explain the motives of the objection.
Dr Nadia Vella, legal representative of Jamesco Trading Co Ltd, started by making reference to their reasoned letter of objection wherein they specified the two main reasons which led to the filing of their objection.

She said that her clients were informed that their offer was not accepted because they did not include the necessary financial standing. She contended that, contrary to what was stipulated by the law, the tender issued by the Department of Contracts did not indicate which references had to be provided by the tenderer as evidence of his financial standing.

Dr Vella claimed that the law itself laid down a mandatory obligation on the Department of Contracts to specify such references. At this point, the lawyer quoted in full Article 50 (4) of Legal Notice 177 of 2005 which stipulated that:

“Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit.”

She argued that, due to the fact that they did not specify which references had been chosen and which had to be provided as evidence of their financial standing, the Department of Contracts could not disqualify their offer once (i) they themselves had breached the law and (ii) Jamesco Trading Co Ltd could not provide any reference once these were not even requested.

In reply to a specific question by the PCAB, Dr Vella said that although the words ‘financial standing’ were included in the tender they did not indicate which of the references specified in the law had to be provided. She said that, as evidence of financial standing, the appellants had submitted the bid bond and a list of ultrasound machines that were installed. Following such claim, the appellant company’s legal advisor’s attention was drawn by the PCAB that the appellants must have wrongly interpreted the term ‘financial standing’ because it was obvious in the commercial world that this was definitely not a bid bond or the installation of such equipment. It was explained that the purpose of the term ‘financial standing’ was to assess whether a tenderer was financially strong to meet the tender’s obligation from a financial aspect only and not from a technical point of view.

With regard to the second ground of their objection, Dr Vella sustained that, from the documents submitted with their tender, the Evaluation Board could have arrived at the conclusion that her client had the necessary financial standing to enter into a contract of this magnitude because it had already installed fourteen (14) such ultrasound machines at Mater Dei Hospital itself and, as far as she was aware, eight of them referred to one contract. She argued that, once her client had the suitable financial standing to install 14 similar ultrasound machines, it was logical that it had the economic standing to install just one machine.

Mr Ronnie Attard, Chairman of the Evaluation Committee, said that according to information made available by Ing Karl Farrugia regarding the machines installed at Mater Dei, the contract was awarded to INSO and that Jamesco Trading Co Ltd were not involved in this matter.
When asked by the PCAB to state what they did expect to receive as evidence of ‘financial standing’, Mr Attard replied that they would have expected to be provided with pertinent financial instruments such as balance Sheets, profit and loss accounts, and other related financial documents.

Mr Attard also made reference to the Selection Criteria and quoted the following from page 72 of the tender document:

“The Tenderer has the necessary financial standing to safely and reliably enter into and perform a contract of this nature and magnitude.”

Dr David Gatt intervened by making reference to Article 50 (1) of the Public Contracts Regulation (LN 177 of 2005) which stipulated that:

“Proof of economic operator’s economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:

(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;

(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;

(c) a statement of the economic operator’s overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.”

Dr Gatt said that for evaluation purposes, as far as the economic and financial standing was concerned, they were prepared to accept any of the above requirements.

Dr Vella rebutted by stating that, contrary to what was stipulated in the above quoted Article 50 (4) of the Public Contracts Regulations, in the tender document it was not specified which references had been chosen and which of them had to be provided. She sustained that, in the prevailing circumstances, her clients were not obliged to provide such documents.

The PCAB drew her attention that they had two options - they could have either not participated in the tendering process, or else, they could have drawn the Contracting Authority’s attention that it was not in a position to participate.

Mr Philip Chircop, representing Jamesco Co Ltd, said that, in his opinion, they had submitted all that was requested in the Selection Criteria referred to earlier during the proceedings.
With regard to ‘financial standing of this magnitude’, the appellant company’s representative pointed out that this tender was issued for only one ultrasound machine and they had installed various similar machines. The PCAB intervened to draw his attention that his company was misinterpreting the term ‘financial standing’ because what was being stated referred to was what is commonly known as ‘track record’. It was explained that (i) the scope of financial standing in tenders was to evaluate the financial strength of a tenderer in order to establish whether they could fulfill their future obligations and (ii) the financial statements were, primarily, the audited accounts which could also be accompanied by a bank statement.

When Mr Chircop said that they submitted the bid bond for future obligations, the PCAB explained that a bid bond was a commitment that signified that a tenderer was serious about the bid.

Mr Chircop said that, due to the fact that they had no indication about which documents had to be submitted as evidence of their financial standing, he had submitted what he felt was sufficient. The PCAB drew his attention that this did not mean that he had submitted what was required.

When the appellant company’s representative said that he was under the impression that in the tender document it was indicated that a meeting could have been held to rectify their position, his attention was drawn to the fact that such meetings were not possible because these could lead to negotiations. However, the PCAB explained that the procedure permitted tenderers to seek clarifications in writing because in such instances any questions and replies thereto would be disseminated to all participants for purpose of transparency and pertinent level playing field.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18 June 2010 and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellant company’s arguments, particularly, those related to the fact that (a) contrary to what was stipulated by the law, the tender issued by the Department of Contracts did not indicate which references had to be provided by the tenderer as evidence of one’s financial standing, (b) due to the fact that it did not specify which references had been chosen and which had to be provided as evidence of their financial standing, the Department of Contracts could not disqualify the appellants’ offer, (c) as evidence of ‘financial standing’, the appellants had submitted the bid bond and a list of ultrasound machines that were installed, (d) according to the appellant company’s legal advisor, once her client had the suitable financial standing to install 14 similar ultrasound machines, it was logical that it had the economic standing to install just one machine and (e) contrary to what was stipulated in Article 50 (4) of the Public Contracts Regulations, in the tender document it was not specified which references had been chosen and which of them had to be provided proceeding to
note that, in the prevailing circumstances, the appellant company was not obliged to provide such documents;

- having also taken note of Mr Ronnie Attard’s intervention;

- having also taken cognizance of Dr Gatt’s reference to Article 50 (1) of the Public Contracts Regulation (LN 177 of 2005),

reached the following conclusions, namely:

1. The PCAB opines that the appellants have wrongly interpreted the term ‘financial standing’ because it is obvious that, commercially speaking, such term does not refer to either a bid bond or to an installation of some equipment. As a matter of fact, in public procurement, it is widely accepted and commonly understood that the scope of a participating tenderer providing evidence of one’s own ‘financial standing’ is for an evaluation board to be in a position to evaluate the financial strength of a tenderer in order to establish whether the latter could fulfill one’s own current and future obligations within the context of the terms of the tender under review. Finally, it is also commonly understood that the ‘financial standing’ is predominantly assessed through pertinent financial instruments as audited accounts, bank statements and so forth.

2. The PCAB considers that, whilst it remains a democratic right for anyone to seek legal remedy, yet, in this particular instance the lodging of this appeal could have been avoided as it was highly frivolous in nature.

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

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

22 September 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 225

Adv CT /A/ 50/2009 - CT 2510/2009
Works tender for the upgrading, embellishment and landscaping of the Waterfront, Xatt ir-Risq, Birgu

This call for tenders was published in the Government Gazette on 30 October 2009. The closing date for this call for offers was 10 December 2009.

The estimated value of this tender was Euro 2,000,000 (exclusive of VAT).

Five (5) tenderers participated in the said tender.

BBHV Joint Venture filed an objection on the 7 July 2010 after being informed that ‘the tender submitted by you was not successful as your offer was not technologically compliant’.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 15 September 2010 to discuss this objection.

Present for the hearing were:

**BBHV Joint Venture**
- Dr. Charisse Ellul LL.D Legal Representative
- Dr. John L. Gauci LL.D Legal Representative

**Bonnici Brothers:**
- Architect David Bonnici
- Mr. Emanuel Bonnici
- Architect Ray Sammut

**Hal Mann:**
- Architect Hugh Vella

**PaveCon Joint Venture**
- Dr. Kenneth Grima Legal Representative
- Architect Sandra Magro
- Mr. Anton Schembri

**Ministry for Infrastructure, Transport and Communication**
- Dr Josette Demicoli Legal Representative
Prior to the hearing, the PCAB and those present paid tribute to the memory of Mr Anthony Pavia, who served as a Board member for the past 8 years, by holding a one-minute silence. Mr Pavia passed away on the 8th September 2010.

Dr Kenneth Grima, legal representative of the PaveCon JV, complained about the fact that his client, whose tender was to proceed to the opening of the financial package, after making a specific request to the Department of Contracts, was not provided with a copy of the appellants’ letter of objection. Mr Francis Attard, Director General (Contracts) replied by stating that the Public Contracts Regulations, under the Three Package Procedure, did not oblige the Department of Contracts to furnish interested parties with appellants’ letter of complaint. However, Dr Grima insisted that, being an interested party, he had a right to participate and comment in these proceedings and, as a consequence, he should be in possession of such letter since, otherwise, he would not be in a position to fulfil his obligations. The Chairman, PCAB said that although, as a praxis, he found no objection to provide such letter of objection to interested parties, however, on the other hand, he could understand the line of action followed by the Director General (Contracts) since he had to abide by the law and not praxis. Furthermore, the PCAB drew the attention of the lawyer that (i) the purpose of this hearing was to evaluate the reasons why a bidder’s offer was discarded during an evaluation process and (ii) only in case of an award it was obligatory on the Director General (Contacts) to forward the relative correspondence to recommended tenderer and all persons with a registered interested.

Mr Attard pointed out that Regulation 82 did not specify the right for interested parties to be furnished with the appellants’ letter of objection. Dr Grima replied by stating that such a right was natural because, as an interested party, his client should have a right to a fair trial. He sustained that he would only be in a position to comment if the relevant documentation was made available.

Finally, with the concurrence of the appellant’s lawyer, it was decided to accede to Dr Grima’s request.

At this point the Chairman PCAB, after making a brief introduction about this case and after informing those present as to how the PCAB was going to conduct the hearing, proceeded by inviting the appellants’ legal representative to explain the motives of the objection.

Dr John L. Gauci, legal representative of BBHV Joint Venture, started by making reference to the Department of Contracts’ letter of exclusion dated 30th June 2010.
whereby his clients were informed that their “offer was not technically compliant” on the basis of the following two reasons:

- The programme of works was spread over a period exceeding the 39 works (should read “weeks”) mentioned in clarification 1
- You have indicated in Form 4.6.7 submitted that you will only have one subcontractor, whereas in the clarification you have indicated otherwise.

He contended that the two reasons given for his clients’ exclusion were unfounded because their offer was in conformity with the tender document.

With regard to the first ground of exclusion, Dr Gauci sustained that the tender document did not make any reference at all to a completion period of works. He explained that during a site visit the tenderers were informed that it was anticipated that this contract would be spread over a 9 month period. The same lawyer said that they never mentioned 39 weeks. At this stage he quoted the relevant paragraph from Clarification No 1 which read as follows:

“ENVISAGED COMPLETION DATE:

A 9 months period is anticipated and was mentioned during the Site Visit – Clarification Meeting to those Tenderers who attended.”

The appellants’ legal representative contended that it was clear that the terms “envisioned” and “anticipated” did not imply any compulsory requirement and these were only indicative.

Furthermore, he said that the tender document itself, in Article 32 (page 131 of the tender document), entitled Period of Performance, it was stated that:

“Performance of the works is expected to take place in accordance with the General Program of works at Volume 5 of these Tender Documents.”

He also pointed out that the General Programme of works did not exist as Volume 5 was completely blank. He drew the attention of those present as to the fact that his clients had demanded a clarification by means of a letter dated 23rd November 2009 addressed to the Director of Contracts which, however, remained unanswered.

Dr Gauci said that, nevertheless, BBHV Joint Venture submitted a programme of works wherein they showed that all the works would be completed within 39 weeks. He said that the only items that would be carried out after the lapse of the 39 weeks were the demobilization and cleaning of the site. Dr Gauci explained that Articles 15.4 (c) and (d) of the Special Conditions in the tender document permitted that such works were to take place after the completion of the works since it was specified that:
(c) Within three (3) days of the completion of works that Contractor shall notify the Supervisor and organise a Site inspection of the finished works.

(d) Within two (2) weeks of the Site Inspection, barring the remedy of any defects, poor workmanship, materials, finishes or other pending items notified to the Contractor in writing, the Contractor shall ensure that the site is cleaned and cleared of all material, debris, waste, plant, machinery or other equipment and shall surrender the site to the Supervisor together with all works and improvements erected thereon.

The appellants’ legal representative said that the tender document itself also stated that, by at least four weeks before commencement of works, the Contractor was obliged to draw up another programme of works and this had to be submitted for the Supervisor’s consideration and approval. He said that Articles 11.5 and 15.4 (pages 81 and 128 of the tender document respectively) specified that:

11.5 .......The Contractor shall draw up and submit for the Supervisor’s approval a programme of performance of the contract, in accordance with the detailed rules laid down in the Special Conditions......

15.4 .......The Program of Works shall be submitted by the Contractor not less than four (4) weeks prior to the start of works on the first phase and shall follow the General Programme indicated in the Gantt Charts, attached at Volume 5 of these Tender Documents.....

The appellants’ lawyer argued that, in view of the above, he failed to understand how his client could have been excluded on the basis of the first reason given.

With regard to the second reason of exclusion, Dr Gauci started by making reference to clarification letter dated 18 May 2010 whereby Mr Hector Chetcuti, Chairman of the Evaluation Committee, asked his clients to ‘clarify that the subcontractor mentioned in Form 4.6.7 will in fact be carrying out all subcontracting works’. On 20 May 2010 Mr Mario Bonnici acting on behalf of BBHV Joint Venture replied that ‘the subcontractor mentioned in Form 4.6.7 will be carrying out all subcontracting works’. Dr Gauci said that, on the basis of such a clear confirmation, it could not be understood how his client could have been excluded from the adjudication process.

Dr Gauci pointed out that, after filing their objection, they received a letter from the Department of Contracts informing them that they were amending the second reason of exclusion because they had made a mistake. At this point, the appellants’ lawyer quoted verbatim from the Director General (Contracts)’s letter dated 16 July 2010 which, inter alia, stated:

“Kindly note that the second bullet of the letter, word for word from the Evaluation Committee’s report, should have read as follows:

The Resources Schedule Plan submitted by the Bidder indicated three sub-contractors for structural steel works, landscaping and M&E works respectively. Since Structural steel works and M&E tally to around approximately 16% of the value of the works and since the
Report on the Working of the GCC, PCAB, and PCRB During 2010

Bidder indicated in Form 4.6.7 in his submission that he will have only one subcontractor carrying out all subcontracting works according to Bidder’s answer to clarification, the Committee decided that the Bidder did not give all the requested information as per tender document and thus is technically not compliant.”

The appellants’ lawyer contended that in their offer they had indicated one subcontractor and in reply to a clarification they had confirmed that such works would have been carried out by one subcontractor. He insisted that they never indicated that such works would be carried out by three subcontractors.

Dr Gauci strongly protested about the fact that, after filing a letter of objection and a reasoned letter of objection that were based on the reasons given for the bid being excluded from being evaluated further, his clients had subsequently received another letter that completely changed all the parameters in the first letter of exclusion. He sustained that this was unjust and unacceptable and, for the purpose of this appeal, he invited the PCAB to disregard the second letter of exclusion dated 16 July 2010 and to consider only the first letter of exclusion dated 30 June 2010.

Dr Josette Demicoli, legal representative of the contracting authority, responded by stating that she did not agree with the interpretation given by the appellants’ lawyer that the completion period of 9 months was only indicative and not mandatory. She sustained that although the completion period of works was not indicated in the tender document, this was clearly stated as 9 months when a specific reply was given to a particular question during a site visit held on 13 November 2009 which was also attended by the appellants BBHV Joint Venture. She said that the 9 months, when converted into weeks, would amount to 39 weeks (based on 3 months = 13 weeks). The lawyer claimed that once the 9 month period was clearly indicated, then it could not be argued that this was approximate because the 9 months were fixed, crystallised.

The PCAB intervened to draw her attention that once the 9 month period was “envisaged” then it was not explicit. Furthermore, it was stated that the reply given was not clear because if the 9 months were compulsory, they should not have used the term “envisaged”.

Dr Demicoli opined that if the appellants had a doubt about the completion period they should have demanded a clarification. Furthermore, she pointed out that considering the fact that all other tenderers had conformed to this requirement then it could not be argued that it was not clear.

The contracting authority’s lawyer said that the appellants’ argument that they had complied with the tender’s requirements was not completely correct because the same Article 15.4 also specified that the 9 month completion period started from the order to start works. She said that, in its programme of works, BBHV Joint Venture decided to include with the 39 weeks a period of 4 weeks for pre-commencement works.

Dr Demicoli maintained that Article 15.4 should be considered holistically because the appellants’ lawyer quoted only part thereof. She said that Article 15.4 (a) under ‘Special Conditions’ specified that:

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The same lawyer also contended that the contractor had to carry out the preliminary works from the order to start works and therefore it was unacceptable that such works were included outside the time frame of 9 months.

With regard to the drawing up and presentation of the new programme of works, Dr Demicoli clarified that the contracting authority was not anticipating that the contractor would amend the programme in substance, including the period within which the works had to be completed.

As regards to the second ground of exclusion and the appellants’ objection to the issue of an amendment to the second bullet of rejection, Dr Demicoli denied that the reason of exclusion was changed. She explained that, when the reason of exclusion in the Evaluation Committee’s report was reproduced in the Department of Contracts’ letter that was sent to the appellants, it was noticed that it did not reflect exactly what was actually written in the said report and, as a result, it was found necessary for a rectification letter to be issued.

The two main witnesses in these proceedings were Mr Hector Chetcuti, Chairman of the Evaluation Committee and Architect Ray Sammut representing the appellant joint venture. Both of them gave their testimony under oath.

On taking the witness stand, Mr Chetcuti gave a brief explanation to clarify what prompted the Director General (Contracts) to send a letter - dated 16 July 2010 - to rectify the second bullet of the exclusion which had been included in his original letter dated 30 June 2010.

Mr Chetcuti said that their report was submitted to the General Contracts Committee for evaluation purposes and for the publication of the results. The Chairman of the Evaluation Committee said that he did not see the contents of the letters that were sent to the participating tenderers, however, when they received a copy of the objection letter, it was noted that the second reason did not reflect what was written in their report. As a result he informed the DG Contracts about the matter and it was decided that the appellant should be informed about the real reason behind the exclusion.

Mr Chetcuti said that they had requested the appellants to confirm that the subcontracting works were going to be carried out by one contractor because in Form 4.6.7 ‘SUB-CONTRACTING’ it was indicated that the soft landscaping works were going to be subcontracted to INTEXT Landscaping while in the ‘Resources Schedule’ it was indicated that there were going to be three sub-contractors and not one, that is, one for electrical and mechanical, another one for soft landscaping and the third for steel metal works. He said that, on the basis of the tenderer’s confirmation in Form 4.6.7 that all the subcontracting works would be carried out by one subcontractor, they failed to understand who was going to perform the remaining subcontracting works indicated in the Resources Schedule. He pointed out that in Form 4.6.7 every tenderer had to declare against each subcontractor the value of subcontracting works in relation to the total cost of project. He said that they only knew that the percentage of the subcontracting landscaping works was 7% but they did not know the percentages of the other two subcontracting works. Furthermore, he said that, in cases...
where a sub-contractor was going to carry out more than 10% of the whole project, tenderers were required to submit certain declarations / documentation. Article 3.3 of the Instructions to Tenderers stipulated that:

“The eligibility requirements detailed in Sub-Articles 3.1 and 3.2 also apply to all partners in a Joint Venture or Consortium, all Sub-Contractors and all Suppliers to Tenderers. In addition to their own details, documents and certificates, Tenderers must supply all details, documents and certificates required under Sub-Article 3.2 in respect of:

i) Every partner in a Joint Venture or Consortium
ii) Every Sub-Contractor providing more than 10% of the value of the Works
iii) Every Supplier providing more than 10% of the value of the Works

Sub-Contractors and Suppliers must also satisfy the eligibility requirements specified in Sub-Article 3.1”

On cross examination by Dr Gauci, Mr Chetcuti confirmed that BBHV Joint Venture did not provide the names of the three sub-contractors but indicated that there were going to be three sub-contractors. The appellants’ lawyer said that in the ‘Resources Schedule’ they did not indicate the number of sub-contractors but the works that were going to be subcontracted, that is, M&E, soft landscaping and steel metal works. Mr Chetcuti remarked that such works had to be carried out by sub-contractors. Dr Gauci responded by stating that, in reply to a specific clarification, his clients had confirmed that such works would be carried out wholly by one sub-contractor.

The Chairman PCAB said that he would interpret the information on the ‘Resources Schedule’ that the indicated three types of works were going to be sub-contacted and this did not necessarily follow that such works were going to be sub-contracted to three different people. The ‘Resources Schedule’ did not indicate three sub-contractors but three types of works.

Continuing, Mr Chetcuti said that, on verifying the estimated value of the subcontracted works with available internal statistical information, it was observed that these had exceeded the threshold of 10%. When the PCAB drew his attention that they should not exclude bidders on assumptions once the financial considerations had not yet been evaluated, the Chairman of the Evaluation Committee responded by stating that internal statistical information was used for guidance purposes and this clearly showed that the total value of the works contemplated by the sub-contractor was above 16%. He maintained that if the appellants did not indicate the three sub-contracting works on the ‘Resources Schedule’ they would not have excluded the bidder on this ground. However, the Chairman PCAB said that they should have corroborated the assumptions with facts first and should not have relied solely on assumptions because facts could prove otherwise.

When the PCAB drew the attention of Mr Chetcuti that, originally, there were five bidders and after the first report these were scaled down to three and, finally, only one bidder remained, the reply given was that it was the General Contracts Committee that decided and not the Evaluation Committee.
With regard to the first reason given for the appellant’s exclusion, that is, the completion period of works exceeded the 39 weeks, the witness said that the 9 months were to be calculated from the order to start works since under Article 15.4 (a) and (b) it was clearly specified that:

a) **Upon issue of the Order to Start Works, the Contractor shall immediately assume his responsibilities and obligations, take possession of the site within two (2) weeks, commence the mobilization process and endeavour to start such preliminary/preparatory works on site as may be required and as may be commenced at that stage.**

b) **Within thirty (30) days (6 weeks) of the Order to Start Works, the contractor shall submit for approval by the Supervisor (in digital and in hard copy form), a detailed program of works for the whole project, clearly identifying commencement and completion dates for each part of the works in accordance with the General Schedule at Volume 5 of the tender documents, tasks, work packages and other related activities for each of the different phases.**

He claimed that (i) BBHV Joint Venture stated that they would be starting the programme of works from -4 to 39 weeks which amounted to 43 weeks and (ii) the Gantt Chart as submitted, indicated that they were assuming that the pre-commencement of works was not part of the performance period.

At this stage Dr Gauci intervened to quote the following from Article 15.4 in order to substantiate his argument that the period of -4 was in conformity with the requirement of the tender document:

‘The Program of Works shall be submitted by the Contractor not less than four (4) weeks prior to the start of works on the first phase...’

Mr Chetcuti rebutted by stating that “prior to the start of works” was different from “prior to the order to start works” because the first phrase referred to the physical works while the second referred to the document that was to be issued to the contractor upon the signing of the contract.

In reply to specific questions by Dr Gauci, the witness confirmed that:

- according to the Gantt Chart, the appellants had indicated that the programme of works would be submitted within four weeks before start of physical works
- the programme of works was not included in the tender document as indicated in Article 15.4
- the cleaning of the site and the demobilization were going to be carried out after the completion of the project
Further to the second bullet, Mr Chetcuti declared that all participating tenderers had complied with the tender’s requirement concerning the submission of the *Programme of Works*.

Mr Chetcuti stated that in the pre-commencement of works the appellants had included the following:

“Obtain all relevant permits for works, Submit works programme, submit topographical survey of the site to Supervisor, Erect site hoarding and gates fence of site, Mobilise site offices and facilities, Provide water, electricity, telephone, internet services to site offices, and install Project Information Board”

Mr Chetcuti also remarked that the other bidders had included the preparatory or preliminary works within the 39 weeks.

When specifically asked by Dr Gauci to state what did the four weeks prior to the start of works mean, the Chairman of the Evaluation Committee said that they should definitely not be considered over and above the 9 month period of performance.

At this point the Chairman PCAB remarked that he understood that the contracting authority wanted the project to be completed within a period of 9 months. It was also stated that as an Appeals Board they had to deliberate on whether the 9 month period was ‘mandatory’ or ‘envisaged’.

Dr Gauci reiterated that his clients had committed themselves to complete the physical works within 39 weeks.

Dr Grima intervened to state that the contractor was obliged to:

- submit the programme of works four weeks prior to the commencement of works
- carry out such works in accordance with what was indicated on the *Gantt Chart*
- start and complete the project within a period of 39 weeks

He contended that all preparatory works were part of the programme of works and, likewise, the pre-contract was part of the contract. He said that it was imperative for the PCAB to analyse whether the preparatory works were part of the normal contract which had to be carried out within 39 weeks.

Dr Grima said that although, undoubtedly, “envisaged” did not mean “exactly”, however, the 39 weeks could not be stretched unlimitedly but by a reasonable period. He claimed that the civil law permitted variances up to 5% and once the 4 weeks as a percentage of the 39 weeks amounted to 10%, then, this could not be considered as “approximate” because it was double that established by law.

With regard to the second reason, Dr Grima said that on analysing the information given in Form 4.6.7, he would arrive at the conclusion that there was one sub-contractor who would be carrying out 7% of the project and that this sub-contractor
would be carrying out landscaping works. He questioned who was going to carry out the other sub-contracting works once (i) M&E, landscaping works and steel metal works involved 16%-17% of the project and (ii) the sub-contractor and the partners of the joint venture had no experience in M&E and steel structures.

With regard to the rectification letter of exclusion, Dr Grima said that everything could be changed in court provided that the mistake was genuine.

The same lawyer maintained that, in view of the above, the appellants’ offer should be discarded.

Mr Chetcuti said that the profile information of the sub-contractor, as submitted by the bidder, did not indicate that they were capable of carrying out steel structures or M&E except for landscaping works.

The second witness, namely Architect Ray Sammut who was representing BBHV Joint Venture, was called by the PCAB to take the stand.

On cross-examination by the PCAB, Architect Sammut testified that their sub-contractor was INTEXT Landscaping who, apart from landscaping, was capable of carrying out various other works, including M&E and steel structures. He said that the 17% mentioned by the Chairman of the evaluation board was an estimate arrived at by their architects to be used for adjudication purposes. The witness contended that these percentages could not be used before and even after the opening of the financial package because (i) they could have different estimates from different contractors and (ii) if a contractor provided all materials and/or labour, the works carried out by the sub-contractor would be much less. Furthermore, he maintained that the value of works carried out by the sub-contractor could never be worked out precisely from the financial bid.

In reply to a specific question by Dr Grima, Architect Sammut said that the percentage of the steel structures, M&E and landscaping would be less than 10%, however, they indicated 7% for landscaping.

The PCAB intervened to draw the attention of the witness that, in view of the fact that in the Resources Sheet it was indicated that the sub-contractor would be carrying out M&E, landscaping and steel metal works, they should not have included only soft landscaping works in Form 4.6.7. Furthermore, it was pointed out that in the same form under Experience in similar work (details to be specified) it was stated ‘See Form 4.6.12. Further Information and in the latter form reference was only made to ‘Landscaping’. It was stated that both forms should have incorporated the three sub-contracting works.

Architect Sammut sustained that electrical and steel structure (canopy) were part of the landscaping and, as a result, the 7% included the value of all sub-contracting works. He said that, in architecture, landscape could also include a steel structure. The witness explained that in the ‘Resources Schedule’ they indicated the three tasks that would be carried out by the sub-contractor. He admitted that, most probably, the fact that they indicated only soft landscaping works in Form 4.6.7 was somehow misleading and this could have been the reason why the Evaluation Board requested such clarification by means of letter dated 18 May 2010 wherein it was stated that:
“In view that Form 4.6.7 submitted as part of your bid indicates INTEXT Landscaping as the sole sub-contractor that you will be engaging if awarded the contract and considering that the resource schedule submitted as part of Form 4.6.3 makes reference to the subcontracting of three elements of the works (landscaping, Mechanical & Electrical and steel structures), please clarify that the subcontractor mentioned in Form 4.6.7 will in fact by carrying out all subcontracting works."

The same witness said that in their reply of the 20 May 2010 they confirmed that the three tasks would be carried out by the same sub-contractor, namely INTEXT.

Dr Gauci intervened to state that, if the Board had any doubts about INTEXT’s experience in similar works, they should have asked specific questions about the matter. Architect Sammut added that they could have been asked to provide further evidence regarding the sub-contractor’s capabilities in carrying out M&E and Steel Structure works.

Mr Chetcuti rebutted that they could not ask bidders to submit further information.

However, Dr Gauci said that they could have sought clarifications on information submitted and if they were asked to state whether they had experience on M&E they would have answered in the affirmative. On his part, the Chairman of the Evaluation Board claimed that the copy of registrations of employees with the Employment and Training Corporation (ETC) that was submitted with their offer did not indicate that they had steel experts, welders or electricians. Architect Sammut claimed that this was not a criterion because such employees were all registered as labourers.

Mr Chetcuti placed emphasis on the fact that steel works were extremely relevant for this project because the steel structure (canopy) was going to have an impact on the whole project and required a specialized job.

Dr Gauci said that the documents submitted showed that parts of the subcontracting works were going to be supplemented by the partners of the joint venture. Architect Sammut added that these were indicated under Own workforce within Labour Resources of the Resources Schedule.

The PCAB drew the attention of the appellants’ representatives that the onus of submitting relevant and appropriate information and clarifications was on the bidders because

- it was they who had to convince the Evaluation Board that the sub-contractor was capable of carrying out such works and that the M&E works and Steel Metal Works did not exceed the 3% (considering the fact that (i) the 7% was attributed to soft landscaping works and (ii) if the sub-contracting works exceeded the 10% they had to corroborate this with further documentation to comply with the tender conditions); and

- the Evaluation Board had to adjudicate on documentation submitted.
The Chairman PCAB said that in view of the manner in which the submission was presented he understood that the M&E and Steed Metal Works were not going to be carried out by the sub-contractor but by the partners of the joint venture.

Architect Sammut maintained that:

(i) they had submitted all information that was requested in the tender document;

(ii) most of the input would be provided from own resources (according to their financial calculations the joint venture could do 93% and the sub-contractor 7% of the value of works);

(iii) the contracting authority’s benchmark of 16%-17% was arrived at on the assumption that such works would be resourced wholly by the contractor; and

(iv) they submitted a confirmation precisely as requested by the Chairman of the Evaluation Committee in his clarification letter, otherwise, their offer might have been disqualified if they provided more information than requested.

Dr Gauci insisted that:

(i) they had confirmed that all sub-contracting works to be carried out by INTEXT was 7% and, as a result, they did not need to corroborate this with further documentation

(ii) the sub-contractor was not going to carry out all M&E and steel metal works since such works were to be carried out with the assistance of the partners of the joint venture by providing material and labour;

(iii) all doubts about the sub-contractor were clarified by appellant who confirmed that INTEXT ‘will be carrying out all subcontracting works’;

(iv) if the evaluation board wanted his clients to clarify specific issues they should not have requested just a confirmation.

In reply to a specific question by the PCAB, the Chairman of the Evaluation Committee confirmed that the tenderer who proceeded to the financial stage was administratively and technically fully compliant.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 12 July 2010 and also through their verbal submissions presented during the public hearing held on 15 September 2010 had objected to the decision taken by the General Contracts Committee;
having taken note of the appellants’ representatives (a) claim that the contents of the Department of Contracts’ letter dated 30th June 2010 wherein two reasons for the exclusion of the appellants’ bid were highlighted were unfounded because their offer was in conformity with the tender document, (b) claim that whilst the tender document did not make any reference at all to a completion period of works, during a site visit, the tenderers were informed that it was anticipated that this contract would be spread over a 9 month period, (c) claim that they never mentioned 39 weeks, (d) contend that it was clear that the terms “envisaged” and “anticipated” did not imply any compulsory requirement and these were only indicative, (e) statement that BBHV Joint Venture submitted a programme of works wherein they showed that all the works would be completed within 39 weeks, (f) contention that in their offer they had indicated one subcontractor and in reply to a clarification they had confirmed that such works would have been carried out by one subcontractor, (g) protest about the fact that, after filing a letter of objection and a reasoned letter of objection that were based on the reasons given for the bid being excluded from being evaluated further, they had subsequently received another letter that completely changed all the parameters in the first letter of exclusion, (h) statement wherein it was stated that in the ‘Resources Schedule’ they did not indicate the number of sub-contractors but the works that were going to be subcontracted, that is, M&E, soft landscaping and steel metal works and that, in reply to a specific clarification, they had confirmed that such works would be carried out wholly by one sub-contractor, (i) claim that the period of -4 weeks was in conformity with the requirement of the tender document, (j) claim that their sub-contractor was INTEXT Landscaping which, apart from landscaping, was capable of carrying out various other works, including M&E and steel structures, (k) claim that the 17% mentioned by the Chairman of the evaluation board was an estimate arrived at by their architects to be used for adjudication purposes and that these percentages could not be used before and even after the opening of the financial package because (1) they could have different estimates from different contractors and (2) if a contractor provided all materials and/or labour, the works carried out by the sub-contractor would be much less;

having also taken note of the points raised during the hearing by the contracting authority, in particular the fact that (a) although the completion period of works was not indicated in the tender document, this was clearly stated as 9 months - which amount to 39 weeks - when a specific reply was given to a particular question during a site visit held on 13 November 2009 which was also attended to by the appellants BBHV Joint Venture, (b) considering the fact that all other tenderers had conformed to this requirement then it could not be argued that it was not clear, (c) in its programme of works, BBHV Joint Venture decided to include with the 39 weeks a period of 4 weeks for pre-commencement works, (d) the contractor had to carry out the preliminary works from the order to start works and therefore it was unacceptable that such works were included outside the time frame of 9 months, (e) with regards to the second ground of exclusion the contracting authority denied that the reason of exclusion was changed explaining that, when the reason of exclusion in the Evaluation Committee’s report was reproduced in the Department of Contracts’ letter that was sent to the appellants, it was noticed that it did not reflect exactly what was actually written in the said report and, as a result, it was found necessary for a rectification letter
to be issued, (f) whilst in Form 4.6.7 every tenderer had to declare against each subcontractor the value of subcontracting works in relation to the total cost of project, yet, with regards to the appellants, the evaluation board only knew that the percentage of the subcontracting landscaping works was 7% but they did not know the percentages of the other two subcontracting works and, considering that in cases where a sub-contractor was going to carry out more than 10% of the whole project, tenderers were required to submit certain declarations / documentation, the Board felt that the bidder, in this case the appellant joint venture, was infringing the specifications of the said tender, (g) albeit internal statistical information was used for guidance purposes only, yet this clearly showed that the total value of the works contemplated by the sub-contractor was above 16 %, namely much more than the 10% threshold, (h) the BBHV Joint Venture stated that they would be starting the programme of works from -4 to 39 weeks which amounted to 43 weeks, (i) the Gantt Chart, as submitted by the appellants, indicated that the latter were assuming that the pre-commencement of works was not part of the performance period, (j) the other bidders had included the preparatory or preliminary works within the 39 weeks and (k) the profile information of the sub-contractor, as submitted by the bidder, did not indicate that they were capable of carrying out steel structures or M&E except for landscaping works;

- having also taken cognizance of Dr Grima’s (a) contention that all preparatory works were part of the programme of works and, likewise, the pre-contract was part of the contract, (b) remark that albeit the term “envisaged” did not mean “exactly”, yet, the 39 weeks could not be stretched in an unlimited manner but by a reasonable period and (c) argument wherein he said that in view of the fact that on analysing the information given in Form 4.6.7, one had to conclude that there was one sub-contractor who would be carrying out 7% of the project and that this sub-contractor would be carrying out soft landscaping works, yet this also gives rise to a few queries as, for example, who was going to carry out the other sub-contracting works once (1) M&E, landscaping works and steel metal works involved 16%-17% of the project and (2) the sub-contractor and the partners of the joint venture had no experience in M&E and steel structures,

reached the following conclusions, namely:

1. The PCAB opines that once the 9 month period was “envisaged” then it was not explicit and that the reply given was not clear because if the 9 months were compulsory, the contracting authority should not have used the term “envisaged”.

2. The PCAB interprets the information on the ‘Resources Schedule’ as stating that the three types of works indicated were going to be sub-contracted and not that these would have been, necessarily, going to be sub-contracted to three different people / entities.

3. The PCAB would have, prima facie, been inclined to consider that the evaluation board should have first corroborated the assumptions with facts and should not have relied solely on assumptions because facts could prove otherwise. However, following further deliberation, the PCAB feels that, likewise, one cannot rely on the arguments raised during the hearing by the appellants’
representatives considering that the same appellants stated that the percentage of the steel structures, M&E and landscaping would be less than 10% when in their submission they had indicated 7% solely for landscaping, casting serious doubts as to how one could expect that steel structures and M&E would be absorbed within the 3% balance requirement to fall within the threshold contemplated in the tender document.

4. The PCAB opines that the very fact that (a) since in the Resources Sheet it was indicated that the sub-contractor would be carrying out M&E, landscaping and steel metal works, the appellants should not have included only soft landscaping works in Form 4.6.7 and (b) in the same form under Experience in similar work (details to be specified) it was stated ‘See Form 4.6.12. Further Information’ wherein reference was only made to ‘Landscaping’, tends to more than clarify that, within the realms of the tender’s requirements, the appellant joint venture was referring to landscaping works to be carried out by the designated sub-contractor throughout without considering M&E and steel structures. The PCAB feels that clarifications would have been preferred but, in this instance, the onus was on the bidder to elucidate the evaluation board and not for the latter to seek clarification on facts which had to be read and examined as they were submitted by bidder. The PCAB argues that the supporting document gave no evidence that the sub-contractor chosen by the appellants is indeed capable of carrying all the works (landscaping, Mechanical & Electrical and steel structures).

5. The PCAB feels that the claim made by the appellant joint venture as to the fact that (a) electrical and steel structure (canopy) were part of the landscaping and, as a result, the 7% included the value of all sub-contracting works and (b) in architecture, landscape could also include a steel structure, fails to convince the same PCAB about its validity and this in view of the fact that no bidder challenged the way the template form was presented in the tender document and, as a result, the PCAB has to question why were steel structure, M&E and landscaping referred to separately even one is to assume that these refer to the same thing.

As a consequence of (1) to (5) above this Board finds against the appellant joint venture.

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

Alfred R Triganza        Edwin Muscat        Carmel J Esposito
Chairman               Member               Member

4 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 226

Adv. 004/2010; CT/2164/2009
Service Tender for Supply of Mattresses to Irregular Immigrants - AFM

This call for tenders was published in the Government Gazette on 5th January 2010. The closing date for this call for offers was 25th January 2010.

The estimated value of this tender was Euro 80,000.

Six (6) tenderers submitted their offers.

Environmed Ltd filed an objection on the 18th June 2010 following the decision by the Contracts Department to reject its offer for being technically non-compliant since the length of the sample mattress was 184 cm instead of the required 185 cm to 190 cm.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

Enviromed Ltd

Dr John Gauci Legal Representative
Mr Noel Delia Representative

Armed Forces of Malta (AFM)

Dr Mario Spiteri Bianchi Legal Adviser

Adjudicating Board

Col. M Bondin Chairman
Lt. Col. B Gatt Member
Lt. Col. G Galea Member
Mr J Debattista Member
Bdr. J Miruzzi Secretary

Department of Contracts

Mr Francis Attard Director General (Contracts)

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motives which led to the objection.
Dr John Gauci, legal representative of Environmed Ltd, the appellants, stated that, by way of letter dated 9th June 2010, the Contracts Department had informed his client that his tender was adjudicated to be non-compliant because the length of the sample mattress presented was 184 cm instead of the requested 185 cm to 190 cm and that since none of the tenders submitted were found fully compliant the tender was to be reissued.

Dr Gauci submitted the following:

- according to the contracting authority, the sample presented by his client was found to be 1 cm short of the length requested in the tender document;

- the sample supplied and, in the event of award, the mattresses that would eventually be supplied by his client would be 185cmx75cmx10cm as per specifications that his client furnished in its tender submission;

- foam material, unlike hard and solid material like steel or wood, tended to vary slightly in dimensions partly because these foam mattresses were delivered compressed in blue fibreglass waterproof bags for the purpose of packaging and transportation; and

- these mattresses were quite dense and when unpackaged and left to straighten out in favourable temperatures the mattresses would assume more or less the declared dimensions

On his part, Col. Martin Bondin, Chairman of the adjudicating board, made the following remarks:

- six tenderers participated in this tendering process of which three were found to be administratively non-compliant;

- of the other three administratively compliant tenders it transpired that on measuring the samples provided, tenderer no. 4 submitted a mattress 192cm long, i.e. exceeding the 185cm to 190cm requested, tenderer no. 5 presented a sample 82cm wide, i.e. beyond the stipulated limits of 75cm to 80cm and tenderer no. 6, the appellant, provided a sample that was 184cm long, i.e. outside the requested 185cm to 190cm;

- the adjudicating board had to evaluate within the specifications outlined in the tender document and it could not accept goods that did not fit those specifications

The PCAB asked whether it was imperative for the mattress to be of the exact measurements stipulated in the tender document. The PCAB argued that strict adherence to sizes and measurements was essential when dealing with precision instruments and scientific equipment but not when dealing with such an item as a foam mattress being 1cm too long or too short. The PCAB also pointed out that the appellants submitted both the sample and the supporting document, which document was within the stipulated criteria, and that one could not simply ignore the written declaration produced by the tenderer. He added that, in the event that the mattresses delivered would not be, in part or entirely, in accordance with the written
specifications accepted by the tenderer, then the contracting authority would have every right to refuse the goods and could even to seek compensation.

Mr Noel Delia, also representing the appellant Company, explained that the manufacturer had indicated to him that one had to allow for a plus or minus 10% from the documented measurements because the cutting machine was liable to vary by that much when it came to cutting foam material.

Col. Bondin remarked that the mattress was measured by two different teams and with different measuring tapes and the result was identical. He added that the contracting authority would prefer to award a tender rather than cancel it, however, since none were strictly in line with specifications they had to refuse them otherwise one would end up with the dilemma as to what variation from the stipulated measurements was acceptable or tolerable.

Dr Gauci insisted that his client was going to commit himself in writing, according to the ‘foam mattress specification’ which he submitted with his offer, that the mattresses were going to be supplied within the specifications requested. He continued that if the deliveries would not respect that commitment then the contracting authority had every right to request replacement or to impose penalties or even to cancel the contract.

The Chairman PCAB remarked that he still needed some reassurance to the statement made that foam material was liable to a 10% variation in size.

Col. Bondin remarked that the tenderers were not obliged to submit written specifications or certificates of the mattress offered but they were obliged to submit a sample as per Art. 5 of the ‘Special Conditions’

Dr Gauci insisted that his client had gone beyond what was requested of him and backed his sample with written specifications as to size, density, cover, packaging and so forth which were in conformity with tender specifications. The appellants’ legal representative insisted that he still had to be convinced that his client’s product was not up to specifications while adding that even the variation of 1cm brought up by the contracting authority was very minimal indeed and therefore his client’s offer ought to be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18 June 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ remarks in respect of the fact that (a) according to the contracting authority, the sample presented by them was found to be 1 cm short of the length requested in the tender document, (b) the sample supplied and, in the event of award, the mattresses that would eventually be supplied by them would be 185cmx75cmx10cm as per specifications that they furnished in
their tender submission, (c) foam material, unlike hard and solid material like steel or wood, tended to vary slightly in dimensions partly because these foam mattresses were delivered compressed in blue fibreglass waterproof bags for the purpose of packaging and transportation, (d) these mattresses were quite dense and when unpackaged and left to straighten out in favourable temperatures the mattresses would assume more or less the declared dimensions and (e) they were committing themselves in writing, according to the ‘foam mattress specification’ and should deliveries not respect that commitment then the contracting authority would have every right to request replacement or to impose penalties or even to cancel the contract;

- having also taken note of the contracting authority’s representatives’ (a) statement relating to the fact that of the other three administratively compliant tenders it transpired that on measuring the samples provided, tenderer no. 4 submitted a mattress 192cm long, i.e. exceeding the 185cm to 190cm requested, tenderer no. 5 presented a sample 82cm wide, i.e. beyond the stipulated limits of 75cm to 80cm and tenderer no. 6, the appellant, provided a sample that was 184cm long, i.e. outside the requested 185cm to 190cm, (b) remark that the adjudicating board had to evaluate within the specifications outlined in the tender document and it could not accept goods that did not fit those specifications, (c) reference to the fact that the mattress was measured by two different teams and with different measuring tapes and the result was identical, (d) remark regarding the fact that, since none of the bidders were strictly in line with specifications, the adjudication board had to refuse them otherwise one would have ended up with the dilemma as to what variation from the stipulated measurements would have been acceptable or tolerable and (e) comment that the tenderers were not obliged to submit written specifications or certificates of the mattress offered but they were obliged to submit a sample as per Art. 5 of the ‘Special Conditions’;

- having considered whether it was imperative for the mattress to be of the exact measurements stipulated in the tender document;

- having taken cognizance of the fact that the appellants submitted both the sample and the supporting document, which document was within the stipulated criteria, and that one could not simply ignore the written declaration produced by the tenderer,

reached the following conclusions, namely:

1. The PCAB feels that it still needed some reassurance to the statement made by the appellants that foam material is liable to a 10% variation in size.

2. The PCAB opines that, prima facie, it seems that the appellants had fulfilled all their obligations when submitting their bid, however, considering the fact that the sample varied from the size of the mattress declared in the document included in their submission, the PCAB is not in a position to establish in an objective manner as to whether the specifications being followed by the contracting authority and the claims made by the appellants are both factual and plausible.
As a consequence of (1) to (2) above this Board has decided to engage an independent expert on subject matter who, within the next few days and in the presence of both the contracting authority’s as well as the appellant company’s representatives, shall conduct his own analysis of facts available. It is this Board’s opinion that such independent analysis will provide it with greater peace of mind as to how it should proceed.

The PCAB so decides that the findings of this independent expert shall determine the outcome of this tendering process and that all parties concerned will have to abide with such expert’s findings and pertinent recommendations.

In consideration of (a) the fact that this appeal was not lodged in a frivolous manner, so much so, that the PCAB itself needs further independent advice on the matter in question and (b) the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed irrespective of the outcome of the independent consultant’s findings.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

13 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 226

ADDENDUM

Adv. 004/2010; CT/2164/2009
Service Tender for Supply of Mattresses to Irregular Immigrants - AFM

Further to:

a. the PCAB’s decision (Case No. 226) in connection with the subject in caption, particularly a couple of the concluding paragraphs wherein it was stated that:

“As a consequence of (1) to (2) above this Board feels that an independent expert on subject matter should be appointed in order to provide this Board with greater peace of mind as to how it should proceed.

The PCAB so decides that the findings of this independent expert shall determine the outcome of this tendering process and that all parties concerned will have to abide with such expert’s findings and pertinent recommendations.”

b. the engagement of Ing Joseph A. Bartolo (Director Metrology at the Malta Standards Authority) as the ‘independent expert’

and

c. following the receipt of the ‘Measurement report in relation to appeals case for Tender CT 2164 / 2009: Tender for the supply of mattresses to irregular immigrants’, dated 25th October 2010, from Ing. Bartolo, a copy of which is attached to this ‘addendum’,

this Board takes cognisance of the conclusion reached by Ing. Bartolo, namely:

“The sample supplied for this tender by Mr Delia, is not to the measurement specifications laid out in tender CT 2164/2009. This discrepancy in length i.e. of 1 cm would effectively result in a material saving for the producer of approximately 13.5 mattresses at a minimum overall length of 185cm.

The supplied sample has effectively failed to meet the minimum specifications laid out.”


In line with its own decision to abide by the conclusions reached by the same expert engaged by this Board, the PCAB finds against the appellant company, Environmed Ltd.

Alfred R Triganza  
Chairman  

Edwin Muscat  
Member  

Carmel J Esposito  
Member  

3 November 2010
Measurement report in relation to appeals case for:

Tender CT 2164/2009: Tender for the supply of mattresses to irregular immigrants.
Date of Test: 20th October 2010
Time of Test: 12:30 to 13:00
Location of Test: Storeroom No 4, AFM barracks Luqa

Interested parties represented: Mr. Bondin AFM; Mr. Miruzzi AFM; Mr. Delia - tenderer

Measurement exercise conducted by Ing Joseph A. Bartolo Director MSA-NMS assisted by Mr. Edgar Decelis Legal Metrology Officer MSA-NMS.

Conditions for test: Temperature 21.62°C RH 51.6%

The appeals case revolves around the actual measurements of the supplied tender sample against the specified tolerances indicated in the AFM tender CT 2164/2009 under Annex II of the mentioned tender document.

Under Annex II technical specifications, the overall dimensions and the tolerance band allowed have been clearly stipulated. The contention being made by the tenderer is that the supplied sample is in accordance to the defined specification in the tender.

In order to verify this a template of the measurements related to the tender document was laid out. The specified tolerance band of 50 mm was marked out against a common datum.

In the presence of the tenderer and the AFM personnel, confirmation that the sample available was the one supplied by the tenderer was made by Mr. Delia. Prior to measuring off the mattress, the tolerance band and its location on the marked out template were measured off and both parties corroborated that the indicated measurement on the template as being correct.

The sample mattress was placed on the marked datum and ensured square abutment against two squares placed on the same datum. The tenderer and the AFM personnel both confirmed that placement against the datum reference edge was correct. The mattress was left unaltered and the furthest edge of the mattress was checked in relation to the tolerance band marked out.
The supplied mattress sample was evidently shy of the tolerance band stipulated and was clearly smaller than the minimum overall length specified in the AFM tender. Both parties once again agreed that the mattress in the state supplied fell short of the specification limits set.

The overall length was measured off at three points across the width of the mattress. In all instances the overall length was found to be 184mm±0.9mm using a class II 3m tape measure.

Both parties corroborated each measurement conducted.

Conclusion:

The sample supplied for this tender by Mr. Delia, is not to the measurement specifications laid out in tender CT 2164/2009. This discrepancy in length ie of 1cm would effectively result in a material saving for the producer of approximately 13.5 mattresses at a minimum overall length of 185cm.

The supplied sample has effectively failed to meet the minimum specifications laid out.

(Signed)

Ing Joseph A. Bartolo
Director Metrology MSA
Date 25th October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 227

P.L.C. OWC/07/10
Tender for the Collection of Organic Waste

This call for tenders was published in the Government Gazette on 23\textsuperscript{rd} March 2010. The closing date for this call for offers was 14\textsuperscript{th} May 2010.

The estimated value of this tender was Euro 212,000 (exclusive of VAT).

Five (5) tenderers submitted their offers.

Mr Clifford Agius filed an objection on the 14\textsuperscript{th} June 2010 following the decision taken by the Pietá Local Council to (i) reject his offer because he failed to submit a true copy of the original offer as stipulated in clause 2.2 of the tender document and (ii) award the tender to SRF Cleaning Services.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

**Mr Clifford Agius**

- Dr Martin Fenech Legal Representative
- Mr Clifford Agius Representative

**SRF Cleaning Services**

- Dr John Gauci Legal Representative
- Dr Stefano Filletti Legal Representative
- Mr Steve Farrigia Representative
- Mr Joseph Attard Representative

**Pietá Local Council**

- Dr Fracesco Depasquale Legal Representative
- Mr Joseph Saliba Executive Secretary

**Adjudicating Board**

- Mr M Seychell Chairman
- Mr C. Mallia Technical Adviser

**Department of Contracts**

- Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant’s representative was invited to explain the motives of the objection.

Dr Martin Fenech, legal representative of Mr Clifford Agius, the appellant, explained that, by way of letter dated 8th June 2010, his client was informed that the Pietá Local Council, acting on the recommendation of the adjudicating board, had disqualified his offer because he failed to enclose a true copy of the original tender document as stipulated in clause 2.2 of the tender document.

Dr Fenech claimed that his client had been awarded this tender for the previous 12 years and that he had submitted the cheapest tender and within the required time limit. The appellant’s legal representative admitted that the only shortcoming on the part of this client was that, through an oversight, he did not enclose a copy of the original tender submission adding that that was a new requirement in the tendering procedure. Albeit conceding that the submission of a true copy of the tender submission was requested in the tender dossier, yet, Dr Fenech contended that this omission did neither put the other tenderers at any disadvantage nor did it influence the tendering process or the price offered and, as a result, the contracting authority should not disqualify his client on such trivial grounds and, at the same, limiting competition especially since he was the cheapest bidder.

Dr Francesco Depasquale, legal representative of the Pietá Local Council, noted that the appellant had conceded that he did not submit the copy of this tender submission and pointed out that the tender conditions were quite clear so much so that Clause 2.2 of the tender document stated, among other things, that:

“Each offer must contain one original, clearly marked as ‘original’, and one copy, marked ‘Copy’. Failure to respect these requirements will result in the rejection of the tender.”

Dr Depasquale remarked that this requirement was meant for a very precise purpose, namely, that the original submission would be kept intact, whereas, the copy would be handed over to the adjudicating board to carry out its evaluation. Dr Depasquale stressed that the tenderer had to furnish the copy of his submission because he would be responsible for its contents. He argued that it was not up to the contracting authority to produce a copy otherwise the contracting authority would be held responsible if any omissions or additions were discovered between the original and the copy.

The contracting authority’s legal representative stated that since the appellant’s tender was found to be administratively non-compliant, the adjudicating board did not and could not go into the technical and financial aspects of that tender.

Dr Depasquale refused the claim that it was the first time that the appellant was dealing with such a tender document because this tender was being issued for the second time because the first tender had been cancelled since all tenderers, including the appellant, were found to be non-compliant.

Dr John Gauci, legal representative of SRF Cleaning Services – the recommended tenderer – endorsed the arguments put forward by Dr Depasquale. Dr Gauci pointed
out that, whenever an appellant admitted before the PCAB that he had contravened the tender conditions, he was disqualified outright. At this point he made reference to PCAB Case No. 82.

Dr Gauci remarked that, as far as he was aware, this was the first time that the appellant was submitting a tender for this service or, better still, the second time since this tender had to be re-issued once none of the bidders had been found administratively compliant. He proceeded by stating that the recommended tenderer’s legal representative pointed out that the appellant did in fact submit a copy of his submission in the original call for tenders and, as a consequence, he could not claim ignorance.

SRF Cleaning Services’s legal representative then referred to the last paragraph of clause 2.3 ‘Administrative Criteria’ which provided that:

“Only those tenders that fulfil all the above administrative criteria will proceed for the evaluation criteria.”

Dr Gauci stressed that the submission by the tenderer of a copy of his original offer was mandatory and the purpose of that requirement was that in case the tenderer would challenge the adjudicating board that he had in fact furnished all the documentation then that controversy could be sorted out by the opening of the original submission.

Dr Fenech reiterated that, whilst his client admitted his mistake, yet he contended that that genuine oversight did not, in any way, prejudice the tendering process or affect the substance of the tender submission or the outcome of the evaluation. He concluded that his client ought to be asked to furnish a copy of the submission and be reinstated in the tendering process.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 14 June 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken particular note of the appellant’s (a) reference to the fact that he was informed that the Pietá Local Council, acting on the recommendation of the adjudicating board, had disqualified his offer because he failed to enclose a true copy of the original tender document as stipulated in clause 2.2 of the tender document, (b) admission that albeit, through an oversight, he did not enclose a copy of the original tender submission which was mandatory, yet no one could argue against the fact that such omission did not put the other tenderers at any disadvantage nor did it influence the tendering process or the price offered and (c) plea to be allowed to furnish a copy of the submission and be reinstated in the tendering process;
• having also taken note of the contracting authority’s (a) remark relating to the fact that the tender conditions were quite clear so much so that Clause 2.2 of the tender document stated, among other things, that each “offer must contain one original, clearly marked as ‘original’, and one copy, marked ‘Copy’” and that failure by anyone “to respect these requirements will result in the rejection of the tender.”, (b) reference to the fact that this requirement was meant for a very precise purpose, namely, that the original submission would be kept intact, whereas, the copy would be handed over to the adjudicating board to carry out its evaluation, (c) observation relating to the fact that it was not up to the contracting authority to produce a copy of the submission as, otherwise, the contracting authority would be held responsible if any omissions or additions were discovered between the original and the copy and (d) refusal of the claim made by the appellant that it was the first time that the appellant was dealing with such a tender document because this tender was being issued for the second time in view of the fact that the first tender had been cancelled since all tenderers, including the appellant, were found to be non-compliant;

• having taken cognizance of Dr Gauci’s (a) reference to the fact that, whenever an appellant admitted before the PCAB that he had contravened the tender conditions, he was disqualified outright making reference to PCAB Case No. 82, (b) remark that, as far as he was aware, this was the first time that the appellant was submitting a tender for this service or, better still, the second time since this tender had to be re-issued once none of the bidders had been found administratively compliant, (c) reference to the fact that the appellant did in fact submit a copy of his submission in the original call for tenders and, as a consequence, he could not claim ignorance and (d) reference to the fact that the submission by the tenderer of a copy of his original offer was mandatory

reached the following conclusions, namely:

1. The PCAB opines that the appellant may have acted in good faith but the fact of the matter remains that he did not submit a document – a true copy of the original - which was mandatory.

2. The PCAB feels that the specifications, terms and conditions of the tender document were clear enough and that the penalty for the said conditions not being observed was stated in an unequivocal manner, namely failure by anyone “to respect these requirements will result in the rejection of the tender”.

3. The PCAB considers the request made by appellant to be allowed to submit a true copy of the original tender document at this point as unacceptable

As a consequence of (1) to (3) above this Board finds against the appellant Company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 228

Service Tender for Restoration Works to Birgu Landfront Fortifications BRG 06

This call for tenders was published in the Government Gazette on 1 September 2009. The closing date for this call for offers was 22 October 2009.

The estimated value of this tender was Euro 645,000 (exclusive of VAT).

Five (5) tenderers submitted their offers.

Schembri Barbros Ltd filed an objection on the 23 July 2010 following the decision by the Contracts Department to award the tender in caption to Polidano Bros Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Trigana as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 4 October 2010 to discuss this objection.

Present for the hearing were:

Schembri Barbros Ltd

Dr John Bonello  Legal Representative
Mr Anton Schembri  Representative

Polidano Bros Ltd

Dr Jesmond Manicaro  Legal Representative

Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Scerri  Legal Representative

Adjudicating Board

Dr Albert Caruana  Chairman
Mr Joseph Casaletto  Secretary

Department of Contracts

Mr Francis Attard  Director General (Contracts)

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr John Bonello, legal representative of Schembri Barbros Ltd, claimed that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the
tender document and the reason for that was that Polidano Bros Ltd did not have audited accounts for the years 2006, 2007 and 2008 so much so that the last set of audited accounts submitted by Polidano Bros Ltd to the Malta Financial Services Authority (MFSA) at the time of the tender submission – closing date of 22nd October 2009 – was for the year 2004. At this point Dr Bonello submitted a document downloaded from the website of MFSA to this effect whilst adding that during the summer of 2010 Polidano Bros Ltd did submit a set of audited accounts to the MFSA.

Dr Albert Caruana, chairman of the adjudicating committee, referred to Clause 4.1.2. of Section I entitled ‘Instructions to Tenderers’ which provided as follows:

“Evidence of financial and economic standing in accordance with Article 50 of LNI 77/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by financial statements for 2006, 2007 and 2008 verified by a certified accountant. In the case of companies established during the dates indicated, only the available financial statements will be required. This evidence must be provided using Form 4.4, Financial Statement, Volume 1, Section 4 of the tender documents. A statement by a recognised bank certifying credit facilities of at least € 100,000 for the duration of the project should also be enclosed.”

Dr Caruana remarked that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and therefore the submission by Polidano Bros Ltd was considered in order from this point of view.

Dr Victoria Scerri, legal representative of the Ministry for Resources and Rural Affairs (MRRA), said that the regulations did not provide solely for a set of audited accounts but it provided a choice in terms of accounting documentation that could be requested.

Dr Jesmond Manicaro, legal representative of Polidano Bros Ltd, objected to Dr Bonello’s request to examine the accounts of Polidano Bros Ltd and to the appellants’ representative’s attitude of casting doubts on his client’s submission.

At that stage, Dr Bonello made reference to Case No. 189 which, he claimed, had identical characteristics, and quoted PCAB conclusion no. 3:

“The PCAB opines that (a) an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification and (b) unless otherwise instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA.”

The Chairman PCAB pointed out that the PCAB had to go through Case No. 189 to check the circumstances of that particular case and thus verify if it had the same characteristics as the case in hand.
Dr Manicaro remarked that the pertinent regulation was not exhaustive but was rather general so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder, such as:

“51. (2) Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services: .....”

Dr Manicaro insisted that his client had abided by all the requisites emanating from the tender document.

At the request of Dr Bonello, the PCAB verified from the submission of Polidano Bros Ltd that (i) the accounts submitted were in respect of 2006, 2007 and 2008 and (ii) these accounts were signed by a certified public account. The PCAB also verified that Schembri Barbros Ltd had submitted its audited accounts.

Dr Bonello then referred once again to PCAB Case No. 189 (page 5) and quoted as follows:

“Dr Scicluna Cassar quoted section 4.1.2 (page 7):

“Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant...”

Dr Scicluna Cassar explained that, in the 2005 financial statements, the appellant indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the ‘notes to the financial statements’ and ‘the auditor’s report’. She added that the same applied to the financial statements presented for 2006 and 2007.

The Chairman PCAB remarked that a financial statement should always be submitted in its entirety. He added that in accounting practice the accounts were verified not by an accountant but by an auditor and that the auditor could even qualify those accounts by adding his remarks thereon.”

Dr Bonello pointed out that Clause 4.1.2 was the same both in this case and in Case No. 189. Dr Bonello argued that, given the identical features of these two cases, what the PCAB had pronounced with regard to Case No. 189 ought to also apply to this case.

Dr Scerri insisted that the adjudicating board had carried out its evaluation in accordance with the provisions of the tender document.

On his part, Mr Francis Attard, Director General (Contracts), under oath, remarked that:

- ‘financial statements for 2006, 2007 and 2008 verified by a certified accountant’ in Clause 4.1.2 of the tender document meant that a certified public accountant and
holder of the warrant required by law had to verify that the information given in the accounts was correct;

- as far as he was aware, the verification requested in Clause 4.1.2 was part of the accounting process and not of an audit process;

- the decision of the PCAB applied solely to that particular case and to that particular tender and that it was not applicable to all tenders; and

- with regard to Case No. 189, as in any other case, the Contracts Department had acted on the conclusions reached by the PCAB but he could not recall if action was taken with regard to the recommendations made by the PCAB in that case.

The Chairman PCAB intervened to remark that, with regard to the recommendations made by the PCAB, it was expected that the entities concerned would act to rectify the shortcomings otherwise the same mistakes would keep on repeating themselves.

Dr Manicaro pointed out that an accountant had to act in accordance with the warrant that he held because the accountant in fact carried out a public function as his title suggested ‘certified public accountant’. Dr Manicaro then quoted from Regulation 50 as follows:

“50. (1) Proof of economic operator’s economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:

(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;

(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;

(c) a statement of the economic operator’s overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.

(4) Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit.”

Dr Manicaro stated that the very wording of the article and in particular the subparagraph (4) thereof showed that the list of references mentioned there was not exhaustive and that the contracting authority did exactly what was required in Regulation 50 (1) and (4), namely the contracting authority had to choose from the references mentioned or to specify from others that it deemed fit and in this case it had opted for “financial statement for the years 2006, 2007 and 2008 verified by a certified accountant ..”.
Dr Manicaro remarked that his client had been awarded a good number of tenders on the presentation of these accounts.

Dr Bonello insisted that this was the same situation as that encountered in Case No. 189 and, as a consequence, he expected the PCAB to act consistently. Dr Bonello did not contest the statement by Polidano Bros Ltd that it had been awarded tenders on the basis of the accounts as presented in the case in hand, however, it was also true that in Case No. 189 the PCAB did not find these accounts acceptable and had decided against Polidano Bros Ltd.

Dr Bonello also casted doubts as to whether the accountant who verified these accounts was in the employ of the appellant. The Chairman PCAB remarked that a warranted accountant had to act professionally and ethically and not act blindly according to the instructions given by his employer.

Dr Scerri disagreed that the facts of this case were identical to those of Case No. 189 especially with regard to the issue of the financial statements. Dr Scerri stated that she had no doubt that any chartered accountant could in fact verify the financial statements.

Dr Manicaro stated that the rule of precedent could not apply when the facts of one case were different from those of the other case.

Dr Bonello insisted that in Case No. 189 the PCAB had decided on the same text as that of Clause 4.1.2 included in this tender document.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 27 July 2010 and also through their verbal submissions presented during the public hearing held on 4 October 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellants’ (a) claim that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the tender document due to the fact that these did not have audited accounts for the years 2006, 2007 and 2008 so much so that the last set of audited accounts submitted by Polidano Bros Ltd to the Malta Financial Services Authority (MFSA) at the time of the tender submission – closing date of 22nd October 2009 – was for the year 2004 and (b) reference to Case No. 189, in particular to Clause 4.1.2 which the appellants considered to be the same and thus, equally applicable, to both references;

• having also taken note of the contracting authority’s representative’s (a) remark in respect of the fact that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and therefore the submission by Polidano Bros Ltd was considered in order from this point of view, (b) reference to the fact that the regulations did not provide solely for a set of
audited accounts but it provided a choice in terms of accounting documentation that could be requested and (c) insistence that the adjudicating board had carried out its evaluation in accordance with the provisions of the tender document;

- having taken cognizance of Polidano Bros Ltd’s legal representative’s (a) remark that the pertinent regulation was not exhaustive but was rather general so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder, (b) insistence that his client had abided by all the requisites emanating from the tender document and (c) reference to the fact that the rule of precedent could not apply when the facts of one case were different from those of the other case

- having also noted DG (Contracts) testimony

reached the following conclusions, namely:

1. With reference to the claim made by the appellant company that Polidano Bros Ltd was not in a position to produce their accounts in the form requested in the tender document due to the fact that these did not have audited accounts for the years 2006, 2007 and 2008, the PCAB notes that

   (a) the tender document required *inter alia* that accounts be verified by a certified public accountant

   (b) reference was made by the appellant company to case no. 189, in particular to Clause 4.1.2, which the appellants considered to be the same and thus, equally applicable, to both references, namely case no. 189 and this case under review (i.e. case no. 228).

In its decision relating to case no. 189 this Board had opined that an accountant, *per se*, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification. Whilst maintaining its stand on this issue - albeit one has to recognise that, technically, an auditor is also an accountant by profession and this is where a *lacuna* in the terminology used in tender specifications could arise unless specifically stated - yet one has to bear in mind that all that is decided upon in a case has to be taken within the context of the case being discussed. In the case discussed in case no. 189, in the 2005 financial statements, the appellant company had indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the ‘notes to the financial statements’ and ‘the auditor’s report’. This scenario repeated itself in the financial statements presented for 2006 and 2007.

Yet, in the case being addressed in this decision relevant to case no. 228, this Board notes that the adjudicating board remarked that the tender document required accounts verified by a certified public accountant and Clause 4.1.3 requested the financial projections for the two years ahead, which was also provided, and, as a result, the submission by Polidano Bros Ltd was considered in order from this point of view. It transpired that the focus, as placed in this tender by the contracting authority, was more on (a) the
evidence of financial and economic standing in accordance with Article 50 of LN1 77/2005 showing that the liquid assets and access to credit facilities are adequate for this contract and (b) that a statement provided by a recognised bank certifying credit facilities of at least €100,000 for the duration of the project had to be enclosed. In other words, the submission of the accounts was only meant to corroborate but not to be regarded as a ‘sine qua non’ as substantiated by the remark passed by the contracting authority’s representative wherein it was stated that the pertinent regulation was not exhaustive but was rather general, so much so that it provided various options whereby the contracting authority could ascertain the financial standing of the bidder.

This Board recognises that a contracting authority may avail of whatever tool it desires to ensure that it has the right operational, commercial and administrative comfort when deliberating on the merits of the participating tenderers. The PCAB cannot re-design what would have been the primary scope of the contracting authority. The PCAB’s remit is to ensure that all offers submitted by all participating tenderers are equally, objectively and fairly analysed. This Board is fully cognisant of the fact that what may be of utmost relevance to one contracting authority may simply be one of a sequence to another contracting authority.

2. The PCAB rejects the claim made by the appellant company’s representatives that in Case No. 189 the PCAB did not find these accounts acceptable and had decided against Polidano Bros Ltd.

This Board would like to place emphasis on the fact that, amongst other things, the PCAB had “opined” that an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification. However, this was not the only issue that was considered by this Board. Other, perhaps, more pivotal issues included the fact that:

a. unless otherwise instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA. The PCAB was very much concerned by the fact that in the 2005 financial statements, the appellant company had indicated in the contents page, reference to pages 1 to 33 but, in fact, submitted only pages 1 to 21

b. irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as requested in the tender document with the PCAB being fully aware that these drawings were mandatory requirements

As a consequence of (1) to (2) above this Board finds against the appellant Company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 229

Adv. CT/046/2010; CT/2647/2009

Supply Tender for the Lease of a Temporary Passenger Handling Structure at Cirkewwa Ferry Terminal

This call for tenders was published in the Government Gazette on 9 February 2010. The closing date for this call for offers was 1 April 2010.

The estimated value of this tender was Euro 135,000 (exclusive of VAT).

Three (3) tenderers submitted their offers.

HMK International Ltd filed an objection on the 23 June 2010 following the decision by the Contracts Department to award the tender in caption to 240 Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 6 October 2010 to discuss this objection.

Present for the hearing were:

HMK International Ltd (HMK Ltd)

Dr. Charisse Ellul  Legal Representative
Mr Karl Mifsud Cremona  Representative
Mr Patrick Hall  Representative

240 Ltd

Dr John L Gauci  Legal Representative
Mr Desmond Mizzi  Representative
Ms Ilwana Pace  Representative

Transport Malta

Dr Joseph Camilleri  Legal Representative
Mr Chris Farrugia  Senior Manager

Evaluation Board

Mr Maurizio Micallef  Chairperson
Mr Ludwig Xuereb  Secretary

Department of Contracts

Mr Francis Attard  Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted the appellant Company’s representatives were invited to explain the motives of the objection.

Dr Charisse Ellul, legal representative of HMK International Ltd, reported that on the 23rd June 2010 her client was informed by the Contracts Department that its bid was unsuccessful because it was not the cheapest technically compliant bid. Contrary to what the Contracts Department had stated, Dr Ellul contended that her client’s offer was, in fact, the cheapest for the following reasons:

- tender condition 12.5 (at page 9) indicated the budget available and that tenderers had to bid for items 1 to 6 as per Annex III;

- condition 11.3 (a) provided that “…The financial bid will include rates for the 2 year lease as well as the possible 6 one-month extensions of the lease and upkeep (this is the period catered for in the budget of the tender as identified in the tender as identified in Annex IIIA and IIIB);

- clause 101 ‘Technical Specifications’ laid down, among other things, that the rate “is to be quoted as a lump sum for the 2 year-period together with a rate for further extensions of 1-month at a time”

- Annex IIIB ‘Financial Offer’, likewise, indicated that lump sums had to be quoted;

- from the published tender award details on the website of the Contracts Department it transpired that 240 Ltd quoted a lump sum for items 1 to 6 of €157,900 against the lump sum of €152,800 quoted by HMK Ltd, namely a difference of €5,100 worked out as follows:

<table>
<thead>
<tr>
<th>Items 1 to 4</th>
<th>Items 5 (per month)</th>
<th>Items 6 (per month)</th>
</tr>
</thead>
<tbody>
<tr>
<td>€134,500</td>
<td>€2,900 (x 6 months)</td>
<td>€1,000 (x 6 months)</td>
</tr>
</tbody>
</table>

240 Ltd: €157,900

<table>
<thead>
<tr>
<th>Items 1 to 4</th>
<th>Items 5 (per month)</th>
<th>Items 6 (per month)</th>
</tr>
</thead>
<tbody>
<tr>
<td>€145,000</td>
<td>€1000 (x 6 months)</td>
<td>€300 (x 6 months)</td>
</tr>
</tbody>
</table>

HMK Ltd: €152,800

HMK Ltd cheaper by €5,100

Dr Joseph Camilleri, legal representative of Transport Malta, the contracting authority, explained that this was a single package tender and the award was to be given to the cheapest compliant tenderer. He further explained that there were three bidders, namely, Casapinta Design Group having been adjudicated administratively non-compliant and the other two bidders, 240 Ltd and HMK International Ltd, having
been found both administratively and technically compliant. As a result, the deciding factor had to be the price.

Dr Camilleri remarked that tenderers were requested to offer a lump sum for the 2-year period together with the rate for further extensions of 1 month at a time. He added that whilst items 1 to 4 of the tender concerned the 2-year lease together with the supply and installation of the structure and its eventual dismantling, item 5 concerned the lease extension for 6 months and item 6 also referred to the 6-month lease but with regard to maintenance and general upkeep of the structure.

Dr Camilleri agreed with Dr Ellul in the sense that 240 Ltd submitted a lump sum for items 1 to 4 and then quoted a separate price for items 5 and 6. At this juncture, Dr Camilleri remarked that, with regards to items 5 and 6 of 240 Ltd, there appeared to be a misunderstanding on the part of the appellants in the sense that the prices displayed on the website and on the notice board for items 5 and 6, i.e. €2,900 and €1,000, were not monthly rates but covered the 6 month period, contrary to what had just been indicated by the appelant company. Dr Camilleri stated that, taking this into account, it would result that the offer made by 240 Ltd amounted to €138,400 against the €152,800 both for items 1 to 6 and excluding VAT. Dr Camilleri remarked that this misunderstanding on the part of the appellants was probably brought about by the way the financial offer was displayed on the notice board and on the website since, through some oversight, the prices of 240 Ltd against items 5 and 6 were quoted as monthly and, as a consequence, the appellants were misled, so much so that Dr Ellul ended up multiplying the amounts by six to cover the 6 month period.

Dr Camilleri stated that Transport Malta was not involved in what appeared on the notice board and website of the Contracts Department. The contracting authority’s legal representative pointed out that the adjudicating board had worked out the prices in a correct manner as could be seen in the adjudicating report.

Dr Camilleri remarked that although the appellant company had quoted a lump sum for items 1 to 6, enough information was given to arrive at the price offered for items 1 to 4 and, in that way, the contracting authority was able to compare the price for items 1 to 4 of the two compliant bidders, namely 240 Ltd €134,800 and HMK International Ltd €145,000. Dr Camilleri added that the adjudicating board had recommended that the tender be awarded only in respect of items 1 to 4 so that the value of the award would be within the budget (€135,000).

The Chairman PCAB observed that the prices indicated by 240 Ltd in Annex IIIA ‘Financial Offer’ in respect of items 5 and 6 under column ‘unit cost’ were €2,900 and €1,000 respectively, which could have well been interpreted as the monthly rate rather than the amount for the whole 6-month period. As a consequence, he asked if any clarification had been sought in this respect.

Dr Camilleri referred to (i) the email dated 20th May 2010 from Transport Malta to 240 Ltd whereby the latter was requested to confirm whether the prices for items 5 and 6 quoted under the column marked ‘unit price’ referred to the full period of 6 months requested in the tender document and (ii) the reply via an email dated 21 May 2010 whereby 240 Ltd confirmed that the prices of €2,900 and €1,000 covered the 6 month period - last two pages of the evaluation report refer. He added that this clarification was sought following consultations with the Contracts Department and informed the PCAB that the closing date of tender was the 1st April 2010. Dr
Camilleri remarked that, in their tender submission, 240 Ltd had already indicated that the prices quoted for items 5 and 6 covered the full 6 month period but, to clear any doubt, the contracting authority felt that it would be better to clarify this point further.

Dr John Gauci, legal representative of 240 Ltd, remarked that, under the column ‘H’ ‘grand total’ of Annex IIIA, his client quoted the price of €3,422 meaning that it covered the 6 month period indicated under column ‘B’ ‘Quantity’.

The Chairman PCAB observed that, with regard to item 6, HMK International Ltd quoted double the amount quoted by 240 Ltd.

Mr Karl Mifsud Cremona, also representing HMK International Ltd, stated that on the 9th of April 2010 he requested a clarification from the Contracts Department as to why his quote was on the basis of items 1 to 6 whereas that of 240 Ltd was based on items 1 to 4 and the only reply he got was that note had been taken of the point raised. Mr Mifsud Cremona also noted that the prices displayed on the Department’s notice board, which Dr Camilleri termed as rather misleading, were reproduced in the same manner on the Department’s website.

Dr Camilleri replied that the evaluation process was still under way when Mr Mifsud Cremona sent his email in April 2010 and that was why the appellants’ request was answered in the sense that note was being taken of its contents for evaluation purposes so much so that the adjudicating board was not misled in that regard.

Dr Gauci intervened to insist that the totals given under column ‘H’ of Annex IIIA included the full 6 months plus VAT and taxes with regard to all items from 1 to 7. He pointed out that the contracting authority sought a clarification with regard to the prices quoted under column ‘H’, which ‘in turn’ referred to the grand total of each item, and not with regard to the prices under column ‘D’ of Annex IIIA, and his client had confirmed that the prices under column ‘H’ covered the full 6 month period.

The PCAB expressed a degree of unease with the clarification sought by the contracting authority at the stage that it was made and even with regard to the fact that the contracting authority felt the need to seek a clarification as, in itself, that indicated that the picture was not all that clear.

At this point, following a specific request made by the appellants, the PCAB informed those present that 240 Ltd had submitted its financial offer under ‘Option B’. The appellants intervened to note that 240 Ltd had filled in the bill of quantities of Option ‘A’.

The contracting authority’s representatives intervened to explain that the difference between Option ‘A’ and ‘B’ was that one included a raised floor while the other included a concrete platform.

Mr Mifsud Cremona remarked that, according to the Contracts Department’s website, 240 Ltd chose Option ‘A’ whereas its Annex III A was referring to Option ‘B’.

Mr Maurizio Micalef, chairman of the adjudicating board, explained that 240 Ltd offered to do Option ‘A’ or ‘B’ at the same price. Mr Micalef stated that Annex III
was common to both Option ‘A’ and ‘B’ as could be seen from that submitted by HMK International Ltd (Option ‘A’) and 240 Ltd (Option ‘B’).

Mr Francis Attard, Director General (Contracts), under oath, remarked that, in his view, under column ‘D’ one should have included the monthly rate and under column ‘H’ the grand total, however, if something was not clear one had the opportunity to seek a clarification. He added that the answer to the clarification had to be convincing otherwise it could still lead to tender rejection.

The PCAB expressed its discomfort that a clarification had been sought at that stage since that could have induced the bidder to take a commercial risk and confirm that the amount given under column ‘D’, ‘unit cost’, was not the monthly rate but covered the entire 6 month period thus, effectively, altering its financial offer.

Mr Attard noted that, at the end of the day, due to budgetary constraints, the tender was going to be awarded for items 1 to 4 only, leaving out items 5 and 6, which were being contested to some extent. In reply to the appellant company’s claim that the contracting authority had to award the tender for items 1 to 6 and not for items 1 to 4, Mr Attard quoted clause 7.1 of the ‘Instructions to Tenderers’:

“This tender procedure is not divided into lots. Tenders must be for the entirety of the quantities indicated. Nevertheless, Government reserves the right of accepting any tender wholly or in part, or of dividing the contract among two or more tenderers.”

Dr Camilleri disagreed with the comment that was being made by the appellants in the sense that the ‘Instructions to Tenderers’ were overridden by the ‘Special Conditions’ because the ‘Special Conditions’ went into play after tender award.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 23 June 2010 and also through their verbal submissions presented during the public hearing held on 6 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ (a) claim that their offer was the cheapest, (b) reference to conditions 12.5, 11.3 (a), clause 101 and Annex IIIB respectively, (c) reference to the fact that their offer was, effectively, €5,100 cheaper in view of the fact that whilst 240 Ltd quoted a lump sum for items 1 to 6 of €157,900, they quoted €152,800 and (d) remark that, according to the Contracts Department’s website, 240 Ltd chose Option ‘A’ whereas its Annex III A was referring to Option ‘B’;

- having also taken note of the contracting authority’s (a) explanation as to what the tender document required in terms of quotes to be submitted by the bidders, (b) remark that, with regards to items 5 and 6 of 240 Ltd, there appeared to be a misunderstanding on the part of the appellants in the sense that the prices displayed on the Department of Contracts’ website and on the same
Department’s notice board for items 5 and 6, i.e. €2,900 and €1,000, were not monthly rates but covered the 6 month period, (c) claim that this misunderstanding on the part of the appellants was probably brought about by the way the financial offer was displayed on the notice board and on the website since, through some oversight, the prices of 240 Ltd against items 5 and 6 were quoted as monthly and, as a consequence, the appellants were misled, so much so that Dr Ellul ended up multiplying the amounts by six to cover the 6 month period, (d) claim that that the offer made by 240 Ltd amounted to €138,400 against the €152,800 both for items 1 to 6 and excluding VAT, (e) contention that Transport Malta was not involved in what appeared on the notice board and website of the Contracts Department and that the adjudicating board had worked out the prices in a correct manner as could be seen in the adjudicating report, (f) remark that although the appellant company had quoted a lump sum for items 1 to 6, enough information was given to arrive at the price offered for items 1 to 4 and, in that way, the contracting authority was able to compare the price for items 1 to 4 of the two compliant bidders, namely 240 Ltd €134,800 and HMK International Ltd €145,000, (g) claim that that the adjudicating board had recommended that the tender be awarded only in respect of items 1 to 4 so that the value of the award would be within the budget (€135,000), (h) reference to the email dated 20th May 2010 from Transport Malta to 240 Ltd whereby the latter was requested to confirm whether the prices for items 5 and 6 quoted under the column marked ‘unit price’ referred to the full period of 6 months requested in the tender document, (i) reference to reply via an email dated 21 May 2010 whereby 240 Ltd confirmed that the prices of €2,900 and €1,000 covered the 6 month period and (j) explanation regarding the difference between Option ‘A’ and ‘B’ which was that one included a raised floor while the other included a concrete platform and that Annex III was common to both Option ‘A’ and ‘B’ as could be seen from that submitted by HMK International Ltd (Option ‘A’) and 240 Ltd (Option ‘B’);

- having taken cognizance of 240 Ltd’s representatives’ (a) claim that under the column ‘H’ ‘grand total’ of Annex IIIA, they quoted the price of €3,422 meaning that it covered the 6 month period indicated under column ‘B’ ‘Quantity’ and (b) reference to the fact that the contracting authority sought a clarification with regard to the prices quoted under column ‘H’, which’ in turn’ referred to the grand total of each item and not with regard to the prices under column ‘D’ of Annex IIIA confirming that the prices under column ‘H’ covered the full 6 month period;

- having also considered the DG Contracts’ evidence, especially, his (a) remark that, whilst, in his view, under column ‘D’ one should have included the monthly rate and under column ‘H’ the grand total, yet, it was equally possible that if something was not clear one had the opportunity to seek a clarification and (b) reference to the fact that, due to budgetary constraints, the tender was going to be awarded for items 1 to 4 only, leaving out items 5 and 6, which were being contested to some extent;

reached the following conclusions, namely:

1. The PCAB expresses a degree of unease with the clarification sought by the contracting authority at the stage that it was made and even with regard to the
fact that the contracting authority felt the need to seek a clarification as, in itself, that indicated that the picture was not all that clear.

2. The PCAB feels that such clarification sought by the contracting authority at that stage in the tendering process, despite being acted upon in absolute good faith, could have induced the bidder to take a commercial risk with the latter confirming that the amount given under column ‘D’, ‘unit cost’, was not the monthly rate but covered the entire 6 month period thus, effectively, altering its financial offer.

As a consequence of (1) and (2) above this Board, in full consideration of the fact that its decision is solely based on the premise that transparency and good intention is more evidently demonstrated, recommends that this call be re-issued.

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

25 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 230

Adv. CT/019/2010; CT/2689/2009


This call for tenders was published in the Government Gazette on 8 January 2010. The closing date for this call for offers was 2 March 2010.

The estimated value of this tender was Euro 880,000.

Four (4) tenderers submitted their offers.

Vassallo Concrete Services Ltd filed an objection on the 2 July 2010 following the decision by the Contracts Department to award the tender in caption to Zrar Ltd and Polidano Bros. Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 6 October 2010 to discuss this objection.

Present for the hearing were:

Vassallo Concrete Services Ltd
Dr Massimo Vella Legal Representative
Mr Pio Vassallo Representative
Mr Denis Vassallo Representative

Zrar Ltd
Dr John Gauci Legal Representative
Perit Rueben Aquilina Representative
Mr Emmanuel Bonnici Representative

Polidano Bros Ltd
Dr Jesmond Manicaro Legal Representative

Ministry for Resources and Rural Affairs (MRRA)
Dr Victoria Scerri Legal Representative

Evaluation Board
Mr John Vella Chairman
Mr Joseph Casaletto Secretary
Ray Farrugia Member
Mr Emanuel Buttigieg Member
Mr Oliver Debono Member

Department of Contracts
Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant company’s representative was invited to explain the motives of the objection.

Dr Massimo Vella, legal representative of Vassallo Concrete Services Ltd, the appellant company, explained that by letter dated 24th June 2010 the Contracts Department informed his client that the company did not provide in its offer evidence of delivery and services effected in the past three years with sums, dates and recipients, whether public or private and that the tender was recommended to be awarded to Zrar Ltd and Polidano Bros Ltd. Dr Vella stated that paragraph 3.6 (ii) of the Instructions to Tenderers provided as follows:

“Tenderers who have never been awarded this contract or who have been awarded a previous contract but not in the last five years, are to provide a list of the principal deliveries effected in the past three years with sums, dates and recipients, whether public or private. Evidence of delivery and services provided shall be given:

Where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority;

Where the recipient was a private purchaser, by the purchaser’s certification on an official letter head of the purchaser.”

Dr Vella remarked that his client had supplied private purchasers and hence the company provided four purchaser’s certificates on official letterhead of the respective purchaser which were submitted as part of its tender documentation. Dr Vella stated that these certificates demonstrated that his client had effected various consignments over a period of time, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Contractors Ltd.

The appellant company’s legal representative claimed that the submission of these certificates satisfied the provisions laid down in para. 3.6 (ii) with regard to evidence of previous experience.

Mr John Vella, chairman of the adjudicating board, referred to the same provision quoted by Dr Vella and underlined the wording:

“...are to provide a list of the principal deliveries effected in the past three years with sums, dates and recipients, whether public or private.”

Mr John Vella stated that the tenderer had to furnish the list of principal deliveries backed by the purchaser’s certification on an official letter head.

The chairman of the adjudicating board explained that by letter dated 2nd March 2010 Vassallo Concrete Services Ltd informed the contracting authority that the firm had started its operations in March 2009 and it therefore followed that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year period requested in the tender document. Mr John Vella added that para. 3.6 ended with
the following sentence underlined and in bold print:

“For further more, non-compliance with point i or ii above will result in disqualification of the tender.”

Mr John Vella stated that, from the four certificates provided by the appellant company, it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company. Mr John Vella concluded that, in the light of the above, the adjudicating board had no option but to declare the appellant company’s offer as non-compliant in terms of para. 3.6 (ii) of the ‘Instructions to Tenderers’ of the tender document.

Whilst the Chairman PCAB asked whether the tender conditions took into account companies that might be undergoing a restructuring process whereby an existing firm would be taken over lock, stock and barrel by a new firm, Mr Edwin Muscat, another PCAB member, asked if the tender conditions allowed for new firms to participate in this tendering process.

Dr Victoria Scerri, representing the Ministry for Resources and Rural Affairs (MRRA), stated that, from the legal point of view, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the adjudicating board could not take into account the credentials of another firm which was totally separate from the firm submitting the tender. Dr Scerri submitted that this was a basic principle in commercial law, namely that each company had its own legal personality, and this principle had been constantly upheld by our courts.

Dr Vella referred the PCAB to a letter dated 2nd March 2010, which his client submitted with his company’s tender submission, where the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd was clearly explained, which letter stated, among other things, as follows:

“Our company Vassallo Concrete Services Limited (Company Registration No 46055) is a limited liability company between Vassallo Builders Group Limited (Company Registration No C2448) in partnership with the same shareholders of Vassallo Concrete Supplies Limited (Company Registration No C 7651). Although Vassallo Concrete Services Limited only started its operations in March of 2009, the Vassallo Concrete Supplies Limited has been in the business supplying concrete to various Government Departments and private contractors since 1978.

The Vassallo Concrete Services acquired all the assets and good will built up over the 30 years operation of the previous Vassallo Concrete Supplies Limited. Although in the last five years Vassallo Concrete Supplies Limited was not awarded this period type of contract for the supply of concrete in the past it was awarded this contract on a number of occasions which it delivered successfully.”

Dr Vella maintained that a company was not made up solely of its memorandum and articles of association but it was essentially, made up of its personnel, with their
experience and knowhow, machinery, equipment and premises - he claimed that all these were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd. The appellant company’s legal advisor added that the reference letters themselves made a distinction between supplies made by Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd. Dr Vella contended that one could not discard the years of experience that the latter company had acquired over so many years when all assets and experience had been put at the disposal of this new company.

Dr Scerri pointed out that the relationship explained by Dr Vella did not have any legal relevance in the case in question. She added that our courts had upheld that a company was a unique entity which could not be associated with any other company and, from the legal point of view, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company. Dr Scerri argued that the two companies referred to by the appellant company were legally two completely different companies.

Dr Vella mentioned the concept of the corporate veil instances where two companies joined forces to execute a contract and the setting up of a company for the sole purpose of carrying out a specific project.

Dr Scerri rejected outright the arguments put forward by Dr Vella because, legally, these were two different companies. At this point Dr Scerri quoted from a court ruling dated 29th April 2010 handed down by the First Instance of the Civil Court wherein it was ruled that:

“Meta soċjetà tkun kostitwita skont il-liġi hija tassumi personalità ġuridika distinta u separata minn dik tal-membri taghha u ghalhekk isegwi illi kull soċjetà illi ghandha personalità ġuridika u distinta, ghandha d-drittijiet u l-obbligi taghha li huma separati u distinti minn dawk tal-membri taghha. Dan allura jfisser li anke jekk is-soċjetà attrici u s-soċjetà ARS ghandhom l-istess azzjonisti wahda ma tistax titħallat mal-oħra peress illi dawn ghandhom personalità ġuridika distinta mill-membri taghha. L-istess jghodd fil-kaz ta’ sister companies li jappartjenu lil parent company komuni jew lil holding company komuni. Is-soċjetajiet sussidjarji li jaqgħu taħt l-istess parent company għandhom ukoll il-personalità ġuridika distinta u separata taghhom u ghalhekk wahda ma tistax tagħmel tajjeb għall-oħra sakemm ma jkunx hemm ftehim f’dan is-sens.”

Dr Jesmond Manicaro, representing Polidano Bros Ltd, remarked that these were two separate companies whereas, for example, the concept of the joint venture was another thing because in that case one could hold responsible the companies individually and collectively. He argued that the experience of the shareholders or of the workers of a newly set up company did not matter because the fact remained that it was a new company. Dr Manicaro pointed out that Dr Vella’s assertion that the transfer of personnel and equipment from one company to another were a guarantee of success did not always come true because it was not unheard of that a successful firm failed or else suffered a setback on joining forces with another company. Dr Manicaro stressed that the contracting authority requested a minimum of 3 years previous experience to assess the track record of the bidder and that it was clear that
one year experience was not considered sufficient to provide comfort. Dr Manicaro remarked that it was a fact that doing business was tough for start-ups.

Mr John Vella reiterated that the appellant company was found to be non-compliant because it did not submit the list requested at para. 3.6 (ii) and because the appellant company could not satisfy the three years previous experience requirement.

Dr John Gauci, representing Zrar Ltd, referred to Reg. 51 (2) of the Public Procurement Regulations which provided as follows:

“51 (2) Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given”

Dr Gauci stated that in the tender document the contracting authority was requesting evidence of the technical abilities of the economic operator, namely of the bidder and not of any other company. Dr Gauci pointed out that the regulations did provide for new companies to participate in such tenders, however, to do that it had to rely on the technical abilities of an experienced operator as provided for in Reg. 51 (3):

“An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.”

Dr Gauci stressed that, in such a case, it was not the tenderer that had to make the undertaking but the undertaking had to be made by the company that would be putting its resources at the disposal of the ‘new’ economic operator. Dr Gauci stressed that such an undertaking had to be made at the tendering stage.

Dr Vella stated that all that Reg. 51 (2) requested was evidence of technical abilities that may be furnished through various means among them the past deliveries. He added that his client did provide these certificates from suppliers. However, Dr Vella conceded that what his client perhaps had failed to do was to make a list of these four suppliers. Nevertheless, Dr Vella proceeded by saying that he felt that this minor shortcoming should in no way disqualify his client since the information was there anyway. Dr Vella noted that the argument seemed to be shifting during the course of the hearing in the sense that whereas, initially, any relationship between Vassallo Concrete Supplies Ltd and Vassallo Concrete Services Ltd was being discarded entirely now the objection that was being raised seemed to concern proof of an undertaking by a company to put its resources at the disposal of the tenderer. Dr Vella maintained that, in fact, his client had submitted a declaration in his tender submission dated 2nd March 2010 wherein details were given as regards the relationship between Vassallo Concrete Supplies Ltd and Vassallo Concrete Services Ltd. Dr Vella
remarked that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company. As a consequence, proceeded Dr Vella, his client had no need for the undertaking mentioned in Reg. 51 (3). Dr Vella remarked that, in other words, what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd.

Mr John Vella stated that the adjudicating board did consider the letter dated 2nd March 2009 submitted by the appellant company in its tender submission and he went on to read as part of its contents:

“We are pleased to submit our tender for the supply of ready mixed concrete as per advert no CT 019/2010 issued by the department of contracts.

Our company Vassallo Concrete Services Limited (Company Registration No 46055) is a limited liability company between Vassallo Builders Group Limited (Company Registration' No C2448) in partnership with the same shareholders of Vassallo Concrete Supplies Limited (Company Registration No C 7651). Although Vassallo Concrete Services Limited only started its operations in March of 2009, the Vassallo Concrete Services Limited has been in the business supplying concrete to various Government Departments and private contractors since 1978.

The Vassallo Concrete Services acquired all the assets and good will built up over the 30 years operation of the previous Vassallo Concrete Supplies Limited. Although in the last five years Vassallo Concrete Supplies Limited was not awarded this period type contract for the supply of concrete in the past it was awarded this contract on a number of occasions which it delivered successfully.

In accordance with Article 3.6 of the Instructions to Tenderers, the required confirmations and details of deliveries and of some of the clients of both these companies can be found in our technical bid marked Doc A. ……”

Mr John Vella reiterated that the appellant company was disqualified because it did not submit the list of deliveries.

Dr Manicaro pointed out that, in the letter just quoted, it was stated that Vassallo Concrete Services Ltd acquired the assets of the other company and not the shareholding. He added that the new company, Vassallo Concrete Services Ltd, was set up in partnership between JLB Vassallo Enterprises Ltd, which was formed in 2008, and Vassallo Builders Ltd.

Dr Vella argued that here one was talking about various companies of the Vassallo Family and he claimed that what took place in this case was ‘a transfer of undertaking’ whereby one company transferred all its assets to the other company.

Dr Manicaro remarked that restructuring would take place in a group of companies which was not the case here.

Dr Vella stated that the reason for exclusion now seemed to refer to the non-
submission of the list of deliveries when his client had submitted four certificates on the appropriate letterheads with all the requested details, such as, the purchaser, the quantity purchased, the number of years and so forth. Dr Vella said that it was not fair to exclude a tenderer for omitting the list referred to in para. 3.6 (ii).

Dr Gauci disagreed with the notion that the appellant company would present any agreement/documentation at this stage because any undertaking had to be entered into and submitted at tendering stage.

Mr Ray Farrugia, a member of the adjudicating board, under oath, remarked that the tender document referred to the list of the deliveries and to the certificate by the purchasers. Mr Farrugia remarked that in the tender submission the appellant company did not submit any list of deliveries made by the two companies that were being mentioned. The same adjudicating board member said that, had the appellant company made such a list available, the adjudicating board would have certainly considered it in its deliberations keeping in view also the requirement of an undertaking by the company that would be putting its resources at the disposal of the tenderer.

Dr Manicaro remarked that the adjudicating board could not decide on documents that were not made available to it at adjudication stage.

On his part, Dr Vella insisted that the four certificates of deliveries submitted did represent evidence for the purposes of clause 3.6 (ii) of the tender document.

Dr Scerri stated that it was legally incorrect for the appellant company to use the terminology ‘and its predecessor’ in the certificates presented because Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still ‘alive’.

Mr Pio Vassallo, also representing the appellant company, under oath, referred to the letter of the 2nd March 2010 submitted with the tender as to the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd. Mr Vassallo mentioned also the transfer of assets agreement between these two companies which had not been submitted with the tender documentation and, at this point the PCAB intervened and ruled that this should not be taken into account at that stage. Mr Vassallo confirmed that Vassallo Concrete Supplies Ltd had ceased operations and that its assets had been transferred to the new company.

Dr Vella explained that a company could cease trading even though it was not struck off the register of companies.

Dr Scerri remarked that no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd and, once again, she objected to the fact that this company had been referred to in the certificates presented as the predecessor of Vassallo Concrete Services Ltd.

Dr Manicaro remarked that it could well have been a transfer of undertaking but the point remained that the pertinent declaration should have been submitted at tendering stage for the board to take it into account during evaluation.

Dr Vella insisted that the adjudicating board had the necessary documentation to carry out its evaluation since it had the declaration dated 2nd March 2010 regarding the relationship between the two companies and the evidence of technical abilities in the
form of four certificates by purchasers which also indicated the link between the two companies. Dr Vella reiterated that, in this case, his client was not going to rely on any other entity in terms of resources.

Dr Gauci concluded that the declaration made by the company submitting the tender was insufficient because Reg. 51 (3) required from the tenderer “an undertaking by those entities to place the necessary resources at the disposal of the economic operator.” In the absence of that, Dr Gauci remarked that there should have been a declaration that there had been a transfer of the business.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 8 July 2010 and also through their verbal submissions presented during the public hearing held on 6 October 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellants’ representatives’ (a) remark that they had supplied private purchasers and hence the company provided four purchaser’s certificates on official letterhead of the respective purchaser which were submitted as part of its tender documentation, (b) reference to the fact that they had effected various consignments over a period of time, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Contrators Ltd and that the submission of the said certificates satisfied the provisions laid down in para. 3.6 (ii) reference with regard to evidence of previous experience, (c) reference to a letter dated 2nd March 2010, which the appellant’s representative had submitted with the company’s tender submission, where the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd was clearly explained, (d) remark that a company was not made up solely of its memorandum and articles of association but it was, essentially, made up of its personnel, with their experience and knowhow, machinery, equipment and premises claiming that all these were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd, (e) reference to the fact that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company and, as a result, they had no need for the undertaking mentioned in Reg. 51 (3), (f) claim that what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd, (g) reference to the fact that what took place in this case was ‘a transfer of undertaking’ whereby one company transferred all its assets to the other company and (h) contention that a company could cease trading even though it was not struck off the register of companies;

• having also taken note of the contracting authority’s representative’s (a) claim that para. 3.6 (ii) stated that “…are to provide a list of the principal deliveries
effected in the past three years with sums, dates and recipients, whether public or private.” And that this provision also ended with the following sentence underlined and in bold print “Furthermore, non compliance with point i or ii above will result in disqualification of the tender.”, (b) reference to the fact that by letter dated 2nd March 2010 Vassallo Concrete Services Ltd informed the contracting authority that the firm had started its operations in March 2009 and it therefore followed that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year period requested in the tender document, (c) remark that from the four certificates provided by the appellant company, it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company, (d) contention that, from the legal point of view, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the adjudicating board could not take into account the credentials of another firm which was totally separate from the firm submitting the tender, (e) claim that the relationship explained by Dr Vella did not have any legal relevance in the case in question adding that our courts had upheld that a company was a unique entity which could not be associated with any other company and, from the legal point of view, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company, (f) reference to the fact that the experience of the shareholders or of the workers of a newly set up company did not matter because the fact remained that it was a new company, (g) emphasis placed on the fact that the appellant company was disqualified because it did not submit the list of deliveries and that the tender document referred to the list of the deliveries and to the certificate by the purchasers and that in the tender submission the appellant company did not submit any list of deliveries made by the two companies that were being mentioned, (h) claim that, had the appellant company made such a list available, the adjudicating board would have certainly considered it in its deliberations keeping in view also the requirement of an undertaking by the company that would be putting its resources at the disposal of the tenderer and (i) claim that it was legally incorrect for the appellant company to use the terminology ‘and its predecessor’ in the certificates presented because Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still ‘alive’ and that no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd;

- having considered Dr Manicaro’s comments, especially his (a) remark that the transfer of personnel and equipment from one company to another were a guarantee of success did not always come true because it was not unheard of that a successful firm failed or else suffered a setback on joining forces with another company, (b) reference to the fact that it was stated that Vassallo Concrete Services Ltd acquired the assets of the other company and not the shareholding adding that the new company, Vassallo Concrete Services Ltd, was set up in partnership between JLB Vassallo Enterprises Ltd, which was formed in 2008, and Vassallo Builders Ltd, (c) remark that the adjudicating board could not decide on documents that were not made available to it at adjudication stage and (d) argument that it could well have been a transfer of undertaking but the point remained that the pertinent declaration should have
been submitted at tendering stage for the board to take it into account during evaluation;

- having taken cognizance of Dr Gauci’s reference to the fact that the regulations did provide for new companies to participate in such tenders, however, to do that it had to rely on the technical abilities of an experienced operator as provided for in Reg. 51 (3) with the latter undertaking at the tendering stage that it would be putting its resources at the disposal of the ‘new’ economic operator,

reached the following conclusions, namely:

1. The PCAB feels that with regards to the claims made by the appellant company’s representatives relating to previous experience, this has to be taken within the context that one has to agree with what was argued by the appellant company, namely that

(a) all personnel, with their experience and knowhow, machinery, equipment and premises were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd,

(b) what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd and

(c) what happened in this case was ‘a transfer of undertaking’ whereby one company transferred all its assets to the other company.

Having thoroughly deliberated on the above, as well as the fact that, by letter dated 2nd March 2010, Vassallo Concrete Services Ltd had informed the contracting authority that the firm had started its operations in March 2009, this Board concludes that these factors alone provide ample proof that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year period requested in the tender document. Indeed, this Board agrees with the evaluation board’s claim that the relationship between companies, as explained by the appellant’s legal advisor, did not have any legal relevance in the case in question upholding the thesis that a company is a unique entity which could never be associated with any other company and, legally, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company.

Also, solely within the context of the requirements of this tender, albeit it may be important from an operational perspective - although not necessarily so due to the fact that the transfer of personnel and equipment from one company to another does not amount to an outright guarantee of success - yet, contractually, the shareholders’ experience or of the workers of a newly set up company did not matter because the fact remained that it was a new company and, as a consequence, it was not in a position to submit the requested documentation covering the listed time frame.
2. The PCAB also opines that with reference to the fact that, over a period of time, the appellant company’s claims, namely that it

(a) had delivered various consignments, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Consultants Ltd and

(b) indeed submitted the requested certificates and thus satisfied the provisions laid down in para. 3.6

it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company. Furthermore, the evaluation board was also correct in disqualifying the appellant company due to the fact that it, rightfully, argued that the tenderer did not submit any list of deliveries requested in the tender document. Indeed, it would have been a different scenario had the appellant company made such a list available pertinently accompanied by an undertaking by the company that the latter would be putting its resources at the disposal of the tenderer, the recently set up company.

This line of thought endorses the argument raised by the contracting authority which submitted that the appellant company’s claim that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company and, as a result, the undertaking mentioned in Reg. 51 (3) was, in their opinion, not required, was arbitrarily and erroneously made. As a consequence, this Board acknowledges that the evaluation board could thus not decide on documents that were not made available to it at adjudication stage.

3. The PCAB also claims that it was legally incorrect for the appellant company to use the terminology ‘and its predecessor’ in the certificates presented because, unlike the impression that the appellant company may have tried to instil during the hearing, Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still ‘alive’ and, it transpired that, at least by the closing date of the tender in question, no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd.

4. The PCAB agrees that, legally, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the evaluation board could not take into account the credentials of another firm which was totally separate from the firm submitting the tender.

5. In the light of the above, the PCAB thus considers the reference made by the appellant company to a letter explaining the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd, as a simple self-generated supporting document which, unfortunately, offers no formal legal comfort.
As a consequence of (1) to (5) above this Board finds against the appellant Company.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 231

CT/2165/2009; CT/WSC/T/22/2009

Supply Tender for the Supply of DN15 Class 2 Meters for Potable Cold Water

This call for tenders was published in the Government Gazette on 3 April 2009. The closing date for this call for offers was 26 May 2009.

The estimated value of this tender was Euro 6,270,000.

Six (6) tenderers submitted their offers.

_Itron of France_ filed an objection on the 22 July 2010 following the decision by the Contracts Department to award the tender in caption to _AFS Ltd._

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Friday, 8 October 2010 to discuss this objection.

_Itron France (previously named Actaris SAS)_

Mr Mathias Martin       Itron Representative
Mr Amrouche Boukhari    Itron Representative
Mr Jes Farrugia         Solar Solutions
Mr David Zammit         Solar Solutions

_AFS Ltd_

Mr Joseph Attard        Representative

_Water Services Corporation (WSC)_

Ing. Marco Perez        Manager Procurement and Stores

_Evaluation Board_

Ing. Stephen Galea St John    Chairman
Ing. Ronald Pace           Member
Ing. Saviour Cini          Member
Mr Anthony Camilleri     Secretary

_Department of Contracts_

Mr Francis Attard        Director General (Contracts)

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant company’s representative was invited to explain the motives...
of the objection. There were no objections for the proceedings to proceed in English for the benefit of the foreign representatives of Itron France.

Mr Mathias Martin, representing Itron France, the appellant company, explained that this was the first occasion that they had to appeal on the basis of the information that they obtained from the previous appeal. Mr Martin stated that to be compliant with MID Directive meant that one had to have an MID Certificate issued by a notified body. He added that the recommended tenderer did not furnish the MID Certificate by the closing date of the tender on the 26th May 2009 for the simple reason that the said bidder did not possess that kind of certificate. Mr Martin contended that, in the circumstances, the recommended tenderer was not compliant.

The appellant company’s representative further explained that a manufacturer was not allowed to mark a water meter as being MID approved if that manufacturer did not have the pertinent MID certification and, as a result, such a meter could not be used in accordance with metrological regulations. He also claimed that the meter submitted by AFS Ltd had the reed switch technology which could lead to faulty signal emissions and that, in this regard, the specifications clearly indicated in clause 14.6 that “the meter must not allow false or faulty signal emissions.”

Mr Martin complained that if Itron France had known that it could submit a meter without an MID certificate then it would have proposed a different and cheaper meter that would not have respected the reliability of pulse signal transmission versus magnet tampering.

The appellants’ representative concluded that AFS Ltd should be disqualified as technically non-compliant and the tender be awarded to Itron France.

Ing. Stephen Galea St John, chairman of the adjudicating board, remarked that in July 2009 the adjudicating board had requested AFS Ltd to give evidence that both its options were MID approved and the reply from AFS Ltd was that in both instances the MID approval process had either started or was in the course of being initiated. He added that the contracting authority would have been satisfied if the meters were MID approved by the time the meters were delivered to the Water Services Corporation. Ing. Galea St John added that this point had been made clear in the addendum to the evaluation report dated 3rd August 2010 where it was recommended that “… both offers from Messrs AFS Ltd can be accepted provided that the tenderer submits an MID certificate with the first delivery for the meter selected, if this tender is awarded to this bidder.”

Ing. Galea St John conceded that, although the tender document did not request the submission of the MID certificate as such, the Water Services Corporation requested MID approved meters as per clause 1.1 of the specifications (page 26) which read as follows:

“The meters shall comply with:

- The EU Measuring Instruments Directive (MID) - 2004/22/EC
- The EU Council Directive No.75/33/EEC relating to cold water meters
Report on the Working of the GCC, PCAB, and PCRB During 2010

- IS04064-1 - Measurement of water flow in fully charged closed circuits - meters for cold potable water and hot water
- The prescription of the regulation No.49 of the OIML (International Organisation for Legal Metrology)

*Where the above standards conflict, the MID shall take precedence.*

Mr Martin replied that it would be illegal for one to claim that his meter was MID approved without having the pertinent MID certificate. The appellants’ representative pointed out that it was not enough for the tenderer to present a declaration that a product was MID approved but one had to provide an MID certificate issued by a notified body. He went further to point out that it was quite clear that, at tendering stage, the recommended tenderer did not submit such an MID certificate. Mr Martin stressed that the fact that one was in the process of applying for an MID certificate did not mean that one would necessarily obtain that certificate.

Ing. Galea St John agreed and added that that was why the recommendation for award to AFS Ltd was conditional to having the MID certification in place by the delivery date of the meters.

Mr Martin explained that MID certification was much more demanding than any other type of certification and hence that reflected itself in the price of the product. He added that if the awarded tenderer did not provide MID approved meters then those meters could not be used for billing purposes and that certification had to be presented at tendering stage. At this point Mr Martin produced a sample of the meters offered by Itron France which bore the markings of MID certification and he stressed that one could not mark one’s meters like that unless in possession of an MID certificate. Mr Martin added that the manufacturer had to possess the necessary certification to produce MID approved meters.

Ing. Galea St John remarked that a sample was requested from tenderers for the purpose of testing metrological performance however Mr Martin, on his part, intervened to contend that the MID markings were the legal way of certifying the metrological performance of the meter.

The chairman of the evaluation board conceded that the Water Services Corporation requested an MID approved meter in the tender document even though one could procure a different kind of meter given that in this regard one was going through a transition period that would end in 2016. Ing. Galea St John informed the PCAB that the evaluation was concluded in October 2009 whereas the closing date of the tender was the 26th May 2009.

Mr Joseph Attard, representing AFS Ltd, the recommended tenderer, informed the PCAB that the necessary MID certificates had been obtained by the manufacturer ‘Janz’ of Portugal. In order to corroborate his claim, Mr Attard produced certificates dated 8th April 2010, 12 May 2010, 2nd August 2010 and 16th September 2010 respectively.
Mr Martin intervened to state that he noted that the MID certificate obtained by AFS Ltd’s supplier, i.e. ‘Janz’ of Portugal, in respect of meter type JV400 was dated April 2010 which date was almost one year after the closing date of the tender.

Mr Attard claimed that MID certification was one of the requirements set out in the tender document and that AFS Ltd had adhered to all of the rest and even submitted a declaration that its supplier was in the process of obtaining MID approval for the meters offered by AFS Ltd, which meant that the meter met MID standards even though it was not MID approved at that time. Mr Attard added that MID approval was not a legal requirement for the time being and, in fact, there were national standards that were still considered valid and, as a consequence, it was not correct to state that it was illegal to use a meter that was not MID approved.

Ing. Galea St John confirmed that for a meter to be in conformity with the MID of the EU as indicated in clause 1.1 of the tender document the meter had to have an MID certificate. He reiterated that the recommended award to AFS Ltd was conditional to the meters supplied being MID approved.

Mr Attard explained that when one considered the dates of issue of the MID certificates, which span from the 8th April to the 16th September 2010, one would note that this certification process was not tied to this particular call for tenders. Mr Attard remarked that any kind of certification, whether MID or otherwise, carried a cost.

The Chairman PCAB remarked that the point at issue was not the price but the timing, namely, whether the MID certificate had to be presented by the closing date of the tender, ie. 26th May 2009, or whether it was acceptable to present the MID certificate at a later stage, thus conditioning the award of the tender.

Mr Martin reiterated that (i) the initiation of a certification process by a manufacturer was not, per se, an assurance that the certificate would actually be issued and so one could not award a tender to a bidder in that situation and (ii) had Itron France been made aware of the option to present a meter without the MID certificate then they would have presented a much cheaper type of meter.

Ing. Marco Perez, representing the Water Services Corporation, the contracting authority, referred to clause 25 (at page 35) of the tender document which listed all the documentation requested in the tender specifications and conditions which did not include the MID certificate. Ing. Perez said that the MID certificate was not required at tendering stage on purpose because the Water Services Corporation was aware that a number of manufacturers were in the course of getting the MID certification and, therefore, if the Water Services Corporation had included the requirement of this certificate at tendering stage then that would have limited competition. Mr Perez added that the length of the process to obtain MID certification depended on the amount of money one was prepared to pay since the speedier the process the more money one had to pay.

Mr Martin remarked that at clause 25 it was clearly stated that the list thereat was not exclusive. Mr Martin disagreed with what Ing. Perez had just stated with regard to restricting competition because, at the closing time of the tender, there were at least four global manufacturers, like Nitron, Hydrometer, Census and Esther, that had MID certification and, as a consequence, there was evidently enough competition on the
market. Itron France’s representative remarked that certification was not only a matter of money but also a matter of time because certification bodies required time to carry out the required tests.

Mr Martin also pointed out that, in this call for tenders, the contracting authority was requesting delivery within 12 weeks from the date of issue of the letter of acceptance and since the first technical report was issued in October 2009, plus another month for the opening of the financial offers, then, had Itron France not filed an objection, the goods should have been delivered around March 2010. Mr Martin remarked that at this juncture it was important for one to place emphasis on the fact that when the pertinent MID certificate was issued to the recommended tenderer this was dated May 2010.

Mr Attard remarked that if that were to be the case then AFS Ltd would have been fined the penalties contemplated in the conditions of the contract.

Ing. Galea St John stated that, with regard to the other issue of tampering raised by the appellant company, the Water Services Corporation was satisfied with the results that it had obtained from the tests carried out on the meters.

Mr Martin remarked that the meter referred to in the MID certificate of the recommended tenderer was much more advanced than the sample meter submitted with its tender submission. The appellant company’s representative stated that since the meter of the recommended tenderer was not MID approved and had a pulse unit based on a reed switch technology then it was not compliant with clauses 7.2, 14.5 and 14.6 of the tender specifications. As a result, continued Mr Martin, the meter reed switch technology could be disturbed by the use of a magnet thus leading to a faulty signal emission and to erroneous readings and subsequent billing.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 23 July 2010 and also through their verbal submissions presented during the public hearing held on 8 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ (a) claim that to be compliant with MID Directive meant that one had to have an MID Certificate issued by a notified body, (b) reference to the fact that the recommended tenderer did not furnish the MID Certificate by the closing date of the tender on the 26th May 2009 for the simple reason that the said bidder did not possess that kind of certificate, (c) reference to the fact that a manufacturer was not allowed to mark a water meter as being MID approved if that manufacturer did not have the pertinent MID certification and, as a result, such a meter could not be used in accordance with metrological regulations, (d) claim that if Itron France had known that it could submit a meter without an MID certificate then it would have proposed a different and cheaper meter that would not have respected the reliability of pulse signal transmission versus magnet tampering, (e) argument that AFS Ltd should be disqualified as technically non-compliant and the tender
be awarded to Itron France, (f) contention that it was not enough for the tenderer to present a declaration that a product was MID approved but one had to provide an MID certificate issued by a notified body and that the fact that one was in the process of applying for an MID certificate did not mean that one would necessarily obtain that certificate, (g) emphasis on the fact that if the awarded tenderer did not provide MID approved meters then those meters could not be used for billing purposes and that certification had to be presented at tendering stage, (h) contention that the MID markings were the legal way of certifying the metrological performance of the meter, (i) reference to the fact that the MID certificate obtained by AFS Ltd’s supplier, i.e. ‘Janz’ of Portugal, in respect of meter type JV400 was dated April 2010 which date was almost one year after the closing date of the tender, (j) counter argument to Ing Perez’s claim relating to restriction of competition because, at the closing time of the tender, there where at least four global manufacturers, like Nitron, Hydrometer, Census and Esther, that had MID certification and, as a consequence, there was evidently enough competition on the market, (k) emphasis on the fact that when the pertinent MID certificate was issued to the recommended tenderer this was dated May 2010 and (l) remark regarding the fact that the meter referred to in the MID certificate of the recommended tenderer was much more advanced than the sample meter submitted with its tender submission;

• having also taken note of the contracting authority’s (a) reference to the fact that in July 2009 the adjudicating board had requested AFS Ltd to give evidence that both its options were MID approved and the reply from AFS Ltd was that in both instances the MID approval process had either started or was in the course of being initiated, (b) claim to the fact that the contracting authority would have been satisfied if the meters were MID approved by the time the meters were delivered to the Water Services Corporation, (c) reference to the fact that, in the addendum to the evaluation report dated 3rd August 2010, the adjudication board recommended that “… both offers from Messrs AFS Ltd can be accepted provided that the tenderer submits an MID certificate with the first delivery for the meter selected, if this tender is awarded to this bidder.”, namely placing emphasis that the award of the tender was conditional, (d) reference to the fact that a sample was requested from tenderers for the purpose of testing metrological performance and (e) confirmation that for a meter to be in conformity with the MID of the EU as indicated in clause 1.1 of the tender document the meter had to have an MID certificate;

• having taken cognizance of AFS Ltd’s representative’s (a) statement that the necessary MID certificates had been obtained by the manufacturer ‘Janz’ of Portugal producing certificates dated 8th April 2010, 12 May 2010, 2nd August 2010 and 16th September 2010 respectively, (b) reference to the fact that when one considered the dates of issue of the MID certificates, which span from the 8th April to the 16th September 2010, one would note that this certification process was not tied to this particular call for tenders and (c) claim that MID certification was one of the requirements set out in the tender document and that AFS Ltd had adhered to all of the rest and even submitted a declaration that its supplier was in the process of obtaining MID approval for the meters offered by AFS Ltd, which meant that the meter met MID standards even though it was not MID approved at that time;
• having also considered Ing Perez’s remarks, particularly, (a) his reference to clause 25 (at page 35) of the tender document which listed all the documentation requested in the tender specifications and conditions which did not include the MID certificate and (b) the fact that he stated that the MID certificate was not required at tendering stage on purpose because the Water Services Corporation was aware that a number of manufacturers were in the course of getting the MID certification and, therefore, if the Water Services Corporation had included the requirement of this certificate at tendering stage then that would have limited competition;

reached the following conclusions, namely:

1. The PCAB opines that the point at issue was not the price but the timing, namely, whether the MID certificate had to be presented by the closing date of the tender, namely the 26th May 2009, or whether it was acceptable for a tenderer to present the MID certificate at a later stage, thus conditioning the award of the tender. This Board feels that other potential tenderers could have decided not to participate in this tender due to the fact that they were not in possession of an MID certificate.

2. The PCAB feels that, as much as this Board does not allow that a participating tenderer to impose any type of condition in its submission to a contracting authority, likewise, one cannot accept that an adjudicating Board awards a tender on the basis of a condition or proviso imposed on a tenderer. This Board concludes that a tenderer should be substantially compliant and, in this Board’s opinion, not being in possession of an MID certificate at time of original submission was against the specifications, terms and conditions of the said tender.

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

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 232

Adv. CT/WSC/T/7/2010; CT/4012/2010

Supply Tender for the Supply and Fitting of Tyres to Water Services Corporation’s Vehicles (Cranes, Trucks & Excavators)

This call for tenders was published in the Government Gazette on 2 March 2010. The closing date for this call for offers was 6 April 2010.

The estimated value of this tender was Euro 51,218.

Three (3) tenderers submitted their offers.

Messrs Montebello Tyres Ltd filed an objection on the 4 August 2010 following the decision by the Contracts Department to award the tender in caption to Messrs Burmarrad Commercials Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Friday, 8 October 2010 to discuss this objection.

Present for the hearing were:

Messrs A Montebello Tyres Ltd

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<tr>
<th>Name</th>
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<tr>
<td>Mr Charles Montebello</td>
<td>Representative</td>
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<tr>
<td>Mr Joe Montebello</td>
<td>Representative</td>
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<tr>
<td>Ms Sylviianne Micallef</td>
<td>Representative</td>
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<tr>
<td>Ms Amanda Abela</td>
<td>Representative</td>
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Messrs Burmarrad Commercials Ltd

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<th>Name</th>
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<tr>
<td>Mr Mario Gauci</td>
<td>Representative</td>
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<tr>
<td>Mr Sharon Camilleri</td>
<td>Representative</td>
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Water Services Corporation (WSC)

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<tr>
<td>Ing. Marco Perez</td>
<td>Manager Procurement and Stores</td>
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Evaluation Board

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<tr>
<td>Ing. Paul Micallef</td>
<td>Chairman</td>
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<tr>
<td>Mr Anthony Camilleri</td>
<td>Secretary</td>
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<tr>
<td>Mr Simon Agius</td>
<td>Member</td>
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<tr>
<td>Ing. Tonio Muscat</td>
<td>Member</td>
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<td>Mr Charles Garzia</td>
<td>Member</td>
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Department of Contracts

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<tr>
<td>Mr Francis Attard</td>
<td>Director General (Contracts)</td>
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After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant company was invited to explain the motives of the objection.

Mr Charles Montebello, representing A Montebello Tyres Ltd, the appellant company, explained that, by letter dated 30\textsuperscript{th} July 2010, the Contracts Department informed the company that its offer in respect of Lot 1 was adjudicated to be non-compliant since item 1.4 (10 R22.5) was offered with ply rating of 14 instead of 16. Mr Montebello suspected that, in spite of having submitted the cheapest prices with regard to all the other tyres requested in Lot 1, the contracting authority had discarded all of them because its offer was deemed as non-compliant in respect of one of the types of tyres requested. Mr Montebello complained that when he contacted the Contracts Department to be informed of the brand names offered by the recommended tenderer, he was informed that he could obtain that information only by lodging an appeal and paying the relative deposit.

The Chairman PCAB lamented that the PCAB should not be called in to decide on whether an interested party could or could not be informed of the brand names of the tyres offered by the recommended tenderer but the PCAB should convene hearings to examine and decide on matters concerning the tendering procedure in terms of transparency, the equal treatment of all tenderers and such related aspects of the process.

Ing. Paul Micallef, chairman of the adjudicating board, explained that following the objection filed by Messrs A Montebello Tyres Ltd, the adjudicating board went through the tender documentation once again and it transpired that both tenderers were not compliant with regard to item 1.4. Ing. Micallef admitted that, with regard to item 1.4, the contracting authority requested ply 16 and that the appellant company had indicated in its submission that ply 16 was not available. The adjudication board’s Chairman was baffled by the fact that the appellants had retyped the schedules of the items requested and item 1.4 was retyped with ply 16 and that the appellants submitted the quote against a ply 16 item. Ing. Micallef remarked that this same schedule had been used in other previous calls for tenders for the supply of tyres and that the previous contract for such tyres was awarded to Messrs A Montebello Tyres Ltd. Ing. Micallef confirmed that, following a review of the literature submitted by the tenderers, the adjudicating board found that both tenderers were not compliant with regard to item 1.4 of Lot 1.

The Chairman PCAB made it quite clear that this was a purely administrative matter and that such issues had to be addressed by the contracting authority and not by the PCAB. The Chairman PCAB stated that if it transpired that a mistake had been committed at evaluation stage then the contracting authority should have sought the advice of the Contracts Department with a view to obtaining directions as to how to rectify that mistake.

Ing. Micallef remarked that, usually, whenever there was a mistake in the schedule (of prices) the bidders would draw the attention of the contracting authority and the contracting authority would then issue a clarification to all bidders to that effect. Ing. Micallef reiterated that the same schedule had been made use of for years and no one had pointed out that it was deficient in this regard.
Ing. Micallef explained to Mr Montebello that the contracting authority had to award Lot 1 in its entirety, i.e. it could not award individual items of a particular lot otherwise that would amount to a separate tender for each item which practice would be administratively cumbersome on the contracting authority. The chairman of the adjudicating board acknowledged that a mistake was made in awarding Lot 1 to Burmarrad Commercials Ltd because this tenderer was, likewise, non-compliant with regard to item 1.4.

On his part, Mr Mario Gauci, representing Burmarrad Commercials Ltd, remarked that, contrary to what the appellant company had declared, he had evidence that item 1.4 was in fact available with ply 16 – however, he admitted that the tyre Burmarrad Commercials offered in its submission in respect of item 1.4 was 14 ply and not ply 16.

Mr Montebello remarked that what he meant was that the type of tyre bearing the description given at item 1.4 in the tender document was not imported and, as a consequence, not available in Malta.

The Chairman PCAB remarked that, apparently, the specifications with regard to item 1.4 were correct, namely the item was manufactured but none of the bidders offered it in their tender submissions and hence they were both technically non-compliant.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 18 August 2010 and also through their verbal submissions presented during the public hearing held on 8 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ (a) claim that the company’s offer in respect of Lot 1 was adjudicated to be non-compliant since item 1.4 (10 R22.5) was offered with ply rating of 14 instead of 16, (b) submission that, in spite of having submitted the cheapest prices with regard to all the other tyres requested in Lot 1, the contracting authority had discarded all of them because its offer was deemed as non-compliant in respect of one of the types of tyres requested, (c) claim that when he contacted the Contracts Department to be informed of the brand names offered by the recommended tenderer, he was informed that he could obtain that information only by lodging an appeal and paying the relative deposit and (d) claim that what he meant was that the type of tyre bearing the description given at item 1.4 in the tender document was not imported and, as a consequence, not available in Malta;

- having also taken note of the contracting authority’s representative’s (a) explanation regarding the fact that, with regards to this objection, the adjudicating board had through the tender documentation once again and it transpired that both tenderers were not compliant with regard to item 1.4, (b) statement that with regard to item 1.4, the contracting authority requested ply 16 and that the appellant company had indicated in its submission that ply 16 was not available albeit it later emerged that the appellants had retyped the schedules of the items.
requested and item 1.4 was retyped with ply 16 and that the appellants submitted the quote against a ply 16 item, (c) remark that the schedule used in this call had been used in other previous calls for tenders for the supply of tyres and that the previous contract for such tyres was awarded to Messrs A Montebello Tyres Ltd, (d) confirmation that, following a review of the literature submitted by the tenderers, the adjudicating board found that both tenderers were not compliant with regard to item 1.4 of Lot 1, (e) remark that, usually, whenever there was a mistake in the schedule (of prices) the bidders would draw the attention of the contracting authority and the contracting authority would then issue a clarification to all bidders to that effect, (f) statement that the same schedule had been made use of for years and no one had pointed out that it was somehow deficient and (g) acknowledgement that a mistake was made by the adjudicating board in awarding Lot 1 to Burmarrad Commercials Ltd because the latter was, similarly, non-compliant with regard to item 1.4;

• having considered Mr Gauci’s (a) remark relating to the fact that, contrary to what the appellant company had declared, he had evidence that item 1.4 was in fact available with ply 16 and (b) admission that, regardless of his earlier remark, the tyre his own Company, namely, Burmarrad Commercials Ltd., had offered in its submission a 14 ply and not ply 16 as far as item 1.4 is concerned;

reached the following conclusions, namely:

1. The PCAB’s function should be to convene hearings to examine and decide on matters concerning the tendering procedure in terms of transparency, the equal treatment of all tenderers and such related aspects of the process. It is not there so that it can be called in to decide on whether an interested party could or could not be informed of the brand names of the tyres offered by the recommended tenderer.

2. The PCAB feels that the issues raised during this hearing were of a purely administrative nature and that such issues had to be addressed by the contracting authority and not by the PCAB.

3. The PCAB contends that if during some stage of the evaluation process it transpired that a mistake had been committed then the contracting authority should have sought the advice of the Contracts Department with a view to obtaining directions as to how to rectify that mistake.

4. The PCAB feels that, from what transpired during the hearing, the specifications with regard to item 1.4 were correct, namely the item was manufactured and available but none of the bidders offered it in their tender submissions and, as a result, they were both technically non-compliant.

5. The PCAB also concludes that the adjudicating board’s own admission that it had made a mistake in awarding Lot 1 to Burmarrad Commercials Ltd because the latter was, similarly, non-compliant with regard to item 1.4, vitiates the entire process rendering this tender null.

As a consequence of (1) to (5) above this Board finds in favour of appellant company.
The Board recommends that in view of the technical deficiencies (demonstrated in the bidders’ respective submissions and the adjudicating board’s own mistake) encountered during the evaluation process rendering the impossibility of this tender from being decided upon, it recommends that this tender be cancelled and a fresh call be published in the immediate future.

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

Alfred R Triganza    Edwin Muscat    Carmel J Esposito
Chairman            Member            Member

27 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 233


Tender for the Civil Works and Embellishment of the Żewwieqa Waterfront, Ġhajnsielem Gozo

This call for tenders was published in the Government Gazette on 29 January 2010. The closing date for this call for offers was 11 March 2010.

The estimated value of this tender was Euro 5,008,059 (excl. of VAT).

Four (4) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on 5 August 2010 following the decision taken by the Contracts Department to disqualify its offer since it was not administratively compliant

The Public Contracts Appeals Board composed of Mr Alfred Trigana as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 11 October 2010 to discuss this objection.

Present for the hearing were:

Polidano Bros Ltd

Dr. Henri Mizzi Legal Representative
Dr Steve Deceasare Legal Representative
Dr Jesmond Manicaro Legal Representative
Mr Claudio Grech
Mr Antoine Portelli

Witness

Mr John Zarb PricewaterhouseCoopers

Road Network JV

Dr Adrian Delia Legal Representative
Arch David Bonnici Representative
Mr Manuel Bonnici Representative

Dr Kenneth Grima Legal Representative
Arch Mark John Scicluna Representative
Mr Edward Schembri Representative
Ms Itianne Schembri Representative

Dr John Refalo Legal Representative
Arch Malcolm Gingell Representative
The representatives of *Bugeja Brothers (Gozo) Ltd* and *Gatt Tarmac Ltd* on behalf of GRV JV were informed about the date of the hearing but none of them attended.

After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellants’ representative was invited to explain the motives of the objection.

Dr Kenneth Grima, legal representative of Road Network JV, an interested party, complained that the Department of Contracts had refused to furnish him with the reasons for the rejection of the bid made by Polidano Bros Ltd, the appellant company, when he had the right to take part in the hearing as an interested party.

Dr Henri Mizzi, legal advisor of the appellant company, argued that the hearing concerned the disqualification of his client and, as a result, legally, no other party had a say in that except his client and the contracting authority which had to justify the disqualification.

Dr Adrian Delia, also representing Road Network JV, submitted that the regulation under which the appellant joint venture made its request did identify the interested parties and, according to the practice adopted, the interested parties were entitled to have access to the grounds for rejection and to documentation submitted during the hearing but the interested parties did not have access to tender documentation that went beyond the scope of the appeal so as to avoid any fishing expeditions.

The Chairman PCAB remarked that, for the sake of transparency and accountability and within the parameters of the regulations, the PCAB gave interested parties the opportunity to air their views during the hearing.
Dr Mizzi explained that, according to the evaluation report, his client’s tender had been disqualified because the (i) 2007 accounts were not audited as requested in the tender and (ii) 2008 accounts were drawn up by the company’s consultants who, inter alia, made the following comment, namely

“We have not audited these financial statements and accordingly express no assurance thereon” whereas the tender document specified at clause 4.2.3 that: “in the case that the year 2008 is unavailable, this must be clearly stated and certified by a recognised commercial bank”

It was stated that this certification was not submitted.

Following this Dr Mizzi made the following submissions, namely, in respect of:

The 2007 Accounts

- the firm’s auditors, Deloitte, did carry out the audit process even if they reported a disclaimer of opinion

The 2008 Accounts

- these accounts were not audited and the tender document stated that these accounts should not necessarily be audited. His client submitted the 2008 accounts certified by the accountants and, per se, that was more meaningful than the requested certification by a commercial bank, which was not involved in any way in the drawing up of the company’s accounts. Once again, contended Dr Mizzi, his client had satisfied the tender requirements

Alternative Evidence

- If, for the sake of the argument the tenderer did not submit the requested documentation one had to refer to Regulation 50 (5) of the Public Procurement Regulations 2005 which stipulated that:

  “In the event that a candidate or tenderer is, for any valid reason, unable to provide the references requested by a contracting authority, its economic and financial standing may be substantiated by any other document which the contracting authority considers appropriate.”

As a consequence, claimed Dr Mizzi, if the document requested was not submitted and that same requirement could be satisfied with the submission of another document, then, the contracting authority was obliged to request alternative documents while, admittedly, it was at the discretion of the contracting authority whether to accept that document or not keeping in view that, at the end of the day, what had to be established was the financial and economic standing of the tenderer. The obligation on the part of the contracting authority to give
the tenderer the opportunity to submit alternative evidence was to apply in exceptional circumstances.

Substantiality

- The Instructions to Tenderers (ITT) clearly stated that a tender which was in conformity with the requirements and specifications laid down in the tender documents with no substantial deviations or reservations must not be disqualified. The ITT was clear also as to what deviations might lead to the disqualification of a tender and clause 28.2 of the ITT exhaustively listed what might be considered to be a 'substantial deviation' and that left no room for interpretation. Moreover, the adjudicating board did not have the power to disqualify his client on the basis of alleged shortcomings.

The value of the tender was about €5m and the scope of regulation 50 was to establish that the tenderer had the financial capacity to execute the contract. In this regard, his client had a credit facility with the bank of €3m, which was more that the €2.5m requested in the tender. Moreover, when one considered the financial figures in the balance sheet, it clearly emerged that his client had the required financial standing to execute this contract.

Dr Mizzi claimed that, even if there were shortcomings on the part of his client, those shortcomings were not substantial and hence it was not justified to disqualify his clients’ offer.

The appellant company’s legal advisor proceeded by stating that the evaluation board was duty bound to evaluate the financial information submitted, even if the data might not have been 100% in order, to see if it could form an opinion as to whether the tenderer was financially sound to undertake this contract.

Dr Titianne Scicluna Cassar, legal representative of the Ministry for Gozo, the contracting authority, made the following submissions:

(i) the appeal concerned clause 4.2.3 of the tender document which read as follows:

“They must provide appropriate statements from banks showing they have access to sufficient credit and other financial facilities to cover the required cash flow for the duration of the contract. The tenderer must have access to a credit facility issued by a recognized commercial bank of not less than €2,500,000. Evidence of financial and economic standing in accordance with Article 50 of LN177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by audited accounts for the years 2006, 2007 and 2008 verified by a certified accountant. In the case that year 2008 is unavailable this must be clearly stated and certified by a recognized commercial bank. All evidence must be provided using Form 4.4, Financial Statement, in Volume 1, Section 4
of the tender documents.”

(ii) at administrative compliance stage the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority. Contrary to what the appellant company had claimed, Dr Scicluna Cassar contended that if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier.

(iii) the tender requested a credit facility of up to €2.5m which requirement the appellant satisfied and even exceeded.

(iv) the 2006 audited accounts, even if with a qualified auditor’s opinion, had been submitted and met the tender conditions.

The 2008 Accounts

- These were not audited but they were admissible according to the tender document. However, these accounts were accompanied by the accountant’s certificate when the tender conditions requested a certificate from a recognised commercial bank that the 2008 audited accounts were not available. The adjudicating board had no discretion to go into the scope of asking for the bank’s certificate but all that it had to do was to check if it was submitted or not. The other bidders had submitted audited accounts for 2008.

The 2007 audited accounts

- These accounts were accompanied by a ‘disclaimer of opinion’ which, after listing the reasons, read as follows:

“Because of the significance of the matters discussed in the preceding paragraph, we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as to whether the financial statements give a true and fair view of the financial position of the company as of 31st December 2007 and of the company's financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standards. Accordingly, we do not express an opinion on the financial statements.”

Contrary to what the appellant seemed to imply, the ‘disclaimer of opinion’ was quite relevant and the following quotes were cited:

“International Standard on Auditing 705 - Disclaimer of Opinion
9. The auditor shall disclaim an opinion when the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive.

27. When an auditor disclaims an opinion due to an inability to obtain sufficient appropriate audit evidence, the auditor shall amend the introductory paragraph of the auditor’s report to state that the auditor was engaged to audit the financial statements. The auditor shall also amend the description of the auditor’s responsibility and the description of the scope of the audit to state only the following: “Our responsibility is to express an opinion on the financial statements based on conducting the audit in accordance with International Standards on Auditing. Because of the matter(s) described in the Basis for Disclaimer of Opinion paragraph, however, we were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion.”

The difference between ‘we audited’ and ‘we were engaged to audit’ was illustrated by Dr Scicluna Cassar when the latter quoted from the book by Robert B. Davies titled ‘Use of Disclaimers in Audit Reports discerning between shapes of opinion’:

“In the introductory paragraph the first phrase changes from ‘we have audited’ to ‘we were engaged to audit’ in order to let the user know that an audit was commissioned but does not mention that the auditor necessarily completed the audit. Additionally, since the audit was not completed and/or adequately performed the auditor refuses to accept any responsibility ….. the scope paragraph is omitted in its entirety since effectively no audit was performed and the final paragraph changes completely stating that an opinion could not be formed and expressed because of the situation mentioned in the previous paragraph.”

Another quote from the same author stated that “lending institutions and governments typically reject financial statements if the auditor disclaimed an opinion and will request the auditee to correct the situation the auditor mentioned and obtain another audit report.”

In terms of the new regulations, on the 6 May 2010, the Contracts Department had requested the appellant to resubmit proper audited accounts but the appellant company claimed that it had submitted all that was requested and attached two letters dated 10 May 2010, one from Deloitte, who performed the 2007 accounts audit, and the other from PricewaterhouseCoopers, which letters did not alter the substance of the accounts submitted. Moreover, it was noted that the
2007 audited accounts were not filed at the Malta Financial Services Authority (MFSA).

Since the 2007 audited accounts were not effectively submitted and the 2008 accounts were not accompanied by the bank’s certificate then the adjudicating board had to refer to Clause 28.3 (page 24) which stated that “If a tenderer does not comply with the requirements of the evaluation grid, it will be rejected by the evaluation committee when checking admissibility.”

Dr Scicluna Cassar concluded that if the auditor was not in a position to verify or not even to express an opinion on the accounts for the various reasons listed, then one could not expect the adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts.

Dr Adrian Delia, legal representative of Road Network JV, an interested party, submitted the following remarks:

(a) he agreed with what Dr Scicluna Cassar had stated with regard to the ‘disclaimer of opinion’ expressed by the auditor on the appellant company’s 2007 accounts

(b) he disagreed with the appellant company’s interpretation of Reg. 50 (5) that the contracting authority was duty bound to ask for alternative evidence to prove financial and economic standing because the regulations, even as recently amended, listed what the contracting authority, as a general rule, might request to establish financial and economic standing and granted the contracting authority some elbowroom by allowing it to ask whatever it deemed fit to ask for this purpose

(c) with regard to Reg. 28 (2), Dr Delia stated that it had to be kept in mind that clause 4.2.3 of the tender document referred to a mandatory requirement as indicated by the repeated use of the term ‘must’ as to what had to be submitted and what had to be submitted as a substitute

(d) if the tenderer disagreed with the requirement of having the bank certifying that the 2008 audited accounts were not available then the tenderer had all the opportunity to clarify that matter with the contracting authority prior to the closing date of the tender and, if acceded to, the contracting authority would have to inform one and all of the change in tender conditions - that was a legal provision which could not be disputed, claimed that Dr Delia. On the other hand, Dr Delia continued, if a tenderer would be allowed to submit other documents in substitution of those requested in the tender dossier then that tenderer would be effectively altering the tender conditions and specifications.

Dr Kenneth Grima, also representing Road Network JV, raised the following points:
(i) with regard to the issue of ‘substantiality’ he recalled that the PCAB had always held that mandatory documentation had to be submitted and that it was up to be contracting authority and not up to the tenderer to decide on what was substantive or not

(ii) the fact that the tender in question was valued at about €5m rendered it more important for the contracting authority to ascertain that the bidder was financially sound to undertake these extensive works. For one of the three years in respect of which the company’s accounts were requested, i.e. for 2007, no audited accounts were effectively submitted and that had to be seen in the light that the 2008 accounts were also unaudited in May 2010, i.e. the closing date of the tender – even though they were admissible according to the tender conditions. On the other hand, his client had submitted the audited accounts with regard to the three years requested

(iii) the contracting authority could not do away with the serious reservations expressed by the auditor in the appellant company’s 2007 financial statements and the adjudicating board could not interpret the 2007 accounts in any other way.

Dr Jesmond Manicaro, another legal representative of Polidano Bros Ltd, the appellant company, stated that it was not mandatory for the 2008 accounts to be audited, even though the other tenderers had submitted 2008 audited accounts, and, as a consequence, that far, his client was compliant. He added that the bank had informed his client that it was not in a position to issue the certificate requested in the tender and hence his client submitted a certificate from an accounting/auditing firm, in its accounting capacity, which he considered as more appropriate in the circumstances.

The Chairman PCAB remarked that even if, from a professional point of view, he did not endorse the requirement of the bank’s certificate as stipulated in the tender document, the tenderer should have asked for a clarification as to whether he could provide a certificate from the accountants rather than from the bank. He added that, technically speaking, one could not seriously take into consideration financial statements with a ‘disclaimer of opinion’.

Mr John Zarb, partner at PricewaterhouseCoopers, accountant/auditor and senior lecturer at the University of Malta, under oath, gave the following evidence:

a) it turned out that, over the years, the rate of expansion of Polidano Group by far exceeded the administrative capacity of the organisation

b) in November 2009 Polidano Bros Ltd engaged PricewaterhouseCoopers to undertake a process to update and ‘clean’ the books of the Group that would lead to the restructuring and consolidating of Polidano Group

The 2008 Accounts

Mr Zarb stated that the firm he represented signed the accounts for 2008 and, as indicated in the report dated 8 May 2010, which he read
out, it did not audit those accounts. Admittedly, the accountant’s report did not provide the same comfort of an audit report but it did provide a certificate from an accountants firm which was more valid than that of a bank because this accounting firm was engaged in a long and rigorous exercise of updating the appellant company’s accounting records and system. The appellant company had explained to the contracting authority that a process was at an advanced stage whereby the 2008 accounts had been drawn up and were soon to be audited, something which materialised in July 2010.

**The 2007 Accounts**

These accounts were audited by Deloitte but, for reasons stated earlier, it could not express an opinion on the 2008 financial statements. Mr Zarb said that an auditor could qualify the audit either because there was something wrong with certain aspects of the accounts or because the auditor was not in a position to do the job properly or if there were serious doubts about the accounts that the auditor could not resolve in any way. He gave a couple of examples about a ‘qualified opinion’ and a ‘disclaimer of opinion’, e.g. Global Funds Ltd and Gozo Ferries Ltd.

**Disclaimer of Opinion**

According to Mr Zarb, there were grades as to how grave the disclaimer was, namely either one did not agree with the accounts or one had doubts about them or there was ‘a limitation of scope’ about the accounts. The disclaimer of opinion rendered those accounts pervasive and it was the worst kind of qualification that an auditor could make to the financial statements.

c) the financial statements would have been used to assess whether the size of the firm was compatible with the size of the contract that the same company was bidding for

d) the audit process entailed a number of procedures that had to be carried out and in the case of a ‘disclaimer of opinion’ that would mean that the auditor was unable to carry out some of these procedures as outlined in the 2007 auditor’s report

e) the 2007 audited accounts submitted were the only ones available and those were the same set of accounts that were presented to the shareholders. The law provided for audited accounts with a ‘disclaimer of opinion’ and all that the tender requested was audited accounts for 2007. At the end of an audit, one could either confirm that the accounts were *true and fair* or one could *qualify* the accounts on specific issues or one could not express an opinion because of doubts and doubts were a part of life stated Mr Zarb.
f) the 2008 accounts contained corrected comparative figures in respect of 2007 and that was the result of the corrective action taken since November 2009. The 2008 accounts showed that the firm had a turnover of €60m and that the profits of €2,996m previously reported in the 2007 audited accounts should have read €4.51m (page 5 of the accounts)

g) Mr Zarb said that it was the practice of PricewaterhouseCoopers not to have the accounts of a client signed by any individual employee but that the accounts should bear the stamp of the organisation so that the exercise would have the backing of the whole organisation

h) to the observation made by Dr Scicluna Cassar that the audited accounts of 2008 were presented to the MFSA whereas the audited accounts for 2007 had not been filed at the MFSA, Mr Zarb remarked that the 2008 audited accounts filed at the MFSA contained the 2007 corrected comparative figures

i) to questions put forward by Dr Delia Mr Zarb declared that (1) PricewaterhouseCoopers was not in any way involved in the 2007 audited accounts as presented with the tender documentation, (2) he had advised the appellant company that the accountant’s report on the 2008 accounts was more relevant than the bank’s certificate requested in the tender (this was reflected in letter dated 10th May 2010 sent to the Contracts Department)

j) the adjudicating board had to establish if the tenderer had the financial muscle to carry out this contract and he opined that, from the financial data submitted by the appellant company, the adjudicating board was in a position to determine that the said appellant company was capable of undertaking large projects.

At this point Dr Delia intervened and referred to clause 4.2 which stated that:

“In order to be considered eligible for the award of the contract, tenderers must (emphasis added) provide evidence that they meet or exceed certain minimum qualification criteria. This evidence must be provided by tenderers in the form of the information and documents described in Sub clause 4.1 and in whatever additional form tenderers may wish to utilise.”

Dr Delia remarked that

- the 2006 audited accounts were in order, even if qualified
- the 2007 audited accounts were ‘pervasive’ - or meaningless - because of the ‘disclaimer of opinion’
- the 2008 audited accounts contained amended comparative figures for 2007
- according to clause 4.2.3 the bank, was only required to confirm that the 2008 audited accounts were not available and not to certify those accounts and that should not have been so difficult to do given that
the bank was going to extend a credit facility of €2.5m to the appellant company.

Moreover, Dr Delia drew the attention of the PCAB that the evidence given by Mr Zarb had to be taken into account only as far as it was relevant to the situation at the closing date of the tender and certainly not as to the state of affairs at the time of the hearing.

Dr Scicluna Cassar drew the attention of Mr Zarb to the long list of shortcomings listed by the auditor in the 2007 report which prompted the auditor to issue a ‘disclaimer of opinion’. She then quoted from IAS 705 as follows:

“13. If the auditor is unable to obtain sufficient appropriate audit evidence, the auditor shall determine the implications as follows:

(a) If the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be material but not pervasive, the auditor shall qualify the opinion; or

(b) the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive so that a qualification of the opinion would be inadequate to communicate the gravity of the situation, the auditor shall:

(i) Withdraw from the audit, where practicable and possible under applicable law or regulation; or (Ref: Para. A13-A14)

(ii) If withdrawal from the audit before issuing the auditor's report is not practicable or possible, disclaim an opinion on the financial statements.”

Mr Zarb remarked that that provision was under the title ‘Consequence of an Inability to Obtain Sufficient Appropriate Audit Evidence Due to a Management-Imposed Limitation after the Auditor Has Accepted the Engagement’ which situation did not apply to this case. He added that, legally, the audit had been carried out and that it was not mandatory to file the accounts at the MFSA. Mr Zarb stated that, once the audited accounts for 2008 with the corrected comparative figures for 2007 corrected were filed with MFSA on the 29 July 2010, there was no point to file the 2007 audited accounts with MFSA. He declared that there were no significant differences between the 2008 accounts submitted with the tender document and the 2008 audited accounts submitted in July to MFSA.

The Chairman PCAB remarked that, according to the evaluation report, Polidano Bros Ltd failed with regard to the ‘Selection Criteria – Financial and Economic Standing’ clause 11 (c) (Clarification 6) where it appeared (i) there was no problem with the financial projections for the two years ahead, (ii) the financial statement had still to be discussed, (iii) the issue of the audited accounts had been exhausted and (iv) there was no problem with the minimum annual turnover of €4m.

Mr John Cremona, chairman of the adjudicating board, submitted the following remarks:
(i) the adjudicating board had met 14 times to discuss this tender. The adjudicating board had to stick to the requirements requested by the contracting authority in the tender document and that the board was not at liberty to depart from mandatory requirements otherwise it would effectively be altering the tender conditions and specifications.

(ii) during its deliberations the adjudicating board concluded that not all the mandatory documentation submitted by the appellant company was in order in the sense that: (a) since the 2008 accounts were not audited the bank had to certify that fact, which certification was not forthcoming and (b) since the auditor could not express an opinion on the 2007 accounts the adjudicating board could not take the contents of those accounts into consideration. If the appellant company was unable to obtain the bank’s certificate, then the tenderer had the opportunity to clear that issue before the closing date of the tender, as it did in the case of other issues.

(iii) no accountant sat on the adjudicating board but, whenever it was felt necessary, the board sought appropriate advice from the attorney general. The adjudicating board was not required to evaluate in depth the financial data submitted by tenderers but the adjudicating board required the audited accounts and the financial projections so as to compare the basic financial data with the financial figures given in Form 4.4 ‘Financial Statement’ (page 45 of the tender). The adjudicating board could not check the figures given by the appellant in Form 4.4 because the financial data in the 2007 audited accounts was not reliable given the ‘disclaimer of opinion’ along with the other problem mentioned with regard to the 2008 accounts.

(iv) the other participating tenderers had submitted audited accounts in respect of the 3-year period indicated.

At this point Mr Cremona gave the following additional evidence under oath:

(a) the adjudicating board first had to undertake a quantitative and then a qualitative exercise so as to establish if the documentation requested had been submitted by the tenderers and, if in the affirmative, whether the documents satisfied the purpose why they were requested in the tender document. It turned out that the 2007 audited accounts presented by the appellant company did not provide the comfort required because of the auditor’s ‘disclaimer of opinion’ whereas the 2008 accounts were acceptable, even if not audited, but were not accompanied by the requested bank’s certificate. On checking with the MFSA the adjudicating board learned that the 2007 and 2008 accounts had not been filed.

(b) the adjudicating board had to stick to the tender conditions and specifications and any departure therefrom had to be approved by the Contracts Department through a clarification which would have been communicated to all bidders. The adjudicating board, through the
Director of Contracts, by letter dated 6 May 2010 had even drawn the attention of the appellant company to the shortcomings noted in its submission with regard to the evidence of the financial standing of the tenderer and it was given up to the 10 May 2010 to rectify its position, however, by letters of reply dated 10 May 2010, the appellant company confirmed that the 2006 and 2007 audited accounts submitted with the tender were the ones available and that the accountant’s report was more relevant than the bank’s certificate.

(c) once the accounts for 2007 and 2008 as presented by the appellant company were not considered in order for the purposes of clause 4.2.3 then the adjudicating board saw no point in considering their contents.

(d) Reg. 50 (5) was taken into consideration by the adjudicating board but it was up to the contracting authority to accept alternative documents to those requested in the tender document and the proper way to do that was for the tenderer to make a request and if it were acceptable to the Contracts Department then it would have been communicated to all bidders by way of a clarification.

(e) part of the tender submission consisted in the filling in of Form 4.4 ‘Financial Statement’ which figures therein had to be supported by the audited accounts. While the declaration in Form 4.4 was the responsibility of the tenderer it still had to be supported by the requested documents which documents had to be in order.

(f) the adjudicating board had to (1) determine if the conditions stipulated in the tender document had been met by the tenderers in the form of turnover, cash flows, credit facility by the bank and so forth and (2) see that the financial data given in Form 4.4 corresponded with the supporting documentation, among them, the audited accounts. The adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in Form 4.4. The tender requested three main requirements, i.e. a minimum annual turnover of €4m for the years 2006/7/8 in relation to road works, civil engineering works, building embellishment and finishing works in respect of which tenderers had to submit the relative list of works accompanied by certificates; credit facilities to the tune of €2.5m; and evidence of financial and economic standing as per Article 50.

Dr Delia pointed out that this tender was not going to be adjudicated on the basis of the most economically advantageous tender (MEAT) but, in this case, the bidder had to meet the minimum requirements as laid down in the tender document and one did not have to be a professional accountant to establish that.

Dr Scicluna Cassar stressed the importance of the audited accounts in the evaluation process since the main financial data extracted from them had to be reflected in ‘Financial Statement’ at Form 4.4.

Dr Mizzi reiterated that Reg. 50 (5) allowed the tenderer to submit alternative evidence to that requested in the tender document and that the adjudicating board
was obliged to consider that alternative evidence but was at liberty to decide whether it was satisfactory or not.

Dr Mizzi maintained that:

(i) an audit process could lead to different conclusions and that, although the 2007 audit report was the way it was, one had to acknowledge that his client had satisfied the tender requirement for the submission of the 2007 audited accounts

(ii) the 2008 accounts - which included the revised comparative figures for 2007 - did not have to be audited and, therefore, that far his client was compliant. The problem arose with regard to the tender requirement of a certificate by the bank that the 2008 audited accounts were not available instead of which his client submitted a report by the accountants which, in the circumstances, he considered more relevant. The adjudicating board had to take that alternative evidence into account in terms of Reg. 50 (5)

(iii) the accounts, even as presented, was evidence of a firm with a turnover of €61m in 2008 and €36m in 2007 and total equity of €37m in 2008 and €32m in 2007

(iv) the evaluation process should have gone beyond the checking process and that the inclination of the evaluation process should be towards the inclusion rather than to the exclusion of bidders for the sake of wider competition. It was unfair to exclude his client, a construction company of such a stature, and then admit bidders with relatively very limited financial standing just because they had submitted their audited accounts

On her part, Dr Scicluna Cassar submitted that:

(a) in spite of what had been stated by the appellant company’s legal representative with regard to the extensive profile of his client, the fact remained that the said company was unable to submit a proper set of audited accounts for 2007 because the one submitted carried the ‘disclaimer of opinion’ which, effectively, meant that they were not audited

(b) the adjudicating board had only the audited accounts for 2006 to work on because the 2008 accounts was also not compliant since the bank’s certificate had not been produced

(c) the financial data requested was a matter of substance for the adjudication process but, on the other hand, were quite straightforward so much so that the information was submitted by the other tenderers except for the appellant company

Dr Grima reiterated that, whenever a tenderer did not submit mandatory information, one had, invariably, been disqualified and rightly so! He added that, in this case, the appellant company was given the opportunity to rectify its shortcomings but the appellant company stood by its original submission as it considered that all that had been requested was in fact submitted in order. Dr Grima recalled that the PCAB has
always upheld that the contracting authority had the right to request whatever information it deemed fit and that it was not up to the tenderer to omit or to substitute the information requested. Dr Grima pointed out that it had been confirmed at the hearing that the last set of audited accounts of Polidano Bros Ltd, which was one of the leading construction companies in Malta, dated back years before. He concluded that the readmission of the appellant company would be unfair on the other bidders who had made a submission in line with the tender conditions and specifications.

Dr John Refalo, also representing Road Network JV, argued that what had to be decided upon was whether the adjudicating board had acted correctly and within the law when it had decided that the appellant company was not compliant with the tender requirements. He added that the tenderer was obliged to provide the minimum requirements requested in the tender and that if it failed to do that then the adjudicating board had no other option but to declare the tenderer as non-compliant. Dr Refalo stated that, in the case under reference, the appellant company had submitted financial evidence which was not reliable in view of the disclaimer of opinion expressed by the auditor.

Dr Delia concluded by putting forward the following arguments:

(i) the appeal did not concern the adjudication process even if the appellant company was suggesting a kind of evaluation exercise that would somehow justify the reinstatement of its bid

(ii) the role of the PCAB was not to replace the adjudicating board but to see whether the adjudicating board acted correctly in accordance with regulations and tender conditions

(iii) that certain documentation was not submitted and/or was not submitted in order was not subject to an opinion but it was a matter of fact and the 2007 audited accounts with a ‘disclaimer of opinion’ were meaningless for the purpose of the evidence requested in Reg. 50. The audit process had to satisfy a series of criteria but the 2007 accounts had failed to satisfy a number of these criteria so much so that a ‘disclaimer of opinion’ had to be put on record

(iv) the fact that the (comparative) figures for 2007 were corrected in the 2008 audited accounts showed that the original figures contained in the 2007 audited accounts were incorrect and hence constituted false evidence

(v) in case no. 189 the PCAB had opined that “an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification.”

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 5 August 2010 and also through their verbal submissions presented during
the public hearing held on 11 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ (a) introductory submissions wherein, inter alia, it was claimed that as regards (i) the 2007 accounts, the firm’s auditors, Deloitte, did carry out the audit process even if they reported a disclaimer of opinion – (ii) the 2008 accounts, these accounts were not audited and since the tender document stated that these accounts should not necessarily be audited these were simply certified by the accountants and, per se, that was more meaningful than the requested certification by a commercial bank, which was not involved in any way in the drawing up of the company’s accounts, (b) claim that, in line with Regulation 50 (5) of the Public Procurement Regulations 2005, if the document requested was not submitted and that same requirement could be satisfied with the submission of another document, then, the contracting authority was obliged to request alternative documents, (c) claim that the Instructions to Tenderers (ITT) clearly stated that a tender which was in conformity with the requirements and specifications laid down in the tender documents with no substantial deviations or reservations must not be disqualified, (d) claim that, since the value of the tender was about €5m and the scope of regulation 50 was to establish that the tenderer had the financial capacity to execute the contract, the fact that they had a credit facility with the bank of €3m, which was more that the €2.5m requested in the tender should have sufficed, (e) claim that the evaluation board was duty bound to evaluate the financial information submitted, even if the data might not have been 100% in order, to see if it could form an opinion as to whether the tenderer was financially sound to undertake this contract and (f) claim that it was unfair for a construction company of such a stature to be excluded because of formal trivialities and, at the same time, have a system where this admits bidders with relatively very limited financial standing just because they would have submitted audited accounts;

- having also taken note of the contracting authority’s representative’s (a) claim that, at administrative compliance stage, the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority, (b) remark that, contrary to what the appellant company, had claimed, if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier, (c) claim that (i) the 2006 audited accounts, even if with a qualified auditor’s opinion, had been submitted and met the tender conditions, (2) the 2008 accounts were not audited but they were admissible according to the tender document, yet these accounts were accompanied by the accountant’s certificate when the tender conditions requested a certificate from a recognised commercial bank that the 2008 audited accounts were not available and it was not the adjudicating board’s remit to ask for the bank’s certificate and (3) whilst the 2007 accounts were accompanied by a ‘disclaimer of opinion’, yet acting in terms of the new regulations governing public procurement, on the 6 May 2010, the Contracts Department had requested the appellant company to resubmit proper audited accounts but the appellant company claimed that it
had submitted all that was requested, (d) statement that since the 2007 audited accounts were not effectively submitted and the 2008 accounts were not accompanied by the bank’s certificate then the adjudicating board had to refer to Clause 28.3 (page 24) which stated that “If a tenderer does not comply with the requirements of the evaluation grid, it will be rejected by the evaluation committee when checking admissibility.”, (e) submission that if the auditor was not in a position to verify or not even to express an opinion on the accounts for the various reasons listed, then one could not expect the adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts, (f) emphasis on the audited accounts in the evaluation process since the main financial data extracted from them had to be reflected in ‘Financial Statement’ at Form 4.4, (g) reiteration of the fact that the adjudicating board had only the audited accounts for 2006 to work on because the 2008 accounts was also not compliant since the bank’s certificate had not been produced and (h) emphasis on the fact that the financial data requested was a matter of substance for the adjudication process but, on the other hand, were quite straightforward so much so that the information was submitted by the other tenderers except for the appellant company;

• having considered Mr Cremona’s testimony, especially, his comments regarding the fact that (a) the 2007 audited accounts presented by the appellant company did not provide the comfort required because of the auditor’s ‘disclaimer of opinion’ whereas the 2008 accounts were acceptable, even if not audited, but were not accompanied by the requested bank’s certificate, (b) the adjudicating board had to stick to the tender conditions and specifications and any departure therefrom had to be approved by the Contracts Department through a clarification which would have been communicated to all bidders, (c) the adjudicating board, through the Director of Contracts, by letter dated 6 May 2010 had even drawn the attention of the appellant company to the shortcomings noted in its submission with regard to the evidence of the financial standing of the tenderer and it was given up to the 10 May 2010 to rectify its position, however, by letters of reply dated 10 May 2010, the appellant company confirmed that the 2006 and 2007 audited accounts submitted with the tender were the ones available and that the accountant’s report was more relevant than the bank’s certificate, (d) once the accounts for 2007 and 2008 as presented by the appellant company were not considered in order for the purposes of clause 4.2.3 then the adjudicating board saw no point in considering their contents, (e) Reg. 50 (5) was taken into consideration by the adjudicating board but it was up to the contracting authority to accept alternative documents to those requested in the tender document and the proper way to do that was for the tenderer to make a request and if it were acceptable to the Contracts Department then it would have been communicated to all bidders by way of a clarification and (f) the adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in Form 4.4 - ‘Financial Statement’ – wherein the figures listed in the said ‘Form’ had to be supported by audited accounts;

• having taken cognizance of the points raised by Dr Delia, especially (a) the one relating to the a mandatory requirement as indicated by the repeated use of the term ‘must’ as to what had to be submitted, (b) the comment made with regards to the fact that if a tenderer would be allowed to submit other
documents in substitution of those requested in the tender *dossier* then that tenderer would be effectively altering the tender conditions and specifications, (c) remark that *(i)* 2006 audited accounts were in order, even if qualified, *(ii)* 2007 audited accounts were ‘pervasive’ - or meaningless - because of the ‘disclaimer of opinion’, *(iii)* 2008 audited accounts contained amended comparative figures for 2007 and *(iv)* according to clause 4.2.3 the bank, was only required to confirm that the 2008 audited accounts were not available and not to certify those accounts and that should not have been so difficult to do given that the bank was going to extend a credit facility of €2.5m to the appellant company, (d) his remark regarding the fact that the evidence given by Mr Zarb had to be taken into account only as far as it was relevant to the situation at the closing date of the tender and certainly not as to the state of affairs at the time of the hearing and (e) his claim that the consideration that certain documentation was not submitted and/or was not submitted in order was not subject to an opinion but it was a matter of fact and the 2007 audited accounts with a ‘disclaimer of opinion’ were meaningless for the purpose of the evidence requested in Reg. 50;

- having also noted Dr Grima’s *(a)* remarks relating to the issue of ‘substantiality’, *(b)* comment referring to the fact that the contracting authority could not do away with the serious reservations expressed by the auditor in the appellant company’s 2007 financial statements and the adjudicating board could not interpret the 2007 accounts in any other way and *(c)* emphasis on the fact that the readmission of the appellant company would be unfair on the other bidders who had made a submission in line with the tender conditions and specifications;

A. having considered Mr Zarb’s *(a)* explanation as to what led to the engagement of PricewaterhouseCoopers to undertake a process to update and ‘clean’ the books of the Group that would lead to the restructuring and consolidating of Polidano Group, *(b)* reference to the fact that, whilst it was true that an accountant’s report did not provide the same comfort of an audit report, yet it did provide a certificate from an accountants firm which was more valid than that of a bank in view of the fact that the accounting firm would have been engaged in a long and rigorous exercise of updating the company’s accounting records and system, *(c)* reference to the fact that the appellant company had explained to the contracting authority that a process was at an advanced stage whereby the 2008 accounts had been drawn up and were soon to be audited, something which materialised in July 2010, *(d)* explanations regarding the scope behind and the corresponding significance of issues such as ‘qualified opinion’, ‘disclaimer of opinion’, ‘limitation of scope’ and so forth, *(e)* claim that *(i)* the 2007 audited accounts submitted were the only ones available and those were the same set of accounts that were presented to the shareholders and since the law provided for audited accounts with a ‘disclaimer of opinion’ these were submitted as such as all that the tender requested was audited accounts for 2007, *(ii)* the 2008 accounts *(A)* contained corrected comparative figures in respect of 2007 and that was the result of the corrective action taken since November 2009 and *(B)* that the firm had a turnover of €60m and that the profits of €2.996m previously reported in the 2007 audited accounts should have read €4.51m (page 5 of the accounts), *(f)* remark that the adjudicating board had to establish if the
tenderer had the financial muscle to carry out this contract and he opined that, from the financial data submitted by the appellant company, the adjudicating board was in a position to determine that the said appellant company was capable of undertaking large projects, (g) remark that, legally, the audit had been carried out and that it was not mandatory to file the accounts at the MFSA and (h) declaration that there were no significant differences between the 2008 accounts submitted with the tender document and the 2008 audited accounts submitted in July to MFSA, 

reached the following conclusions, namely:

1. The PCAB agrees with the fact that the 2008 accounts, albeit not audited, were still admissible in the format as submitted according to the tender document.

   However, although it is still not convinced as to the effectiveness of this requirement and, theoretically, whilst agreeing with the contracting authority in the latter’s submission that an accountant’s report does not provide the same comfort as that provided by an audit report, yet also tends to agree with the appellants’ claim, namely that, at least in this context, a certificate from an accountants firm may tend to be more valid than that, possibly, provided by a commercial bank.

   However, factually, this Board acknowledges the fact that these accounts were accompanied by the accountant’s certificate when the tender conditions specifically requested a certificate from a recognised commercial bank.

   The PCAB has repeatedly pronounced itself that, despite one’s reservations as to the mandatory submission of a particular document or set of documents, unless otherwise agreed with the pertinent contracting authority via the Department of Contracts, one cannot simply renege on submitting such document / documents in an arbitrary manner and then expect for its submission to proceed in a normal manner with the evaluation process.

2. The PCAB feels that, with regards to the obligation of the contracting authority to request alternative documents, contrary to what the appellant company had claimed, if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier.

3. This Board notes that, albeit the 2007 accounts were accompanied by a ‘disclaimer of opinion’, yet, acting in terms of the new regulations governing public procurement, on the 6 May 2010, the Contracts Department had requested the appellant company to resubmit proper audited accounts. Nevertheless, despite such request, the appellant company claimed that it had submitted all that was requested.

   The PCAB concurs with the stand taken by the adjudicating board, namely that once the accounts for 2007 and 2008, as presented by the appellant company, were not considered in order for the purposes of clause 4.2.3, then
the adjudicating board was presented with no alternative but to desist from considering further their contents.

Additionally, this Board also agrees with the contracting authority’s claim that if, unless otherwise agreed between all parties concerned, one were to allow any tenderer to submit other documents in substitution of those requested in the tender dossier, then that tenderer would be, effectively, altering the tender conditions and specifications.

4. The PCAB disagrees with the issues raised by the appellant company in connection with the fact that tender documents with no substantial deviations or reservations must not be disqualified. Apart from the fact that such financial data is indispensable for any adjudicating body to enable it to reach reasonable and justified conclusions, it remains the prerogative of a contracting authority to establish which documents it deems substantial or not.

This Board acknowledges that it seems that the information, as requested in the tender specifications, was quite straightforward and attainable, so much so that, as transpired during the hearing, the information, as requested, was submitted by all the other tenderers except for the appellant company.

5. With regards to the argument brought forward by the appellant company wherein, inter alia, it was stated that the fact that the said appellant company is the beneficiary of a credit facility of Euro 3 million sanctioned by its bankers should have sufficed for the adjudicating board to establish the solidity of the company, especially, in consideration of the fact that this goes beyond the limit requested in the same tender document which required a credit limit of Euros 2.5 million, this Board opines that credit facilities on their own are not enough proof of a going concern of a commercial entity. Undoubtedly, whilst it is a fact that during the evaluation stage such credit facilities should not be overlooked yet, likewise, these should not serve to be as the sole benchmark during an adjudicating process.

6. Furthermore, the PCAB feels that the remark made by the appellant company’s representatives regarding the fact that the evaluation board was duty bound to evaluate all financial information submitted even if data might have not been fully in order as somewhat unreasonable. This Board agrees with the claim submitted by the contracting authority’s representatives wherein it was stated that, at administrative compliance stage, the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority. Also, it is even true that the level of comfort provided in the tenderer’s submission was not one of the best one could have longed for. One cannot but agree with the contracting authority’s claim that, in the circumstances, if the auditor was neither in a position to verify nor in a position to express an opinion on the accounts for the various reasons listed, then one could not expect the adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts as submitted with the offer. At this point one cannot but highlight the fact that the adjudicating board had only the audited accounts for 2006 to work on because, administratively, the 2008 accounts was also not compliant since the bank’s certificate had not been produced.
It is a fact that, in this tender, the adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in Form 4.4 - ‘Financial Statement’ – wherein the figures listed in the said ‘Form’ had to be supported by audited accounts.

This Board argues that, whilst, during the hearing, it was amply manifested that the appellant company has embarked on an intensive accounting campaign to get its books in order, yet it is also a fact that, upon closing date of this tender, the said appellant company was not in a position to provide what was requested in the tender specifications, so much so, that the 2008 accounts had only been drawn up and audited in July 2010, some four months after closing date of the call of the tender under review.

Whilst it is encouraging from an operational and commercial perspective, the declaration made by the appellant company that there were no significant differences between the 2008 accounts as submitted with the tender document in March 2010 and the 2008 audited accounts as submitted in July 2010 to the MFSA, is meaningless for the purpose of this tender considering the delay in the availability of such results which had to be submitted way back in March 2010 rather than in July 2010.

7. The PCAB maintains that the comment made by the appellants’ representative wherein, inter alia, it was stated that it is unfair for a company of such stature to be excluded because of formal trivialities and, at the same time, have a system where this admits bidders with relatively very limited standing just because they would have submitted audited accounts as, possibly, logically, sound. However, this Board also maintains that all entities, regardless of their size, should abide by the terms and conditions of a tender as such conditions should never discriminate amongst participating bidders, regardless of their stature.

As a consequence of (1) to (7) above this Board finds against the appellant company.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 234

Advert No: CT/A/003/2010 – CT/2037/2009

Works Tender for Construction Works in conjunction with the Pembroke Landscape Project, Pembroke

This call for tenders was published in the Government Gazette on 15 January 2010. The closing date for this call for offers was 25 February 2010.

The estimated value of this tender was Euro 2,333,429.

Five (5) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on 24 June 2010 following the decision taken by the Contracts Department that the company’s (appellant’s) bid was not administratively compliant since, in the financial statements submitted, the auditor’s report indicated that they were “not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.1 of the ITT.”

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 13 October 2010 to discuss this objection.

Present for the hearing were:

**Polidano Bros Ltd**
- Dr. Henri Mizzi Legal Representative
- Dr Steve Decesare Legal Representative
- Mr Claudio Grech

**PaveCon JV**
- Dr Kenneth Grima Legal Representative
- Mr Anton Schembri Representative

**Bonnici Brothers Ltd**
- Dr John Gauci Legal Representative
- Arch David Bonnici Representative
- Arch Malcolm Gingell Representative
- Mr Manuel Bonnici Representative

**Malta Tourism Authority (MTA)**
- Dr Frank Testa Legal Representative
- Arch Kevin Bencini Representative
- Arch Christian Buhagiar Representative
Dr Henri Mizzi, legal representative of Polidano Bros Ltd, the appellant company, explained that by letter dated 18 June 2010 his client was informed by the Department of Contracts that its tender was not administratively compliant and the reason for the disqualification was that the auditors' report in respect of the statements for the year that ended on 31st December 2007 indicated that the said auditors “were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT (Instructions to Tenderers).”

Dr Mizzi referred to Clause 4.1.2 which provided as follows:

“4.1.2. Evidence of financial and economic standing in accordance with Article 50 of LN177/2005 showing access to credit facilities of at least €250,000 and confirmed by a financial statement verified by a certified accountant. Audited accounts for the years (2006, 2007, 2008 (in the case of 2008 signed extracts of accounts/balance sheets are acceptable where the official audited accounts are not yet finalized) must be submitted using Form 4.4, Financial statement, in Volume 1, Section 4 of the tender documents.”

Dr Mizzi remarked that his client submitted the audited accounts for 2006, the accounts for 2007 audited by Deloitte but accompanied by a disclaimer report, and the accounts of 2008 together with a report by an accountant of PricewaterhouseCoopers.

Dr Mizzi submitted the following, especially with regard to the 2007 accounts, which appeared to be the main hurdle:

i) in its deliberations the PCAB has adopted the practice of evaluating the ‘substance’ rather than sticking to purely formalistic procedures and, in this regard, even the Courts had shifted their position over the past few decades, namely from a rather formalistic approach to an approach that sought to achieve what the legislator had in mind when enacting the law. This same approach was being taken by the European Court of Justice claimed Dr Mizzi. The ‘purposes approach’ was doing away with certain formalities that had no bearing on the ‘substance’ of the case, so much so that, in recent years, the Courts have annulled few cases on the basis of formalities;
ii) it appeared that the adjudicating board felt uncomfortable having the 2007 accounts accompanied by an auditor’s disclaimer report. However, the appellant company’s lawyer, stated that the adjudicating board should have delved into the ‘substance’ of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which accounts were more recent and, as a consequence, more relevant than the accounts for 2007;

iii) even if one were to concede that the 2007 audited accounts were not effectively submitted, that shortcoming should not have led to disqualification in the spirit of the law since the adjudicating board could still arrive at the financial and economic standing of his client from the documentation made available in the tender submission;

iv) the adjudicating board was not entrusted with establishing whether the accounts were in perfect order or not but it was charged with establishing the financial and economic standing of the tenderer to see if the latter was capable to undertake the contract;

v) the accounts rigorously prepared according to ‘International Accounting Standards’ were mostly relevant to investors, to consider whether it was worth putting their money in the company, and if a company was worth €20m or €40m would be quite relevant from an investor’s point of view;

vi) the shortcoming, such as the non-submission of the 2007 accounts when, on the other hand, the 2008 accounts, which included the 2007 figures by way of comparison, were submitted, was not ‘substantive’ because the information was still made available anyway;

vii) the accounts for 2008 demonstrated that his client had considerable financial and economic resources and that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m;

viii) although there was an auditor’s disclaimer report with regard to the 2007 accounts, yet this did not mean that the accounts were not audited but it meant that the audit process was carried out but without reaching a conclusion. An auditor could either (a) certify that the accounts gave a ‘true and fair view’ of the financial situation or (b) issue a ‘qualified report’ in view of particular circumstances, such as a pending court case the outcome of which could have a considerable effect on the financial situation of the company or (c) issue a ‘disclaimer report’ because, for example, the directors prevented the auditor from doing his work properly in which case one could argue that the audit had not been effectively carried out. The reasons given for the ‘disclaimer opinion’ expressed by the auditors did not nullify the audit exercise because the audit process took place.

ix) Reg, 50 (5) of the Public Procurement Regulations 2005 which stipulated that:
“In the event that a candidate or tenderer is, for any valid reason, unable to provide the references requested by a contracting authority, its economic and financial standing may be substantiated by any other document which the contracting authority considers appropriate”;

As a result, the contracting authority should consider other documentation that could show the economic standing of the tenderer if the tenderer could not furnish the documents requested. In such a case, the contracting authority was obliged to consider such alternative documentation. The fact that different contracting authorities demanded different evidence of financial and economic standing, in itself, demonstrated that there were various means to prove the financial and economic standing of a firm;

x) the ‘Instructions to Tenderers’ were quite clear that a tender which contained substantial deviations or reservations might be disqualified and Clause 28.2 exhaustively listed what might be considered a ‘substantial deviation’. Even if the accounts for 2007 provided by his client were not adequately substantiated - something which his client did not admit - that could have been addressed by referring to the 2008 accounts which were submitted as requested and which were more recent than the accounts for 2007. Therefore, proceeded Dr Mizzi, there was no ‘substantial’ deviation in that regard and as such there was no justification for the disqualification of his client.

Dr Frank Testa, legal representative of the Malta Tourism Authority (MTA), made the following submissions:

a) he agreed that in recent years our courts did concentrate more on what was ‘substantial’ rather than on formalities, yet it did not do away completely with formalities. The requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise. In fact, the contracting authority wanted a history of the financial situation of the tenderer and not the financial position during one year as the appellant seemed to imply. One should note that the 2006 accounts had been referred to as ‘Report and Financial Statements’, the 2007 accounts were referred to as ‘Report and non-Statutory Financial Statements’ and the 2008 accounts, although submitted within the requirements requested, still were not audited; and

b) in Case No. 189 the PCAB had stated that:

“(a) an accountant, per se, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification …”

Mr Josef Formosa Gauci, Chairman of the adjudicating board, and who declared that he had a background in accounts, under oath, gave the following evidence:

i) at administrative compliance stage the adjudicating board noted that (i) the 2006 were normal audited financial statements, (ii) the 2007 accounts were not
referred to as ‘financial statements’ but as ‘non-statutory financial statements’ both on the first page and in the auditor’s report and that the auditors could not express an opinion as to whether the accounts provided a true and fair picture of the firm and (iii) the directors’ report usually included the reappointment of the auditors but, in this case, there was no such reference.

ii) there were various ways how the auditors could qualify the report, i.e. a qualified report which would mean that the accounts gave a true and fair picture except for a particular area (e.g. going concern) or, as in the case of the 2007 accounts of the appellant company, issue a disclaimer that the auditor could not determine if the accounts gave a true and fair picture of the company’s financial situation. The audit process had been carried out in the case of 2007 with the result that the auditor could not express an opinion which defeated the very purpose of undertaking the audit exercise, i.e. to obtain an independent certification that the accounts gave a true and fair account. Albeit the 2008 the accounts did not have to be audited, yet one could not rely on the figures as they were because those financial statements were not audited and one could not tell if there was a qualified audit report. It was true that the 2008 accounts were certified by accountants from PricewaterhouseCoopers that the figures were extracted from the accounting books of the company but, nevertheless, they were not audited financial statements.

iii) at administrative compliance stage the adjudicating board had serious doubts about whether the financial documentation submitted by the appellant was administratively compliant, namely the information submitted was insufficient or not available to assess financial stability.

iv) the audit of the annual accounts of a company would, naturally, refer to the audit of the statutory financial statements. In order to take the accounts into consideration one required a clean audit report but with regard to the 2007 accounts there was a ‘disclaimer’ report by the auditor.

v) although one did not have to be too formalistic, adjudicating boards had to ascertain that mandatory requirements were submitted otherwise that could give rise to appeals by competing tenderers. Out of the three years’ accounts requested, the appellant company had only presented the audited accounts for one year, namely 2006, because the 2007 accounts carried a disclaimer report and the 2008 accounts were not audited and, as a consequence, the adjudicating board considered that the information submitted in this regard was insufficient and unreliable for financial evaluation purposes.

vi) the auditor’s basis for disclaimer of opinion read as follows:

“The following information which we considered necessary for the purpose of our audit was not made available to us by the company by the date of this audit report:

- Up to date audited financial statements of the company’s subsidiaries, associates and jointly
controlled entities, and management accounts of
the company subsequent to the balance sheet date;

- Reconciliations and confirmation of all
  transactions and balances between the company
  and related parties;
- The company's parent consolidated financial statements;
- Appropriate cash flow forecasts and business plans
  for the company and material subsidiaries,
  associates and jointly controlled entities;
- Full details of the company's interests in jointly controlled
  entities;
- Supporting documentation in connection with
  transactions and balances with shareholders and
  related parties; and.
- Supporting documentation regarding works
  undertaken but not yet billed by the company for the
  related party entities.”

Disclaimer of opinion

Because of the significance of the matters discussed in the preceding
paragraph, we have not been able to obtain sufficient appropriate
audit evidence to provide a basis for an audit opinion as to whether
the financial statements give a true and fair view of the financial
position of the company as of 31--December 2007 and of the
company's financial performance and cash flows for the year then
ended in accordance with International Financial Reporting
Standards. Accordingly, we do not express an opinion on the
financial statements.

The Chairman PCAB observed that the reason for rejection was not the non-
submission of the audited accounts but “that the auditors were not able to obtain
sufficient appropriate audit evidence to provide a basis for an audit opinion as
requested in Clause 4.1.2 of the ITT” and, therefore, the exclusion concerned the
outcome of the audited accounts.

Mr Claudio Grech, representing the appellant company, under oath, gave the
following evidence:

a) in November 2009 the appellant company engaged
PricewaterhouseCoopers to undertake a process to restructure and
consolidate Polidano Group;

b) Polidano Group was made up of 94 registered companies and it turned
out that the rate of expansion of the group by far exceeded the
administrative capacity of the organisation. The financial management
of the group was decentralised such that each company managed its own
financial affairs and that the inter-company relationships were not
properly accounted for, i.e. no consolidation used to be carried to
establish the final overall picture. Moreover, the works in progress,
involving some 50 on-going projects, was not being accounted for in line with ‘International Accounting Standard – IAS 11’ which stipulated how this had to be done;

c) this situation led to Deloitte, an auditing firm, to issue the disclaimer in respect of the 2007 financial statements;

d) the work carried out from November 2009 onwards consisted of addressing the issues raised in the 2007 accounts and the adjustments made to 2007 were included in the 2008 financial statements which were audited by Deloitte - which had not withdrawn - with a marginal qualification. Whilst the 2007 disclaimed opinion dented the firm’s standing, yet the 2008 audited accounts were concluded in July 2010 and filed at the Malta Financial Services Authority. Following this process, it resulted that the net asset value for 2007 of Polidano Bros Ltd, the tenderer, was €36m as compared to the €30m shown in the disclaimed accounts for 2007. It was reckoned that the audited accounts of 2009 would be filed at the MFSA in November 2010;

e) Polidano Group employed about 700 employees in its core activities - construction and real estate - and that number would go up to about 1,200 employees taking into account subsidiaries engaged in hospitality and the like;

f) it was appreciated that the adjudicating exercise was concluded on 11 May 2010 and, as a result, at that stage the board did not have the comfort of the 2008 audited financial statements which were concluded in July 2010;

g) the 2008 accounts were drawn up by PricewaterhouseCoopers from the records held by the tenderer and certified by the same accounting firm, which, although not being the auditor, was more than the contracting authority had asked for in the tender document. The 2007 accounts were, in fact, audited as requested, even if with the disclaimer, and it later transpired that the net asset value of the company in the disclaimed 2007 accounts was underestimated by €6m; and

h) the tenderer had always been up-to-date with regard to the filing of tax returns.

Dr Kenneth Grima, legal representative of PaveCon JV, an interested party, observed that the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, per se, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage.

Dr Mizzi claimed that the adjudicating board could have undertaken the evaluation of his client’s bid from the documentation made available in the tender submission. He remarked that, for tender evaluation purposes, it was irrelevant whether the accounts for 2007 gave a true and fair view or not because the audited accounts were required for other purposes, for investing, whereas what should have mattered to the
adjudicating board was whether the bidder was solvent and such other aspects. Dr Mizzi expected the adjudicating board to go beyond the formalistic approach of establishing whether there was an auditor’s qualified report or disclaimer, in fact, he expected it to examine the financial information available to see if the tenderer had the financial standing required to execute the contract particularly by examining the 2008 accounts which were certified by the accounting firm, which, although short of being audited, still carried weight. Dr Mizzi stressed that the 2008 accounts presented with the tender proved that the shortcomings pointed out in the auditor’s disclaimer in respect of the 2007 accounts were not material ones.

Dr Testa disagreed with the appellant company’s claim that all was well with the financial information submitted by the appellant company. He argued that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish. Dr Testa insisted that, at the time the adjudicating board was carrying out its evaluation exercise, it did not have reliable financial data for the three year period requested.

Dr Grima observed that the line of reasoning taken by the appellant company seemed to imply that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company’s bid so as to render it compliant. He remarked that the PCAB had always ruled that mandatory requirements had to be submitted and that it was not up to the tenderer to decide what was required or what was substantial or not. Dr Grima pointed out that, whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data in order so much so that it took nine months work to prepare the 2008 audited accounts along with the 2007 amended comparative figures. Dr Grima noted that the appellant company had been failing to produce proper accounts for the previous seven year period. Dr Grima concluded that it was irrelevant to present the 2008 audited accounts to the adjudicating board in July 2010 when the closing date of tender was February 2010 and when the adjudication was concluded in May 2010 and that demonstrated that the appellant company was not able to meet the requirements set out in this particular tender.

Dr John Gauci, representing Bonnici Brothers Ltd, an interested party (a) agreed with what Dr Grima had submitted and (b) made reference to Case No. 189 paragraph (3) of its conclusions (at page 12) with regard to the functions of the accountant and the auditor and that the accounts submitted with a tender had to be in the same format as submitted to MFSA, unless instructed otherwise.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 24 June 2010 and also through their verbal submissions presented during the public hearing held on 13 October 2010 had objected to the decision taken by the General Contracts Committee;
having taken note of the appellants’ (a) remark that they submitted the audited accounts for 2006, the accounts for 2007 audited by Deloitte but accompanied by a disclaimer report, and the accounts of 2008 together with a report by an accountant of PricewaterhouseCoopers, (b) reference as to how the question of ‘substance’ over content is now being considered by competent authorities locally and in foreign institutions contending that the adjudicating board should have delved into the ‘substance’ of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which accounts were more recent and, as a consequence, more relevant than the accounts for 2007, (c) argument that even if one were to concede that the 2007 audited accounts were not effectively submitted, that shortcoming should not have led to disqualification in the spirit of the law since the adjudicating board could still arrive at their financial and economic standing from the documentation made available in the tender submission, (d) reference to the fact that the adjudicating board was not entrusted with establishing whether the accounts were in perfect order or not but it was charged with establishing the financial and economic standing of the tenderer to see if the latter was capable to undertake the contract, (e) remark relating to the fact that the 2008 accounts, which included the 2007 figures by way of comparison, were submitted and that, as a result, the information was still made available anyway, (f) reference to the fact that the accounts for 2008 demonstrated that they had considerable financial and economic resources and that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m, (g) (h) claim that, in line with Reg. 50 (5) of the Public Procurement Regulations 2005, • the contracting authority should consider other documentation that could show the economic standing of the tenderer if the tenderer could not furnish the documents requested, • the fact that different contracting authorities demanded different evidence of financial and economic standing, in itself, demonstrated that there were various means to prove the financial and economic standing of a firm, (i) claim that there was no ‘substantial’ deviation and, as such, there was no justification for the disqualification of their offer, (j) claim that the adjudicating board could have undertaken the evaluation of its bid from the documentation made available in the tender submission and (k) contention that, for tender evaluation purposes, it was irrelevant whether the accounts for 2007 gave a true and fair view or not because the audited accounts were required for other purposes, for investing, whereas what should have mattered to the adjudicating board was whether the bidder was solvent and such other aspects;

having also taken note of the contracting authority’s various representatives’ (a) reference to the fact that albeit it is true that in recent years our courts did concentrate more on what was ‘substantial’ rather than on formalities, yet it did not do away completely with formalities, (b) claim that the requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise, (c) explanation as to the various ways as to how the auditors could qualify a financial report, (d) argument that albeit the 2008 accounts were certified by accountants from PricewaterhouseCoopers that the figures were extracted from the accounting books of the company yet, nevertheless, they were not audited financial
statements, (e) claim that in order for the evaluation board to take the accounts into consideration one required a clean audit report but with regard to the 2007 accounts there was a ‘disclaimer’ report by the auditor, (f) contention that out of the three years’ accounts requested, the appellant company had only presented the audited accounts for one year, namely 2006, because the 2007 accounts carried a disclaimer report and the 2008 accounts were not audited and, as a consequence, the adjudicating board considered that the information submitted in this regard was insufficient and unreliable for financial evaluation purposes, (g) emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish and (h) emphasis on the fact that at the time the adjudicating board was carrying out its evaluation exercise, the latter did not have reliable financial data for the three year period requested;

- having also duly considered Mr Grech’s testimony, especially (a) the reason as to why, in the appellant company’s opinion, Deloitte, an auditing firm, issued the disclaimer in respect of the 2007 financial statements, (b) the point raised in connection with the fact that the work carried out from November 2009 onwards consisted of issues raised in the 2007 accounts and the adjustments made to 2007 were addressed and included in the 2008 financial statements which were audited by Deloitte, (c) the fact that whilst the 2007 disclaimed opinion dented the firm’s standing, yet the 2008 audited accounts – wherein, inter alia, the net asset value for 2007 of Polidano Bros Ltd, the tenderer, was €36m as compared to the €30m shown in the disclaimed accounts for 2007 - were concluded in July 2010 and filed at the Malta Financial Services Authority and (d) the fact that the same witness appreciated the fact that the adjudicating exercise was concluded on 11 May 2010 and, as a result, at that stage the board did not have the comfort of the 2008 audited financial statements which were concluded in July 2010;

- having taken cognizance of the fact that the reason for rejection was not the non-submission of the audited accounts but “that the auditors were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT” and, therefore, the exclusion concerned the outcome of the audited accounts;

- having also noted Dr Grima’s observation as regards the fact that (a) the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, per se, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage, (b) the line of reasoning taken by the appellant company seemed to imply that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company’s bid so as to render it compliant, (c) the PCAB had always ruled that mandatory requirements had to be submitted and that it was not up to the tenderer to decide what was required or what was substantial or not, (d) whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data and (e) it was irrelevant for the appellant company to present the 2008 audited accounts to the adjudicating board in July 2010 when...
the closing date of tender was February 2010 and when the adjudication was concluded in May 2010, a process that more than amply demonstrated that the appellant company was not able to meet the requirements set out in this particular tender;

reached the following conclusions, namely:

1. The PCAB notes that the reason for rejection was not the non-submission of the audited accounts but “that the auditors were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as requested in Clause 4.1.2 of the ITT” and, therefore, the exclusion concerned the outcome of the audited accounts. However, this Board opines that, with regards to the submission of accounts, (i) whilst the other tenderers submitted all that was required in order, yet the appellant company did not submit the financial data as requested and (ii) it was irrelevant for the appellant company to present the 2008 audited accounts to the adjudicating board in July 2010 when the closing date of tender was February 2010 and when the adjudication was concluded in May 2010, a process that more than amply demonstrated that the appellant company was not able to meet the requirements set out in this particular tender.

2. The PCAB feels that, with regards to the question of ‘substance’ over ‘content’ as raised by the appellant company during the hearing and the submission made by the appellant company with regards to the fact that the adjudicating board should have delved into the ‘substance’ of the matter by acknowledging that the tenderer had submitted the 2008 accounts certified by an accountant as requested, which, in the appellant company’s opinion such accounts were more recent and, as a consequence, more relevant than the accounts for 2007, this Board feels that, albeit the 2008 accounts were certified by accountants from PricewaterhouseCoopers with figures extracted from the accounting books of the company yet, nevertheless, they were not audited financial statements as requested in the tender document.

The PCAB has repeatedly pronounced itself that, despite one’s reservations as to the mandatory submission of a particular document or set of documents, whether considered substantial or not, unless otherwise agreed with the pertinent contracting authority via the Department of Contracts, one cannot simply renge on submitting such document / documents in an arbitrary manner and then expect for its submission to proceed in a normal manner with the evaluation process.

3. The PCAB disagrees with the issues raised by the appellant company in connection with the fact that tender documents with no substantial deviations or reservations must not be disqualified. Apart from the fact that such financial data is indispensible for any adjudicating body to enable it to reach reasonable and justified conclusions, it remains the prerogative of a contracting authority to establish which documents it deems substantial or not.

This Board acknowledges that it seems that the information, as requested in the tender specifications, was quite straightforward and attainable, so much so
that, as transpired during the hearing, the information, as requested, was submitted by all the other tenderers except for the appellant company.

4. The PCAB also opines that, with regards to the appellant company’s claim that the adjudicating board could have undertaken the evaluation of its bid from the documentation made available in the tender submission, this Board (a) finds that the requirement of the audited accounts for the three previous years was not a formality but it was an important element in the evaluation exercise, (b) places emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd so much so that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish. This Board notes that the accounting firm PricewaterhouseCoopers spent from November 2009 to July 2010 to put the 2007 accounts in order and that, per se, demonstrated the type of accounts that the adjudicating board had been presented with by the appellant company at tendering stage.

5. The PCAB maintains that with regards to the fact that, according to the appellant company, the accounts for 2008 (a) demonstrated that they had considerable financial and economic resources and (b) that the adjustments effected in the comparative figures for 2007 that featured in the 2008 audited accounts did not change the picture in any significant manner but, if anything, that showed that the net asset value of the company in the audited accounts for 2007 had been undervalued by some €6m, this Board places emphasis on the fact that it was clearly indicated by the two witnesses, namely, Mr Josef Formosa Gauci and Mr Claudio Grech, that there was a grey area in the financial management of Polidano Bros Ltd, so much so, that an accounting firm had to be engaged to rectify the situation and that the task took nine months work to accomplish.

This Board observes that whilst it is encouraging from an operational and commercial perspective, the declaration made by the appellant company that there were no significant differences between the 2008 accounts as submitted with the tender document in February 2010 and the 2008 audited accounts as submitted in July 2010 to the MFSA, is meaningless for the purpose of this tender considering the delay in the availability of such results which had to be submitted way back in February 2010 rather than in July 2010.

6. The PCAB generally agrees with the appellant company’s claim that, albeit there was an auditor’s disclaimer report with regard to the 2007 accounts, yet this did not mean that the accounts were not audited but it simply meant that the audit process was carried out but without reaching a conclusion. However, this Board also maintains that, in order for the evaluation board to take the accounts into consideration, one required a clean audit report but it was also a fact that with regard to the 2007 accounts there was a ‘disclaimer’ report by the auditor.

This Board notes that, albeit the 2007 accounts were accompanied by a ‘disclaimer of opinion’, yet, acting in terms of the new regulations governing public procurement, on the 6 May 2010, the Contracts Department had requested the appellant company to resubmit proper audited accounts.
Nevertheless, despite such request, the appellant company claimed that it had submitted all that was requested. The PCAB disagrees with this claim made by the appellant company.

7. With regards to the fact that the appellant company’s representatives claimed that the contracting authority was obliged to request alternative documents to audited accounts and other mandatory documents not submitted, this Board feels that the line of reasoning taken by the appellant company, implying that the adjudicating board was obliged to make all efforts to mitigate or to justify the shortcomings in the appellant company’s bid so as to render it compliant, was wrong.

As a consequence of (1) to (7) above this Board finds against the appellant company.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010
Report on the Working of the GCC, PCAB, and PCRB During 2010

PUBLIC CONTRACTS APPEALS BOARD

Case No. 235

Adv No CT/A/012/2010; CT/2524/2009; GPS 02094T09MH

Tender for the Supply of Glyceryl Trinitrate 5mg patches

The closing date for this call for offers was 25 February 2010.

The estimated value of this tender covering 36 months was Euro 833,345.16.

Three (3) tenderers submitted their offers.

Joseph Cassar Ltd filed an objection on the 14 July 2010 against the decision taken by the Contracts Department to disqualify its offer as administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 13 October 2010 to discuss this objection.

Present for the hearing were:

**Joseph Cassar Ltd**
Mr Emanuel Cassar Representative
Mr George Muscat Representative

**Government Pharmaceutical Services**
Ms Anne Debattista Director

**Evaluation Committee:**
Ms Miriam Dowling Chairperson
Mr Mark Spiteri Member

**V J Salomone Pharma Ltd**
Mrs Vanessa Said Salomone Representative
Mrs Jackie Mangion Representative

**Alfred Gera & Sons Ltd**
Ms Anna Curmi Representative
Ms Christine Spiteri Parnis Representative

**Department of Contracts**
Mr Francis Attard Director General

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

Mr Emanuel Cassar, representing Joseph Cassar Ltd, the appellant company, explained that, by way of a letter dated 9th July 2010, the Contracts Department
informed his Company that the offer was rejected as administratively and technically non-compliant since the product was not locally registered. Mr Cassar explained that in his tender submission he had indicated that his firm was in the course of initiating the process to have the product registered with the Malta Medicines Authority.

At this point it was established that the closing date of the tender was the 25th February 2010 whereas the product was locally registered on the 19th July 2010.

Ms Anne Debattista, representing the contracting authority, remarked that, according to the tender document in question, the product had to be locally registered by the closing date of the tender. She added that, in recent calls, tenderers were even being required to submit a copy of the product registration certificate. Ms Debattista explained that the provision that existed in the previous calls for tenders whereby tenderers were allowed to obtain the local product registration within 6 weeks from the closing date of the tender had been dropped, the reason being that, over time, enough products had been locally registered for the purposes of competition. At this stage Ms Debattista referred to Annex IV ‘Declaration Sheet for Medicinal Products’, which, among other things, stated (at page 2) the following, namely,

“I hereby declare….. (iii) that the product being offered, and for which a sample is being submitted, is authorised under the prevailing Laws of Malta to be placed on the market in Malta for wholesale distribution and for sale or supply by other means to patients.”

Mr Cassar admitted that he had overlooked the requirement that the local product registration had to be presented by the closing date of the tender but added that he did present the registration certificate issued by the authorities in Greece.

The Chairman PCAB noted that the tender document specifically stipulated that the product had to be authorised under Maltese Law and not, for example, under EU law, in which case the certificate issued in Greece could perhaps have been admissible. He added that it seemed evident that the tenderer did not possess the required local product registration at the closing date of the tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 14 July 2010 and also through their verbal submissions presented during the public hearing held on 13 October 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ and the contracting authority’s counter arguments,

reached the following conclusions, namely:

1. The PCAB opines that the tender document specifically stipulated that the product had to be authorised under Maltese Law and not, for example, under
EU law, in which case the certificate issued in Greece could perhaps have been admissible.

2. The PCAB feels that it was evident that the tenderer did not possess the required local product registration at the closing date of the tender.

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

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 236

Provision of an inspection report on playing field sites within Malta and Gozo
Local Councils responsibilities

This call for tenders was published in the Government Gazette on 18 December 2009. The closing date for this call for offers was 2 April 2010.

The estimated value of this tender was Euro 56,000.

Eleven (11) tenderers submitted their offers.

JGC Ltd filed an objection on 28 June 2010 against the decision to re-issue the call for tenders since none of the bidders were compliant with tender conditions and specifications.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 27 October 2010 to discuss this objection.

Present for the hearing were:

JGC Ltd

Dr Rita Mifsud  Legal Representative
Mr Simon Micallef  Managing Director
Mr Pierre Cuschieri  Technical Manager

Local Government Department

Adjudicating Board

Mr Silvio Frendo  Chairman
Mr Pio Farrugia  Member
Mr Mark Mizzi  Member

Department of Contracts

Mr Francis Attard  Director General (Contracts)
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellant company’s representative was invited to explain the motives of the objection.

Dr Rita Mifsud, legal representative of JGC Ltd, the appellant company, explained that, by letter dated 12th June 2010, the Contracts Department informed her client that its offer was not compliant due to the non submission of (i) proof of level of satisfaction of its clients in similar services and (ii) proof of financial and economic standing as per clause 4.5 of the tender document.

**Proof of Level of Satisfaction of Clients in Similar Services**

Dr Mifsud submitted that the level of inspections hitherto carried out in Malta were not up to the standard requested in the tender document – Playground Equipment Standards EN 1176, 1177 and 14960 listed at Annex III of the tender document - and, as a result, her client could not and, in fact, did not, submit the proof requested but, instead, opted to submit ample proof as submitted by their partner, namely, RoSPA Playsafety Ltd of the UK (Royal Society for the Prevention of Accidents), which entity had a track record in Europe, together with details of specific projects undertaken by same for several different clients.

Mr Simon Micallef, Managing Director of the appellant company, confirmed that the inspections to playgrounds carried out locally were not of the standard required in the tender document however the ROSPA representative that his firm was going to bring over was an authority in this field. Mr Micallef added that, over and above the tender requirements, his firm was also offering to train local staff so that, in the future, such inspections would be undertaken by local personnel.

On his part, Mr Pierre Cuschieri, Technical Manager of JGC Ltd, remarked that there were only about 25 registered playground inspectors in Europe who could effect the inspections up to the standards indicated in the tender document.

Mr Silvio Frendo, Chairman of the adjudicating board, stated that clause 4.6 (c) provided for:

“Proof of number of similar services completed by tenderer including proof of level of satisfaction of their clients”

Mr Frendo remarked that the contracting authority did not, specifically, request services rendered at the level indicated in the tender but the request was left open for bidders to include any kind of similar services. The same contracting authority’s representative added that the appellant company did not submit anything in this regard but only a list of works carried out by ROSPA, its subcontractor, which, then again, was not accompanied by certificates that demonstrated proof of the level of satisfaction attained and duly confirmed by the latter’s clients.
Proof of Financial and Economic Standing

Dr Mifsud referred to clause 4.5 of the tender document which read:

“To be eligible for participation in this tender procedure, tenderers must prove to the satisfaction of the Contracting Authority that they comply with the necessary legal, technical and financial requirements and have the wherewithal to carry out the contract effectively.”

and submitted that the contracting authority did not specify what type of proof/documentation was required as it should have done according to Regulation 50 which read as follows:

“(1) Proof of economic operator’s economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:
(a) appropriate statements from banks, or where appropriate, evidence of relevant professional indemnity insurance;
(b) the presentation of balance-sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the economic operator is established;
(c) a statement of the economic operator’s overall turnover and, where appropriate its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.

(4) Contracting authorities shall specify in the contract notice or in the invitation to tender, which references mentioned in subregulation (1) have been chosen and which must be provided, and of any others it deems fit.”

Dr Mifsud remarked that her client did not submit any proof of financial and economic standing because it was not specified in the tender document.

The same appellants’ legal representative added that another point was that JGC Ltd was registered in January 2009 and, as a consequence, the audited accounts were not available by the 2nd February 2010, the closing date of the tender. Dr Mifsud confirmed that no note was inserted in the tender submission to that effect and, at this stage, she appealed to the PCAB to consider the spirit of the law in the sense that, shortly after the closing date of this tender, guidelines were issued and, eventually, the regulations were amended to provide for a measure of flexibility and for the outright rejection of tenders on purely administrative shortcomings to be avoided.

Mr Micallef remarked that it was a great pity that his firm was being disqualified on administrative grounds when it was equipped and prepared to render a service of the highest standard.

At this point during the hearing it was noted that, practically, all the tenderers failed to submit proof of financial and economic standing.

The Chairman PCAB remarked that, even if the tender document did not specify the documents required as proof of financial standing, the fact remained that it did request
proof to that effect and, therefore, the options open to the tenderer were either for the latter to ask for a clarification or else to submit document/s that it felt presented proof enough as to its economic standing in which case the contracting authority would have had to consider it since it was not specific in its request. The Chairman PCAB continued his intervention by stating adding that it was not an option for the tenderers to disregard completely clause 4.5 because that was required to render the bidder eligible to participate and, besides, the contracting authority had the right to establish that the awarded tenderer had, among other things, the financial stability to execute the contract.

The Chairman PCAB stated that the adjudicating board had to evaluate amongst alternative bids on the basis of the documentation submitted and according to regulations in force at the time of adjudication and to ensure a level playing field among all participating tenders.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 1 July 2010 and also through their verbal submissions presented during the public hearing held on 27 October 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellants’ remarks in respect of the fact that (a) the level of inspections hitherto carried out in Malta were not up to the standard requested in the tender document – Playground Equipment Standards EN 1176, 1177 and 14960 listed at Annex III of the tender document, (b) it could not and, in fact, did not, submit the proof requested but, instead, opted to submit ample proof as submitted by their partner, namely, RoSPA Playsafety Ltd of the UK (Royal Society for the Prevention of Accidents), which entity had a track record in Europe, together with details of specific projects undertaken by same for several different clients, (c) over and above the tender requirements, the company was also offering to train local staff so that, in future, such inspections would be undertaken by local personnel, (d) the contracting authority did not specify what type of documentary proof/of financial and economic standing was required as it should have done according to Regulation 50 and (e) JGC Ltd was registered in January 2009 and, as a consequence, the audited accounts were not available by the 2nd February 2010, the closing date of the tender;

• having also taken note of the contracting authority’s representatives’ (a) claim that the contracting authority did not, specifically, request services rendered at the level indicated in the tender but the request was left open for bidders to include any kind of similar services and (b) claim that the appellant company did not submit any proof of number of similar services completed by tenderer but only a list of works carried out by ROSPA, its subcontractor, which, then again, was not accompanied by certificates that demonstrated proof of the level of satisfaction attained and duly confirmed by the latter’s clients;
• having taken cognizance of the fact that the appellant company’s representatives confirmed that no note was inserted in the tender submission regarding the lack of formal financial reporting information available to company management which prevented the latter from providing required evidence of its financial standing;

• having duly considered the appellant company’s plea for the PCAB’s consideration to be within the spirit of the law in the sense that, shortly after the closing date of this tender, guidelines were issued and, eventually, the regulations were amended to provide for a measure of flexibility and for the outright rejection of tenders on purely administrative shortcomings to be avoided,

reached the following conclusions, namely:

1. The PCAB regards the submission of documentary evidence corroborating the level of satisfied clients as something which could have easily been clarified by the appellant company. Indeed, any submissions made, albeit with all the best of intentions, necessitate the prior attainment of the formal endorsement of the respective contracting authority and no bidder should expect to, arbitrarily, decide what is best or not. This Board argues that tender specifications are, generally, expected to be met by all participants and that whoever feels that any of such specifications cannot be met or may be can be adhered to in a better way should first, formally, address such issue with the competent authority.

2. The PCAB feels that even if the tender document did not specify the documents required as proof of financial standing, the fact remained that it did request proof to that effect and, therefore, the options open to the tenderer were either for the latter to ask for a clarification or else to submit document/s that it felt presented proof enough as to its economic standing in which case the contracting authority would have had to consider it since it was not specific in its request. This Board cannot tolerate an instance wherein a participating tenderer decides, arbitrarily, what to insert or not in a tender document duly submitted to a contracting authority.

3. The PCAB opines that an adjudicating board had to evaluate amongst alternative bids on the basis of the documentation submitted and according to regulations in force at the time of adjudication thus ensuring a level playing field among all participating tenders. As a consequence, at this juncture, this Board cannot allow the introduction of new legal provisions published after the closing date of this particular call or new operational praxis.

As a consequence of (1) to (3) above this Board finds against the appellant company.
In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

12 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 237

Adv No CT/A/011/2010; CT/3038/2010

Supply and Service Tender for the installation commissioning and operation of environmental monitoring equipment and data gathering, supply and analysis at Hal Saflieni Hypogeum.

This call for tenders was published in the Government Gazette on 16 April 2010. The closing date for this call for offers was 27 May 2010.

The estimated value of this tender was Euro 223,245.

Two (2) bidders participated in this tender.

On 16th July 2010, AIS Ltd filed an objection against the award of Lot 1 of this tender to Evolve Ltd, after being informed that their offer was not technically compliant in view of Item 1 – Temperature and Relative Humidity Sensors (35 units): sensors offered do not incorporate warmed probe technology as requested in the tender document.

The Public Contracts Appeals Board composed of Mr Edwin Muscat as Chairman and Mr Carmel J Esposito and Mr John Buhagiar as members convened a public hearing on Friday, 29th October 2010 to discuss this objection.

Present at this meeting:

**AIS Ltd**
- Dr Ian Spiteri Bailey, Legal Representative
- Ing Mario Schembri, Managing Director
- Mr Anthony Bartolo, Representative
- Mr Bernard Brincat, Representative
- Mr Michael Lebron, Representative/Consultant

**Evolve Ltd**
- Dr Peter Caruana Galizia, Legal Representative
- Mr Christopher Busuttil, Representative
- Mr Lawrence Zammit, Representative

**Heritage Malta**
- Dr Patrick Valentino, Legal Representative
After the Chairman’s brief introduction appellants were invited to give a brief account of the motives of their objections.

Dr Ian Spiteri Bailey, legal adviser to AIS Ltd, explained that by letter dated 9th July 2010, the Contracts Department informed his client that (a) his offer (AIS submitted an offer for Lot 1 only) was not technically compliant with regard to Item 1 – Temperature and Relative Humidity Sensors (35 units); sensors offered do not incorporate warmed probe technology as requested in the tender document, and (b), the said lot was recommended for award to Evolve Ltd.

Dr Spiteri Bailey submitted that there appeared to have been a breach of the requirements of Clause 34(2) of the tender document insofar as the letter sent to AIS Ltd by the Contracts Department, dated 9th July 2010, did not contain all the prescribed information such as, “the criteria for award” or “the score obtained by the unsuccessful bidder and the score of the successful bidder” as specifically required in sub-paragraphs (i) and (iv) of Clause 34(2). He contended that even if, for the sake of argument, his client was awarded no points with regard to technical specification which attracted 10% of the marks allocated to Technical Criteria in respect of Lot 1, there still remained 90% of the marks available. Thus, AIS Ltd could still have obtained 70% of the marks under technical criteria that were necessary for them to qualify for the next phase, i.e. the financial evaluation of the offers.

Dr Patrick Valentino, on behalf of Heritage Malta, remarked that once the appellant failed to qualify under the technical criteria, the Adjudicating Board could not allocate the appellant any score in that regard. Dr Valentino stressed that once the appellant did not offer the product requested in the tender document, the offer was discarded at technical evaluation stage and could not therefore proceed to the financial evaluation stage.

Dr Spiteri Bailey then proceeded to air another grievance. He stated that the Adjudicating Board had sought clarifications from his client via email, in terms of Clause 29 (2) of the tender document, regarding what turned out to be the main reason for rejection. AIS Ltd were asked to highlight where the technical specifications including details were in the submitted documentation. He stressed that this clarification was sent by email on the 4th June 2010 to an incorrect email address, namely, info@ais.com.mt which is the generic email address of AIS Ltd, rather than the email address of Mrs Odette Schembri i.e. odette.schembri@ais.com.mt who was identified as the contact person in the tender form.
Dr Spiteri Bailey remarked that, as a consequence of this error, no action was taken by his client on that email. He added that 31 minutes prior to closing time for submission of clarifications, the contracting authority contacted his client, this time through the correct email address informing him that the Adjudicating Board was still awaiting his reply. Dr Spiteri Bailey complained that as a result of the Adjudicating Board’s failure and in view of the limited time afforded to AIS Ltd, the latter had no opportunity to adequately clarify his position vis-à-vis the humidity sensors.

In his reaction, Dr Valentino stated that both email addresses referred to by Dr Spiteri Bailey had been furnished by the appellant in his tender submission – one in the “Details of Bidder” and the other in the “Tender Form”. It was the responsibility of the bidder to ensure the checking of emails received on the company’s email addresses. Dr Valentino added that it was, therefore, not correct to blame the Adjudicating Board for sending the email to the wrong email address. In fact, when the closing time for reply drew near, the Board alerted the company that they had not as yet received any reply.

When referring to Warmed Probe Technology, Dr Spiteri Bailey stated that it was understood that such technology was only available from Vaisala Corporation. It was also understood that the warmed probe sensors’ heaters consume considerable electrical energy that would result in a big drain on the inconspicuous battery packs that were required for installation on site. According to appellants, the utility and feasibility of warmed probe technology as required in the tender document was, at best, doubtful, even if one were to install a massive battery pack. In comparison the alternative sensor solution offered by AIS Ltd is in current use by major meteo organisations in the UK, Switzerland and France and it complies with tender requirements. He added that in terms of Regulation 45(3), a contracting authority cannot “reject a tender on the grounds that the products and services tendered for, do not comply with the specification to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications”. Dr Spiteri Bailey maintained that the proposal submitted by his client meets the requirements defined by the tender technical specifications, so that, in terms of the above regulation, AIS Ltd’s offer should not have been rejected.

Finally, he suggested that the exclusivity pertaining to Vaisala Corporation in respect of warmed probe technology seems to be contrary to the requirements of Regulation 45(6) of the Public Contracts Regulations which inter alia state that “contracting authorities shall not introduce into the contractual clauses --- technical specifications which maintain products of a specific make or source of a particular process or to trade marks, patents, types --- with the effect of favouring or eliminating certain undertakings of certain products”.

Ing Joseph Bartolo, member of the Adjudicating Board was then called to the witness stand.

In his evidence, Mr Bartolo explained, under oath, that the Hypogeum has unique environmental conditions due to the presence of water droplets and the number of people that visit the place. The purpose of this tender is to monitor the temperature
and humidity at this site and hence, the requested 35 sensors are the most critical item in this tender. He added that the contracting authority requested warmed measurement technology probes. Whereas Evolve Ltd, the recommended bidder, offered this type of probes, AIS Ltd offered probes with “normal” or “standard” technology which do not meet the tender’s technical requirement. Ing Bartolo explained that the warmed probe technology, includes a small heater which functions intermittently. Once a sensor gets wet due to the amount of humidity at the site, the heater will switch on automatically to dry the sensor so that the latter will continue functioning, thus producing a continuous range of data on the environmental conditions at the site.

On the other hand, the “normal” type of sensor functions only for a couple of hours. When it gets wet with humidity, it will switch off for some time until it dries up by air convection currents and then it will start functioning again. This means that for a number of hours, no data will be obtained from such sensors. This is not what Heritage Malta required. Ing Bartolo added that it was evident to the adjudicating board that appellant did not offer the warmed probe technology in his tender submission, but to confirm that, a clarification was sought. In response, the appellant presented a copy of the same original document, meaning that he did not intend to offer the technology requested by the contracting authority. In fact, in his reasoned letter of objection, appellant conceded that “AIS Ltd accepts that its tender proposal did not contain the warmed probe technology.”

Ing Bartolo further explained that Evolve Ltd offered a product from the Vaisala range which provided the requested warmed probe technology. He added that this product was freely obtainable on the open market. On the other hand, appellant offered a Rotronic (Group International) product of the “normal” or “standard” type, even though this company had in its range of products heated sensors (Hygromer RS 70) which offered the required technology. Had AIS Ltd offered this latter type of sensor, the Adjudicating Board would have been in a position to compare the two products i.e. Vaisala and Rotronic RS 70 on a like-with-like basis. However, as things stood, the Adjudicating Board considered appellants’ offer (standard sensors) as unacceptable and decided not to proceed with its further evaluation. Ing Bartolo added that the 35 sensors were intended to be installed all over the Hypogeum site to gather and analyse continuous data on the environmental conditions of the site so as to determine what kind of air conditioning or dehumidifying systems were required. Normal type sensors fail to produce data for long periods of time. Ing Bartolo concluded by confirming that the sensors offered by both tenderers were battery operated that could also be connected to the main power supply when and where conditions permitted.

Ing Bartolo was followed by Ing Mario Schembri, Managing Director of AIS Ltd who explained under oath that the Vaisala probe was an option which his company did not consider fit for the requested purpose because according to an information sheet of the product, it resulted that “The HMP 155 warmed probe is heated continuously so that its temperature is always higher than that of the environment. This prevents condensation on the probe”. The note also stated that “during the sensor heating, the outputs are locked to the values measured before the heating cycle”.

This meant that the probe would not function effectively during the time that the sensor was being heated, so that its performance was similar to that of the sensor that
was being proposed by AIS Ltd. Since the warmed probe technology sensor did not provide effective continuous monitoring during the time the heater was switched on, then his conclusion was that both probes rendered the same performance. According to Ing Schembri, the solution was not the installation of warmed probe technology sensors but how to determine humidity by, for example, the installation of air conditioners or dehumidifiers. Ing Schembri added that the purpose of the tender was to provide as much as possible continuous monitoring with inconspicuous equipment in order to preserve the environment of the site. The sensors offered by AIS Ltd were slightly larger than the size of a mobile telephone. Besides, these sensors had a battery that would last 5 years and over instead of 3 years as required in the tender document.

Ing Bartolo intervened to state that according to the product information of the Vaisala warmed probe technology, when the sensor gets wet, it will be heated up in a matter of a few seconds and the sensor will become operational almost immediately.

Dr Valentino for Heritage Malta remarked that the contracting authority requested the warmed probe technology and that it was for the contracting authority to dictate what type of sensor was required and not the bidders.

Mr Mario Galea, principal conservator and member of the adjudicating board confirmed under oath, that the Hypogeum had a near condensation environment for most of the time with the result that normal sensors as the ones presently installed would get wet and stop functioning. When that happens, hand held sensors are used to keep the place under constant monitoring. He explained that the warmed probe technology is required to provide continuous monitoring because Heritage Malta is aware that the environmental conditions at the site tended to change due to various factors, such as the number of visitors on site. This continuous monitoring will provide the required data for the authorities to introduce measures for the proper conservation of the site by installing air conditioning and/or dehumidifying equipment and limiting the number of visitors at any one time. Finally, Mr Galea confirmed that the two types of sensors offered by the respective bidders had, more or less, the same visual impact on the site.

Mr Michael Lebron, technical consultant, on behalf of AIS Ltd explained under oath, that with regard to the Rotronic RS 70 sensor which utilises heated sensors similar to the Vaisala product, he was informed over the telephone by a supplier, Omni Instruments, that this sensor was still under development and that it would not be available for this contract. He also confirmed that the Vaisala product was considered but they opted against it, because of the cost and because it required high power to operate it. This would have entailed either frequent replacement of batteries or a larger battery pack. This latter option would have a negative visual effect on the site.

A further grievance put forward by Dr Spiteri Bailey concerned the tender price and budget. Dr Spiteri Bailey explained that the budget available for Lot 1 was fixed at a lump sum of Euro 171,453 exclusive of VAT. He noted that the offer of the preferred bidder for Lot 1 amounted to Euro 209,083.54 inclusive of VAT. This works out at Euro 177,189.44 exclusive of VAT. Eventually, his client was informed by D.G. Contracts that Lot 1 of the tender was being recommended for award to Evolve Ltd for the price of Euro 171,448.50 excluding VAT and the price of Euro 51,789.97 exclusive of VAT for Lot 2. Dr Spiteri Bailey referred (i) to article 27.4 of the Tender
Document which states that reductions/observations made by tenderers after submission of tender prices will not be taken into account during evaluation of Tenders, and (ii) to article 29.2 of the Tender Document which provides for exceptions when corrections (arithmetical errors) are allowed and (iii), article 31.2 which provides for adjustments made by the evaluation committee should first be approved by the General Contracts Committee, Dr Spiteri Bailey expected a valid explanation to account for the changes in the price offered by Evolve Ltd.

Mr Anton Catania, Chairman of the Adjudicating Board, under oath, explained that during the financial evaluation of Lot 1 of the offer made by Evolve Ltd, the Adjudicating Board noted that this bidder quoted two prices (as required in the tender document) – one, itemised which was inclusive of VAT (Euro 209,083.54), and the other, a lump sum which was exclusive of VAT (Euro 171,448.50). When the Board removed the VAT element from the first (itemised) figure, the resultant price, rather than tallying with the lump sum figure, came up to Euro 177,189.44, that is, a discrepancy of Euro 5740.94 between the two prices quoted by Evolve Ltd. This discrepancy was reported to the Department of Contracts.

Mr Francis Attard, Director General, Contracts Department, under oath, confirmed that (a) tender budget for Lot 1 was Euro 171,453 exclusive of VAT and (b) bidders were requested to quote prices (lump sum) exclusive of VAT. He also confirmed that the Adjudicating Board drew the attention of the Contracts Department that in the case of Evolve Ltd’s offer for Lot 1, when the VAT component was deducted from the itemised price offered by bidder (Euro 209,083.54), the result came up to Euro 177,189.44. This price differed from that (Euro 171,448.50) also quoted as lump sum by the same bidder exclusive of VAT in the same tender offer. Mr Attard explained that the General Contracts Committee operated a procedure, which is rarely used, whereby it asks the preferred bidder whether he was prepared to reduce his offer to within the budgeted amount without altering the content of the tender. Following the recommendation of the Adjudicating Board, the General Contracts Committee decided to go for this procedure and asked Evolve Ltd, who in the case of Lot 1 were the preferred bidders, whether they were prepared to reduce their offer to Euro 171,448.50 exclusive of VAT without altering the content of the tender to be within the budget amount. Evolve Ltd, the preferred bidder agreed, and reduced their offer for Lot 1 to Euro 171,448.50 exclusive of VAT.

In his concluding remarks, Dr Spiteri Bailey insisted that the product offered by AIS Ltd met the requirements of the tender so that, on the basis of Regulation 45 of the Public Contracts Regulations, the contracting authority should not have rejected his client’s offer. Dr Spiteri Bailey referred also to the grievances he had aired earlier, namely, the email for clarification that was erroneously sent to the wrong email address, the lack of transparency in the changes that were allowed in the price quoted by the preferred bidder and the fact that no account had been given as to how his client’s bid had fared with regard to the technical evaluation. Dr Spiteri Bailey concluded by stating that the whole process was neither correct nor transparent.

Dr Patrick Valentino, on behalf of the contracting authority refuted the conclusion reached by his counterpart. He reiterated that the hearing had established that the appellant was not technically compliant, a fact that was admitted by AIS Ltd in its reasoned letter of objection. With regard to the clarification, Dr Valentino insisted that it was sent on an email address given by the appellant and in this regard, the
contracting authority went out of its way by contacting the appellant prior to closing time. Dr Valentino stated that the product offered by the preferred bidder was battery operated as requested in the tender document with the added advantage that it could also be operated on the main power supply.

Dr Peter Caruana Galizia on behalf of Evolve Ltd stated that it was evident that the appellant had not submitted the type of product requested in the tender and therefore there was no need for the contracting authority to seek clarification in that regard. Dr Caruana Galizia remarked that even in his reply to the clarification, the appellant stuck to his original submission and even went further to query the contracting authority’s request for a product having the warmed probe technology. He stressed that on the other hand his client’s product was compliant to the tender specifications.

At this point, hearing was brought to a close.

This Board

- having noted that the applicants, in terms of their reasoned letter of objection dated 28th July 2010 and also through their verbal submissions presented during the public hearing held on 29th October had objected to the decision taken by the General Contracts Committee.

- having considered the arguments brought forward by the appellant’s legal adviser regarding the alternative technical solution offered by AIS Ltd particularly (i) in his understanding that Warmed Probe Technology was available only from one source, namely Vaisala Corporation, so that such exclusivity could perhaps infringe upon the requirements of Regulation 45(6) of the Public Contracts Regulations, and (ii), that the feasibility/utilisation of warmed probe technology as required in the tender document was at best doubtful because of the heavy consumption of electric current, which would cause a huge drain on the small battery pack as required in the tender document and (iii) that even if, for argument’s sake, one were to install large battery packs (which are not acceptable because their size would prejudice the Hypogeum’s visitor area), such packs would require very regular replacements that would increase running costs considerably and (iv) that his client’s offer of an alternative solution should have been accepted under the provision of Regulation 45(3) if the Public Contracts Regulations.

- having also considered the claims brought forward by AIS Ltd’s legal advisor regarding the lack of transparency and seriousness noted in the evaluation of this tender, namely: (i) the latitude allowed by the Adjudicating Board/General Contracts Committee for changes to the tender price of the preferred bidder (ii) the breach of Article 34(2) of the Tender Document when the letter of 9th July 2010 sent by the Contracts Department to his client did not indicate the criteria for award and the respective scores obtained by the successful and unsuccessful bidders (iii) the very limited time (31 minutes) afforded to his client to clarify his position with regard to the sensors incorporating warmed probe technology as a result of an error committed by the Adjudicating Committee.

- having considered the Contracting Authority legal advisor’s interventions and submissions particularly those regarding (a) warmed probe technology where Dr
Valentino remarked that once the Contracting Authority opted for warmed probe technology, it was unacceptable for bidders to offer other technologies/solutions as AIS Ltd had done (b) the reason why the contracting authority had failed to provide the score obtained by AIS Ltd and (c) the explanation given by Mr Valentino regarding the wrongly addressed email.

- having taken note of Ing Joseph Bartolo’s evidence where
  1. he explained the purpose of the tender
  2. he explained why the contracting authority opted for temperature and relative humidity sensors incorporating warmed probe technology
  3. he confirmed that whereas Evolve Ltd offered a Vaisala product that conformed wholly to the tender specifications, AIS Ltd had offered a Rotronic sensor that did not meet tender requirements
  4. he explained why the Adjudicating Board sought the clarifications from AIS Ltd
  5. he clarified that the Vaisala product was freely available on the open market so that there was no exclusivity regarding its supply
  6. he asserted that Rotronic Int. had in its range of products a heated sensor, Hygromer RS 70, that was equivalent to Vaisala warmed probe project
  7. he explained that had AIS Ltd offered the Hygromer RS 70, they would have met the tender requirements

- having taken note of the evidence given by Ing Mario Schembri, director of AIS Ltd who (i) stated that the Vaisala probe was an option which he did not take, (ii) raised a number of issues of a technical nature with regard to the Vaisala probe and (iii) asserted that the performance of his offer was similar to that provided by the warmed probe sensors

- having taken note of Ing Joseph Bartolo’s intervention with regards to Mr Schembri’s latest assertion

- having considered the evidence given by Mr Mario Galea, principal conservator of the Hypogeum and member of the adjudicating board who commented on the environmental problems being faced at the Hypogeum and the importance of effecting regular monitoring for the proper conservation of the site.

- having considered the evidence of Mr Michael Lebron, technical consultant on behalf of AIS Ltd who (a) remarked that according to information received by phone, the Rotronic RS 70 was still under development and (b) confirmed that the Vaisala product was considered, but they opted not to offer it because of the cost involved.

- having also noted certain decisions concerning the tender price and the explanations give to account for such decisions particularly those given by Mr Anton Catania, Chairman of the Adjudicating Board and Dr Francis Attard, Director General, Department of Contracts.

- having taken note of Dr Peter Caruana Galizia on behalf of Evolve Ltd who amongst other issues he insisted that his client’s offer was fully compliant unlike that of appellant who failed to offer the requested type of product.
reached the following conclusions, namely, that

1. The Contracting Authority was very specific when it drew up the technical specifications of this tender. The “standard” sensors the Authority is currently using at the Hypogeum are not giving the required results. Whenever these sensors get wet with the humidity prevailing on the site, they stop functioning and employees are constrained to go round the site with hand held sensors to keep the place under constant monitoring.

2. Initially, it appeared that the Vaisala product had exclusivity over warmed probe technology and that this exclusivity could favour a particular bidder. Following the hearing of the case, the Board is satisfied that this product was freely available on the open market and accessible to any interested party. In fact, during the hearing, both Ing Mario Schembri, Managing Director of AIS Ltd and Mr Michael Lebron, technical advisor to the same company confirmed that the Vaisala product was considered but they opted not to offer it. During the same hearing, it also emerged that Rotronic Int, whose standard sensors were being offered by AIS Ltd, were also offering the RS 70 model with warmed probe technology similar to that being offered by Vaisala.

3. In the tender document, the contracting authority specifically requested monitoring equipment that incorporated warmed probe technology. Appellants opted to offer equipment without that technology claiming that the equipment they were offering still met the tender requirements. The adjudicating board concluded otherwise, and after they rejected the offer, they refrained from allocating it any score. On similar issues, the Public Contracts Appeals Board has always expressed the view that a contracting authority has the prerogative to demand, through the issue of a tender, that which it thinks is best to meet its requirements, and the bidder is expected to offer that which the authority asks for.

4. With regard to the request for clarification that was addressed incorrectly, this Board feels that the adjudicating committee erred when it sent the said email to the wrong email address. A contact person is what the designation implies and any correspondence should have strictly been addressed to that person. However, this Board feels, that the failure of the adjudicating committee to address this request for clarification to the designated person’s address, was not of such material importance as to prejudice the conclusion reached by the adjudicating committee, namely the rejection of AIS’s offer and the recommendation for award to Evolve Ltd. In their request for clarification, the adjudicating committee did not ask for additional information on the offer. They only asked AIS Ltd to identify where in their tender bid, they were offering warmed probe technology. As it resulted during the hearing, AIS Ltd confirmed that they were not offering that type of equipment.

5. With regard to the financial evaluation of this tender, this Board feels that the General Contracts Committee should have tackled this issue differently. This case was particular because the preferred bidder, in accordance with tender requirements, submitted two price figures – a lump sum and an itemised one. These two figures should have tallied, but in fact, they did not. Rather than
requesting the preferred bidder to reduce his offer (the itemised figure) to match the budget, the GCC could have adopted the lump sum figure which almost matched the allocated budget. In doing so, the General Contracts Committee would have obtained the same result without having had to ask for a reduction in price. In spite of this, the Board feels that the procedure adopted by the GCC was still acceptable.

As a consequence of (1) to (5) above, this Board finds against the Appellant Company.

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

Edwin Muscat                   Carmel J Esposito                    John Buhagiar
Chairman                               Member                                    Member

15 November 2010
Public Contracts Appeals Board

Case No. 238

Adv. CT/045/2010 ; CT 2669/2010

Service Tender for the Awareness Raising Campaign for the Dignity of Domestic Violence Survivors Project

This call for tenders was published in the Government Gazette on 9th February 2010. The closing date for this call for offers was 6th April 2010.

The estimated value of this tender was Euro 249,750 excluding VAT

Four (4) tenderers participated in this tender.

*BPC International Ltd* filed an objection on the 19th July 2010 against the proposed award of this tender to *MPS Marketing Communications Ltd* after being informed that their tender "was not successful as it was not administratively compliant" because they "did not submit accompanying certificate of satisfactory execution for the most important works listed similar to those being requested in the tender dossier, as stipulated in 3(f)1 on page 7."

The Public Appeals Board composed of Mr Edwin Muscat as Chairman and Mr Carmel J Esposito and Mr John Buhagiar as Members convened a public hearing on Friday 29th October 2010 to discuss this objection.

After the Chairman's brief introduction as to how the PCAB was going to conduct the hearing, the appellant company was invited to explain the motives of his objection.

Present

**BPC LTD**

Mr David Brockdorff                         Managing Director  
Mr Ramon Naudi                               Representative

**MPS Marketing Communications Ltd**

Dr Adrian Delia                             Legal Representative  
Dr John Gauci                                Legal Representative  
Mr Chris Mifsud                              Representative

**Commission for Domestic Violence**

Dr Joanna Xuereb                           Chairperson  
Mr George Papagiorcopulo                  Project Administrator
Mr David Brockdorff, Managing Director of BPC Ltd started by making reference to the Department of Contract's letter dated 9th July 2010, whereby his firm was informed that its offer had been disqualified as it was not administratively compliant since the bid was not accompanied by certificates of satisfactory execution for the most important listed works similar to those being requested in the tender dossier in para 3(f) on page 7. Mr Brockdorff stated that his company had given clear evidence of its technical abilities to carry out works similar to those requested in the tender document. He submitted that his company's offer included a document entitled “Data on Consortium” which listed the various similar works undertaken by the company, which list included EU funded campaigns and government contracts that amply demonstrated that his firm was more than capable of executing this contract. Moreover, Mr Brockdorff contended that his firm had submitted that same kind of documentation when it participated in similar EU and Government funded calls for tenders and that there were occasions when he was awarded contracts. Therefore, he reckoned that in this case there must have been some mistake or oversight on the part of the contracting authority. Mr Brockdorff further complained that no template had been furnished in the tender document laying down the kind of certificate that the contracting authority was after because had that been the case, his firm would have provided the information in the prescribed form. Finally, Mr Brockdorff referred to the Department of Contract's Circular No 11/2010 which provides that in cases of administrative non-compliance, tenders are given the opportunity to rectify their shortcomings. In this case he was not given such opportunity.

In her reply, Dr Marceline Naudi, the chairperson of the Adjudicating Board acknowledged that in their offer BPC Ltd had submitted a list of principal works and services provided by the company, however, appellants failed to submit certificates of satisfactory execution of such works and services. Section 3(f) (1) stated, inter alia, that tenderers must provide evidence of technical abilities by providing a list of principal deliveries effected or main services provided accompanied by certificates of satisfactory execution for the most important works. This latter requirement was ignored by appellants. With regards to the second point raised by Mr Brockdorff, namely that his company had been awarded other contracts with similar documentation, Dr Naudi stated that she was assigned to evaluate this tender and that she was not answerable to what took place in the adjudication of the tenders referred to by the appellant. In an intervention on this point, the Chairman of the Board remarked that the hearing had to deal with this particular tender and that references to other cases were out of place. With regard to Mr Brockdorff assertion that no template was included in the tender document, Dr Naudi remarked that although no specific
template was provided, other tenderers did submit such certificates in the form of letters from their clients indicating that the latter were satisfied with the services they obtained. Finally, Dr Naudi referred to Mr Brockdorff's submission regarding Contract's Circular No 11/2010. She pointed out that the tender was published on 9th February 2010 and therefore it had to be evaluated in accordance with the regulations and procedures applicable at that time. In this regard, the Chairman of the Board pointed out that the Clarification Letter No 2 dated 17th March 2010, states that "No rectification shall be allowed. Only clarification on the submitted information may be requested. This is indicated by the symbol*". He added that this note applied also to the evaluation criteria as per clause 11(e) of the same clarification and that the submission of satisfactory execution certificates was a selection criterion as per clause 3(f) of the tender document.

In his intervention, Dr Adrian Delia, legal representative of MPS Marketing Communications Ltd, the recommended tenderer submitted the following remarks:

a) the missing certificates were a mandatory requirement.

b) there was a difference between the fact that the bidder had executed similar contract which were submitted by the appellant, and the provision of certificates from the clients acknowledging that these contracts were carried out to their satisfaction which were not submitted.

c) the amendments to the tendering procedure and the subsequent amended regulations laid down that the tenderer would be given the opportunity to rectify his shortcoming only in certain specific instances but he could not submit any document that should have been furnished in the first place with original tender submission.

At this point the hearing was brought to a close.

This Board,

1 having noted that the appellants, in terms of their reasoned letter of objection received on the 19th July 2010, and also through their verbal submissions presented during the public hearing held on 29th October 2010, had objected to the decision taken by the General Contracts Committee;

2 having taken note of appellant's claims that (a) the company had given clear evidence of its technical abilities to carry out works similar to those requested in the tender document as evidenced by the list of works and services provided in their offer, and (b) that the company had been awarded Government contracts with documents similar to those submitted in this tender offer, and (c) that no format or template for certificates of satisfactory execution of listed works were included in the tender document, and (4) that the company should have been given the opportunity to remedy their offer to be fully compliant in terms of Contracts Circular No 11/2010;

3 having considered the points raised by the representative of the contracting authority who (a) confirmed that appellants failed to submit relative certificates which were explicitly required by the Department as such certificates offered
comfort that the bidder was capable of offering the required services, and (b) that the Departmental Board was assigned to evaluate this tender so that whatever decisions were taken on other tenders were of no concern to their (Departmental) Board, and (c) confirmed that no specific templates for such certificates were included in the tender document, however, other bidders forwarded copies of letters from their clients indicating that the latter were satisfied with the works provided by the relative contractors, and (d) pointed out that whereas the tender document was published on the 9th February 2010, Contracts Circular No 11/2010 was issued on 16 April 2010. In the circumstances, the Adjudicating Board evaluated the offers in accordance to the regulations and procedures applicable at the time;

4 having also taken note of the intervention made by Dr Adrian Delia on behalf of MPS Marketing Communications Ltd who submitted that (a) the missing certificates were mandatory and (b) there is a difference between the execution of contracts and certification that works were carried out satisfactorily, and (c) Contract Circular No11 of 2010 provided for the rectification of offers only in specific instances but certainly not in this instance, when missing documents should have been furnished with original tender submission;

reached the following conclusion:

1 Appellants failed to submit relative documents in spite of the fact that their submission was mandatory.

2 The submission of the document “Data on Consortium” could be said to confirm that the company was capable but the failure of the bidder to submit the certificates of satisfactory execution left the Department without the comfort that it was seeking.

3 Appellant’s claim that Contract’s Circular No 11/2010 allows for the rectification of the shortcoming of his offer is not correct because the provision of the missing documents was mandatory and should have been furnished together with original offer.

As a consequence of points 1 to 3 above, this Board finds against the appellant.

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

Edwin Muscat                                      Carmelo J Esposito                                      John Buhagiar
Chairman                                           Member                                               Member

6 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 239

Adv CT 88/2010 - CT 2040/2010 – DH 3566/09
Leasing of Chauffeur Driven Transportation Facility for the Distribution of Pharmaceuticals for the Pharmacy of Your Choice Scheme

This call for tenders was published in the Government Gazette on 16 March 2010. The closing date for this call for offers was 11 May 2010.

The estimated value of this tender was Euro 125,180.

Seven (7) tenderers submitted their offers.

Cherubino Ltd filed an objection on 26 July 2010 against the decision taken by the Contracts Department to award this tender to John’s Garage Group.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 3 November 2010 to discuss this objection.

Present for the hearing were:

Cherubino Ltd
Dr Antoine Naudi Legal Representative
Mr David Basile Cherubino
Dr Francis Basile Cherubino LL.D

John’s Garage Ltd
Mr Joseph P. Farrugia General Manager
Mr Gordon Farrugia

Health Division (Evaluation Board)
Ms Angela Borg Barthet Chairman
Mr Domenic Azzopardi Evaluator
Mr Alex Bugeja Evaluator
Mr Paul Caruana Evaluator

Department of Contracts
Mr Francis Attard Director General (Contracts)
After the Chairman’s brief introduction as to how the proceedings were going to be conducted, the appellant company’s representatives were invited to explain the motives of the objection.

Dr Antoine Naudi, legal representative of Cherubino Ltd, the appellant company, started his submission by making reference to the Department of Contract’s letter dated 16 July 2010 wherein his client was informed that the tender was recommended for award to John’s Garage Ltd. Dr Naudi stated that the only reason given to his client for his offer not being accepted was that their offer was not the cheapest.

The appellant company’s legal advisor proceeded by that on 28 July 2010 Cherubino Ltd filed an objection in which they explained that the recommendation to award the tender to John’s Garage Ltd was based on an arithmetical mistake. Dr Naudi sustained that the offer submitted by his client was substantially cheaper than that submitted by the recommended tenderer.

The appellant’s lawyer said that the tender document stated that “the POYC scheme is currently operational within 68 pharmacies...it is expected that in the near future, the POYC scheme will be systematically spread over the other 143 pharmacies...”. Dr Naudi claimed that this highlighted the fact that the POYC scheme in the tender was considering an increase from 68 to 211 pharmacies.

At this point Dr Naudi made reference to Cherubino Ltd’s financial offer whereby under ‘Option A’, which was based on the current requirement of 68 pharmacies for the period Monday to Friday from 7.00am to 1.00 pm, his client quoted €29,440 per annum. Dr Naudi also claimed that if one were to make a simple calculation by dividing this amount by 52 (weeks) and divide again by 5 (days), the result obtained would be €113.23 per day for 68 pharmacies.

With regard to ‘Option B’, which took into consideration the roll-out of another 143 pharmacies, Dr Naudi stated that if one were to carry out the same exercise by taking the quoted amount of €33,010.50 per annum, the result would amount to €126.96 per day for 211 pharmacies.

Dr Naudi explained that John’s Garage Ltd gave different daily rates for ‘Up to 15 Pharmacies’, ‘Up to 20 Pharmacies’, ‘Up to 25 Pharmacies’. The appellant company’s legal advisor pointed out that it was significant for one to note that for ‘Additional Pharmacies’ (over the 25 Pharmacies) the rate quoted was €3 for each pharmacy.

Therefore, the same lawyer contended that, under such a scenario, the current requirements of 68 pharmacies would amount to:

| 25 pharmacies (Lump sum) | € 120 |
| Remaining 43 pharmacies @ € 3 each | € 129 |
| Total cost of 68 pharmacies | € 249 daily |
Furthermore, Dr Naudi said that the calculation of the 211 pharmacies contemplated for roll-out would give the following result:

- 25 pharmacies (Lump sum) € 120
- Remaining 186 pharmacies @ € 3 each € 558
- Total cost of 211 pharmacies € 678 daily

Dr Naudi said that the figures in the summary featuring in the motivated letter of objection showed that the financial offers of the two bidders would be as follows:

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<th></th>
<th>John's Garage</th>
<th>Cherubino Ltd</th>
</tr>
</thead>
<tbody>
<tr>
<td>68 pharmacies (current)</td>
<td>Euro 249.00</td>
<td>Euro 113.23</td>
</tr>
<tr>
<td>211 pharmacies (roll-out)</td>
<td>Euro 678.00</td>
<td>Euro 126.96</td>
</tr>
</tbody>
</table>

Ms Angela Borg Barthet, Chairperson of the Evaluation Board, submitted that:

- in its evaluation the Board did not take into consideration solely the arithmetical exercise but also the logistics
- the tender was issued for the leasing of one chauffeured driven van only
- in the tender it was specified that there were currently 68 pharmacies in the ‘Pharmacy of Your Choice’ scheme and that, in the near future, these would increase to 211

On cross-examination by the PCAB, the Ms Borg Barthet claimed that:

1. the Board interpreted the ‘modus operandi’ of John’s Garage Ltd’s offer as implying that for 15 pharmacies they were going to charge €68 daily and if they covered up to 20 pharmacies they would charge €85 daily
2. from the Board members’ experience, the maximum number of pharmacies that could be supplied on a given day was 23 but, for arithmetical purposes, they based their calculations on the upper limit of 25 pharmacies
3. the Board did not base its calculations on 68 pharmacies due to the fact that, logistically, it was impossible for one to cover such a number of pharmacies with one van
4. information at bullet no 2 above was not indicated in the tender specifications
5. on the basis of such calculations Cherubino Ltd’s offer for ‘Option A’ and ‘Option B’ was more expensive than that submitted by John’s Garage Ltd

At this point the PCAB drew Ms Borg Barthet’s attention that
a) once the benchmarks stipulated in the tender were 68 and 211 pharmacies they should have based the calculations on such benchmarks and not on other parameters

b) in the tendering process it was imperative that bidders were given the chance to participate on a level playing field and that the process was transparent for all bidders

c) the PCAB failed to understand why, in the tender specifications, the contracting authority included 68 pharmacies once the maximum capacity of one van was 25 deliveries daily

Mr John Farrugia, General Manager of John’s Garage Ltd, explained that their rates, as structured, gave the contracting authority certain flexibility as the applicable rates depended on the number of stops, that is, according to daily usage. The rates per day quoted were as follows:

- Up to 15 Stops €68
- Up to 20 Stops €85
- Up to 25 Stops €120
- In excess of 25 stops / additional stop €3

Mr Farrugia also claimed that no additional charges would be levied on those days where no deliveries were required.

John’s Garage Ltd’s representative said that Cherubino Ltd’s rates were fixed for 68 and 211 (roll-out) stops (€113.23 and €126.96 respectively) and this was immaterial of the number of deliveries made daily.

During his submission, Mr Farrugia tabled a schedule wherein it was demonstrated that, in cases where the number of pharmacies did not exceed 20 per day, the rates quoted by the appellant company could result in an excess of between €29,359 and €70,559 in expenditure, depending on the term of the tender, that is, for a period of 4 or 5 years.

The PCAB intervened to remark that, rather than focusing on cost savings, the evaluation board should have compared the rates.

Mr Farrugia reiterated that they were arguing that the rates as quoted by them gave certain flexibility whilst those of the appellant company were considerably rigid. With regard to logistics, Mr Farrugia contended that it was impossible for one to make 68 deliveries daily using only one van and that, at present, the maximum number of deliveries reached 23 pharmacies.

The Chairman, PCAB said that, whilst he believed that the parameters used by John’s Garage Ltd were more realistic and would satisfy the Health Division’s requirements, yet he drew the attention of those present that these were not incorporated in the tender.

Continuing, Mr Farrugia said that their company was committed to deploy a chauffeured driven vehicle exclusively for the provision of this particular service.
Dr Naudi rebutted by stating that all the arguments being made were irrelevant for the purpose of this appeal because their objection was based on the fact that his clients were informed that their offer was not the cheapest. The appellant company’s legal advisor sustained that this case concerned only their bid which they contended as being cheaper than John’s Garage Ltd’s offer. With regard to “flexibility”, Dr Naudi said that the benchmarks on which the recommended tenderer based its rates were chosen by the said bidder and that these were not stipulated in the tender. Dr Naudi maintained that John’s Garage Ltd should have first provided what was requested in the tender and then they could have submitted an alternative offer.

The PCAB noted that, if they were to rely on the analysis made by John’s Garage Ltd, their rate ‘Up to 20 stops’ was cheaper (€85 vis-a-vis €113.23), but Cherubino Ltd’s rate was cheaper when taking into consideration ‘Up to 25 stops’ (€113.23 vis-a-vis €120).

Messrs Damian Azzopardi and Alex Bugeja, other members of the Evaluation Board, said that experience had shown them that in the morning it was even impossible to make 25 stops. At this point the PCAB drew their attention that they could not establish and adjudicate on parameters that were not included in the tender document. The same PCAB also pointed out that it failed to understand how the parameters in the tender establish 68 and 211 stops when the Health Division knew that the capacity level was a maximum of 25 stops.

Dr Naudi said that it was rather strange how, from 8 bidders, the recommended tenderer’s offer fitted exactly with the parameters of 20 and 25.

Finally, in reply to a specific question by the Chairman PCAB, the Chairperson of the Evaluation Board declared that the current contractor was John’s Garage Ltd.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28 July 2010 and also through their verbal submissions presented during the public hearing held on 3 November 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ remarks in respect of the fact that (a) they claimed that the recommendation to award the tender to John’s Garage Ltd was based on an arithmetical mistake and that their offer was substantially cheaper than that submitted by the recommended tenderer, (b) bearing in mind that since the operators of the POYC scheme were considering an increase from 68 to 211 pharmacies – they submitted two options, (1) €113.23 per day for 68 pharmacies and (2) €126.96 per day for 211 pharmacies, (c) John’s Garage Ltd gave different daily rates for ‘Up to 15 Pharmacies’, ‘Up to 20 Pharmacies’, ‘Up to 25 Pharmacies’ and that for ‘Additional Pharmacies’ (over the 25 Pharmacies) the rate quoted was €3 for each pharmacy ending with the following cost structure, namely, (1) €249.00 for 68 pharmacies and (2)
€ 678.00 per day for 211 pharmacies and (d) it was rather strange how, from so many bidders, the recommended tenderer’s offer fitted exactly with the parameters of 20 and 25;

- having also taken note of the contracting authority’s representatives’ (a) claim that, in its evaluation, the Board did not take into consideration solely the arithmetical exercise but also the logistics, (b) remark that the tender was issued for the leasing of one chauffeured driven van only, (c) statement that in the tender it was specified that there were currently 68 pharmacies in the ‘Pharmacy of Your Choice’ scheme and that, in the near future, these would increase to 211, (d) claim that the Board had interpreted the ‘modus operandi’ of John’s Garage Ltd’s offer as implying that for 15 pharmacies they were going to charge €68 daily and if they covered up to 20 pharmacies they would charge €85 daily, (e) claim that from the Board members’ experience, the maximum number of pharmacies that could be supplied on a given day was 23 but, for arithmetical purposes, they based their calculations on the upper limit of 25 pharmacies, (f) claim that the Board did not base its calculations on 68 pharmacies due to the fact that, logistically, it was impossible for one to cover such a number of pharmacies with one van and (g) rebuttal that all the arguments being made were irrelevant for the purpose of this appeal because their objection was based on the fact that they were informed that their offer was not the cheapest;

- having this Board, during the hearing (a) submitted that it failed to understand why, in the tender specifications, the contracting authority included 68 pharmacies once the maximum daily capacity of one van was 25 deliveries, (b) noted that, if they were to rely on the analysis made by John’s Garage Ltd, their rate ‘Up to 20 stops’ was cheaper (€85 vs-à-vis €113.23), but Cherubino Ltd’s rate was cheaper when taking into consideration ‘Up to 25 stops’ (€113.23 vs-à-vis €120) and (c) observed that it failed to understand how the parameters in the tender established 68 and 211 stops when the Health Division knew that the capacity level was a maximum of 25 stops;

- having also noted that the recommended tenderer’s General Manager’s (a) explanation relating to the fact that their rates, as structured, gave the contracting authority certain flexibility as the applicable rates depended on the number of stops, that is, according to daily usage, (b) remark that Cherubino Ltd’s rates were fixed for 68 and 211 (roll-out) stops (€113.23 and €126.96 respectively) and this was immaterial of the number of deliveries made daily and (c) claim that it was impossible for one to make 68 deliveries daily using only one van and that, at present, the maximum number of deliveries reached 23 pharmacies;

- having taken full cognizance of the fact that in reply to a specific question by the Chairman PCAB, the Chairperson of the Evaluation Board declared that the current contractor was John’s Garage Ltd,

reached the following conclusions, namely:
1. The PCAB feels that, once the benchmarks stipulated in the tender were 68 and 211 pharmacies, the evaluation board should have based its calculations on such benchmarks and not on other parameters which were not included in the tender specifications.

2. The PCAB opines that, in any tendering process, it is imperative that bidders are given the chance to participate on a level playing field and that the process is equally transparent for all bidders.

3. The PCAB feels that it cannot ignore the fact that, at the same time that it was stated (by the contracting authority’s representatives) that the maximum number of pharmacies that could be supplied on a given day was 23 but, for arithmetical purposes, they had based their calculations on the upper limit of 25 pharmacies, the PCAB was also provided with calculations which reflected how the rate as submitted by John’s Garage Ltd, namely ‘Up to 20 stops’ was cheaper when compared to that submitted by the appellant company (€85 vis-a-vis €113.23). However, this Board cannot but also take full note of the fact that, when one considered the rate ‘Up to 25 stops’ (€113.23 vis-a-vis €120), Cherubino Ltd’s rate was cheaper than that of that of the recommended tenderer.

As a consequence of (1) to (3) above this Board finds in favour of the appellant company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellant company should be reimbursed.

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

12 November 2010
PUBLIC CONTRACTS REVIEW BOARD

Case No. 240

WSM 167/2010

Works Tender for the Finishing Works at the Second Floor Level at SAWTP Administration Building, M’Scala

This call for tenders was published in the Government Gazette on 16 July 2010. The closing date for this call for offers was 6 August 2010.

The estimated value of this tender was Euro 94,004.37 (inclusive of VAT).

Six (6) tenderers submitted their offers.

Vella Falzon Building Supplies Ltd filed an objection on 13 August 2010 against the decision taken by the Contracts Department to disqualify its offer as administratively non-compliant.

In terms of PART II – Rules governing public contracts whose value does not exceed €120,000 of LN 296 of 2010 the Public Contracts Review Board, composed of Mr Alfred Triganzia as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members, convened a public hearing on Monday, 8 November 2010 to discuss this objection.

Present for the hearing were:

Vella Falzon Building Supplies Ltd

Dr Nicolai Vella Falzon Legal Representative
Mr Alexis Vella Falzon Representative

Schembri Barbros Ltd

Dr John Bonello Legal Representative
Mr Anton Schembri Representative

WasteServ Malta Ltd

Dr Victor Scerri Legal Representative
Mr Aurelio Attard Representative

Evaluation Committee:
Perit Ivan F. Bartolo Chairman
Ing. Joseph Bezzina Secretary
Perit Robert Grech Member
Perit Giorgio Schembri Member
After the Chairman’s brief introduction the appellant company was invited to explain the motives of the objection.

Dr Nicolai Vella Falzon, legal representative of Vella Falzon Building Services Ltd, the appellant company, explained that his clients had been informed that their offer was rejected as it was considered to be administratively non-compliant for the three reasons mentioned hereunder, which, in the same lawyer’s personal opinion, concerned facts rather than arguments:

**Reason No. 1**

*The technical literature for the plasterboard partitions was not submitted*

Dr Vella Falzon maintained that his client had in fact submitted this literature.

Mr Aurelio Attard, representing WasteServ Malta Ltd, the contracting authority, intervened to confirm that the said literature was furnished and that the adjudicating board must have overlooked it.

It was thus agreed by all those present that this objection will be dropped due to contracting authority’s own admission of error committed.

**Reason No. 2**

*Section M 20 ‘Plastering/rendered/roughcast coating’ 1.05 ‘extra over above for curved work’*

Dr Vella Falzon stated that the contracting authority was claiming that the respective three columns relating to ‘Rate (excluding VAT)’, ‘Amount (excluding VAT)’ and ‘VAT’ were missing. The appellant company’s legal advisor disagreed with the authority’s claim in view of the fact that, according to him, his client had inserted three ‘dashes’, which meant that his client was not going to charge for that work/service (i) because the amount of work involved was insignificant and (ii) because it was, more or less, included in the previous item 1.04 which involved plastering works. He added that this was confirmed by the fact that the total added up with the three columns against 1.05 taken as zero (dash).

At this point Dr Vella Falzon referred to a previous tender (Ref: FTS/33/10) wherein his client filled in the same details and the said company’s offer had not only been adjudicated to be compliant but ended up being awarded the tender. Dr Vella Falzon agreed that his client could have been more clear in this respect but insisted that the three ‘dashes’ were equivalent to a zero and that was in fact reflected in the total of the schedule.

On his part, Mr Attard contended that the instructions with regard to the ‘Schedule of Rates/Prices’ were quite clear and he quoted from clause 1.2.2, namely:
“... Failure to fill in this form, or a form with incomplete information, or a form containing ambiguous financial information (e.g. prices, total etc) shall disqualify the tender submission.”

Mr Attard retained that the contracting authority could not interpret the three ‘dashes’ inserted by the appellant company against item 1.05 and, as a consequence, that amounted to ambiguous information and, given that this concerned the price of the bid, the contracting authority was precluded from seeking clarifications and so, according to directives received from the Department of Contracts, the only option it had was to reject the offer.

Dr Victor Scerri, legal representative of the contracting authority, remarked that, elsewhere in its submission, the appellant company had inserted such notes as ‘included in above rate’.

The Chairman PCRB agreed that no clarification which could alter the price quoted by the tenderer was permissible but he held the view that, in this case, had the tenderer been asked to confirm if the ‘dash’ represented a ‘zero’, this would not have had a bearing on the price because the total would have remained unaltered and there would have been no negotiated element introduced in the adjudication process.

**Reason No. 3**

*Schedule of rates had been left completely empty*

Dr Vella Falzon remarked that this tender was issued for finishing works, namely plastering and painting on already constructed structures, whereas the ‘schedule of rates’ related to construction works, i.e. concrete, admixtures to concrete, masonry and so forth, and not to finishing works. He added that his client had, in fact, contacted the contracting authority by phone and, in the circumstance, he was informed by Mr Aurelio Attard that one did not have to fill in the schedule of rates.

The appellant company’s legal advisor stated that his client had participated in a similar tender (ref: 119/2010 – published on the 27 April 2010 and awarded on the 2 June 2010) in which case he did not fill in the ‘schedule of rates’ but inserted the note ‘Does not apply’. Dr Vella Falzon stressed that the ‘schedule of rates’ had no bearing on the total price offered by the bidder pointing out that the tender had to be awarded on the total price offered.

Mr Attard intervened and, whilst admitting that in the case of tender ref. 119/2010 Mr Alexis Vella Falzon, the appellant company’s representative, had sought a verbal clarification and that he had advised Mr Vella Falzon that one did not have to fill in the ‘schedule of rates’. However, proceeded Mr Attard, he categorically denies having been contacted by any of the appellant’s representatives with regard to the call for tenders which was the subject of this hearing. Mr Attard conceded that, in hindsight, the advice he gave the appellant company with regard to tender ref. 119/2010 was an erroneous one, both in substance, as well as, the normal public contracting regulations permitted as, under normal circumstances, the latter envisaged that any similar contact had to be carried out in writing and all correspondence had to be circulated amongst all bidders via the Department of Contracts. Mr Attard stated
that, nevertheless, what applied to one tender did not, necessarily, apply to another tender and, furthermore, he could not vouch for what happened in the case of tender ref. FTS/33/10 referred to earlier by Dr Vella Falzon since it was not issued by his organisation.

Mr Attard remarked that albeit the ‘schedule of rates’ was part of the tender document which had to be filled in, yet, it appeared that the appellant company had decided not to fill it in without even seeking a clarification thereon. The contracting authority’s same representative acknowledged that, although the ‘schedule of rates’ did not influence the price quoted by the bidder, these rates were required in case the need for additional works arose, in which case the contracting authority would have the applicable rates in hand.

At this stage the PCRB verified that the recommended tenderer had, in fact, filled in the ‘schedule of rates’ in its original tender submission.

The Chairman PCRB said that he saw the purpose why the contracting authority requested the information in the ‘schedule of rates’ and, despite the fact that he shared the appellant company’s view, namely that these ‘rates’ did not, as such, have a bearing on the total price offered, the contracting authority had to adjudicate the tender submission as a whole and that included the filling in of the ‘schedule of rates’.

Dr John Bonello, legal advisor of the recommended tenderer, drew the attention of the PCRB to clause 2.8 of the tender document which dealt with ‘Tender Rates/Prices’.

In conclusion, Mr Vella Falzon stated that he felt that his company had been misguided by the information it had obtained from the contracting authority on an identical tender which had been issued by the same contracting authority a few months before.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 13 August 2010 and also through their verbal submissions presented during the public hearing held on 8 November 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant’s representatives’ remarks in respect of the fact that (a) these disagreed with the contracting authority’s claim that the respective three columns - as submitted by the appellant company - relating to ‘Rate’ (excluding VAT), ‘Amount’ (excluding VAT) and ‘VAT’ were missing, (b) they claimed that, in view of the fact that they had inserted three ‘dashes’ – which the appellant company claimed that these were equivalent to a zero – this automatically implied that they were not going to charge for that work/service, (c) they were not charging for such work/service referred to in (b) because, apart from the fact that the amount of work involved was insignificant, it was, more or less, included in the previous item 1.04 which involved plastering works, (d) they claimed that this tender was issued for finishing works, namely plastering...
and painting on already constructed structures, whereas the ‘schedule of rates’ related to construction works, i.e. concrete, admixtures to concrete, masonry and so forth, and not to finishing works, (e) they remarked that the ‘schedule of rates’ had no bearing on the total price offered by the bidder and (f) they claimed that the company had been misguided by the information it had obtained from the contracting authority on an identical tender which had been issued by the same contracting authority a few months before;

• having also taken note of the contracting authority’s representatives’ (a) claim that the instructions with regard to the ‘Schedule of Rates/Prices’ were quite clear as reflected in clause 1.2, (b) claim that the contracting authority could not interpret the three ‘dashes’ inserted by the appellant company against item 1.05 and, as a consequence, that amounted to ambiguous information and, given that this concerned the price of the bid, the contracting authority was precluded from seeking clarifications and so, according to directives received from the Department of Contracts, the only option it had was to reject the offer, (c) denial that Mr Attard had been contacted by any of the appellant’s representatives with regard to the call for tenders which was the subject of this hearing, (d) remark that, albeit the ‘schedule of rates’ was part of the tender document which had to be filled in, yet, it appeared that the appellant company had decided not to fill it in without even seeking a clarification thereon and (e) claim that, although the ‘schedule of rates’ did not influence the price quoted by the bidder, these rates were required in case the need for additional works arose;

• having taken cognizance of the fact that, with regards to the objection submitted in relation to the fact that whilst, originally, the contracting authority had argued that the appellant company had not submitted the pertinent technical literature for the plasterboard partitions, yet, during the hearing it was agreed by all those present that this objection will be dropped due to contracting authority’s own admission of error committed in, originally, reaching such conclusion, namely the non-submission of the relevant literature by Vella Falzon Building Supplies Ltd,

reached the following conclusions, namely:

1. The PCAB feels that no clarification which may alter the price quoted by the tenderer is permissible. However, in this particular instance, had the tenderer been asked to confirm if the ‘dash’ represented a ‘zero’, this would not have had a bearing on the price because the total would have remained unaltered and there would have been no negotiated element introduced in the adjudication process.

2. The PCAB opines that, although, as was the case in this particular call, the ‘schedule of rates’ do not influence the price quoted by the bidders, yet, these rates are required in case the need for additional works arises, in which case the contracting authority would already have the applicable rates in hand.

3. Furthermore, this Board argues that the contracting authority has to adjudicate a tender submission as a whole and that includes any ‘schedule of rates’ duly filled.
4. This Board cannot tolerate an instance wherein a participating tenderer decides, arbitrarily, what to insert or not in a tender document duly submitted to a contracting authority.

As a consequence of (1) to (4) above this Board finds against appellant company.

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman  Member  Member

12 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 241

Adv No CT/A/470/2009; CT/2571/2009; GPS 02088TO9MH
Tender for the Supply of Atenolol 25 mg Tablets

This call for tenders was published in the Government Gazette on 15 December 2009. The closing date for this call for offers was 28 January 2010.

The estimated value of this tender was Euro 70,471.56.

Five (5) tenderers submitted their offers.

Rodel Ltd, acting on behalf of Accord Healthcare Ltd filed an objection on 25 June 2010 against the decision taken by the Contracts Department to the Contracts Department to (a) reject its offer as non-compliant since product was not locally registered and (b) to award the tender to V J Salomone Pharma Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 10 November 2010 to discuss this objection.

Present for the hearing were:

**Rodel Ltd (obo Accord Healthcare Ltd)**

Dr Norman Vella Director

**V J Salomone Pharma Ltd**

Ms Jackie Mangion Representative

**Government Health Procurement Services (GHPS)**

Ms Anna Debattista Director

**Adjudicating Board**

Ms Miriam Dowling Chairperson

Ms Miriam Azzopardi Member

**Contracts Department**

Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant company’s representative was invited to explain the motive/s of the objection.

Dr Norman Vella, obo Rodel Ltd, confirmed that the product was not locally registered by the closing date of the tender so much so that in its tender submission dated 20\textsuperscript{th} January 2010 his firm had indicated that “procedures for (product) registration in Malta have started.”

Dr Vella explained that, by way of letter dated 22\textsuperscript{nd} June 2010, the Contracts Department had informed his firm that its offer was found not compliant because the product was not locally registered.

The appellant company’s representative claimed that the statement by the Contracts Department was not correct because, by the 22\textsuperscript{nd} June 2010, his firm had registered the product locally as per certificate issued by the Medicines Authority dated 22\textsuperscript{nd} April 2010 and that was the reason why his firm had lodged the objection.

Dr Vella also pointed out that the product offered by his firm was cheaper than the product recommended for acceptance.

Ms Anne Debattista, Director GHPS, submitted that it was mandatory for tenderers to have the product locally registered by the closing date of the tender. In line with this statement Ms Debattista quoted from Annex IV, ‘Declaration Sheet for Medicinal Products’, where, inter alia, the ‘Responsible Person’ had to declare that:

“I hereby declare: .... (iii) that the product being offered, and for which a sample is being submitted, is authorised under prevailing Laws of Malta to be placed on the market in Malta for wholesale distribution and for sale or supply by other means to patients .....”

Ms Debattista furnished the following chronology of events:

n) 15\textsuperscript{th} December 2009  
a. date tender was published

o) 28\textsuperscript{th} January 2010  
a. closing date of tender

p) 8\textsuperscript{th} February 2010  
a. date application for product registration was received by the MA

q) 22\textsuperscript{nd} April 2010  
a. date licence issued by the Medicines Authority

r) 15\textsuperscript{th} June 2010  
a. date copy of licence was emailed to Contracts Department and Contracting Authority

At this point the hearing was brought to a close.
This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28 June 2010 and also through their verbal submissions presented during the public hearing held on 10 November 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of Dr Vella’s own admission that the product offered by his company was not locally registered by the closing date of the tender, so much so that in its tender submission dated 20th January 2010 his firm had indicated that “procedures for (product) registration in Malta have started.”;

- having also taken note of Dr Vella’s claim that the statement made by the Contracts Department by way of a letter dated 22nd June 2010, namely that his company’s offer was found not compliant because the product was not locally registered, was not correct because, in his opinion, by the 22nd June 2010, his firm had registered the product locally as per certificate issued by the Medicines Authority dated 22nd April 2010;

- having equally considered Dr Vella’s claim that, due to the interpretation he had given to the letter received from the Director of Contracts dated 22nd June 2010, his firm had lodged the objection assuming that the Director of Contracts was referring to the date of dispatch of letter dated 22nd June 2010 and not the closing date of the tender;

- having considered Ms Debattista’s reference to the fact that the submission of proof that a product offered for the purposes of this tender had to be locally registered by the closing date of the tender was a mandatory requirement.

reached the following conclusions, namely:

1. The PCAB expresses the view that the specifications as listed in the tender document were clear enough to avoid any misunderstandings.

2. The PCAB feels that the appellant company has acted frivolously in filing this appeal as it was more than evident that products had to be locally registered within the parameters contemplated in the tender document and not as, arbitrarily and conveniently, interpreted by the appellant company.

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

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

17 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 242

Adv No CT/A/298/2009; CT/2318/2009; GPS 89004TO9MS
Tender for the Supply of Bromazepam 3mg Tablets

This call for tenders was published in the Government Gazette on 28 July 2009. The closing date for this call for offers was 10 September 2009.

The estimated value of this tender was Euro 97,782.49.

Four (4) tenderers submitted their offers.

Vivian Corporation Ltd filed an objection on 30 July 2010 against the decision taken by the Contracts Department to the Contracts Department to (i) to disqualify its offer as non-compliant since the shelf-life of the product was not according to tender specifications and (ii) to award the tender to Krypton Chemists Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 10 November 2010 to discuss this objection.

Present for the hearing were:

Vivian Corporation Ltd

Dr Karl Briffa Legal Representative
Ms Joanna Cremona Representative
Ms Denise Borg Manche Representative

Krypton Chemists Ltd

Mrs Lorraine Arrigo Representative
Mrs Pat Engerer Representative

Government Health Procurement Services (GHPS)

Ms Anna Debattista Director

Adjudicating Board

Ms Miriam Dowling Chairperson
Ms Miriam Azzopardi Member

Contracts Department

Mr Francis Attard Director General
Mr Franco Agius Procurement Manager
After the Chairman’s brief introduction the appellant company was invited to explain the motives which led to the filing of the objection.

Dr Karl Briffa, legal representative of Vivian Corporation Ltd, the appellant company, explained that on the 23rd April 2010 the Contracts Department informed the appellants that their offer did not contain the shelf life of the product. Dr Briffa went on to make the following submissions by:

- referring to PCAB Case No. 198 where, according to Dr Briffa, the PCAB had decided that the shelf life of the product was not sufficient reason to preclude a tender from qualifying to the next stage of the tendering process;

- stating that, over a span of three years, his client’s offer would result in a saving of about €31,000 to the department when compared to that offered by the recommended bidder;

- arguing that, in their bid, his clients had indicated that the shelf life of the product was five years and that the product was going to be delivered with a minimum 40 month remaining shelf life. Dr Briffa argued that 40 months was by far longer than the minimum of 2 years stipulated in Clause 11 of Annex VI which provided as follows:

  - the shelf life of the product must be clearly indicated in the Tender documents submitted. Goods received at Government Health Procurement Services must not have their shelf-life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services

  - when five-sixths of the total shelf-life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf-life will be given preference

  - the Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions

  - in case of medicinals containing blood products, the shelf-life must not be more than two-thirds expired

- claiming that his client had met the tender specifications and, if anything, preference should have been given to tenderers who provided a product with a longer shelf life.

Ms Anne Debattista, representing the contracting authority, stressed that one had to consider each case on its own merits because what applied to one case did not necessarily apply to another case. Ms Debattista remarked that, albeit the appellant company did, in fact, indicate the shelf life of the product as requested, which was 5 years, yet the said appellant company also indicated that the product would be
delivered with a 40 month remaining shelf life which worked out at 2/3 and not 5/6 of the product’s shelf life and, as a consequence, the offer was not technically compliant since it was in violation of Clause 11 of Annex VI.

Dr Briffa pointed out that, as indicated in Clause 11, the contracting authority would even accept this medicine with a remaining shelf life of less than 2 years while his client was offering the product with a minimum remaining shelf life of 40 months. The appellants’ legal advisor added that that did not mean that the deliveries, or part thereof, were going to have a remaining shelf life within the 5/6 limit set in the tender document. Moreover, Dr Briffa stressed that the tender document even provided for penalties in case the contractor infringed the shelf life conditions.

The appellant company’s advisor explained that the condition that deliveries were to be made within 6 to 8 weeks from the date of order was creating difficulties so much so that the department used to accept products with 2/3 remaining shelf life – prior to the introduction of the 5/6 remaining shelf life. Dr Briffa informed the PCAB that discussions were underway between the Chamber of Commerce and the Department of Health and the two sides seemed to agree to stick to the 6 to 8 week delivery from date of order but to revert back to the 2/3 remaining shelf life instead to the current 5/6.

Ms Debattista explained that, by and large, the department was placing an order on a 6 monthly basis, meaning that there would be about six orders of this product over the 3 year contract period although, having said that, one had to keep in view that, in some cases, consumption had a rather irregular pattern. She further explained that penalties were contemplated in case of breach of conditions and, in case a product was delivered with less than 5/6 of its shelf life, the contractor undertook to exchange any expired stock or to credit it.

At this point, the Chairman of the PCAB questioned the logic behind the decision to reject a product with a minimum 40 month remaining shelf life when the department placed an order for this same product every 6 months. He remarked that it could be the case that the department was applying the same tender conditions and specifications irrespective of the fact that different medicines had different characteristics and that what was reasonable in the case of one medicine might turn out to be unreasonable in the case of another medicine, implying that a one-size-fits-all approach was proving to be rather inappropriate.

Ms Debattista remarked that the decision of the adjudicating board was strictly in accordance with the provisions of Clause 11 of Annex VI, which were the published conditions. She acknowledged that the tender conditions and specifications were under constant review and that they were being amended whenever it was considered reasonable to do so.

Dr Briffa reiterated that the 2/3 remaining shelf was in line with previous practice and that the new 5/6 limit was under discussion between the Chamber of Commerce and the department. Dr Briffa called upon the PCAB so that, in this case it would apply the same line of reasoning as it did in Case No. 198, i.e. that in the particular circumstances of his client’s case strict adherence to the 5/6 minimum remaining shelf life was not reasonable ground for the disqualification of the bid.
Ms Pat Engerer, representing the recommended tenderer, intervened to remark that, in her opinion, the published tender conditions and specifications were applicable to all the tenderers and therefore all tenderers had to adhere to them.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 9 August 2010 and also through their verbal submissions presented during the public hearing held on 10 November 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant company’s representative’s (a) argument that in their bid they had indicated that the shelf life of the product was five years and that the product was going to be delivered with a minimum 40 month remaining shelf life which was indeed by far longer than the minimum of 2 years stipulated in Clause 11 of Annex VI, (b) claim that they had met the tender specifications and, if anything, preference should have been given to tenderers who provided a product with a longer shelf life and (c) claim that the condition that deliveries were to be made within 6 to 8 weeks from the date of order was creating difficulties so much so that the department used to accept products with 2/3 remaining shelf life prior to the introduction of the 5/6 remaining shelf life;

- having also taken note of the contracting authority’s representative (a) claim that, albeit the appellant company did, in fact, indicate the shelf life of the product as requested, which was 5 years, yet the said appellant company also indicated that the product would be delivered with a 40 month remaining shelf life which worked out at 2/3 and not 5/6 of the product’s shelf life and, as a consequence, the offer was not technically compliant since it was in violation of Clause 11 of Annex VI, (b) state that by and large, the department was placing an order on a 6 monthly basis, meaning that there would be about six orders of this product over the 3 year contract period although, having said that, one had to keep in view that, in some cases, consumption had a rather irregular pattern and (c) remark that the decision of the adjudicating board was strictly in accordance with the provisions of Clause 11 of Annex VI, which were the published conditions;

- having this Board, during the hearing, expressed reservations concerning the (a) logic behind the evaluation board’s decision to reject a product with a minimum 40 month remaining shelf life when the contracting authority placed an order for this same product every 6 months and (b) fact that it could be the case that the department was applying the same tender conditions and specifications irrespective of the fact that different medicines had different characteristics and that what was reasonable in the case of one medicine might turn out to be unreasonable in the case of another medicine, implying that a one-size-fits-all approach was proving to be rather inappropriate;

- having thoroughly deliberated on the recommended tenderer’s representative’s remark that the published tender conditions and specifications were applicable to all the tenderers and, as a consequence, all tenderers had to adhere to them,
reached the following conclusions, namely:

1. The PCAB expresses the view that, whilst it is true that it seems awkward for this Board to maintain that an offer for the supply of a product with a minimum 40 month (2/3 of 5 years) remaining shelf life - when the contracting authority regularly places an order for this same product every 6 months - should be rejected in view of the fact that this threshold should have been 50 months (5/6 of 5 years), yet it is also a fact that the appellant company had every chance to clarify its position ‘a priori’ and not select to, arbitrarily, submit what it could offer, even if this contravened the parameters stated in the tender specifications (Clause 11 of Annex VI).

2. The PCAB feels that, unless modifications to tender specifications are made through timely amendments applicable to all bidders, the original published tender conditions and specifications shall remain valid and applicable to all the tenderers thus ensuring a level playing field throughout.

3. The PCAB, regardless of the above, draws the attention of the contracting authority to be in future more pragmatic in instances such as those transpired in this hearing where, administratively and operationally, specifications seem to be, by far, out of sync with reality.

As a consequence of (1) and (3) above this Board finds against the appellant company.

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

Alfred R Triganza  Edwin Muscat  Carmel J Esposito  
Chairman  Member  Member

17 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 243

Adv No CT/A/436/2009; CT/2664/2009; GPS 07292TO9BB
Tender for the Supply of Beta Interferon 1A Injections

This call for tenders was published in the Government Gazette on 24 November 2009. The closing date for this call for offers was 19 January 2010.

The estimated value of this tender was Euro 563,760.

One (1) tenderer submitted their offers.

Pharma.MT Ltd filed an objection on 17 June 2010 against the decision taken by the Contracts Department to the Contracts Department to (i) to reject its offer since it was found non-compliant due to the shelf-life of the product not being according to tender specifications and (ii) to cancel the tender.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 10 November 2010 to discuss this objection.

Present for the hearing were:

Pharma.MT Ltd

Dr Gerald Montanaro Gauci Legal Representative
Mr Tony Nicholl Representative

Government Health Procurement Services (GHPS)

Ms Anna Debattista Director

Adjudicating Board

Ms Miriam Dowling Chairperson
Ms Miriam Azzopardi Member

Contracts Department

Mr Francis Attard Director General
Mr Franco Agius Procurement Manager
After the Chairman’s brief introduction the appellant was invited to explain the motives which led to the filing of the objection.

Dr Gerald Montanaro Gauci, legal representative of Pharma.MT Ltd, the appellant company, opened his intervention by referring to Case No. 198, which he considered quite similar to the case in hand, and presented notes on the correspondence dated the 29<sup>th</sup> September and 3<sup>rd</sup> November 2010 exchanged between the Chamber of Commerce and Government (Department of Contracts) on the issue, among others, of the shelf life of medicinals.

Dr Montanaro Gauci submitted the following explanations:

(i) his client had been supplying this product to the Health Department since 1994 and it had always been delivered with a remaining shelf life of two thirds (2/3);

(ii) the shelf life of the product was 24 months and this product, due to its particular nature, had to be kept in quarantine prior to distribution;

(iii) his clients had always fulfilled their contractual obligations over the years;

(iv) Annex VI – Tender Technical and Special Conditions - Clause 11 of the tender document provided as follows:

The shelf life of the product must be clearly indicated in the Tender documents submitted. Goods received at Government Health Procurement Services must not have their shelf-life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services.

When five-sixths of the total shelf-life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf-life will be given preference.

The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.

In case of medicinals containing blood products, the shelf-life must not be more than two-thirds expired.

(v) in Case No. 198, it had resulted that the product was going to be delivered with half (1/2) its shelf life whereas his client was offering a product with 2/3 of its shelf life remaining.

Mr Tony Nicholl, also representing the appellant company, remarked that:

(a) although the product’s shelf life was not clearly indicated in Annex III ‘Financial Offer’, it was readily available on the SPC of the product which had
already been submitted to the department with the sample since they were the current suppliers;

(b) worldwide, there was one manufacturer of this very specialised product, used for multiple sclerosis patients, and, upon manufacture, this product had to be held in quarantine for about 3 months prior to distribution so as to ensure its stability and, as a consequence, the product could not be delivered upon manufacture;

c) there was an arrangement with the manufacturer to retain a stock of this product at all times so that the appellant company would avail itself of such stock whenever the department so requested since, occasionally, orders were placed by the latter in an erratic pattern;

(d) although the deliveries had to be effected between 6 to 8 weeks, in urgent cases, the appellant company even managed to deliver supplies within one week;

(e) in the circumstances, the appellant company could not adhere to the 5/6 remaining shelf life requested in the tender.

The Chairman PCAB observed that it appeared that the tender document did not reflect the realities on the ground. On the other hand, the PCAB’s Chairman also saw it pertinent to remark that the tenderer could have sought a clarification from the contracting authority regarding the shelf life provision in the tender document with the view to enable the modification of that particular condition which, at that stage, would have made it possible for it to be applicable to all tenderers and this for the sake of transparency and level playing field.

On her part Ms Anne Debattista, Director GHPS, submitted that:

i. there was an instance when the contracting company, to which Mr Nicholl was a party, had folded and the department was left with no supplier for a period of time and that was the cause when this medicine had ran out of stock;

ii. the appellant company was the current supplier of this medicine and it has been the supplier for a number of years and, as such, it was not required to submit a sample with this tender;

iii. the appellant company obtained this medicine from the same source even if this manufacturer, over the years, had changed its name a couple of times;

iv. although it appeared that there is one manufacturer of this type of medicine, the department did not resort to a direct order but preferred to issue a tender because it argued that one could not vouch in absolute terms that there is no other similar manufacturer worldwide. Furthermore, the department also argued that there could also be more than one distributor/agent of this medicine;
v. there was only one offer as a result of this call for tenders;

vi. the department’s initial decision was to recommend the rejection of the said tender as the only offer received was deemed to be technically non compliant in view of the fact that the shelf life offered was not in conformity with specifications;

vii. always acting through the Contracts Department, a second recommendation was made for the contracting authority to opt for the negotiated procedure, obviously with the appellant company since it was the only participating tenderer;

viii. the department had attempted to seek a clarification from the appellant company with respect to the information given on the shelf life of the product in Annex III, however, the Contracts Department had advised the cancellation of the tender.

When the PCAB questioned the use of lodging an appeal in such circumstances, Mr Nicholl explained that, by letter dated 11th June 2010, the Contracts Department informed him that his company’s offer was not compliant and that the tender was being cancelled but no mention was made as of the proposal to go for the negotiated procedure. Mr Nicholl added that, in those circumstances, his company’s only option was for its representative to lodge an appeal. At this point Mr Nicholl remarked that, had he known that the negotiated procedure was being contemplated, he would not have appealed at all.

Mr Francis Attard, Director General (Contracts), under oath, offered the following explanations:

(i) once the contracting authority had categorically adjudicated the tender as non compliant, the Contracts Department saw no purpose in seeking any clarifications and, as a result, that is why the cancellation of the tender was recommended;

(ii) procedurally, the negotiated process commenced (a) following the cancellation of the tender which decision and motivation has to be communicated to all participating tenderers and (b) only after the appeal procedure would have been exhausted;

(iii) the negotiated procedure consisted of a meeting with all participating tenderers where the shortcomings of each tenderer would be divulged and, at that same meeting, a tender document would be handed over to tenderers, this time, to be submitted within 15 days instead of the usual 52 days. This, continued Mr Attard, would be regarded like a fresh call for tenders and, in the process, the contracting authority could amend the original tender document if it turned out that it was impossible to obtain the supply with those original specifications.

(iv) albeit, in this case, there happened to be only one participating tenderer, yet, the full process had to be followed.
Ms Debattista, intervened and stated that, being fully aware that the hearing was dealing with this particular tender, she saw it pertinent to remark that the department was adjudicating another tender for this same product and the appellant company was indicating that it could offer the product with a remaining shelf life of between 5/6 and 2/3.

Ms Debattista stated that (a) it was normal practice for medicinals to be subjected to quarantine prior to distribution and (b) in cases when medicines would have been supplied not strictly according to the specified shelf life, then, generally, the contractor who would have had to undertake to exchange any eventual expired stock, will have to do so unless all the stock would have already been consumed, in which case there would be no need for such action to be taken.

Dr Montanaro Gauci appealed to the PCAB to apply to this case the same line of reasoning that it applied to Case No. 198.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 17 June 2010 and also through their verbal submissions presented during the public hearing held on 10 November 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellant company’s (a) claim that they had been supplying this product to the Health Department since 1994 and it had always been delivered with a remaining shelf life of two thirds (2/3), (b) remark in connection with the fact that although the product’s shelf life was not clearly indicated in Annex III ‘Financial Offer’, it was readily available on the SPC of the product which had already been submitted to the department with the sample since they were the current suppliers, (c) claim that, worldwide, there was one manufacturer of this very specialised product, used for multiple sclerosis patients, and, upon manufacture, this product had to be held in quarantine for about 3 months prior to distribution so as to ensure its stability and, as a consequence, the product could not be delivered upon manufacture, (d) claim that the appellant company had an arrangement with the manufacturer to retain a stock of this product at all times so that the company would avail itself of such stock whenever the department so requested since, occasionally, orders were placed by the latter in an erratic pattern, (e) claim that, in the circumstances, the appellant company could not adhere to the 5/6 remaining shelf life requested in the tender, (f) claim that in the letter dated 11th June 2010 sent by the Contracts Department, the latter informed the appellant company that its offer was not compliant and that the tender was being cancelled; (g) claim that no mention was made in the letter mentioned in the preceding reference as regards the proposal for the evaluation process to continue through a negotiated procedure and (h) claim that, in the circumstance, the company had no other alternative but to file an appeal against the decision reached by the Contracts committee insisting that had the company known that the negotiated procedure was being contemplated, it would not have appealed at all;
having also taken note of the contracting authority’s (a) reference to the fact that there was an instance when the contracting company, to which Mr Nicholl was a party, had folded and the department was left with no supplier for a period of time and that was the cause when this medicine had run out of stock, (b) reference to the fact that the appellant company was the current supplier of this medicine and it has been the supplier for a number of years and, as such, it was not required to submit a sample with this tender, (c) claim that, although it appeared that there is one manufacturer of this type of medicine, the department did not resort to a direct order but preferred to issue a tender because it argued that one could not vouch in absolute terms that there is no other similar manufacturer worldwide, (d) reference to the fact that there was only one offer as a result of this call for tenders and (e) reference to the fact that, whilst the department’s initial decision was to recommend the rejection of the said tender as the only offer received was deemed to be technically non compliant in view of the fact that the shelf life offered was not in conformity with specifications, yet, acting through the Contracts Department, the same contracting authority opted for a negotiated procedure (with the appellant company since it was the only participating tenderer) to be embarked upon;

- having duly considered DG Contracts’ (a) explanation of issues relating to the process to be followed in a negotiated procedure, (b) claim that once the contracting authority had categorically adjudicated the tender as non compliant, the Contracts Department saw no purpose in seeking any clarifications and, as a result, that is why the cancellation of the tender was recommended and (c) reference to the fact that, albeit, in this case, there happened to be only one participating tenderer, yet, the full process had to be followed

reached the following conclusions, namely:

1. The PCAB expresses the view that, at tendering stage, the tenderer could have formally sought a clarification from the contracting authority regarding the shelf life provision in the tender document with a view to enable the modification of that particular condition which, at that stage, would have made it possible for such modification to be made applicable to all tenderers and this for the sake of transparency and a level playing field amongst all bidders.

2. The PCAB agrees with DG Contracts’ rendition of facts and explanations submitted by the latter during the hearing, especially the fact that, although it may sound bureaucratic, yet, even within the context of this tender, the full process had to be followed.

3. The PCAB places emphasis on the fact that, over the years, it has, repeatedly, pronounced itself that, despite one’s reservations as to the mandatory requirements of a given term or condition as stipulated in a tender document, unless otherwise agreed with the pertinent contracting authority via the Department of Contracts, a tenderer cannot simply renge on fulfilling such requirements in an arbitrary manner and then expect for one’s submission to proceed in a normal manner with the evaluation process.
As a consequence of (1) and (3) above this Board finds against the appellant company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board, while fully cognisant of the responsible manner in which this appeal has been filed, yet, in full cognisance of the parameters envisaged in the same regulations, recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

*17 November 2010*
PUBLIC CONTRACTS REVIEW BOARD

Case No. 244

GHRC/009/2010

Tender for the Supply and Installation of Raised Access Flooring at the Banca Giuratale, No. 197, Merchants Street, Valletta.

This call for tenders was published in the Government Gazette on 24 June 2010. The closing date for this call for offers was 20 July 2010.

The estimated value of this tender was Euro 50,000.

Five (5) tenderers submitted their offers.

Link Projects Ltd filed an objection on 27 August 2010 against the decisions by the contracting authority (i) to reject its offer due to lack of experience in the installation of such flooring and (ii) to award the tender to Joseph Cachia and Son Ltd.

In terms of PART II – Rules governing public contracts whose value does not exceed €120,000 of LN 296 of 2010 the Public Contracts Review Board, composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members, convened a public hearing on Monday, 12 November 2010 to discuss this objection.

Present for the hearing were:

Link Projects Ltd

Dr Nicole Vella Legal Representative
Mr Alfred Calascione Representative
Mr Michael Valenzia Representative

Joseph Cachia & Son Ltd

Ms Maronna Filletti Representative
Mr Hans Weenink Representative

Grand Harbour Regeneration Corporation (GHRC)

Architect Adrian Mamo Project Consultant

Adjudicating Board

Mr Chris Paris Chairperson
Architect Damian Vella Linicker Member
Mr Mario Sammut Member
Ms Charmaine Monseigneur Member
After the Chairman’s brief introduction the appellant company’s representatives were invited to explain the motives which led to the objection.

Dr Nicole Vella, legal representative of Link Projects Ltd, remarked that:

i. by email dated 18th August 2010 her client was informed that (a) its offer was found to be not compliant due to lack of experience in installing such items, which requirement, namely relevant experience, was listed as mandatory in the tender document, and (b) the tender was recommended for award to Joseph Cachia & Son Ltd;

ii. despite the claim being made in regard, her client did have the necessary experience to execute this contract as the said appellant company has been in this line of business for the past 16 years during which time it had undertaken works at SmartCity and Portomaso, among others;

iii. the appellant company did not declare the relevant experience because the bidder’s experience requested in clause 1.9 (b) and Annex 6 of the tender document related to, at least, three projects with a value of €50,000 or more and, as such, her client carried out projects worth less than €50,000;

iv. her client was reluctant to furnish erroneous information and, as a consequence, indicated a negative answer with regard to experience on projects worth €50,000 or more and declined from indicating the relevant experience on projects worth less than €50,000 because that was not what was requested in the tender document;

v. her client was aware that the recommended tenderer did not have the kind of experience requested in the tender;

vi. the bids submitted in response to this tender were all, more or less, in the region of €25,000 and, therefore, one wondered why the contracting authority requested experience on the basis of contracts worth €50,000 or more, namely double the value of this tender. The appellant company’s legal advisor contended that the kind of experience requested was considered excessive such that it precluded her client from being in a position to declare the company’s relevant experience;

vii. the contracting authority, on receipt of the bids, could have issued a clarification requesting experience in the execution of contracts worth, for example, €25,000 and over, in which case her client would have been able to give account of the company’s relevant experience in this sector;

viii. her client was offering the same material/product as that of the recommended tenderer, namely that manufactured by Uniflair, with the difference that her client was offering a price that was about €4,000 cheaper than that of the recommended tenderer;
ix. Clause 1.18 of the tender document stated, among other things, that those “tender offers fulfilling the Tender requirements shall be ranked in order of their respective price offers. The Bidder that quotes the best price for his offer shall be selected as the Preferred Bidder”;

x. it appeared that the recommended tenderer had been allowed to reduce its price from €28,445, as per list of valid tender offers, to €25,195, as per recommended award and a clarification was called for in this regard.

The Chairman PCRB intervened and remarked that the tenderer had the opportunity to clarify with the contracting authority this issue prior to the closing date of the tender, e.g. whether it was admissible to include experience in the execution of contracts worth less than €50,000. Furthermore, the PCRB also argued that listing the contracts executed, even if below the limit set in the tender document, was always better than indicating no experience at all. The Chairman PCRB added that it was up to the appellant company to seek the clarifications it deemed appropriate and not the other way round. The Chairman PCRB opined that the €50,000 limit indicated in the tender document did not necessarily relate to the value of the contract itself but rather to the level of experience that the contractor was expected to have to carry out these works.

Mr Chris Paris, representing the Grand Harbour Regeneration Corporation (GHRC), the contracting company, sympathised with the appellant company after having heard the explanations given at the hearing but he remarked that such explanations should have been given at tender submission stage and not at appeal stage. He added that the tenderer was free to ask for clarifications but it was not correct or ethical for the contracting authority to approach a tenderer to, for example, draw one’s attention that one had indicated no experience. Mr Paris stressed that the adjudicating board had to assess on the documentation made available and that it could not rely on public knowledge or on what happened in past contracts. The adjudication board’s chairperson pointed out that the appellants themselves had given a clear negative answer with regard to their experience in this line of work, which was a mandatory requirement, and, as a result, the adjudicating board had no other option but to reject the offer.

Mr Paris acknowledged that the appellant company’s offer was the cheapest and, even though the contracting authority would have preferred to save money, it could not recommend award to a non compliant bidder. He explained that this was a high profile project and, as a consequence, it was important for the contracting authority to select a contractor who could guarantee a high standard in terms of workmanship.

Architect Adrian Mamo, project consultant, gave the following evidence:

i. the appellant company’s submission was a valid one except for the issue of lack of experience. The contracting authority’s consultant proceeded by stating that, had the tenderer left the space available to declare one’s experience blank, one might have thought that there was some kind of error of omission. However, the tenderer indicated a definite ‘no’ which left no room for any other interpretation;
ii. the benchmark of €50,000 was meant to ensure that the awarded bidder would be capable of executing the contract up to the desired standard;

iii. confirmed that the preferred bidder, Joseph Cachia and Son Ltd, had declared in their submission that the works they submitted as evidence of experience were supervised by a team of foreign workers (Medi Impianti S.p.a) that had experience in this kind of installation, and that this same team was going to be engaged on the contract in question;

iv. the preferred bidder listed three projects, namely two projects for ST Microelectronics (Malta) Ltd worth €56,000 and €65,000 and another project worth €57,000 for Steel Structures Ltd;

v. the declaration of experience was made by Joseph Cachia & Son Ltd and hence the experience claimed was attributed to the preferred bidder;

vi. no satisfactory execution certificate was requested in respect of the projects submitted to demonstrate experience but, at least, in the case of the preferred bidder, the contracting authority had the possibility to check them out because it had all the relevant details. In fact, the footnote at Annex 6 stipulated that failure “to identify Client organisation will result in experience being discounted.”

Mr Alfred Calascione, also representing the appellant company, reiterated that his firm opted to play a fair game and that was why it did not indicate contracts worth €50,000 and over because it did not have any project of that extent to its credit but, on the other hand, his firm did offer a guarantee on the works and the architect in charge had the authority to withhold payment or to impose penalties in case of breach of contract.

The Chairman PCRB observed that since the appellant company and the preferred bidder were going to use the same material, that supplied by Uniflair, then the differentiating factor seemed to be solely the installation. He added that, in the case of the appellant company, the adjudicating board had no submission to consider with regard to experience whereas in the case of the preferred bidder it had a written declaration and if that would turn out to be untrue then the bidder would face the consequences arising from a false declaration.

At this point Mr Calascione requested an explanation as to how the price offered by the recommended tenderer, which initially featured as €28,445 on the ‘list of valid tender offers’ was subsequently reduced to €25,195 as per ‘recommendation to award’.

Dr Vella intervened to ask if it was the case that the preferred bidder had submitted two different prices.

Mr Paris explained that, following the technical examination of the tender submission, it turned out that one could extract two prices, the higher price referred to custom fabricated material which had a particular kind of finish and the other lower price related to off-the-shelf material. Mr Paris added that although, initially, the figure of €28,445 was displayed, the original submission contained all the information wherefrom one could arrive at the price of €25,195, depending on the material...
selected. Mr Paris remarked that the consultant architect was satisfied with the off-the-shelf product and the contracting authority was happy to settle for the option which involved the disbursement of the least funds.

At this point the hearing was brought to a close.

This Board,

• having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 27 August 2010 and also through their verbal submissions presented during the public hearing held on 12 November 2010 had objected to the decision taken by the General Contracts Committee;

• having taken note of the appellant company’s representatives’ remarks particularly, (a) the fact that the company had the necessary experience to execute this contract as it has been in this line of business for the past 16 years during which time it had undertaken works at SmartCity and Portomaso, among others, (b) the fact that the company did not declare the relevant experience because the bidder’s experience requested in clause 1.9 (b) and Annex 6 of the tender document related to, at least, three projects with a value of €50,000 or more whilst the company had, till then, carried out projects worth less than €50,000 and was reluctant to furnish erroneous information and, as a consequence, indicated a negative answer, (c) its claim that the kind of experience requested in this tender was considered excessive such that it precluded the appellant company from being in a position to declare the company’s relevant experience and (d) the fact that the company was offering the same material/product as that of the recommended tenderer, namely that manufactured by Uniflair, with the difference that the said company was offering a price that was about €4,000 cheaper than that of the recommended tenderer;

• having also taken note of the contracting authority’s representatives’ (a) claim that, whilst sympathising with the appellant company’s position, yet it was fair to state that such explanations should have been given at tender submission stage and not at appeal stage, (b) claim that the tenderer was free to ask for clarifications but it was not correct or ethical for the contracting authority to approach a tenderer to, for example, draw one’s attention that one had indicated no experience, (c) reference to the fact that the adjudicating board had to assess on the documentation made available and that it could not rely on public knowledge or on what happened in past contracts, (d) reference to the fact that the appellants themselves had given a clear negative answer with regard to their experience in this line of work, which was a mandatory requirement, and, as a result, the adjudicating board had no other option but to reject the offer, (e) reference to the fact that albeit it was a fact that the appellant company’s offer was the cheapest, yet even though the contracting authority would have preferred to save money, it could not, unfortunately, recommend award to a non compliant bidder and (f) explanation as to how the price offered by the recommended tenderer, which initially featured as €28,445 on the ‘list of valid tender offers’ was subsequently reduced to €25,195 as per ‘recommendation to award’;
• having taken cognizance of Architect Mamo’s testimony, especially, the points raised in connection with the fact that (a) the appellant company’s submission was a valid one except for the issue of lack of experience, (b) the benchmark of €50,000 was meant to ensure that the awarded bidder would be capable of executing the contract up to the desired standard, (c) the preferred bidder, Joseph Cachia and Son Ltd, had declared in their submission that the works they submitted as evidence of experience were supervised by a team of foreign workers (Medi Impianti S.p.a) that had experience in this kind of installation, and that this same team was going to be engaged on the contract in question, (d) the preferred bidder listed three projects, namely two projects for ST Microelectronics (Malta) Ltd worth €56,000 and €65,000 and another project worth €57,000 for Steel Structures Ltd and (e) the declaration of experience was made by Joseph Cachia & Son Ltd and hence the experience claimed was attributed to the preferred bidder,

reached the following conclusions, namely:

1. The PCAB feels that the tenderer had the opportunity to clarify with the contracting authority any issue prior to the closing date of the tender, such as whether it was admissible to include experience in the execution of contracts worth less than €50,000. The PCAB thus agrees with the contracting authority’s statement wherein it was argued that explanations given by the appellant company at the public hearing should have been given at tender submission stage and not at appeal stage

2. The PCAB maintains that it was up to the appellant company to seek clarifications it deemed appropriate and not the other way round.

3. The PCAB opines that the €50,000 limit indicated in the tender document did not necessarily relate to the value of the contract itself but rather to the level of experience that the contractor was expected to have to carry out these works.

4. This Board argues that, in the case of the appellant company, the adjudicating board had no submission to consider with regard to experience whereas in the case of the preferred bidder it had a written declaration and if that would turn out to be untrue then the bidder would face the consequences arising from a false declaration.

As a consequence of (1) to (4) above this Board finds against appellant company.

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza Edwin Muscat Carmel J Esposito
Chairman Member Member

18 November 2010
PUBLIC CONTRACTS APPEALS BOARD

Case No. 245

Advert No. CT 466/2009 – CT 2679/2009
Tender for Restoration Works to Valletta Land front Fortifications – VLT 12 –
Tender for the restoration of St James’ Counterscarp and Bridge

This call for tenders was originally published in the Government Gazette on 11th December 2009. The closing date for this call for offers was 28th January 2010.

Five (5) tenderers had submitted their offers.

The budget available for this tender was Euro 273,947 (excluding VAT).

C.A.V.V. Allieri JV filed an objection on 29th October 2010 against the intended award of the tender in caption to De La Valette JV.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Monday, 6th December 2010 to discuss this objection.

Present for the hearing were:

C.A.V.V. Allieri Joint Venture

Dr. Franco Galea Legal Representative
Mr. Brian Miller Senior Manager
Witnesses:-
Mr. Rosario Agius
Mr Hans Attard
Mr. Nyal Xuereb

De La Valette Joint Venture

Dr. David Wain Legal Representative
Ms. Denise Xuereb Representative
Mr Angelo Xuereb Representative

MRRA – Project Design and Implementation Division

Dr Franca Giordmaina Legal Representative

Evaluation Board
Dr Albert Caruana Chairman
Mr Joseph Casaletto Secretary
Arch Mireille Fsadni Member
Mr Mark Azzopardi Member
After the Chairman’s brief introduction as to how the hearing was going to be conducted, the appellants’ representative was invited to explain the motive/s of the objection.

Dr Franco Galea, legal representative of C.A.V.V. Allieri Joint Venture, started by raising the following two issues (i) that the PCAB’s decision issued on the 17th September 2010 (Case No.223) in connection with the appeal lodged by De La Valette on this same tender was null because the decision was signed by two instead of the three members of the PCAB, given the demise in the meantime of Mr Anthony Pavia, and (ii) that Mr Alfred Triganza, Chairman, and Mr Edwin Muscat, member, should not decide on his client’s appeal because they had already expressed an opinion on the merits of the case.

The Chairman PCAB remarked that the decision referred to by the appellants’ representative was legally valid because two out of three members constituted a quorum. In order to corroborate this statement the Chairman PCAB made reference to Article 84 (15) of the 2005 Public Contracts Regulations wherein it is stated that decisions “of the Appeals Board shall preferably be taken on the basis of unanimity. However, majority decisions shall be final and binding with regard to the award of the contract. The Chairman and the other two members shall have one vote each.”

The Chairman PCAB further remarked that it was legally correct for the PCAB to deal with more than one appeal in connection with the same tender lodged at different stages of the tendering process - that did not amount to dealing with the same issue twice – and, the PCAB’s Chairman concluded that it was certainly not the first time that the PCAB did just that.

At this point the Chairman asked those present whether, following his intervention, anyone present in the room still had any problem with the members of the Board proceeding with the hearing of this appeal. All those present confirmed that they were agreeing to this Board proceeding with the formal hearing of the appeal lodged by appellant company.

Dr Galea referred to the decision communicated to his client by the Contracts Department on the 20th October 2010 whereby the joint venture was informed that its offer was not the cheapest, technically compliant offer. Dr Galea maintained that his clients’ bid was, in fact, the only technically compliant bid while the recommended tenderer, De La Valette JV, had made untruthful declarations in its tender submission which should have led to its outright disqualification. Dr Galea remarked that, apart from the fact that the Valletta Waterfront Project was completed outside the 5 year period stipulated in the tender, which issue had already been decided upon by the PCAB, his client had become aware that this same project had been completed before July 2004. Moreover, Dr Galea declared that other projects submitted by the preferred tenderer to demonstrate one’s experience in restoration works were not in fact carried out by any partner constituting De La Valette JV which event was in violation of clauses 4.2 (page 9) and 14.3.2.12 (page 14) – both provisions quite similar in substance. To corroborate his statement Dr Galea proceeded by citing clause 14.3.2.12:

“A dossier of not more that 20 A4 size pages containing description including photographs of at least three restoration intervention projects of masonry
structures carried out by bidder/s during the last five years. The value of the restoration works of each of the three projects listed shall not be less that €40,000. The dossier must be accompanied by a written declaration signed by the bidder confirming that personnel with similar or better qualifications and/or experience will be engaged on this contract to carry out specialised restoration works as specified in this tender document.”

Dr Galea stated that the recommended tenderer submitted the following works for the purposes of clauses 4.2 and 14.3.2.12 namely, St Cecilia Chapel, Villa Cagliare, Fort Rinella and Valletta Waterfront.

**ST CECILIA CHAPEL**

Dr Galea conceded that there was no problem with regard to this project because it was carried out by one of the partners of De La Valette JV, i.e. Baron Group Ltd.

Architect Mireille Fsadni, a member of the adjudicating board, intervened to remark that, albeit, due to lack of information, this project was not taken into account, yet, she pointed out that the remaining three projects were sufficient for the purposes of clauses 4.2 and 14.3.2.12.

**VILLA CAGLIARES**

Dr Galea remarked that this project was, in fact, carried out by Lawrence Buhagiar and, to this effect, submitted a certificate dated 28th October 2010 by Architect Joanna Spiteri Staines. He added that the recommended tenderer did not contest this matter of fact so much so that in their letter of reply dated 8th November 2010 the joint venture representatives stated as follows, namely:

“It is not contested that Master Mason Lawrence Buhagiar carried out the works at Villa Cagliare (which sentence continued as follows: and the letter of recommendation by Perit Joanna Spiteri Staines dated 26th March 2010 at no time indicates or tries to create the impression that the works were carried out by an actual signatory to the De La Valette joint venture agreement).”

**FORT RINELLA**

Dr Galea remarked that the recommended joint venture did not perform any restoration works at Fort Rinella which, as in the case of Villa Cagliare, amounted to a misrepresentation of facts and should have led to the disqualification of the recommended tenderer for not having satisfied the provisions of clauses 4.2 and 14.2.3.12.

Mr Angelo Xuereb, representing De La Valette JV, testified under oath that the works at Fort Rinella had been carried out by mason Lawrence Buhagiar.
VILLA CAGLIARES AND FORT RINELLA

Dr Galea submitted that in Form 4.6.4 of Section 4 Volume 1 (page 53 of the tender document) the bidder had to list the works performed by the bidder and, by listing these two projects, the recommended tenderer had misrepresented the facts. Furthermore, Dr Galea pointed out that, at page 4 of its letter of reply, De La Valette JV remarked that the fact remained that the adjudicating board had accepted Villa Cagliares – and, similarly, Fort Rinella - presumably in terms of Regulation 51 (3) of the Public Contracts Regulations which provided as follows:

“An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.”

Dr Galea argued that this provision was not applicable to this case because Reg. 51 (3) was applicable for ‘a particular contract’ and, as a consequence, had to be reproduced in the tender document, which was not the case in this tender. He also pointed out that in the tender submission of the recommended tenderer there was not the undertaking stipulated in Reg. 51 (3).

Dr Franca Giordmaina, legal representative of the contracting authority, remarked that, contrary to what was being claimed by the appellants, the recommended tenderer had furnished in its tender submission an undertaking whereby Master Mason Lawrence Buhagiar authorised De La Valette JV to make use of and reference to his experience in masonry restoration for the purposes of submitting a tender. She added that the same Mr Buhagiar had also accepted to be appointed by De La Valette JV as Master Mason on the project. Dr Giordmaina stated that the adjudicating board had considered that, through his undertaking, Mr Buhagiar had met the requirements set out in the tender whereas another expert of the recommended tenderer, Prof. Gasparoni, was not deemed to have satisfied those same requirements.

Dr David Wain, legal representative of De La Valette JV, remarked that the undertaking by Mr Buhagiar did not emerge at the stage of the appeal but it was entered into on the 8th January 2010. He added that, in the tender submission, his client had clearly indicated that the works at Villa Cagliares and Fort Rinella were carried out by master mason Lawrence Buhagiar and George Borg and that, certainly, did not amount to any misrepresentation, which, apparently, was the basis of the appellants’ objection.

Dr Galea intervened to argue that the fact that Mr Lawrence Buhagiar had accepted to be appointed as master mason on the project did not, in any way, render him a partner in the joint venture for the purposes of clauses 4.2 and 14.3.2.12.

On the other hand, Dr Wain argued that the law per se (regulations - LN 177/2005) was applicable at all times and that it did not have to be reproduced in the tender document for it to be rendered applicable. He added that the adjudication board could
opt to make use of Reg. 51 (3) to ascertain that the tenderer had the necessary resources to carry out the contract.

At this point the Chairman PCAB remarked that what had to be established was (a) whether Mr Lawrence Buhagiar, being the master mason of the project but not being a partner in the joint venture, satisfied the requirements set out in clauses 4.2 and 14.2.3.12 and (b) whether the undertaking made by the same Mr Buhagiar satisfied the requirements of Reg. 51 (3).

Dr Albert Caruana, chairman of the adjudicating board, remarked that, in the case of Mason Buhagiar, the adjudicating board had a written declaration whereas in the case of Prof. Gasparoni it had a letter which was not considered sufficient. Dr Caruana added that when the adjudicating board came across the reference by Architect Joanna Spiteri Staines (dated 26/03/10) that mason Mr Lawrence Buhagiar had satisfactorily carried out the works at Villa Cagliares, the adjudication board opted to make use of Reg. 51 (3), even though it was not laid down in the tender document, to enable them to establish the link between mason Mr Lawrence Buhagiar and De La Valette JV.

Dr Caruana said that in the clarification sought by the adjudicating board it had been pointed out that (i) the letter of reference to one of the projects presented was issued in the name of Lawrence Buhagiar on behalf of one of the companies making up the joint venture, (ii) the other reference in the form of a newspaper article had named Mr Buhagiar but with no connection to any of the partners making up the joint venture and (iii) Mr Buhagiar had been named by the bidder as one of key persons to be deployed on this project and even included him in the organisation chart. On the basis of those observations Dr Caruana, acting on behalf of the adjudication board, requested the bidder to declare whether there was any agreement whereby Mr Buhagiar authorised the joint venture to use his experience in the tender submission. Dr Caruana said that the part of the reply to the adjudication board’s request came in the form of the letter of undertaking dated 8th January 2010 entered into by Mr Lawrence Buhagiar and Mr Angelo Xuereb, representing De La Valette JV.

The Chairman PCAB observed that the consortium was made up of its employees at different levels and that, ultimately, it was the expertise of those employees which rendered the consortium capable of undertaking certain specialised works. As an example, the Chairman PCAB mentioned the case of a turnkey contractor which brought together a number of contractors with different skills to execute a project.

Dr Caruana submitted that, in terms of Reg 51 (3), the economic operator could rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. Dr Caruana stated that, with the undertaking between mason Buhagiar and De La Valette JV, the adjudicating board had the comfort that the recommended tenderer was capable of carrying out the requested works.

Dr Giordmaina held the view that the provisions of clause 14.2.3.12 were, in substance, similar to those of Reg. 51 (3) where a bidder, besides relying on one’s own experience, could also rely on that of others with whom such bidder would either engage or have an undertaking.

Dr Galea argued that, on closer examination of clause 14.3.2.12, one would deduce that the first part requested the bidder/s to submit the three projects as proof of
experience whereas the second part - in bold print - referred to personnel within the joint venture who could carry out these works. He added that it was in the latter case that mason Buhagiar would come into the picture. Dr Galea conceded that, for the purpose of demonstrating experience, a contractor could claim to have carried out works that were actually carried out by one of his sub-contractors.

Dr Wain rebutted that Reg. 51 (3), being part of the laws of Malta, was applicable to this tender, in the absence of a specific clause in the tender document that rendered Reg 51 (3) inapplicable which was not the case.

**VALLETTA WATERFRONT**

Dr Galea submitted that his client could prove that the restoration works carried out by the recommended tenderer was not completed in July 2004 – which issue had been decided upon by the PCAB at the previous appeal – but was completed as far back as 2003. Dr Galea also mentioned the conflicting dates of completion of works indicted by various sources, namely the:

- i) letter sent by Viset (dated 20\textsuperscript{th} November 2009) where it was stated that *The Constructors Ltd*, which forms part of the joint venture, had completed the works in July 2004; and

- ii) final certificate of payment issued by Messrs Architecture Project to *The Constructors Ltd* (dated 22\textsuperscript{nd} September 2005)

At this stage Dr Galea presented an extract from ‘*The Times*’ indicating that the Valletta Waterfront project was inaugurated in late 2003.

Dr Galea then started calling his witnesses.

Mr Angelo Xuereb, representative of *The Constructors Ltd*, under oath, gave the following evidence:

- the restoration works at the Valletta Waterfront consisted mainly of Pinto Stores;

- the major part of the restoration works were completed in July 2004 but all the works, including the part at the back of the structure, were completed during 2005;

- he was a director of Viset, the entity responsible for the Valletta Waterfront;

- the article that appeared in ‘*The Times*’ on the 17\textsuperscript{th} December 2003 referred to the opening of part of the Waterfront Project and not of the whole project – it often happened that large projects were put into operation in phases; and
• the contract for the reconstruction of that structure damaged during WWII was awarded to *Agius Stoneworks* whereas the contract for restoration works was awarded to his firm, *The Constructors Ltd*.

Mr Rosario Agius, of Agius Stoneworks and part of the C.A.V.V. Allieri Joint Venture, under oath, gave the following evidence:

• the restoration works on the façade of Pinto Stores was completed by *The Constructors Ltd* towards the end of 2003 whereas the construction of part of the façade undertaken by his firm was completed at a later stage;

• his firm had carried out all the works, including construction and restoration, on all the vaults which formed part of the internal structure of Pinto Stores;

• he could not tell when the restoration works carried out by *The Constructors Ltd* at the back of Pinto Stores were completed; and

• he was not charged with the supervision of the works carried out by *The Constructors Ltd* at the Valletta Waterfront

Mr Hans Attard, who was previously employed by *The Constructors Ltd* as Construction Manager, under oath, gave the following evidence:

• he modified his declaration which had been submitted with the appellants’ letter of objection in the sense that his employment with *The Constructors Ltd* was from August 2005 to April 2009 (as indicated by the recommended tenderer in its letter of reply) and not from September 2004 to April 2009;

• as far as he was aware, the restoration works on the façade of Pinto Stores by *The Constructors Ltd* was completed by the time he took up employment with the same firm in August 2005;

• he was not aware of the final certificate of payment issued by *Messrs Architecture Project* to *The Constructors Ltd* dated 22nd September 2005; and

• his superior was the Construction Director, Mr Richard Xuereb, Mr Angelo Xuereb’s son

Mr. Nyal Xuereb, who, between November 2004 and June 2008, was engaged by Architecture Project on a full-time basis to carry out supervisory duties at the Valletta Waterfront, under oath, gave the following evidence:

• he is self employed but was engaged as consultant on this tender by the appellants, C.A.V.V. Allieri Joint Venture;
- no restoration works were carried out by *The Constructors Ltd* at the Valletta Waterfront during his term of employment which started in November 2004;

- it could have been the case that certain final certificates were issued to *The Constructors Ltd* after November 2004 because they might have represented retention money on works already carried out;

- he used to handle all the contracts at the Valletta Waterfront project; and

- despite the fact that payments following certification of works carried out at the Valletta Waterfront used to go through him, he was not aware of the payment issued in September 2005 and authorised by Architect David Drago, who was a partner in *Architecture Project*.

At this point Dr Wain presented a document by Architect Drago, dated 10\(^{th}\) November 2010, certifying that *The Contractors Ltd* was awarded the restoration works at Pinto Stores and adjacent Forni Stores. Mr Xuereb intervened to state that the latter stores were much smaller structures than Pinto Stores but both stores formed part of the Valletta Waterfront project. Dr Wain continued by stating that works were satisfactorily executed between 2002 and 2005. Dr Wain also pointed out that Mr Nyal Xuereb commenced his employment at the Valletta Waterfront in November 2004 when his client had already provided evidence that they had completed the restoration works in July 2004.

Dr Galea requested that Architect Drago be summoned to (a) testify whether the works at Forni Stores were awarded as a separate contract from the works at Pinto Stores and (b) comment on Viset’s declaration indicating July 2004 and his (Architect Drago’s) declaration indicating 2005 as the completion date of restoration works carried out by *The Constructors Ltd*.

The Chairman PCAB remarked that, in the tender submission, the recommended tenderer referred to the Valletta Waterfront project, which project incorporated Pinto and Forni Stores. He added that the PCAB had already decided on the completion date of July 2004 and, as a result, the other completion date, 2005, indicated by Architect Drago was irrelevant to the case. The Chairman PCAB declared that, if during its deliberations, the PCAB would find it necessary to reopen the hearing to listen to what Architect Drago had to say on the matter then it would do so.

Dr Wain noted that the appellants had submitted a written declaration by Mr Charles Micallef, ex-foreman with *The Constructors Ltd*, who, nevertheless, had failed to turn up at the hearing. Mr Rosario Agius acknowledged that Mr Micallef was one of his employees whereas Mr Nyal Xuereb conceded that he had helped Mr Micallef in the drafting of the declaration.

Dr Giordamaina called upon the PCAB to appreciate that the documents that had been presented during this appeal were not available to the board during adjudicating stage.

Dr Galea remarked that from the hearing it emerged that, out of the three projects submitted by the recommended tenderer, two, namely Fort Rinella and Villa Cagliares, were carried out by
Mr Lawrence Buhagiar and the third, Valletta Waterfront, was carried out by a partner of the joint venture but in respect of which there was conflicting evidence with regard to the completion date of the restoration works.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 29th October 2010 and also through their verbal submissions presented during the public hearing held on 6th December 2010 had objected to the decision taken by the General Contracts Committee;

- having taken note of the appellants’ representatives’ remarks in respect of the fact that (a) their bid was the only technically compliant bid while the recommended tenderer, De La Valette JV, had made untruthful declarations in its tender submission which should have led to its outright disqualification, (b) apart from the fact that the Valletta Waterfront Project was completed outside the 5 year period stipulated in the tender they had become aware that this same project had been completed before July 2004, (c) other projects submitted by the preferred tenderer to demonstrate one’s experience in restoration works were not in fact carried out by any partner constituting De La Valette JV, (d) with regard to St Cecilia Chapel, there was no problem with regard to this project because it was carried out by one of the partners of De La Valette JV, i.e. Baron Group Ltd, (e) with regard to Villa Cagliari, this project was, in fact, carried out by Mr Lawrence Buhagiar, (f) with regard to Fort Rinella, once again, this project was carried out by Mr Buhagiar, (g) in spite of the fact that the adjudicating board had accepted Villa Cagliari – and, similarly, Fort Rinella - presumably in terms of Regulation 51 (3) of the Public Contracts Regulations, yet, this provision was not applicable to this case because Reg. 51 (3) was applicable for ‘a particular contract’ and, as a consequence, had to be reproduced in the tender document, which was not the case in this tender, (h) in the tender submission of the recommended tenderer there was not the undertaking stipulated in Reg. 51 (3), (i) that the fact that Mr Lawrence Buhagiar had accepted to be appointed as master mason on the project did not, in any way, render him a partner in the joint venture for the purposes of clauses 4.2 and 14.3.2.12, (j) on closer examination of clause 14.3.2.12, one would deduce that the first part requested the bidder/s to submit the three projects as proof of experience whereas the second part - in bold print - referred to personnel within the joint venture who could carry out these works adding that it was in the latter case that mason Buhagiar would come into the picture, (k) with regard to Valletta Waterfront, they could prove that the restoration works carried out by the recommended tenderer was not completed in July 2004 – which issue had been decided upon by the PCAB at the previous appeal – but was completed as far back as 2003, mentioning in the process a letter sent by Viset and the final certificate of payment issued by Messrs Architecture Project to The Constructors Ltd, (l) even The Times had indicated that the Valletta Waterfront project was inaugurated in late 2003, (m) the restoration works on the façade of Pinto Stores was completed by The Constructors Ltd towards the end of 2003 whereas the construction of part of the façade undertaken by Agius
Stoneworks was completed at a later stage, (n) Agius Stoneworks had carried out all the works, including construction and restoration, on all the vaults which formed part of the internal structure of Pinto Stores, (o) they could not tell when the restoration works carried out by The Constructors Ltd at the back of Pinto Stores were completed and (p) Mr Agius was not charged with the supervision of the works carried out by The Constructors Ltd at the Valletta Waterfront;

- having also considered Mr Hans Attard’s testimony wherein, inter alia, (a) as far as he was aware, the restoration works on the façade of Pinto Stores by The Constructors Ltd was completed by the time he took up employment with the same firm in August 2005, (b) he stated that he was not aware of the final certificate of payment issued by Messrs Architecture Project to The Constructors Ltd dated 22nd September 2005 and (c) he stated that, during the said employment, his superior was the Construction Director, Mr Richard Xuereb, Mr Angelo Xuereb’s son;

- having also reflected on the testimony given by Mr Nyal Xuereb, especially, (a) the fact that whilst, between November 2004 and June 2008, was engaged by Architecture Project on a full-time basis to carry out supervisory duties at the Valletta Waterfront, yet now he is self-employed and, amongst other things, he was engaged as consultant on this tender by the appellants, C.A.V.V. Allieri Joint Venture, (b) his claim that no restoration works were carried out by The Constructors Ltd at the Valletta Waterfront during his term of employment which started in November 2004, (c) the fact that it could have been the case that certain final certificates were issued to The Constructors Ltd after November 2004 because they might have represented retention money on works already carried out, (d) his claim that he used to handle all the contracts at the Valletta Waterfront project and (e) his claim that despite the fact that payments following certification of works carried out at the Valletta Waterfront used to go through him, he was not aware of the payment issued in September 2005 and authorised by Architect David Drago, who was a partner in Architecture Project;

- having also taken note of the contracting authority’s representatives’ (a) remark that, contrary to what was being claimed by the appellants, the recommended tenderer had furnished in its tender submission an undertaking whereby Master Mason Lawrence Buhagiar authorised De La Valette JV to make use of and reference to his experience in masonry restoration for the purposes of submitting a tender and that, through his undertaking, Mr Buhagiar had met the requirements set out in the tender, (b) claim that Mr Buhagiar had also accepted to be appointed by De La Valette JV as Master Mason on the project, (c) statement that when the adjudicating board came across the reference by Architect Joanna Spiteri Staines (dated 26/03/10) that mason Mr Lawrence Buhagiar had satisfactorily carried out the works at Villa Cagliares, the adjudication board opted to make use of Reg. 51 (3), even though it was not laid down in the tender document, to enable them to establish the link between mason Mr Lawrence Buhagiar and De La Valette JV, (d) submission that, in terms of Reg 51 (3), the economic operator could rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, (e) reference to the fact that, with the undertaking between mason Buhagiar and De
La Valette JV, the adjudicating board had the comfort that the recommended tenderer was capable of carrying out the requested works and (f) viewpoint that the provisions of clause 14.2.3.12 were, in substance, similar to those of Reg. 51 (3) where a bidder, besides relying on one’s own experience, could also rely on that of others with whom such bidder would either engage or have an undertaking;

- having duly considered De La Valette JV’s representatives’ (a) claim that the works at Fort Rinella had been carried out by mason Lawrence Buhagiar, (b) remark that in their tender submission they had clearly indicated that the works at Villa Cagliares and Fort Rinella were carried out by master mason Lawrence Buhagiar and George Borg claiming that, certainly, that did not amount to any misrepresentation, which, apparently, was the basis of the appellants’ objection, (c) claim that the law per se (regulations - LN 177/2005) was applicable at all times and that it did not have to be reproduced in the tender document for it to be rendered applicable, (d) claim that the adjudication board could opt to make use of Reg. 51 (3) to ascertain that the tenderer had the necessary resources to carry out the contract, (e) claim that the restoration works at the Valletta Waterfront consisted mainly of Pinto Stores, (f) the major part of the restoration works were completed in July 2004 but all the works, including the part at the back of the structure, were completed during 2005, (g) the article that appeared in ‘The Times’ on the 17th December 2003 referred to the opening of part of the Waterfront Project and not of the whole project, (h) the contract for the reconstruction of that structure damaged during WWII was awarded to Agius Stoneworks whereas the contract for restoration works was awarded to The Constructors Ltd, (i) presentation of a document by Architect Drago, dated 10th November 2010, certifying that The Contractors Ltd had been awarded the restoration works at Pinto Stores and adjacent Forni Stores, (j) claim that, albeit Forni Stores were much smaller structures than Pinto Stores, yet both stores formed part of the Valletta Waterfront project and (k) claim that Mr Nyal Xuereb commenced his employment at the Valletta Waterfront in November 2004 when The Constructors Ltd had already provided evidence that they had completed the restoration works in July 2004;

- having also reflected on the appellants’ representatives’ request for Architect Drago to be summoned to (a) testify whether the works at Forni Stores were awarded as a separate contract from the works at Pinto Stores and (b) comment on Viset’s declaration indicating July 2004 and his (Architect Drago’s) declaration indicating 2005 as the completion date of restoration works carried out by The Constructors Ltd;

reached the following conclusions, namely:

1. The PCAB opines that a consortium, or a company for all that matters, is made up of its employees at different levels and that, ultimately, it is the expertise of all employees which renders such consortium or company capable of undertaking certain specialised works. This Board acknowledges that this line of reasoning should suffice to provide a contracting authority with the right level of comfort.
2. The PCAB also opines that Mr Lawrence Buhagiar, being the master mason of the project but not being a partner in the joint venture, still satisfied the requirements set out in clauses 4.2 and 14.2.3.12, especially, in consideration of the undertaking made by the same Mr Buhagiar to corroborate the submission made with the tendering company’s offer thus satisfying the requirements of Reg. 51 (3). As a consequence, this Board finds nothing wrong as regards the fact that, out of the projects mentioned by the recommended tenderer, Mr Buhagiar had carried out two, namely Fort Rinella and Villa Cagliari.

3. This Board feels that the provision of an extract from ‘The Times’ indicating that the Valletta Waterfront project was inaugurated in late 2003 does not provide any formal proof. This Board considers that the appellant joint venture had enough time to gather more credible evidence than the ones presented. As a consequence, this Board considers the request made at this stage by the appellant joint venture’s representatives to summon Architect Drago as witness in a future hearing as unnecessary as the written document drafted by the latter and submitted by the recommended tenderer’s representatives during the hearing provides sufficient formal proof to enable adequate deliberation by this Board.

4. Furthermore, this Board regards the submissions made by the appellant joint venture, in writing and during the hearing, as providing no additional significant evidence that the conclusions reached by the adjudicating board were, in any way, based on erroneous premises.

As a consequence of (1) to (4) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 December 2010
PUBLIC CONTRACTS REVIEW BOARD

Case No. 246 and Case No. 247

Case No. 246 - Objection 1

**WSM/190/2010 - Period Contract for the Hire of a Hooker Loader to be used at CA Sites managed and operated by WasteServ Malta Ltd**

This call for tenders was published in the Maltese Government Gazette on 27th August 2010. The closing date of the said call was 17th September 2010.

The estimated value of this tender was up to €120,000 over two years.

Four (4) different tenderers submitted their offers.

Case No. 247 - Objection 2

**WSM 191/2010 - Period Contract for the Hire of a Hooker Loader to be used at the SAWTP (Sant Antnin Waste Treatment Plant)**

This call for tenders was published in the Maltese Government Gazette on 27th August 2010. The closing date of the said call was 17th September 2010.

The estimated value of this tender was up to €120,000 over two years.

Six (6) different tenderers submitted their offers.

Following the decision taken by the adjudication committee to award the two tenders to Polidano Bros Ltd, Messrs Bonnici Bros Ltd filed appealed against these decisions on 21 October 2010 (both in Case No. 246 and Case No. 247) respectively.

The Public Contracts Review Board (PCRB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel J Esposito, respectively, acting as members, convened a public hearing on the 10 December 2010 to discuss these objections.
Present for the hearing were:

**Bonnici Bros Ltd**
- Dr John Gauci, Legal Representative
- Mr Mario Bonnici, Representative
- Perit Reuben Aquilina, Representative

**Polidano Bros Ltd**
- Dr Jesmond Manicaro was informed of the date of the hearing but no representative of the recommended tenderer turned up at the hearing.

**WasteServ Malta Ltd**
- Dr Victor Scerri, Legal Representative

**Adjudicating Board**
- Ing. Peter Vella, Chairperson (WSM/190/2010)
- Mr Marco Borg, Member (WSM/191/2101)

**Contracts Department**
- Mr Francis Attard, Director General

The parties concerned agreed with the suggestion put forward by the Chairman PCRB to deal with these two appeals concurrently once they involved the same parties and the cases were identical.

After the Chairman’s brief introduction the appellant company was invited to explain the motive/s of the objections.

Dr John Gauci, legal representative of Bonnici Bros Ltd, explained that both objections were basically the same and then went on to raise the following issues:

- clause 1.2.11 requested tenderers to submit with their tender offer any relevant technical literature, catalogues and/or illustrations related to the items being offered, which had to corroborate the details filled in the ‘Specifications Form’. The said clause specifically stated that these documents “are required to enable a full technical evaluation. All documents provided shall be written in English Language. **Failure to comply with this clause shall render the tender offer null**”

- clause 8.4 (xvii) provided that these hook loaders had to have the year of manufacture from 2005 onwards with Euro IV engines and respective emission standards and that failure “**to comply with the above clause**” would have rendered “**the Tender null**”
his client, being the local representative for DAF, was aware that the DAF loader offered by Polidano Bros Ltd and, for that matter, loaders offered by the other participating bidders, were not Euro IV compliant.

he called upon the adjudicating boards to state if they had verified whether the loader being offered by Polidano Bros Ltd was technically compliant and whether they had checked this against relative brochures and catalogues.

he contended that his client had submitted the only technically compliant offer.

Mr Mario Bonnici, also representing Bonnici Bros Ltd, remarked that, although Polidano Bros offered a loader manufactured in 2005 and was described as Euro IV compliant, the fact was that a Euro IV engine had to have installed the AdBlue Tank otherwise it would not be Euro IV compliant. Mr Bonnici added that he was aware that the DAF loaders owned by Polidano Bros Ltd were not Euro IV compliant.

Ing. Peter Vella, chairman of the adjudicating board (SWM/190/2010), gave the following explanations with regard to the administrative evaluation:

the tender requested a date of manufacture from 2005 onwards with Euro IV engine and the recommended tenderer declared in writing that the company was offering a hook loader manufactured in 2005 and with a Euro IV engine and respective emission standards.

Polidano Bros Ltd had submitted the catalogue as requested – as verified thereafter by the PCRB with the original tender submission - which, admittedly, could be downloaded anytime and by anyone from the internet.

the recommended tenderer submitted a copy of the logbook issued by Transport Malta, confirming the year of manufacture as 2005, and a copy of the insurance as requested.

therefore, according to the documentation submitted by Polidano Bros Ltd, the hook loader offered was manufactured in 2005 and was Euro IV compliant and, as a result, in accordance with tender specifications.

upon commencement of operations or within six weeks after the tender award the contracting authority reserved the right to inspect the hook loader offered.

Mr Vella added that, in the company’s letter of reply dated 3rd November 2010, the recommended tenderer attached a copy of the VRT test carried out on vehicle PLB060 - dated 2nd November 2010 - indicating ‘test OK’ with regard to emission limits even though the emission readings were not related to the Euro IV standards.

Mr Bonnici stated that, as from September 2006, it became compulsory for one to manufacture such loaders Euro IV compliant. Nevertheless, he conceded that manufacturers could have placed on the market this kind of plant Euro IV compliant even in 2005.
The Chairman PCRB referred to the email dated 14 September 2010 from WasteServ Malta Ltd addressed to Mr Reuben Aquilina of Bonnici Bros Ltd wherein it clarified that the Euro IV Emissions Standard was approved and came into effect on 1st October 2005 and that, as a consequence, the tender technical specifications were correct.

Mr Bonnici explained that Transport Malta would register a vehicle as compliant with Euro IV standards from year of manufacture 2006 onwards. He added that the fact that a vehicle passed the VRT test did not mean that the vehicle was Euro IV compliant and further stated that, in spite of the fact that heavy duty vehicles on our roads passed the local VRT, there were only about 100 such vehicles that were Euro IV compliant. Mr Bonnici maintained that he could not picture a situation where a vehicle was manufactured somewhere in Europe after October 2005, namely when the Directive came into force, brought over to Malta and registered with the local transport authority during 2005 and that was why Transport Malta deemed 2006 as the starting date for the registration of Euro IV engines.

Ing Vella stated that, to inspect such heavy duty vehicles, WasteServ Malta Ltd usually would detail a graduate engineer either from within the organisation itself but unconnected with the adjudication process or else engage an independent engineer. He added that the tender provided for inspections to be made and for the log book to be presented even after the award of tender because the contracting authority wished to leave the tender open also to bidders who would import the required vehicle once they were awarded the contract. Mr Vella remarked that if it would, eventually, result that, upon inspection, the vehicle was not found up to specifications then the contracting authority would (i) impose upon the contractor the penalties contemplated in the tenderer, (ii) terminate his contract and (iii) award the tender to the next compliant bidder, if there would be any, or else issue a fresh call for tenders.

Ing. Vella remarked that by time one became aware of what the relatively small local market had to offer in terms of plant and equipment but, then again, a contracting authority had to rely on the documentation submitted and on subsequent inspections and not on personal knowledge. He added that, at that stage, no verifications had been carried out with Transport Malta.

Dr Gauci insisted that, besides the 2005 year of manufacture, the bidder had to corroborate one’s claim that the vehicle was Euro IV compliant with documents and illustrations – as his client did – especially since the hook loader offered was already in the possession of the recommended tenderer.

Dr Victor Scerri, legal representative of WasteServ Malta Ltd, the contracting authority, remarked that the contracting authority could not depart from the point that the bidder was not going to offer what one would have committed oneself to provide in one’s tender submission but the contracting authority had to go by the documentation presented reserving the right to inspect the equipment. Dr Scerri argued that, once the recommended tenderer was compliant as far as the documentation was concerned, then the contracting authority had to award the said bidder the tender otherwise the contracting authority would be inviting an objection from that same tenderer. Dr Scerri assured the PCRB that, at the opportune time, the contracting authority would carry out the necessary inspections on the equipment being offered.
The Chairman PCRB observed that the point of departure of the contracting authority was October 2005, the date the relative EU Directive came into force and hence a hook loader manufactured in 2005 could still be Euro IV compliant. The Chairman PCRB remarked that once the preferred bidding company was offering a particular hook loader, so much so that it presented its log book, then the inspection had to be carried out on that specific vehicle and not on any other vehicle.

Ing. Vella informed the PCRB that in tender WSM/190/2010 the next cheaper bid was that of Bonnici Bros Ltd whereas in tender WSM/191/2010 the next cheapest bidder was Mr Andrew Abela’s – who did not lodge an appeal - with Bonnici Bros Ltd next in line. Dr Gauci declared that what applied to Polidano Bros Ltd applied to Mr Andrew Abela in the sense that both were technically not compliant. The Chairman PCRB remarked that it appeared that should Polidano Bros Ltd bid be found technically non compliant on inspecting the hook loader then both tenders would eventually be awarded to Bonnici Bros Ltd.

The Chairman PCRB remarked that, at this stage and in both cases, the PCRB had to establish whether the two adjudication boards had acted correctly as far as administrative compliance was concerned and that it had to leave it up to the contracting authority to move on to the next step of inspecting the plant offered to see whether they were up to the technical data indicated in the relative tender submissions.

It transpired that Polidano Bros Ltd offered the same hook loader in these two calls for tenders and hence the question arose as to whether this bidder could service both tenders with one loader considering that in both instances the said bidder had to provide the service within a relatively short time from the order to do so.

Dr Scerri argued that the contracting authority had to evaluate each tender separately and according to the documentation provided in each case and, similarly, Polidano Bros Ltd was entitled to bid for both the contracts because the company had no assurance that it would be awarded both contracts. He added that even if Polidano Bros Ltd were to be awarded both contracts the contractor would have to provide the service as specified in the tender and failure to do so would result in the imposition of penalties and, possibly, the termination of the contract.

Dr Gauci considered it nearly impossible for the recommended tenderer to service both contracts with the same hook loader in the light of the provisions of clause 8.5.1 which stated that:

“The Hook Loader is expected to operate on a 7-day week cycle from 0600hrs to 2300hrs. In exceptional circumstances, the Hook Loader may be required to operate outside these hours. …”

At this stage the public hearing was brought to a close and the PCRB proceeded with the deliberation before reaching its decisions.

Following thorough deliberation, the PCRB felt that, considering the amount of overlap with regards to facts submitted by all interested parties, verbally and during the said hearing, as well as the relevance to both appeals of submissions and
statements made, the PCRB decided to treat all in a holistic manner listing its decision motives separately if and where required for it to do so.

This Board,

- having noted that the appellants, in terms of their ‘motivated letters of objection’ dated 21 October 2010 (in Case No. 246 and Case No. 247) respectively, and also through their verbal submissions presented during the public hearing held on the 10.12.2010, had objected to the decision taken by the Adjudication Committee;

- having noted the appellant company’s representatives’ (a) submission relating to the fact that clause 8.4 (xvii) provided that these hook loaders had to have the year of manufacture from 2005 onwards with Euro IV engines and respective emission standards, (b) submission relating to the fact that they were aware that the DAF loader offered by Polidano Bros Ltd and, for that matter, loaders offered by the other participating bidders, were not Euro IV compliant, (c) claim that their offer was the only technically compliant offer and (d) claim that Transport Malta would register a vehicle as compliant with Euro IV standards from year of manufacture 2006 onwards and that the fact that a vehicle passed the VRT test did not mean that the vehicle was Euro IV compliant;

- having considered the contracting authority’s (a) remark that the tender requested a date of manufacture from 2005 onwards with Euro IV engine and the recommended tenderer declared in writing that the company was offering a hook loader manufactured in 2005 and with a Euro IV engine and respective emission standards, (b) claim that Polidano Bros Ltd had submitted the catalogue as requested, (c) claim that the recommended tenderer submitted a copy of the logbook issued by Transport Malta, confirming the year of manufacture as 2005, and a copy of the insurance as requested, (d) submission that upon commencement of operations or within six weeks after the tender award the contracting authority reserved the right to inspect the hook loader offered, (e) statement that the tender provided for inspections to be made and for the log book to be presented even after the award of tender because the contracting authority wished to leave the tender open also to bidders who would import the required vehicle once they were awarded the contract, (f) remark that if it would, eventually, result that, upon inspection, the vehicle was not found up to specifications then the contracting authority would (1) impose upon the contractor the penalties contemplated in the tenderer, (2) terminate his contract and (3) award the tender to the next compliant bidder, if there would be any, or else issue a fresh call for tenders, (g) remark that at that stage, no verifications had been carried out with Transport Malta and (h) claim that the contracting authority could not depart from the point that the bidder was not going to offer what one would have committed oneself to provide in one’s tender submission but the contracting authority had to go by the documentation presented reserving the right to inspect the equipment;

- having also considered the email dated 14 September 2010 from WasteServ Malta Ltd addressed to Mr Reuben Aquilina of Bonnici Bros Ltd wherein it clarified that the Euro IV Emissions Standard was approved and came into effect on 1st October 2005 and that, as a consequence, the tender technical specifications were correct;
reached the following conclusions, namely:

1. The PCRB acknowledges that, in full consideration of what emerged during the hearing, in both Case Nos. 246 and 247 respectively, it cannot uphold the objections as filed by appellants subject to the proviso that further checks will have to be carried out to ensure that the hook loader offered by Messrs Polidano Bros Ltd is indeed EU IV certified.

2. The PCRB feels that, whilst Polidano Bros Ltd offered the same hook loader in these two calls for tenders, yet the contracting authority had to evaluate each tender separately and according to the documentation provided in each case and, similarly, Polidano Bros Ltd was entitled to bid for both the contracts because the company had no assurance that it would be awarded both contracts.

3. The PCRB recommends that, upon verification, should it be established that the submission made by the recommended tenderer ends up not corroborating with actual findings made by the authority’s representative/s, then, as a consequence, apart from the imposition of fines as contemplated in the tender document, the second cheapest compliant tenderer’s offer - in both cases under review - will have to be re-evaluated with a view for the said tenderer/s to be awarded the tender.

4. The PCRB establishes that the awarded tenderer cannot be allowed to offer a hook loader other than the one specifically referred to in the offer.

5. Finally, the PCRB recommends that the pertinent contract between the contracting authority and the awarded tenderer/s should not be signed prior to the positive outcome following apposite inspection carried out within the six week period allowed in the tender document.

As a consequence of (1) to (5) above, this Board:

1. cannot uphold the objection (Case No. 246) as lodged by appellants

2. cannot uphold the objection (Case No. 247) as lodged by appellants

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants (Case Nos.246 and 247 respectively) should not be reimbursed if, following further verification within the next six weeks, it transpires that the recommended tenderer’s statement regarding compliance with EU IV certification was justified. On the other hand, this Board recommends that the deposit submitted by the said appellant company should be reimbursed if the recommended tenderer’s statement is found to be non-compliant.
Report on the Working of the GCC, PCAB, and PCRB During 2010

Alfred R Triganza  Edwin Muscat  Carmel J Esposito
Chairman    Member    Member

16 December 2010
PUBLIC CONTRACTS REVIEW BOARD

Case No. 248

WSM/149/2010

Period Contract for a Rodent Control Programme and Pest Control Services

This call for tenders was published in the Government Gazette on 11 June 2010. The closing date for this call for offers was 25 June 2010.

The estimated value of this tender was up to €120,000 over two years.

Two (2) tenderers submitted their offers.

Ortis Ltd filed an objection on 23 July 2010 against the decision taken by the WasteServ Malta Ltd to (i) disqualify its offer as it was considered not compliant and (ii) award the tender to Comtec Services Ltd.

In terms of PART II – Rules governing public contracts whose value does not exceed €120,000 of LN 296 of 2010 the Public Contracts Review Board, composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members, convened a public hearing on Monday, 10 December 2010 to discuss this objection.

Present for the hearing were:

**Ortis Ltd**

- Mr Mario Callus Representative
- Mr Adrian Borg Marks Representative

**Comtec Services Ltd**

- Mr Ronnie C. Galea Representative

**WasteServ Malta Ltd**

- Dr Victor Scerri Legal Representative
- Mr Aurelio Attard Representative

**Adjudicating Board**

- Mr Tonio Farrugia Chairperson
- Mr Marco Putzulu Caruana Member

**Contracts Department**

- Mr Francis Attard Director General
After the Chairman’s brief introduction the appellant company was invited to explain the motive/s of the objection.

In providing the motives behind his objection Mr Mario Callus, representing Ortis Ltd, the appellant company, made reference to *Services Specified in the Tender*.

Mr Callus stated that although the tender document title included the term ‘pest control services’, the tender specifications made no mention whatsoever of the ‘fly trap recharge’ except at item 19 in the *Schedule of prices and rates*, where the details had been crossed out while requesting the tenderers to quote the rate. He added that a bidder should not be expected to bid for a service without having been given the details of the service requested.

Mr Aurelio Attard, representing WasteServ Malta Ltd, the contracting authority, conceded that the tender document as such did not contain information about the ‘fly trap recharge’ except at item 19 of the *Schedule of Rates and Prices*. Mr Attard explained that, in the opinion of the contracting authority, the term ‘fly trap recharge’ was self-explanatory and required no further elaboration for those in this line of business. Mr Attard added that the tender document also provided for site visits by prospective bidders.

Mr Attard pointed out that bidders had the opportunity to request clarifications in instances where they felt that more information was warranted and the contracting authority would have circulated such information to all participating tenderers. Mr Attard concluded that the contracting authority had requested the rate for this service but the appellant company, Ortis Ltd, did not quote the rate against item 19 of the schedule ‘recharging of fly traps’.

With regards to the rodent control service referred to in the award and the defective schedule of offers received, Mr Callus explained that the call for tenders was requesting the provision of two services, namely the setting up of the rodent bait stations, which involved a once-only service, and the periodical recharging of these bait stations during the contract period. Mr Callus noted that the recommended tenderer had quoted €1.31 per baiting point and it was not clear to him if that rate included the provision of the bait station and its recharge cost and, if that was the case, he questioned how come that the total price for servicing this contract would amount to a mere €753.25 – as per schedule of offers received and as per breakdown provided by the preferred bidder - over a period of two years.

Mr Attard intervened to reiterate that, in case of any grey areas in the tender specifications, the appellant company was at liberty to request clarifications prior to the closing date of the tender.

The Chairman PCRB, on consulting page 2 of the evaluation report ‘Summary of tenders received’, observed that, evidently, the *Schedule of Offers Received* was not compiled on a like-with-like basis in the sense that the prices of the appellant company, option 1 of €74,136.70 and Option 2 of €72,187.20, covered the whole contract period whereas the €753.25 quoted by the recommended tenderer was the monthly rate. He added that, for comparison purposes, the price quoted by the preferred bidder on the *Schedule of Offers Received* should be €18,098 (€753.25 x 24
months) and pointed out the considerable variation in the prices quoted by the two tenders and even when compared to the estimated value of the tender of €120,000.

Regarding the wide variation between the two prices quoted, Mr Attard remarked that it was up to the bidders to ensure that the prices they quoted were realistic, however, he added that the rates quoted by the recommended tenderer were in line with the current rates for the same services. Mr Attard explained that although this was a single package tender, the adjudicating board still had to evaluate the tender in stages and in fact the appellant company was disqualified on administrative grounds for having failed to submit the mandatory information regarding its past experience and, therefore, the other aspects of the appellant company’s offer, including the financial side of it, were not evaluated. He informed the PCRB that two tenderers participated in this call for tenders, the appellant company and Comtec Services Ltd, the latter being the recommended tenderer and the current contractor.

Mr Attard also explained that, besides the existing sites such as Maghtab, Zwejra and Qortin Landfills, WasteServ Malta Ltd included in this tender new sites which brought the total number of sites to 18.

The question arose as to whether there was level playing field given that on the previous sites, the recommended tenderer, being the current contractor, already had baiting stations in place whereas the appellant company, not being the current contractor, would have to provide baiting stations to existing sites, unless the baiting stations presently in place were the property of WasteServ Ltd and thus could be used by whoever was awarded the tender.

Mr Marco Putzulu Caruana, member of the adjudicating board, under oath, declared that, previously, the baiting station was in the form of a tube whereas in this call for tenders the baiting station had to be in the form of a box which was lockable and hence more secure so that no other creatures would be able to enter the baiting station. He confirmed that, according to the new tender specifications, whoever was awarded this tender had to replace the existing baiting stations and, as a consequence, all the bidders were effectively competing on a level playing field.

When referring to the issue of Past Performance Records, Mr Callus stated that clause 1.2.14 provided that:

“Tenderers shall provide with their offer a document with the Full details and Past Performance Records of similar pest control services carried out by his/her company. Failure to comply with this clause shall render the Tender offer null.”

Mr Callus remarked that he rendered such services to various clients and that whilst he was prepared to provide information regarding his capabilities to provide the services requested in the tender, yet he was reluctant to divulge details about its clients without obtaining their permission beforehand.

Mr Attard conceded that in its tender submission Ortis Ltd did give an account of its experience in this sector but the information given was of a general nature and lacked the full details as requested in the tender document. Mr Attard remarked that the appellant company considered such information as confidential and that it would
provide it once it is shortlisted. Mr Attard explained that the adjudication of this tender did not involve short-listing adding that the contracting authority expected the bidders to name their past clients and the type of service that they rendered them. Mr Attard noted that this requirement was included in most of the calls for tenders issued by government and bidders were even requested to authorise the contracting authority to verify from source the information they gave for the purpose of evaluating the track record of the tenderers. The contracting authority’s main representative stated that it was up to the bidders to obtain the consent of their clients prior to divulging the information to the contracting authority. Mr Attard observed that Ortis Ltd did mention the Water Services Corporation as one of its clients but, then again, it was not clear if the appellant company simply provided the products or if it rendered the full service.

Mr Mario Callus remarked that, at the time this tender was issued, he was rather busy and, as a result, he did not have the time to seek clarifications from the contracting authority. On the other hand, he contended that the tender document should have been issued in more detail and the schedules and information emanating from the adjudication process should have been presented in a more logical and articulated manner.

The Chairman PCRB remarked that albeit the bidders had the right and the opportunity to seek clarifications from the contracting authority, yet it was not up to the bidder to decide which mandatory information it would submit or not. He added that, ultimately, it was the responsibility of the bidder to ensure that its tender submission was presented in order.

Mr Ronnie Galea, technical director of Comtec Services Ltd, an interested party, made the following remarks:

a. contrary to the previous tender issued in 2008, where it was left up to the contractor as to what type of bait station to provide, in this tender the contracting authority specified the kind of box that had to be provided as a bait station and, in that regard, his firm would have to replace all the bait stations presently in place since they were in tube form;

b. whilst his company’s quote of €753.25 per month was arrived at according to the data given by the contracting authority, yet, since there was the eventuality of more bait stations being added on the company also included the standard rate of €1.31 per month per baiting point, which included the provision of the baiting station (the box) requested in the tender – a once only expense - and one inspection treatment visit per month. His firm had estimated that it would recover the cost of the bait station over the two year contract period; and

c. the price quoted by Comtec Services Ltd was commercially viable because it was, more or less, the same rate charged in the execution of the current contract.

By way of conclusion Mr Callus stated that had the tender specifications been clearer from the beginning and had the schedule of offers received been
compiled properly on a like-with-like basis then the need for lodging this appeal would not have arisen.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 23 July 2010 and also through their verbal submissions presented during the public hearing held on 10 December 2010 had objected to the decision taken by WasteServ Malta Ltd;

- having taken note of the appellant company’s representatives’ (a) claim that although the tender document title included the term ‘pest control services’, the tender specifications made no mention whatsoever of the ‘fly trap recharge’ except at item 19 in the schedule of prices and rates, where the details had been crossed out while requesting the tenderers to quote the rate, (b) reference to the fact that the call for tenders was requesting the provision of two services, namely the setting up of the rodent bait stations, which involved a once-only service, and the periodical recharging of these bait stations during the contract period, (c) reference to the fact that, with regards to submission of past performance records, the company whilst it has rendered such services to various clients, yet it reluctant to divulge details about its clients without obtaining their permission beforehand and (d) remark that, at the time this tender was issued, he was rather busy and, as a result, he did not have the time to seek clarifications from the contracting authority;

- having also taken note of the contracting authority’s representatives’ (a) reference to the fact that whilst the contracting authority would concede that the tender document as such did not contain information about the ‘fly trap recharge’ except at item 19 of the Schedule of Rates and Prices, yet, in the opinion of the contracting authority, the term ‘fly trap recharge’ was self-explanatory and required no further elaboration for those in this line of business, (b) claim that the tender document also provided for site visits by prospective bidders, (c) claim that bidders had the opportunity to request clarifications in instances where they felt that more information was warranted and the contracting authority would have circulated such information to all participating tenderers, (d) claim that clauses 8.4.4, 8.4.5 and 8.4.6 clearly described the type of bait stations required and the relative bait station markers with the rate mentioned including the setting up of the bait station, (e) remark that, whilst it was up to the bidders to ensure that the prices they quoted were realistic, yet, the rates quoted by the recommended tenderer were in line with the current rates for the same services, (f) claim that since this was a single package tender, the adjudicating board still had to evaluate the tender in stages and in fact the appellant company was disqualified on administrative grounds for having failed to submit the mandatory information regarding its past experience and, as a result, the other aspects of the appellant company’s offer, including the financial side of it, were not evaluated, (g) reference to the fact that besides the existing sites such as Maghtab, Zwejra and Qortin Landfills, WasteServ Malta Ltd included in this tender new sites which brought the total number of sites to 18,
(h) declaration that, previously, the baiting station was in the form of a tube whereas in this call for tenders the baiting station had to be in the form of a box which was lockable and hence more secure so that no other creatures would be able to enter the baiting station, (i) claim that, according to the new tender specifications, whoever was awarded this tender had to replace the existing baiting stations and, as a consequence, all the bidders were effectively competing on a level playing field and (j) claim that it was up to the bidders to obtain the consent of their clients prior to divulging the information to the contracting authority;

• having taken cognizance of the fact that in page 2 of the evaluation report ‘Summary of tenders received’ the Schedule of Offers Received was not compiled on a like-with-like basis in the sense that the prices of the appellant company, option 1 of €74,136.70 and Option 2 of €72,187.20, covered the whole contract period whereas the €753.25 quoted by the recommended tenderer was the monthly rate. Furthermore, for comparison purposes, this Board also notes the price quoted by the preferred bidder on the Schedule of Offers Received should be €18,098 (€753.25 x 24 months) pointing out the considerable variation in the prices quoted by the two tenders especially when compared to the estimated value of the tender of €120,000;

• having thoroughly considered Mr Galea’s remarks, especially (1) the fact that if awarded the tender his firm would still have to replace all the bait stations presently in place since they were in tube form, (2) that in its rate as quoted in the tender submission the company had estimated that it would recover the cost of the bait station over the two year contract period and (3) the fact that the price quoted by Comtec Services Ltd was commercially viable because it was, more or less, the same rate charged in the execution of the current contract,

reached the following conclusions, namely:

1. The PCRB feels that due to the fact that, according to the new tender specifications, whoever was awarded this tender had to replace the existing baiting stations, all the bidders were effectively competing on a level playing field.

2. The PCRB opines that, albeit the bidders had the right and the opportunity to seek clarifications from the contracting authority, yet it was not up to the said bidders to decide which mandatory information they would submit or not.

3. Furthermore, this Board argues that, whilst it was up to the bidders to ensure that the prices they quoted were realistic, yet, the rates quoted by the recommended tenderer were in line with the current rates for the same services and that, all things being equal, the commercial risk has been fully absorbed by the participating tenderer.

As a consequence of (1) to (3) above this Board finds against appellant company.
In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 December 2010
Report on the Working of the GCC, PCAB, and PCRB During 2010