

PUBLIC CONTRACTS APPEALS BOARD

Case No. 114

Advert No CT 453 /2006 - CT 2680 /2006 and DH 1664/2006 Building Engineering Services for the Construction of a 280-Bed Facility

This call for tenders was published in the Maltese Government Gazette on 19.12.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Health Division.

The actual closing date for this call for offers was 08.02.2007 and the estimated original contract value was Lm 360,000.

Four (4) different tenderers submitted their offers.

Following the publication by the competent Authority of the award of tender on 02.08.2007 and subsequent receipt of (i) a letter dated 13.04.2007 which was sent by the Health Division to Messrs *Scicluna & Associates Engineering Consultants* wherein the latter were notified that they had “*failed to satisfy the tender requirement of Article 4, “Qualification Requirements” regarding the submission of professional references*” and (ii) other correspondence relating to same subject matter as well as the amount of deposit payable when lodging a formal complaint, the latter filed an objection on 10.08.2007 against the intended award of the tender in caption to Messrs *Engineering Services 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 two public hearings on 05.12.2007 and 11.12.2007 respectively to discuss this objection.

Present for the hearing were:

Scicluna & Associates Engineering Consultants

Dr Norval Desira	-	Legal Advisor
Ing Alfred Scicluna		
Ing Simon Scicluna		
Ing Joseph Scicluna		

Engineering Services Ltd

Dr Tanya Camilleri Sciberras	-	Legal Advisor
Ing Anton Cutajar		
Ing Oliver Aquilina		

Health Division – Evaluation Committee

Mr Joseph Micallef	-	Chairperson
Mr Joseph Degiorgio	-	Member
Mr Peter Morales	-	Member

Department of Contracts

Mr Francis Attard	-	D G (Contracts)
-------------------	---	-----------------

Public Hearing of the 5th December 2007

After the Chairman's brief introduction Scicluna & Associates Engineering Consultants' legal representative was invited to explain the motive which led to their objection.

Dr Norval Desira, the appellants' legal representative, commenced his intervention by stating that his clients' objection was directed against the evaluation carried out by the Evaluation Committee because they felt that there were various categories where the recommended tender was awarded more points than it deserved while his clients were awarded less points.

The appellants' lawyer referred also to the issue regarding the amount of deposit that the appellants were requested to pay, that is, Lm 3,600 which was 1% of Lm 360,000. The lawyer argued that, based on a professional fee of 4%, the estimated value of the Mechanical and Electrical works would amount to Lm9 million, which was surely on the high side.

Mr Francis Attard, Director General (Contracts), was the first witness to be summoned to testify.

In reply to specific questions by Dr Desira regarding

- (i) the professional experience of Engineering Services Limited and the period of time taken to complete the projects indicated in their offer,

and the
- (ii) Rationale, Strategy and Timetable of Activities.

the witness said that the Evaluation Committee was in a better position to answer. Mr Attard went on to explain that, in public tender evaluation, whenever clarifications are sought, these are always referred to the Department concerned and the latter prepares a draft reply which is subsequently issued by the Contracts Department to all prospective bidders. In other words, the Contracts Department serves only as the intermediary.

Mr Attard testified that the amount of Lm 360,000 represented the estimated fee payable for consultancy services to be provided under this tender. The said amount, continued the DG Contracts, was calculated by the Health Department.

When the Chairman of the Evaluation Committee, Mr Joseph Micallef, took the stand, he was asked by Dr Desira to state what was the 'experience' indicated by Engineering Services Limited in their offer. The witness replied that he was not in a position to answer because, apart from the fact that they did not bring along the individual offers, he needed to consult his lawyer to establish whether such information could be divulged. Dr Desira responded by stating that he did not see any reason why such information could not be disclosed, arguing that that there was nothing confidential once this formed an integral part of a public tender. The appellants' legal representative insisted that, in the prevailing circumstances, he had no alternative but to request for the postponement of the public hearing because the

relevant documentation was indispensable for him to ask the necessary questions and for the Evaluation Committee to explain the basis on which they awarded the points. At this stage, the PCAB intervened by assuring Dr Desira that the procedure will be transparent enough giving all involved parties the possibility to view all documentation pertinent to the case. Needless to say, concluded the PCAB, that in line with its declared policy, the PCAB was only against fishing expeditions which are never tolerated anyhow.

In reply to a specific question by the PCAB, Mr Micallef said that the Board was composed of a Chairman and three members and that the points were given collectively after analysing the offers.

Continuing, Dr Desira alleged that, apparently, the Evaluation Committee did not analyse the tenders in detail since one of the tenderers, namely Zammit & Associates, was awarded maximum points in spite of the fact that albeit Clause 4.1.1 of the tender requested a minimum ten years professional experience, the said tenderer had only eight years experience.

Dr Desira claimed that it was very doubtful whether Engineering Services Limited could obtain the maximum points (40 + 10) under Clause 4.1.2. The lawyer clarified that they were not contesting the recommended tenderer's ten years experience as specified under Clause 4.1.1 because this dealt with general experience but their experience as stipulated under clause 4.1.2 since this was specifically requested '*in design, tender preparation and supervision of Health and Elderly Care projects.*' The appellants' legal advisor argued whether it was possible that the Evaluation Committee could have based its evaluation on a subjective opinion rather than on an objective one, based on facts.

At this point, Dr Tanya Camilleri Sciberras, legal representative of Engineering Services Limited, intervened by stating that (i) whilst she would request the PCAB to ensure that no fishing expeditions be allowed in view of the fact that the appellants were basing their arguments by simply trying to cast doubt rather than reflecting availability of tangible proof, (ii) she was also drawing the attention of those present that, in their offer, her clients provided a list of projects as required in the tender document.

Following Dr Camilleri Sciberras' intervention the PCAB proceeded to explain that for the purpose of this appeal, they would only consider the appellants' offer vis-à-vis that of the recommended tenderer enabling a benchmarking exercise to be conducted amongst them.

In line with its declared stand, the PCAB presented Mr Micallef with copies of both offers, and the latter confirmed that these were the bids submitted by Scicluna & Associates Engineering Consultants and Engineering Services Limited.

On cross-examination by Dr Desira, Mr Micallef declared that under *Health and Elderly Care Projects*, Engineering Services Limited indicated various projects that were completed at *St Lukes Hospital* and one at *Casa Antonia Retirement Village*. He also confirmed that no dates were shown against each project. The Chairman of the Evaluation Committee said that in attached ANNEX titled, 'EXPERIENCE: Relevant Projects Completed', it was specified that this included '*information about the major*

projects completed over the past ten years, giving priority to any Health and Elderly Care projects'. Furthermore, it was declared that Engineering Services Limited had presented references/declarations which stated that between 1993 and 1998 they were involved in the design, preparation of the tender documents, supervision and works completion on the refurbishing at *St Lukes Hospital*. Also, continued Mr Micallef, in other documents, it was indicated that between 2000 and 2002 the same tenderer was involved from project inception to completion of *Casa Antonia Retirement Village*. Dr Desira insisted that the said tenderers should have submitted such information against each contract in order to satisfy the requirements of Clause 4.1.2. Actually, continued Dr Desira, the works at *St Lukes Hospital* were carried out under separate contracts and not under a holistic contract that included all services required in this tender. Mr Micallef responded by stating that the only holistic project carried out in the health sector was that relating to the Mater Dei Hospital whose magnitude was undoubtedly larger.

When asked by Dr Desira about the fact that the projects at *St Lukes Hospital* could not be considered to be 'health and elderly care projects', Mr Micallef claimed that the elderly were part of *St Lukes Hospital* because the majority of patients treated there were elderly. Also, he further argued that the 'New Data Centre' at *St Lukes Hospital* was relevant because a hospital complex did not offer solely health services but also supporting services. At this point, Dr Desira insisted that *St Lukes Hospital* was not considered as an elderly care facility.

The PCAB intervened to question the scope of the tender's requirement regarding 'professional experience in design, tender preparation and supervision of Health and Elderly Care Projects' once the common denominator between a normal hospital and a 'health and elderly care project' was the same. On his part, Mr Micallef said that the project under reference, namely, the construction of a 280 bed Rehabilitation Facility was a rehabilitation hospital and that it had no connection with St. Vincent De Paul Residence. The appellants' lawyer insisted that the tender was issued for a rehabilitation facility within the precincts of St. Vincent De Paul Residence and not for a hospital. He said that his clients had submitted their offer because they had vast experience in health and elderly care projects, otherwise they would not have tendered.

Considering Mr Micallef's own admission, the PCAB said that it would have then been more appropriate if the Contracting Authority would have mentioned the word 'hospital' rather than 'rehabilitation facility'.

When Dr Desira referred the witness to his clients' experience, Mr Micallef confirmed that Scicluna & Associates Engineering Consultants provided a list of projects completed as per ANNEX found in page 44 of the Tender Document and confirmed that they had indicated the date against each project.

The appellants' lawyer then questioned how his clients and the recommended tenderer were given maximum points for 'five years professional experience in design, tender preparation and supervision of Health and Elderly Care projects' considering the fact that the first had provided a list of projects related specifically to health and elderly care together with relative dates while the latter only submitted a declaration that the projects were completed within the ten years without indicating the date of each

contract and also the fact that the large majority thereof were all related to general health projects, namely, *St Lukes Hospital*.

Mr Micallef explained that in their evaluation they took into consideration:

- (a) the tenderers' experience on projects of a general nature as per clause 4.1.1
- (b) their experience regarding health and elderly care projects as per Clause 4.1.2
- (c) their proven track record on general terms as per Clause 4.1.3.

When asked to intervene, Mr Peter Morales, another member of the Evaluation Committee, explained that, from an engineering perspective, a person who would have gained ample experience within various operational facets of a hospital would have concurrently gained enough experience in specific areas of any hospital. Considering the witness' statement, the PCAB asked Mr Morales to state who would have the most suitable experience for the rehabilitation facility, namely a tenderer who would have had general experience in health institutions or another who would have had experience in specific facets such as in health and elderly care projects, Mr Morales said that on the basis of this tender he would give them equal points.

Continuing, Dr Desira remarked that Engineering Services Limited did not indicate any experience gained between 2002 and 2007. However, when the PCAB drew the attention of Mr Micallef about the fact that in the Revised Evaluation Grid it was specified that a tenderer would be given *'plus two points for every extra year over the five years professional experience'*, Mr Micallef replied that this did not necessarily refer to the last five years. The appellants' lawyer responded that in the tender document the Contracting Authority requested 10 years experience over the past 10 years, as implied in an attached Annex *'EXPERIENCE: Relevant Projects Completed'* wherein it was specified that all tenderers had to *'fill in all the information about the major projects completed over the past ten years, giving priority to any Health and Elderly Care projects'*. Also, in another ANNEX titled *'EXPERIENCE: All projects in progress'* it was specified that a tenderer had to *'fill in all information about the major projects presently in progress, giving priority to any Health and Elderly Care projects'*.

Mr Joe Degiorgio, another member of the Evaluation Committee, clarified that they did not give points for all projects in the list because this was requested for information purposes. They gave points only for relevant projects that satisfied the requirement of clause 4.1.2.

At this point Dr Desira exhibited a letter from Zammit & Associates which stated that Engineering Services Limited were not involved in the Mater Dei Hospital's design and tender preparations, and that its engineers only attended as witnesses for the inspections since relative services were provided by others.

Dr Camilleri Sciberras drew the PCAB's attention that the letter presented by the appellants was not signed and that it included false allegations against her clients. She insisted that the person concerned should be called to the witness stand to testify under oath. Dr Desira explained that the letter was not signed because he received it on 2 December 2007 as an attachment to an e-mail sent by Engineer Norman Zammit

who was one of the tenderers. Dr Desira said that this person could not attend for this hearing because he was abroad and that he was expected to return to Malta on the 19 December 2007. However, the lawyer said that he was prepared to testify under oath that he had received that letter from Mr Zammit.

Dr Camilleri Sciberras intervened and insisted that the letter should be signed by its author since otherwise her clients would not be able to seek any judicial redress in case they decided to do so.

At this point the both Drs Camilleri Sciberras and Desira, respectively, decided to make the following verbal submissions:

Dr Norval Desira, representing Scicluna & Associates Engineering Consultants:

‘L-implikazzjoni tal- works in progress li qiegħed isir fil- Mater Dei ma jaqax taħt it-terms of reference ta’ clause 4.1.2 billi ma hemm l-ebda xogħol ta’ design, tender preparation u/ jew supervision fis-servizzi li qegħdin isiru fil-Mater Dei liema esperjenza giet rikjesta specifikatament għall-finijiet ta’ l-iscore mogħti taħt Clause 4.1.2 u li allura jfisser illi Engineering Services Ltd ma għandhiex l-esperjenza neċessarja għall-finijiet tal-puntegġ sħiħ mogħti lilha taħt din il-klawsola.

Dr Desira jitlob ukoll li l-Adjudicating Board jesebixxi fl-atti ta’ dan l-appell kopji tal-professional references u tad-dettalji tal-kuntratti sabiex dan il-bord ikun jista jezamina jekk effettivament is-servizzi elenkati minn Engineering Services għall-finijiet tal-klawsola 4.1.2 fid-definizzjoni stretta mogħtija fl-istess klawsola jimmeritawx il-puntegġ massimu mogħti mill-Adjudicating Committee.’

Dr Tanya Camilleri Sciberras representing Engineering Services Ltd;

‘Fl-ewwel lok tiddeplora li tiġi pprezentata ittra mingħajr firma da parti ta’ tenderer ieħor mill-Inġinier Norman Zammit u tirriserva l-posizzjoni tagħha fil-konfront tiegħu.

Fit-tieni lok tirrileva wkoll illi fit-tender document u l-annexes annessi fl-ebda ħin ma ntqal illi Engineering Services Ltd kienet involuta fid-design and tender preparation inkonnessjoni mal-proġett ta’ Mater Dei.

Fit-tielet lok tikkontesta dak allegat minn Dr Norval Desira għal Scicluna & Associates bħala totalment infondat u mhux sostanzjat.’

The hearing proceeded with Dr Desira insisting that the recommended tenderer did not submit the list of projects according to the requirements of Clause 4.1.2. He argued that it is a known fact that they had a minimum of five years professional experience specifically related to health and elderly care projects. Mr Micallef intervened and argued that the list submitted by Engineering Services Limited was relevant for the purposes of Clauses 4.1.1 and 4.1.2 respectively. Dr Camilleri Sciberras, on her part, reiterated that the information submitted by her clients was according to the requirement of the tender document.

Dr Desira contended that the tender document was anomalous and that the PCAB was being misled. He said that under clause 4 there was a requirement that '*All experiences quoted must be supported by professional reference*' and that they even received a letter asking them to '*forward the professional references requested*'. Dr Desira claimed that they were informed that the offers of any tenderer who failed to submit such declaration would not be considered any further. Mr Micallef pointed out that they analysed all the information available and that they had all the required references.

Dr Desira reiterated that the dates against each contract were indispensable for the Evaluation Committee because they had to establish that the tenderers had the required '*minimum of five years professional experience in design, tender preparation and supervision of Health and Elderly Care projects*'. The appellants' lawyer said that the experience indicated at Mater Dei Hospital could not be taken into consideration because in her *verbal* the recommended tenderers' lawyer admitted that they were not involved in the design and tender preparation. Dr Desira claimed that, apart from this, Engineering Services Limited had experience only in health projects and not in health and elderly care projects. As far as *Casa Antonia Retirement Village* was concerned, they felt that they should not have taken two to three years to provide such services. The appellants' legal representative said that he failed to understand how the Evaluation Committee gave the points without seeking any clarifications especially when one takes into consideration the fact that he did not mention another tenderer who was given maximum points even though the said tenderer had declared that they did not have the necessary experience. All this, argued Dr Desira, goes to show that there is ample justification for one to conclude that the offers were not properly examined.

Dr Desira claimed that he wanted the Evaluation Committee to exhibit the necessary documents since they wanted to establish whether the recommended tenderer had the necessary specific experience according to the requirement of Clause 4.1.2. Furthermore, he said that he still needed to cross-examine the witness regarding the points given on the 'Rationale, Strategy and Timetable of Activities' since the difference of the four (4) points between the recommended tenderer and his clients was reflected in the analysis of these categories.

Dr Camilleri Sciberras explained that the dates were indicated in the references while Dr Desira claimed that his clients had indicated the dates against each project in accordance with the requirement of the tender.

In view of the limited time available, the PCAB decided to defer the hearing to Tuesday 11 December 2007 at 16.00 hours.

Public Hearing of the 11th December 2007

At the beginning of the second session Dr Norval Desira, Scicluna & Associates Engineering Consultants' legal representative, tabled another letter duly signed by Ing. Norman Zammit. He said that this was received via email from Sudan.

Also, soon after, the PCAB acceded to Dr Camilleri Sciberras' request to provide her clients with the points awarded to both tenderers since apparently these were only given to the appellants.

Finally, on Dr Desira's request, the PCAB's Secretary read the statement that was dictated by the same appellants' lawyer in the previous sitting wherein, *inter alia*, the Evaluation Committee was requested to exhibit the professional references and details of contracts pertaining to the recommended tenderer.

At this stage, following this preamble, the public hearing continued with the cross examination of Mr Micallef. The Chairman of the Evaluation Committee testified that the said Committee did not have details of contracts pertaining to St Luke's Hospital since these were not requested in the tender document. Mr Micallef confirmed that the Committee had only the submission of tender wherein, under 'Health Projects', Engineering Services Limited indicated the works carried out between 1993 and 1999. With regard to professional references, continued the same witness, these were requested for professional experiences specified under Clauses 4.1.1 and 4.1.2.

Dr Desira remarked that Clause 4 of the tender stipulated that:

4.1 The Building Engineering firm entrusted with this project must include a warranted Electrical Engineer and a warranted Mechanical Engineer in accordance with the laws of Malta who must be in possession of the following qualifications

4.1.1 A minimum of ten years professional experience. Applicants must submit professional and/or company references

4.1.2 A minimum of five years professional experience in design, tender preparation and supervision of Health and Elderly Care projects

4.1.3 A proven track record for delivering projects on schedule quoting references

4.1.4 Familiarity with issues of Disability/Accessibility. It is expected that all electrical and other engineering fittings are provided and installed with disability facility

4.1.5 All experiences quoted must be supported by professional references.

He also made reference and exhibited a letter dated 13 April 2007 that was sent by the Director General (Health) to his clients wherein it was stated that:

'Please refer to your offer date 6 February 2007 for Building Engineering Services for the Construction of a 280 Bed Facility.

I wish to inform you that you have failed to satisfy the tender requirement of Article 4 "Qualifications Requirements" regarding the submission of professional references.

You are therefore kindly requested to forward the professional references requested as soon as possible but not later than Monday 30 April 2007. Please note that there will not be any extension to this deadline. Consequently if you fail to submit this declaration your offer will not be considered any further.'

In reply to a specific question by Dr Desira, Mr Micallef confirmed that in terms of Clause 4.1.5 Engineering Services Limited had submitted the required professional references to support the experiences. The witness said that the professional references submitted by the recommended tender confirmed that they had been involved in various projects at St Luke's Hospital between 1993 and 1998. He proceeded by claiming that although the professional reference of *Casa Antonia Retirement Village* did not specify any date, other documents showed that relative works were carried out between 2000 and 2001.

Dr Desira remarked that the fact that Engineering Services Limited declared that between 1993 and 1998 they had carried out relevant work at St Luke's Hospital as much as, similarly, they had also done so at Casa Antonia Retirement Village between 2001 and 2002, showed that they only had nine years experience. Furthermore, he said that the ten years experience was not continuous because no project was referred to for the years 1999 and 2000 respectively. Mr Micallef explained that tenderers were required to prove that they had ten years experience, irrespective of whether these were continuous or not. However, Dr Desira insisted that the maximum number of years was nine and not ten since the only service provided at Mater Dei Hospital was simply that relating to verification of works performed.

Mr Micallef, once again, interjected to claim that Engineering Services Limited's experience was calculated from the year 1993 onwards.

At this point the discussion focused on Scicluna & Associates Engineering Consultants' experience with Mr Micallef confirming that the said firm had considerable experience in design, tender preparation and supervision of health and elderly care projects gained over a continuous period of ten years.

As far as the proven track record was concerned Mr Micallef confirmed that the recommended tenderer and the appellants were awarded 20 points each out of a maximum of 30 points. The same witness testified that tenderers were penalised 10 points each because the references provided by Scicluna & Associates Engineering Consultants did not specify that the projects were delivered on time while Engineering Services Limited did not have all the relevant references for the proven track record.

On the other hand, proceeded Mr Micallef, the same tenderers were given maximum points for 'Familiarity with the issues of Accessibility' because it was felt that both tenderers had worked on projects where access was considered important.

Dr Desira cross-examined the witness on 'Rationale, Strategy, Timetable of Activities'. In this context, Mr Micallef stated that each tender was evaluated on the basis of presentation, establishing that Engineering Services Limited was given four points more than Scicluna & Associates Engineering Consultants, that is, one point each for 'Rationale and Strategy' and two points for 'Timetable of Activities'. Mr Micallef testified that the whole presentation of these three categories under 'Organization and Methodology' as submitted by recommended tenderer was much better than that of the appellants.

In reply to a specific question by the PCAB, the witness said that the members of the Board were unanimous in their decision.

Dr Desira asked the witness to explain what was missing in his clients' offer regarding 'Rationale, Strategy and Timetable of Activities' because during the tendering period clarifications were sent to all prospective bidders who, *inter alia*, were specifically informed that 'The organization and methodology mentioned in Clause 2.5.3.1.II is to be drawn up on the following lines' and relative information was provided as requested by appellants under each category.

Mr Micallef testified that Scicluna & Associates Engineering Consultants were penalised two points under Rationale because it was not as detailed as that submitted by Engineering Services Limited. He explained that the recommended tenderer had a whole section on 'Risks and Assumptions' and the approach was more methodological. The witness claimed that the content of the documentation as submitted by appellants was not comforting as that of the recommended tenderer and that in the Evaluation Committee's opinion it was superficial. Replying in regard to Mr Micallef's allegation, namely that in the appellants' offer there was no reference to 'Risks And Assumptions', Dr Desira said that these were provided in the last two paragraphs of 'Rationale' on page 4/10 of their offer and that the only difference was that the recommended tenderer presented the relative information under the relevant heading and sub-headings.

When asked by the PCAB to explain what did the recommended tenderer offer more than the others, Mr Micallef said that the latter were more accurate and professional. As an example he mentioned the fact that in Scicluna & Associates Engineering Consultants' offer it was stated that '*No matter how secure the tender document is defined one must always be prepared for the eventuality of delays*' while the recommended tenderer stated that '*Such a concept will be complete with the first indicative budget for the project.....accurate to plus or minus 25%*'.

With regard to 'Strategy', Mr Micallef said that the recommended tenderer presented specific details of building services such as

- a. the main power distribution,
- b. the extra low voltage system and
- c. all other points associated with building services.

Dr Desira intervened by stating that in his clients' offer it was specified that 'As members of BSRIA (*Building Services Research and Information Association UK*) our design framework for Building Services is based on BSRIA document BG 6/2006'. He claimed that all items mentioned by Scicluna & Associates Engineering Consultants were covered by these building standards and that they had complied with the requirements of the tender.

In reply to the PCAB's question, Mr Micallef said that the difference was that the appellants were quoting all the standards without being specific and the others entered into certain details which specifically indicated what was being sought. Dr Desira claimed that his clients explained the methodology step by step and gave all the required information. However, Mr Micallef said that the details given by the recommended tenderer under 'strategy' were presented in a better way.

As far as Timetable of Activities was concerned, Mr Micallef testified that the difference between the recommended tenderer and the appellants was that the latter had a longer timetable for the whole project to be completed. The difference in timeframes from the design of the project up to tender stage was between fifteen (15) and forty-three (43) weeks, that is, twenty-eight (28) weeks. When asked by the PCAB to state whether they gave any estimated time period in the tender, the reply given by Mr Micallef was in the negative. He contended that the tenderer who took longer was penalised. In reply to a specific question by Dr Camilleri Sciberras, the witness said that if they had all the resources available and the necessary experience on similar projects it was possible for such services to be provided within the specified time.

At this stage Dr Desira gave a detailed breakdown of his clients' schedule regarding the forty-three (43) weeks and, subsequently, on the request of the appellants' lawyer, Mr Micallef gave details of each activity in respect of Engineering Services Limited's fifteen (15) weeks, which covered the whole brief. Dr Desira pointed out that, notwithstanding, he failed to understand how the Evaluation Committee did not seek any clarification on the fact that the difference in the time table of activities between the two tenderers was substantial. The appellants' legal representative argued that he was not convinced that such services could be provided within fifteen (15) weeks after taking into consideration the fact that it has been declared that no tenderer had any experience on such unique project.

When asked by the PCAB to state whether they were satisfied that with the resources available they could deliver, the reply given by Mr Micallef was in the affirmative and the reason given was that both tenders contemplated completion of works within acceptable timeframes subject to resources being made available.

Replying to remarks made by Dr Desira, Mr Micallef said that there was no comparison between Casa Antonia Retirement Village and this project because in Casa Antonia Retirement Village's case the three years covered the completion of the whole project whilst in this particular instance, the fifteen (15) weeks covered only the period from design up to tender stage.

Mr Morales was then cross-examined by Dr Desira. The witness testified that he was not a warranted engineer but had practical work experience. He confirmed that taking into consideration the resources available Engineering Services Limited's fifteen (15)

weeks was acceptable and that he had informed the Board that Scicluna & Associates Engineering Consultants could have been cautious. Mr Morales informed those present that during these last ten years he had never been involved in adjudication boards.

Mr Joseph Degiorgio, Assistant Director (Procurement) and a member of the Adjudication Board, was also summoned to the witness stand again. When cross-examined by Dr Desira, he said that the estimated value of Lm 720,000 in respect of Architectural and Engineering fees was suggested by the Permanent Secretary MHEC. He said that this amount was divided equally between the two services, arbitrarily, in order to proceed with the issue of relative tenders. He explained that, subsequently, it was established the Architectural and Engineering fees were to be calculated in the ratio of 2:1 and therefore the value for the provision of such services would be Lm 480,000 and Lm 240,000 respectively. He declared that they did not ask the Contracts Department to revise such amounts but if requested they would have done so.

Dr Desira said that based on Lm 240,000, the value of the contract for Engineering Works would amount to Lm 6m because the rate was 4%. The witness said that they calculated the Engineering fees at the rate of 6% of the contract value of the engineering works which were estimated at Lm 4m. Mr Degiorgio confirmed that, on the basis of contract value of Lm4m and at a rate of 4%, the estimated value for the provision of Engineering Services would amount to Lm 160,000 as opposed to the original Lm 360,000.

Ing. Joseph Scicluna, a warranted professional Electrical Engineering and Managing Director of Scicluna & Associates Engineering Consultants, was called to testify by Dr Desira. Engineer Scicluna stated that the major project in health and elderly care that was included in their list of projects carried out during these last 10 years was St Vincent de Paule's at a cost of Lm2.5m. He declared that the design process of this project, although on a smaller scale, took them six (6) to seven (7) months because of the number and complexity of the services. Another project whose cost reached almost Lm1m was the 'Serenity Wards' project which was complete in approximately the same time frame. With regards to the complexity of the design, Ing Scicluna explained that this depended on the scope of the project.

In reply to a specific question by Dr Desira, Ing Scicluna declared that before making the drawings they needed to enter into a process of discussions both with the clients and internally because the use of some areas were not identified on the plans. He declared that this consultation exercise was very time consuming.

On cross-examination by the PCAB, Ing Scicluna declared that resources were allocated and increased according to exigencies. However, he said that it was a known fact that there were more delays in projects where Government Departments were involved than in the private sector. Furthermore, Ing Scicluna testified that there were many people involved in the preparation of this tender. With regard to the aspect of caution, the witness said that they assigned timeframes according to their past experience. He said that in his opinion, taking into consideration the number of drawings, items in the Bills of Quantity (BOQ) and the complexity of specifications, the fifteen (15) weeks indicated in the timetable of activities by Engineering Services Limited was too short. Furthermore, Engineer Scicluna said that although they

indicated forty-two (42) weeks, he personally thinks that they would have managed to provide the required services within less than thirty (30) weeks. He explained that the shortening of the time span did not depend solely on them but also on the client, such as, if discussion with the client were accelerated and if the required information was submitted immediately.

When Mr Anton Cutajar, representing Engineering Services Ltd, was summoned to testify, he said that the fifteen (15) weeks in their time table of activities was arrived at after taking into consideration the

- list of drawings for this project,
- number engineers/draftsmen required,
- time sheets of similar projects and the approximate hours required for each drawing.

Mr Cutajar declared that substantial part of their resources would be committed on this project and he was confident that they could deliver within the said time frame.

Answering Dr Desira's remark regarding Casa Antonia Retirement Village, Mr Cutajar witness said that the designs were drawn in four and a half months but the whole project was completed in three (3) years during which they had to supervise the contractors. He explained that this project took such a long time to complete due to delays by contractors and alterations by the client. He confirmed that part of his staff worked continuously at St Luke's Hospital during the period 1993 – 1998.

On cross-examination by Dr Camilleri Sciberras, Engineer Cutajar categorically denied Engineer Norman Zammit's allegation that the services at Mater Dei Hospital were carried out by 'direct order'.

With regard to the statement that '*There was no involvement of Engineering Services on the electrical installation*' the witness said that there were various instances where he personally was directly involved in advices given to Foundation for Medical Services. He claimed that they took over most of the services formerly provided by Skanska and taught the hospital employees about the use of the relevant hospital services. In reply to specific questions by Dr Desira, Engineer Cutajar declared that they did not make any designs or tender preparation for Mater Dei Hospital. With regard to supervision and monitoring, the same witness declared that they did the supervision of the commissioning on behalf of Foundation for Medical Services, which meant that it was their duty to inform Foundation for Medical Services where the work was not up to standard.

In his concluding remarks, Dr Desira argued that, irrespective of the outcome of this appeal, once it had been acknowledged that the value of the tender was wrong, the PCAB should recommend that the deposit paid by his clients for filing their objection should be refunded in part, if not in full.

The appellants' legal representative claimed that this tender was solely adjudicated on subjective opinions. He was disappointed to hear that, even though this was considered a unique, particular and specialised project, the tender was adjudicated by persons who were neither qualified nor experienced in engineering and adjudication

processes. Dr Desira argued that during the proceedings it was established that the tender was not adjudicated on what was offered under 'rationale, strategy and time table of activities', but was recommended for award to that tenderer who was more competent in writing. .

Dr Desira contended that the Evaluation Committee also failed miserably in analysing the professional experience of the tenderers in design, tender preparation and supervision in health and elderly care projects as specifically requested in the tender document. He claimed that the recommended tenderer was given maximum points even though they had eight (8) years experience - six (6) years at St Luke's Hospital, two (2) out of three (3) years at Casa Antonia Retirement Village, and none (0) at Mater Dei Hospital, and this contrary to appellants' ten (10) years continuous experience in health and elderly care projects.

Mr Degiorgio remarked that, although Dr Desira repeatedly stated that no reference to 'hospital' was made in the tender, in the plans the project was referred to as Rehabilitation Facility and Day Hospital.

In reply to a specific question by the PCAB, Mr Degiorgio explained that the tender was evaluated by weighing quality against price on an 80/20 basis and that it was based on the most economically advantageous offer.

Dr Camilleri Sciberras insisted that this was a 'fishing expedition' and that during the proceedings it was established that the project was not an Old Peoples' Home but a Rehabilitation Facility/Hospital. She contended that the services indicated under Clause 3.1.3 were not of an Old Peoples' Home but were in a much broader sense. The recommended tenderer's legal representative claimed that the Evaluation Committee preferred a tender on a wider scale rather than one limited to health care for the elderly as submitted by Scicluna & Associates Engineering Consultants. She sustained that her clients were given more points for Organisation and Methodology not because of a subjective opinion or style but because of content and approach. Dr Camilleri Sciberras claimed that if they were to compare both tenders they would realise that Engineering Services Ltd's offer was better and so the points given were justified. The lawyer contended that it appeared that, in the opinion of the appellants, her clients should have been penalised because they gave deliverables of fifteen (15) weeks. She insisted that her clients' offer was the most advantageous and satisfied the tender's requirements. Dr Camilleri Sciberras said that, contrary to what was stated by Dr Desira, the PCAB should not substitute its discretion with that of the Evaluation Committee. She claimed that the PCAB should base its decision on the tender document because it was on this basis that the Evaluation Committee used its discretion and arrived at a justified decision. The lawyer concluded by stating that, on this scenario, the PCAB should confirm the Evaluation Committee's decision.

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

This Board,

- 1 having noted that the appellants, first through their formal letter of objection dated 10.08.2007, and also through their verbal submissions presented during the public hearings held on 05.12.2007 and 11.12.2007 respectively, had objected to the decision taken by the General Contracts Committee;
- 2 having noted the arguments brought forward by the appellants, particularly those relating to (a) the limited professional experience of Engineering Services Limited in health and elderly care projects, (b) issues concerning the duration of pertinent time frames availed of by Engineering Services Limited to complete contracted works, (c) the rationale, strategy and timetable of activities, (d) the doubtful level of presumed professional competence shown by members of the Evaluation Committee, (e) the apparent erroneous adjudication methodology adopted by the Committee in assessing the validity of offers submitted by participating tenderers, (f) familiarity with issues of accessibility, (g) organisation and methodology, and (h) the disputed amount of deposit charged by pertinent authority to the appellants in order to enable the latter to formally lodge an appeal against the award of the said contract to Messrs Engineering Services Ltd.;
- 3 having considered the testimony given and statements made by various members of the Evaluation Committee;
- 4 having also noted the observations made by the legal representatives of the other interested parties;
- 5 having taken cognizance of the confusion which emanated as a consequence of (a) the inclusion of different terminologies given in the tender document itself and, subsequently by the Evaluation Committee wherein, whilst the former refers to a 'facility' and 'health and elderly care projects', the latter verbally focuses on a 'rehabilitation facility' – all this whilst, concurrently, claiming that the project under reference, namely, the construction of a 280 bed Rehabilitation Facility was a rehabilitation hospital and that it had no connection with St. Vincent De Paul Residence. One has to make reference to the fact that this was being stated albeit during the same hearing sessions major emphasis was placed by the Evaluation Committee Chairman on the fact that the tender was issued for a rehabilitation facility within the precincts of St. Vincent De Paul Residence, a place more synonymous with 'health and elderly care' rather than uniquely attributed to 'rehabilitation';
- 6 having considered the apparent high degree of subjectivity adopted by the Evaluation Committee in the assigning of scores to offers submitted by participating tenderers as well as the same Committee's relative arbitrary way of deciding who should get bonus points or not subject to an interpretation of respective clauses listed in the *Tender Document*, such as that relating to the fact that whereas in the *Revised Evaluation Grid* it was specified that a tenderer would be given '*plus two points for every extra year over the five years professional experience*' the Committee's understanding of the meaning of this clause was that this did not necessarily refer to the last five years;

- 7 having taken note of the fact that the Evaluation Committee did not even attempt to seek clarification in areas which were substantially obscure;

concludes that the

- a. Evaluation Committee was not really fully competent and experienced enough to adjudicate the offers submitted;
- b. scoring system adopted was too much dependent on subjective criteria rather than on tangible ones, providing this Board with little comfort as to why should an offer score higher scores than another;
- c. MEAT (Most Economically Advantageous Tender) adjudication process, whilst remotely referred to by one of the Evaluation Committee members (Mr Degiorgio) was not resorted to, thus providing this whole process with minimal scientific and logical evidence to support conclusions reached.

As a result of the above-mentioned points, this Board decides in favour of appellants and recommends that a fresh call for offers be issued wherein it would be advisable if the:

- specifications were to be made amply clearer and devoid of minimal room for misinterpretation by participating members as well as Board members alike;
- members chosen to sit on the Evaluation Committee are experienced enough, both technically, as well as, preferably, with a proven track record in adjudicating tenders;
- extent of arbitrary judgement is kept highly minimal, especially, considering that the difference between offers submitted could turn out to be negligible.

Furthermore in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

18 January 2008