

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 137

**CT 2075/06 – Adv No 381/07**

**Tender for the Reconstruction of Marsascala Bypass, Marsascala/Zabbar**

This call for tenders was, for a contracted value of € 10,307,477 (excl. VAT) was published in the Government Gazette on 30.10.2007. The closing date for this call for offers was 20.12.2007.

Four (4) different tenderers submitted their offers.

Following the publication of the ‘Notification of Recommended Tenderers’, Asfaltar Ltd filed an objection on 29.09.2008 against the decision by the General Contracts Committee against the intended award of tender in caption to Bonnici Brothers 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 three (3) public hearings on 29.10.2008, 14.11.2008, and 20.11.2008 respectively to discuss this objection.

Present for the hearing were:

#### **Bonnici Brothers Ltd**

|                     |                      |
|---------------------|----------------------|
| Dr Adrian Delia     | Legal Representative |
| Dr John Gauci       | Legal Representative |
| Mr Reuben Aquilina  | Architect            |
| Mr Mario Bonnici    |                      |
| Mr Emmanuel Bonnici |                      |

#### **Asfaltar Ltd**

|                    |                                |
|--------------------|--------------------------------|
| Dr Michael Sciriha | Legal Representative           |
| Dr Franco Galea    | Legal Representative           |
| Mr Paul Magro      | Representative of Asfaltar Ltd |
| Mrs Sandra Magro   | Architect                      |

#### **Malta Transport Authority**

|                        |   |
|------------------------|---|
| Dr Duncan Borg Myatt   | Legal Representative                                  |
| Mr Paul Buhagiar       | Director ADT, Architect and Adjudication Board Member |
| Mr Vince Micallef Pule | Adjudication Board Member                             |
| Mr Mario Ellul         | Consultant Architect                                  |

#### **Schembri Joint Venture Ltd**

|                  |                      |
|------------------|----------------------|
| Dr Kenneth Grima | Legal Representative |
|------------------|----------------------|

#### **Contracts Department**

|                   |                              |
|-------------------|------------------------------|
| Mr Francis Attard | Director General (Contracts) |
|-------------------|------------------------------|

After the Chairman's brief introduction, Dr Michael Sciriha, representing Asfaltar Ltd, was invited to explain the motive of the objection. This was followed by interventions by representatives of the Malta Transport Authority - the contracting authority - and Bonnici Brothers Ltd, the awarded tenderer.

Dr Michael Sciriha, legal advisor of Asfaltar Ltd, identified the cash flow payments schedule and the day work schedule as the main reasons listed in his clients' letter of objection. He added that Asfaltar Ltd's offer was found compliant in all other respects and was even the lowest in price out of the other tenderers, except for another offer which was not party to the objection. Dr Sciriha argued that it was unacceptable, in terms of fairness and transparency, for the Adjudication Board (a) not to give full reasons to back the decision for rejection but simply to indicate two 'nos' and (b) to depart from the grid included in the tender document and instead drawing up another grid where it overlooked two important factors.

With regards to the '*Day work Rates Schedule*' Dr Sciriha quoted from the 'Notes to Volume 4 – Schedules of Quantities – Day work Schedules', viz:

*A day work schedule is to be provided by tenderer in the rare event that unforeseen works not covered by the bill of quantities arise. To facilitate checking by the Contracting Authority of the realism of rates quoted by the tenderers, the day work schedule will comprise the following:*

The appellants' legal representative noted that the day work schedule referred to a situation of a rare event and he argued that once it did not result that there were any unforeseen works, therefore, the day work schedule would never have been resorted to.

As far as the '*Cash Flow Payments Schedule*' is concerned, Dr Sciriha argued that cash flow payments schedules are required to check the solvency of a Company. He explained that in the case in hand this did not arise as Page 9 of the tender document stated that:

- (a) *pre-financing shall be permitted in accordance with article 44 of the general/special conditions of the contract up to a maximum of 20% of the contract value. In this regard tenderers must indicate their intention to apply this provision when submitting their tenders;*
- (b) *interim payments amounting to 90% as per articles 43 and 48. Then the retention and final payment shall be effected according to article 49.*

Dr Sciriha remarked that it appeared that the Adjudication Board ignored

- (i) the above-mentioned aspects
- (ii) the presence of a site supervisor
- (iii) that the tenderer was bound by a certain sum of money and by a certain amount of work.

In the light of the foregoing, Dr Sciriha could not understand how the Adjudication Board used the cash flow payment schedule to eliminate a tenderer that was compliant and cheaper by 500,000 euros.

Furthermore, the complainants' legal advisor stated that it was worrying that the Adjudicating Board departed from the pre-established evaluation grid in the tender dossier which, *per se*, did not include the cash flow payments schedule. He contended that the evaluation grid in the tender document was more detailed than the one used by the Adjudication Board.

On his part, Dr Duncan Borg Myatt, the contracting authority's legal advisor, explained that correspondence was exchanged between the Contracts Department and Asfaltar Ltd wherein it was explained that there was a mistake in the evaluation grid, in the sense that there were certain documents indicated as missing. He added that this fact was referred to in page 3 of the 'letter of objection' of Asfaltar Ltd under (A) 'Tender Form and Appendix in accordance with forms provided in Volume 1, Section 2'. Dr Borg Myatt remarked that it was later clarified that Asfaltar Ltd had in fact submitted the forms provided in Volume 1, Section 2 that were previously indicated as missing and he added that this did not influence the decision to reject Asfaltar Ltd's tender because the Adjudicating Board was aware of that correction.

Dr Borg Myatt stated that the tender of Asfaltar Ltd was rejected for the non-submission of the:

- a. cash flow payments schedule *and*
- b. day work rates schedule

that were both requested in envelope 3 which related to financing referred to in Section 14.3.2.10 (page 29 of the tender document as well as the notes to volume 4).

Dr Borg Myatt remarked that, for the sake of transparency, the Adjudication Board had to deliberate on the documents submitted and in the case of Asfaltar Ltd the cash flow payments schedule and the daywork schedule were neither submitted in envelope 3 nor at any other stage of the tendering process.

Dr Borg Myatt explained that the need for the day work schedule would arise if the need arose for unforeseen works, eg discovery of historic remains in the course of work, so that the contracting authority would not have to negotiate the rates for such works. The Adjudication Board could not overlook the fact that these two requested documents were missing from Asfaltar Ltd's offer thus rendering its submissions with regard to envelop 3 not in order which in turn led to the rejection of the tender.

Dr Borg Myatt explained that if the appellant Company was contending that, elsewhere in the tendering process, it had submitted a document equivalent to the cash flow payments schedule that was the appellants' interpretation. However, the fact remained, argued Dr Borg Myatt that the Adjudication Board did not find all that was requested in envelope 3.

Dr Franco Galea, another legal representative of Asfaltar Ltd, requested the representative of the Contracting Authority to indicate which forms were not submitted by his client Company. He explained that the notes to Volume 4 indicated that the “*day work schedule is to be provided by the tenderer in the rare event that unforeseen works not covered by the bill of quantities arise*”. To Dr Galea, that meant that the day work schedule was to be provided when the unforeseen works arose and not before and he further stated that, in fact, there was no document titled ‘day work schedule’ in volume 4.

Dr Adrian Delia, legal advisor of Bonnici Brothers Ltd, remarked that the notes to volume 4 subsection (a) stated that:

*“a list of the various classes of labour and construction plant for which basic day work rates or prices are given, together with a statement of the conditions under which the Contractor will be paid for work executed on a day work basis.”*

Dr Galea intervened to state that the contracting authority departed on the wrong foot from the very start because the notes to volume 4 stated that a day work schedule was required if unforeseen works arise and, therefore, if one did not predict unforeseen works, the need for a day work schedule did not arise. Dr Galea argued that it would have made sense had a discrepancy arose between the drawings and the bill of quantities, i.e. the bill of quantities was not covering all the works, however, that did not arise in this case.

The Chairman PCAB asked if that could also refer to works cropping up in the course of works which might not be covered with the established rates and then *ad hoc* rates would have to be negotiated, in which case the contractor might request higher rates. He added that the purpose of the day work schedule would be to establish rates or prices to cover such eventualities.

Dr Galea explained that the tender document already provided the necessary controls with regard to variations and, moreover, there was also the supervisor on site. He added that there was a specific clause included in all tenders that stated that if there resulted more works than those contemplated in the bill of quantities and those works were of a similar nature then the same established prices would apply.

At this stage the PCAB’s Chairman requested that interested parties need to explain to all those present which prices would apply if, in the course of works, there were works of an extraordinary nature.

Dr Galea stated that the tenderer had no discretion in such cases because, according to the tender document, that remained at the Contracting Authority’s discretion.

Regarding the *cash flow payments* Dr Franco Galea submitted that if one referred to page 29 one would find the cash flow payments during the project. However, if one were to go through the tender document one would find no reference to ‘cash flow payments’, but the only reference to ‘cash flow’ was in the evaluation grid of the tender document at page 95 where it was stated that:

*Tenderer has access to credit and other financial facilities to cover the required cash flow for the duration of the contract. The amount of credit available must exceed the equivalent of Lm 500,000.*

Dr Galea added that one had to submit (a) the audited accounts, (b) the income forecast and a bank document, namely (c) a bank guarantee, stating that the bank was going to grant credit to the tenderer for the whole project - all of which had been submitted by his client Company. He maintained that the term “schedule” was not mentioned anywhere in the tender document.

Dr Delia pointed out that those were items requested in envelope 2, whereas the objection referred to documents requested in envelope 3. He claimed that the appellant Company was trying to cover up the missing documents.

Dr Galea explained that they were not claiming that the bank guarantee was equivalent to the cash flow payments but that the tender document did not provide the format that the cash flow payments schedule had to be presented in. However, he reiterated that all the documents referred to in the evaluation grid had been submitted and that the tenderer was not requested to fill in any schedule.

The Chairman PCAB remarked that one had to establish what the cash flow payments referred to because, in his view, cash flow meant an implicit financial capacity comfort. He added that cash flow projections, on which the appellant Company’s tender was rejected, referred to the claims for payment that the contractor would be presenting to the contracting authority and that document had to be submitted once the contracting authority requested it. He asked whether there was any document stating that the tenderer was going to abide by the conditions of the contract.

Dr Galea explained that the tender document provided for pre-financing, meaning that the sum was established and his client had indicated that he would be requesting the full amount. He further explained that (a) the contracting authority knew that it had to fork out the pre-financing, (b) the tenderer had to indicate in the tender documentation the timeline/phases in which the works were scheduled to be executed and (c) the tender document established the procedure how payments were to be effected. Dr Galea contended that the way things were, the contracting authority could easily assess when and how payments would fall due.

Dr Delia observed that what was being said was meant to illustrate what the appellant Company had submitted whereas the hearing was concerned with what the appellant Company had not submitted. He stated that, from what they heard, so far nobody had said that the two documents in question were not requested or that they were submitted. Dr Delia stated that the notes to volume 4 section (a) explained clearly the day work schedule and added that it was equally clear that it was not submitted by the appellant Company. Then, Dr Delia quoted from section (b) of the notes to volume 4:

*the nominal quantities for each item of day work. The rates to be entered by the tender against each basic day work item should include the Contractor’s profit, overheads, supervision and other charges.*

Dr Delia argued that it was not a question of submitting an incomplete schedule but that Asfaltar Ltd submitted no schedule at all. He explained that the evaluation grid was the paper on which the Adjudication Board would tick what documents had been submitted but the requirements emerged from the tender document and the fact that 'no' was indicated on the grid meant that the relative documents were not submitted.

Regarding the cash flow payments schedule, Dr Delia remarked that, irrespective of the reason why the contracting authority was requesting it, the fact remained that this schedule was:

- requested
- mandatory

and that it was clearly indicated in page 29 that this schedule was

- to be inserted ONLY in package 3

because it was a financial item and without it one could not arrive at a price, even though the objection did not concern the price as such.

Dr Galea remarked that one could not overlook the first sentence under 'day work schedule' of the notes to volume 4 because the clause did not refer to any unforeseen works but to unforeseen works not covered by the bill of quantities. He argued that his clients' interpretation was that if one reckoned that all the works were covered by the bill of quantities, then the need for a day work schedule did not arise, and, added, that the text was clear to his clients, so much so, that no clarification was sought in that regard. Dr Galea maintained that his client Company had submitted all the rates required.

Architect Paul Buhagiar, an Adjudicating Board member, under oath and on cross-examination, explained that, under normal circumstances, albeit tests would have been carried out on site so as to minimize variations, yet, no matter how rigorous the tests would have been, something not covered by the bill of quantities would usually crop up. He admitted that perhaps the term 'rare' did not reflect reality because variation in works was not that rare, such as, in the case of a storm that could devastate work in progress or in the event that historic remains were uncovered.

To the question put forward by the Chairman PCAB as to whether the unforeseen works meant

- extra works but of the same nature *or*
- works of a totally different nature

Mr Buhagiar replied that the works that featured in the plans were all included in the bill of quantities. However, the same witness added that the value of the unforeseen works that could arise had to be worked out on the day work rates. Mr Buhagiar stated that this was the first time that he sat on an Adjudication Board and, therefore, could not tell if there were previous instances when a tender was awarded to a bidder who failed to submit the requested day work schedule. Yet, he added that, in this instance, the day work schedule was requested and that one of the tenderers had submitted it.

The Chairman PCAB remarked that the fact that only one tenderer seemed to have understood what the contracting authority meant by the day work schedule might have been an indication that things were not laid down in a clear manner.

At this point, Dr Sciriha added that the bidders that participated in the tendering process were quite experienced in this line of work. Dr Sciriha contented that, in the third envelope submitted by Asfaltar Ltd, one could find both the breakdown rates and the day work rates.

Mr Buhagiar reiterated that the Adjudicating Board did not find the day work schedule in envelope 3 submitted by Asfaltar Ltd and he confirmed that all the offers were evaluated throughout the whole process by the same Adjudication Board and that the board went through all the documentation.

Dr Delia insisted that Asfaltar Ltd did not submit the day work rates and at that point quoted from page 5 of Asfaltar Ltd's letter of objection:

*“Therefore before one proceeds to deliberate whether the tenderer failed to submit a day work schedule one must decide whether the day work schedule was in fact required. For a day work schedule to be required there must first arise unforeseen works not covered by the bills of quantities. Nowhere does it result that these unforeseen works did arise and therefore tenderers were not required to submit a day work schedule”.*

Dr Sciriha contended that their legal arguments still held because the contracting authority had all that was required in terms of rates and that Asfaltar Ltd's offer had all that the tender document requested in the spirit of the law. He added that the day work schedule was a novelty which was not properly qualified, so much so, that all the tenderers did not submit it except for one

Mr Buhagiar confirmed that, with regard to the cash flow payments and the day work schedules, all tenderers were found lacking except for the awarded tenderer.

Ms Sandra Magro, an Architect representing Asfaltar Ltd, under oath, stated that in envelope 3 there was a breakdown in terms of labour, materials, plant, equipment, unit cost and so forth in respect of all the items in the bill of quantities. She contended that all the rates for labour, plant and so on were there if the contracting authority needed to undertake any work in an unforeseen circumstance. She added that, although the day work schedule referred to classes of labour and construction plant, there should have also been rates for materials, like concrete.

The Chairman PCAB asked Mr Buhagiar if the Adjudication Board considered that the rates make-up in envelope 3 were applicable both to the items in the bill of quantities and, similarly, to unforeseen works. Mr Buhagiar stated that the rates for the items in the bill of quantities were required to arrive at the cost of works and those rates were in fact submitted by Asfaltar Ltd and added that those rates were applicable also to variations provided that the works were of the same nature as those included in the bill of quantities.

The Chairman PCAB asked (a) what were the ‘unforeseen circumstances’ in respect of which the tenderer was expected to quote the day work rates, and (b) whether the tender document qualified the unforeseen works. Moreover, he questioned how the Adjudication Board could disqualify a tenderer for not quoting the rates for something which was unknown, i.e. unforeseen and even rare.

Dr Delia argued that the event was unforeseen and the tender document was not asking for the price of the unforeseen event but tenderers were asked to submit the price of the various classes of labour and construction plant to facilitate checking by the contracting authority irrespective of whether the unforeseen event would have been an earthquake, a historical site or anything else. Dr Delia reiterated that the contracting authority was not contending that Asfaltar Ltd did not give all the day work rates but that Asfaltar Ltd did not submit any schedule at all. Dr Delia argued that, whether the request for a day work schedule was reasonable or not, should have been clarified with the contracting authority beforehand. He maintained that these provisions were introduced as from 2004 with the advent of EU funding.

On cross-examination, Architect Magro went on to explain that the rates make up did not refer specifically to, say, an excavator or a labourer, but referred to instances where one could go to “excavation”, in which case a technical person, such as the supervisor, would be able to arrive at the rate of the excavator because a technical person would know what excavation works entailed in terms of labour and plant. She emphasised that an architect would find no difficulty to arrive at the rates of items of plant and classes of labour for road works from the rates make up and insisted that no specific format for the day work schedule was given in the tender document. Architect Magro claimed that the list of day work rates presented by Bonnici Brothers Ltd, which she glimpsed at from a distance, could not be an exhaustive one because there were items which she was sure that these would not have been included, such as, a tunnel boring machine.

Mr Reuben Aquilina, Architect representing Bonnici Brothers Ltd, on cross-examination explained that what tenderers were requested to submit were the rates for different classes of labour and construction plant and not the list of unforeseen events. He added that he presented the rates in respect of the labour and plant normally used in road works, in his case the eleven items he had already given in envelope 2. He explained that, from the hourly rates quoted, one could easily arrive, for example, at the cost of unforeseen works, e.g. 3 labourers for 4 hours at so much per hour, or 3 hours for an excavator at so much per hour. Architect Magro intervened to state that she was certain that Bonnici Brothers Ltd had more items of labour and equipment than those on the list and insisted that circumstances could arise for the use of specialised machinery, e.g. a tunnel boring machine, which she was certain was not on the list presented by Bonnici Brothers Ltd.

At this point the Chairman PCAB asked if the day work rates were the same as those in the bill of quantities, i.e. whether in essence they were the same even though they were presented differently.

Architect Aquilina further explained that the rates given by Bonnici Brothers Ltd in respect of the bill of quantities were given in, say, cubic metres or per square metre whereas in the day work schedule the rates were given on an hourly or daily basis.

Architect Aquilina confirmed that although the rates in the bill of quantities (e.g. in cubic or square metres) were quoted differently from the day work rates (hourly or daily basis), basically Bonnici Brothers Ltd quoted the same rates in both instances.

At this point Dr Delia remarked that, even if it were possible to extract the hourly rates from the rates make up, still, the contracting authority requested the day work rates and tenderers were free to quote day work rates differently from those applicable to the bill of quantities. Dr Delia claimed that what Architect Magro was stating meant that Asfaltar Ltd did not submit the day work rates schedule - as a matter of fact it had already been established that the day work rates schedule was not physically submitted in envelope 3 – because a technical person could perhaps arrive at them from the rates make up.

To a set of questions put forward by Dr Sciriha, Mr Buhagiar explained that:

- the rates make-up referred to the breakdown of the rates applicable to items in the bill of quantities in terms of the amount of labour, material and plant involved whereas what was being requested in the day work schedule were the individual rates for plant and labour applicable to ‘unforeseen’ works not covered by the bill of quantities;
- once the day work rates schedule was requested in the tender document, then the Adjudication Board was obliged to ensure that tenderers submitted this schedule;
- although the Adjudication Board did arrive at the price of each lot from the rates given by Asfaltar Ltd and, consequently, at the total price in respect of the offers made by the tenderers participating in stage 3 of the tendering process, Mr Buhagiar insisted that the rates of the items in the bill of quantities was one thing and the day work rates schedule was another;
- the Adjudication Board was made up of a non-voting chairman, Engineer Paul Cardona, and three members, architects Henry Sultana and himself (Paul Buhagiar) together with Mr Vincent Micallef Pule, ADT Director, with Mr Angelo Camilleri acting as board secretary. Mr Buhagiar explained that architect Mario Ellul, an ADT employee, was engaged by the Adjudication Board as consultant to prepare a comparative analysis of the rates submitted by the tenderers whereas Mr Francis Cassar, ADT’s Financial Controller, was engaged to give advice on financial matters. Mr Buhagiar stated that the Adjudication Board
  - examined the reports drawn up by the consultants
  - asked questions where necessary

but, ultimately, it was the Adjudication Board that decided and that it did so unanimously; and

- the Adjudication Board verified whether tenderers submitted the cash flow payments schedule and the day work rates schedule.

At this point, Dr Sciriha requested the minutes of the Adjudication Board, specifically those relating to the meeting of the 6<sup>th</sup> August 2008 because he suspected that what Mr Buhagiar was saying did not corroborate with what actually took place. In turn, Dr Delia remarked that it appeared that the appellants knew of the contents of the minutes of the Adjudication Board, which document was sensitive and that, legally, it should have been accessible only to the ADT. Dr Delia said that he was considering presenting a judicial protest in court about the matter.

Dr Delia claimed that the tender document indicated which documents were required and not the evaluation grid. He then quoted from a letter dated 19<sup>th</sup> September 2008 which the Director of Contracts sent to Asfaltar Ltd which, *inter alia*, stated:

*“Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by you was not financially compliant. It was observed that the tender submitted did not contain cash-flow payment schedules and the Day Work Schedule”.*

Mr Buhagiar reported that whilst the tender documentation submitted by Asfaltar Ltd in envelope 3 did include the rates make up as per para. 14.3.1.13 in page 29 which was referred to by Architect Magro, however, it did not include the cash flow payments schedule during the project referred to in para 14.3.2.12 in page 29 and the day work rates schedule referred to in the notes to volume 4.

Dr Delia insisted that he was not contesting what Asfaltar Ltd submitted but what Asfaltar Ltd did not submit.

Dr Sciriha referred to page 9 of the tender document under section ‘payment’ from (a) to (d) and remarked that the tenderer could not depart from those provisions.

Architect Magro insisted that the rates for unforeseen works were made available by Asfaltar Ltd as much as they were in the case of Bonnici Brothers Ltd. because she claimed that the supervisor on site, who would be a technical person, would be able to work them out from the information already submitted by Asfaltar Ltd.

Dr Sciriha requested that Architect Robert Sant, who had been contracted by ADT to act as supervisor, be asked to give evidence as to whether he could extract the day work rates from the information already provided by Asfaltar Ltd in its tender documentation.

Architect Buhagiar informed those present that Architect Sant had not signed the contract as supervisor with the ADT and, as a consequence, the order to start work could not be issued.

Architect Aquilina reacted by saying that the day work schedule formed part of the contract and the supervisor required it to facilitate his work in cases of unforeseen works.

Architect Magro stated that she had already explained that although Asfaltar Ltd did not submit individual rates it had submitted the necessary information to arrive at any individual hourly or daily rate.

Dr Delia remarked that it would appear that Asfaltar Ltd did not submit a requirement because they thought that one could arrive at it from the other information that it had submitted.

Dr Sciriha remarked that he wished to call as witness an architect who had experience in the role of supervisor over a project similar to the one under consideration. He added that given the technical aspects brought up by the architects representing the interested parties, the evidence of an independent technical person would provide comfort to all concerned, even to the PCAB.

The Chairman PCAB remarked that, as far as the PCAB was concerned, it did not require any further evidence to conduct its deliberations however if any one of the parties concerned felt the need to call further witnesses then the PCAB would find no objection for the sake of transparency and comfort.

Following an exchange of legal arguments between the parties concerned the following emerged:

- (i) Dr Sciriha, representing the appellant Company, requested the PCAB to appoint an architect to give an expert opinion on the evidence given by Architects Sandra Magro and Aquilina respectively, and, without prejudice to that request, he requested the PCAB to provide access to an *ex-parte* expert – nominated by the appellant Company – to those documents permissible at law;
- (ii) with regard to the appellants' request for the PCAB to appoint an expert, Dr Delia, legal representative of the awarded tenderer, referred to article 83 (9) of the Public Contracts Regulations which already provided for the PCAB to appoint expert/s on its own initiative and not when so requested by third parties. Dr Delia found no objection to the appellants' request to produce an *ex-parte* witness provided that the witness would not examine or even comment on a tender that was not the subject of the objection brought before the PCAB;
- (iii) the name of the witness would be communicated after the hearing that was to take place on Tuesday 4<sup>th</sup> November 2008 concerning an objection lodged by Schembri Joint Venture Ltd with regard to the exclusion of its bid in the course of the same tendering process.

Further public hearing held at the Department of Contracts on Friday, 14 November 2008 at 16.45 hours.

As agreed during the public hearing of 29 October 2008 and through correspondence that had been exchanged between all the parties concerned, it was agreed to hold this joint hearing so that Asfaltar Ltd, Schembri Joint Venture Ltd and Bonnici Brothers Ltd would present experts to give evidence as to whether it was possible for a technical person to extrapolate daily or hourly rates for different classes of labour and construction plant – as requested under ‘day work schedule’ in the Notes to Volume 4 – Schedule of Quantities - from the rates make up of the priced bill of quantities.

Mr Anthony Cassar, an architect and civil engineer, was summoned by Dr Kenneth Grima, legal representative of Schembri Joint Venture Ltd, to take the stand. Architect Cassar, under oath, declared that he had no interest in the tender under reference. During the course of the said hearing Architect Cassar ...

- stated that Schembri Joint Venture Ltd had presented him with a set of the rates make up and the notes to volume 4 – schedule of quantities - which were verified during the hearing to be a copy of those submitted by Schembri Joint Venture Ltd in envelope 3, to carry out an exercise with a view to establishing whether daily or hourly rates could be worked out from the rates quoted in the bill of quantities;
- analysed the rates make up and the bill of quantities, an exercise that took him about 10 hours and produced a set of rates. From this exercise it emerged that under ‘different classes of labour’ there was indicated an employee @ Lm 5 per hour and a warden @ Lm 3.64 per hour whereas under ‘plant and machinery’ the following were listed: excavator @ Lm 45 per hour, jackhammer and compressor @ Lm 5.50 per hour, bobcat / Hiab / skip / handtools (e.g. a shovel) @ Lm100 per day, truck @ Lm 50 per trip and there were also a bowser and a pole planting machine. He remarked that this exercise could be undertaken by any architect though it usually was the work of a quantity surveyor;
- conceded that there were no rates for the different classes of labour but that he considered the rate for labour at Lm 5 per hour as an average rate because the normal rate of an unskilled labourer was about Lm1.60 per hour and that of a skilled labourer was of about Lm 3 per hour;
- noted that para (a) in the Notes to Volume 4 under ‘day work schedule’ it was stated:

*a list of the various classes of labour and construction plant for which basic day work rates or prices are given, together with a statement of the conditions under which the Contractor will be paid for work executed on a day work basis.*

- stated that Schembri Joint Venture Ltd gave him neither a cash flow payments schedule, which, to him would have represented a breakdown of the payments that had to be made to the contractor, nor did he come across the list or

schedule of day work rates for the different classes of labour and construction plant.

Dr Grima, stated tht the workings produced by Architect Cassar proved that, in fact, the submission by Schembri Joint Venture Ltd did contain rates per hour and per day and prices as required in para (a) of the notes to volume 4 unlike what the Adjudication Board had indicated, i.e. that no such rates were submitted. He added that the rates were extracted from the breakdown of rates submitted in envelope 3. Architect Cassar said that the rates for the main items of plant required for road construction were there.

Mr Stuart Azzopardi, another architect, was summoned by Dr Sciriha, legal representative of Asfaltar Ltd. Under oath, Mr Azzopardi declared that he had worked on this tender on behalf of Penza Construction Ltd, which tenderer had been disqualified at an earlier stage of the tendering process. However, notwithstanding, he did not render any service to the contractors involved in these two appeals.

Architect Azzopardi ...

- conceded that he had limited time, a few hours in fact, to go through the rates make up presented to him by Asfaltar Ltd. He went on to explain that, as a technical person, he would be able to work out the rates for different classes of labour and construction plant from the rates make up and the programme of works presented by Asfaltar Ltd. He added that he could even arrive at the nominal quantities per day of construction plant, e.g. the amount of material that an excavator could excavate in a day. As an example, Architect Azzopardi explained that from the programme of works he would obtain the amount of excavation works involved and the time required to carry it out, then from the rates in the bill of quantities and from the rates make up he would arrive at the rates for labour (even its different classes) and the construction plant like an excavator, a truck and so forth. He added that in case unforeseen works involving trenching arose, the site supervisor could charge the rates found under trenching in the bill of quantities, which would be the lowest rates. Architect Azzopardi continued that in a case where the roller, the grader and the driver were to be involved, one could work out the rates individually;
- to the question put forward by Dr Grima as to what was the difference between 'modification' and 'variation' works and 'unforeseen' works in road construction, Architect Azzopardi remarked that unless something extraordinary arose, what usually happened was that more trench work would be involved or else instead of excavating in soft stone one would encounter hard stone. However, the same witness proceeded by stating that the rates in the bill of quantities relative to trenching in hard stone would apply;
- claimed that the list of classes of labour and construction plant that a contractor was asked to submit could hardly ever be exhaustive. Yet, the bill of quantities was very detailed in this respect. He noted that the day work schedule referred to various classes of labour but was not specific.

The Chairman PCAB asked Architect Buhagiar whether he agreed with what Architect Azzopardi had just explained. Architect Buhagiar declared that he did not agree with the method explained by Architect Azzopardi because the programme of works submitted could undergo changes during execution and, with regard to the rates for various classes of labour, they were interested only in the rate of a labourer – to apply it for unforeseen works whatever those might be - rather than the rate of a labourer that would change according to the different types of work that he would be detailed to do.

To a direct question by the PCAB, Architect Buhagiar was unable to indicate how many items on the list would have satisfied the contracting authority.

Architect Azzopardi stated that the term ‘foreman’ was not exhaustive because, even at foremen level, there were grades, e.g. a foreman on asfaling works had a different grade from another one detailed on other works. In this respect, Dr Grima intervened to observe that in his clients’ case, the average rate of labour was given, namely, Lm 5 per hour, and he was disqualified whereas Architect Buhagiar now stated that the Adjudication Board was interested in one rate. Architect Buhagiar insisted that the contracting authority wanted one rate for a labourer irrespective of the job he was detailed to and not one rate applicable for a skilled or unskilled or technical person and so forth.

To questions put forward by Dr Delia, Architect Azzopardi replied that he received no instructions with regard to the cash flow payments during the project and that with regard to the day work schedule he would need the programme of works along with the rates make up to work the rates of a labourer on a particular job. Dr Delia remarked that, contrary to what architect Azzopardi was trying to impress, it was not at all simple to carry out this rates-extraction exercise.

Mr Maurice Galea, an Architect and Civil Engineer, was summoned as a witness by Dr Delia, legal representative of Bonnici Brothers Ltd, and, under oath, Mr Galea declared that he was in no way professionally connected with the tenderer or had in any way participated in the submission of any offer. Mr Galea stated that he graduated in architecture in 1955, worked for a long time at the Water Works and Industry Departments and at the Malta Development Corporation and that he acted as technical adviser to the Contracts Department for about 13 years.

On being cross-examined, Mr Galea submitted the following explanations:

- In his view the cash flow payments during the project referred to in clause 14.2.3.12 (page 29) of the tender document represented a forecast, usually reviewable on a monthly basis, of the payments that the contracting authority would have to provide to the contractor. He added that the provisions of para (a) to (d) under ‘Payments’ (page 9) of the tender document were general provisions of how payments were to be effected but the cash flow payments schedule, which was tied to the programme of works, was still required because that quantified the payments and established the date the payments would fall due;

- With regards to the rates make up, Architect Galea stated that this was a breakdown of the rates in the bill of quantities in terms of
  - labour
  - materials
  - plant *and*
  - equipment

He added that this was not always requested but it was useful in case of variations to arrive at the rates applicable to those variations;

- Mr Galea remarked that he disagreed with Architect Azzopardi with regard to the relationship between the rates in the bill of quantities and the day work rates. According to him, the day work rates served a different purpose because they were applicable to odd jobs not included in the bill of quantities, such as, in case the contracting authority required the services of 4 labourers for 3 hrs or a crane for five hours. He remarked that the day work rates were usually higher than those applicable to the rates in the bill of quantities because the latter were based on a high volume of work whereas the day work rates would involve undertaking small jobs and therefore had to take into account other considerations, such as, mobilisation and demobilisation costs. As an example, he mentioned the day work rate of Lm 4.50 per hour for a labourer and Lm 5.50 per hour for a skilled labourer.

At this point, the Chairman PCAB asked whether the rates in the bill of quantities and the day work rates were the same in the case of the awarded tenderer. Architect Buhagiar replied that albeit the said rates were the same, yet, Bonnici Brothers Ltd could have presented different rates but the important thing was to have both rates. Architect Aquilina, intervening on behalf of Bonnici Brothers Ltd, tried to explain that, in an earlier intervention during the same hearing proceedings of this appeal, he did not say that both sets of rates were the same because one was given in cubic metres and the other on a daily/hourly basis. What he did say, continued Architect Aquilina, was that, in his computations, he started with the day work rates but ended up differently. Architect Aquilina contended that he never said that both sets of rates were the same.

This claim was received with a certain level of disagreement by many of those present for the hearing with the latter claiming that, during the previous meeting, Architect Aquilina had said that the two sets of rates were basically the same;

- Architect Galea explained that one could not give a standard rate because, for example, there were excavators of different capacities and one ought to quote a rate for each according to its capacity. He added that if only one rate were to be given for an item of equipment, say, an excavator, one wouldn't know for which type of excavator that rate referred because, for example, ordering a crane of 10 tons was different from ordering a crane of 20 tons;

- Architect Galea tended to disagree with Architect Azzopardi for the latter basing his workings on the rates make up in relation to the programme of works because, on a large project, it usually happened that the programme of works would be subject to various revisions or modifications;
- With regard to *the nominal quantities for each item of day work* referred to in para (b) under ‘day work schedule’ as stated in the notes to Volume 4, Architect Galea agreed that, although it was not very clear, he understood that the term referred to the capacity of the plant, e.g. how much material would an excavator excavate in an hour or a day. He added that the problem with day work rates was that if the excavator was on site for, say, 4 hours, then one had to verify that it, in fact, excavated the amount of material relative to its capacity otherwise one would end up paying the rate for 4 hours when it might have been idle for some of that time;
- Mr Galea declared that he would not be satisfied if the day work rates were not given because he would encounter problems when day works arise at implementation stage. He added that, in his opinion, one could not extract correct day work rates from the data available in the bill of quantities and the rates breakdown. He reiterated that one could use the normal rates for works that vary from that in the bill of quantities but that were similar in nature. However, Architect Galea continued by stating that day work was something completely different because it represented only labour and plant together or separately;
- The Chairman PCAB remarked that no template was provided in the tender document with regard to the day work schedule and asked what would constitute an exhaustive list of classes of labour and construction plant for the works contemplated in the tender. For example, he asked whether 10 items or 15 items would be enough when the likelihood could mean that 20 or perhaps, 50 items would be far more realistic. He proceeded by asking whether, on the other hand, would a list of four (4) items be adequate so long as a list was presented. On these same lines, Architect Anthony Cassar remarked that it would have been better to have the list of day work rates, however, he wondered where such a list would start and end given that even the term ‘excavator’ was not exhaustive enough in view of the different types/sizes of excavators available.

Architect Galea conceded that

- (a) it would have been better had a template been provided in the tender document *and*
- (b) in the case of classes of labour or construction plant not covered by the day work schedule, one would still have to establish or negotiate the rate per hour or day.

Mr Galea remarked that the tender document was quite clear in requesting the list.

When the Chairman PCAB asked if there were any other witnesses, Dr Grima remarked that although Architect Mario Ellul, who acted as advisor to the Adjudication Board, was at that time abroad, he still intended to call him to give evidence because he alleged that it was Mr Ellul who had advised the Adjudication Board to reject his client Company's offer. Architect Buhagiar stated that the Adjudication Board had examined the advice given by Architect Ellul and although it did not amount to a cut and paste exercise, the Adjudication Board, unanimously, endorsed the report by Architect Ellul. The PCAB argued that, in the circumstances, the evidence of Architect Ellul would not be relevant because once the Adjudication Board unanimously adopted his advice, in part or in full, then clarifications, if any, had to be sought from the Adjudication Board. Besides, the PCAB had heard enough contrasting views to enable it to come to a conclusion. Dr Grima informed the PCAB that, in the circumstances, he had no further witnesses.

At this stage it was agreed that the winding up with regard to both objections would take place during two separate hearings on established dates convenient to all interested parties.

**Further public hearing held at the Department of Contracts on Thursday, 20 November 2008 at 16.45 hrs.**

The Chairman PCAB started by inviting Dr Sciriha, legal representative of Asfaltar Ltd, to deliver his concluding remarks.

Dr Sciriha made the following submissions:

Dr Sciriha commenced his intervention by inviting the PCAB to look into this case with the aim to

- a. ensure that justice, equity and fairness, are done
- and*
- b. take into account the credibility and the consistency of the witnesses.

He argued that the PCAB should not deliberate solely on the basis of the papers produced or on whether certain forms were or were not in the documentation submitted in connection with this tender but that the PCAB should take into account the general feeling of the whole process. In order that justice would be done in this case Dr Sciriha contended that one had to ensure that the tender should be awarded to a competent contractor and whose bid was the cheapest, in other words, to the tenderer that offered good value for money.

Dr Sciriha maintained that he was very open in the way he presented his case because his client Company had nothing to hide. He stressed that, at no point, the appellants did they admit that they did not submit the day work rates schedule or the cash flow payments (during the project) schedule and insisted that there were no grounds to disqualify his clients' tender.

Dr Sciriha argued that if the PCAB were to refer to the evidence of Architect Maurice Galea, to whom he referred as the star witness, and to that given by Architect Stuart Azzopardi, witness summoned by Asfaltar Ltd, together with the arguments that he presented during the hearing, it would notice that there were no deficiencies in the tender of Asfaltar Ltd.

Dr Sciriha contended that, in his view, the day work schedule and the cash flow schedule were not the main issues but one had to concentrate on the bill of quantities because from the evidence given by architects Stuart Azzopardi, who had an M.Sc in road works, and Maurice Galea, respectively, it emerged that the rates were there. He stressed that one had to presume that the members of the Adjudication Board had the necessary expertise and therefore he did not expect them to base their deliberations on whether a certain 'form' was submitted or not. He pointed out that the tender document did not provide the 'form' in which these schedules were to be submitted.

Dr Sciriha then referred to the evidence given by Mr Reuben Aquilina, architect of Bonnici Brothers Ltd, where he had confirmed that in real terms, the rates quoted by Bonnici Brothers Ltd in the day work schedule were the same as those it had quoted in the bill of quantities. Dr Sciriha said that that reinforced his contention that Asfaltar Ltd had satisfied the tender conditions. He stated that Architect Paul Buhagiar, Adjudication Board member, did not seem to keep in view that the tenderer

was bound by his submissions and that the tender document provided that the supervisor on site had the last word in case of disputes arising from the interpretation of the tender document.

Dr Sciriha maintained that the tender document made no reference to the term 'schedule' and therefore he argued that, in the absence of a given format, then one could present it in various forms. He asked the PCAB to weigh whether or not, in essence, the *cash flow projections* and the *day work rates* were present in the tender documentation of Asfaltar Ltd. Dr Sciriha argued that since the tender document referred to *cash flow payments* and not to a cash flow schedule, the fact that the tenderer had credit facilities to undertake these works together with other information about the financial situation of the tenderer and the submission made by Asfaltar as a whole, should suffice to enable the PCAB to be satisfied that his client was financially compliant.

Dr Sciriha insisted that there was no question regarding the administrative and technical compliance but the reasons for rejection were the non-submission of the day work schedule and cash flow payments scheduled. At this stage the appellant Company's legal advisor commented that, in his opinion, a tender should be adjudicated on substance and not on details.

Dr Sciriha maintained that Asfaltar Ltd had satisfied the administrative grid, where there was no mention of a cash flow schedule or of the day work schedule, and, as a consequence, the appellant Company had, in good faith, made its submission according to the tender dossier. He contended that, after the publication of the tender, no Adjudication Board was empowered to change anything, including the grid. He added that his clients were being penalised for adhering to the grid that featured in the tender document because the Adjudication Board adjudicated on a different grid.

Dr Sciriha stated that he could not comment on the prices because he did not have all the information but he was convinced that the PCAB would look into the value-for-money aspect of this tendering process and into the whole process not just into a few details. He argued that once Asfaltar Ltd was compliant, it was in the interest of the contracting authority to leave as many competitors as possible and not to limit competition due to trivial omissions.

The appellants' legal advisor drew the attention of the PCAB that, in essence, the evidence given by Architects Stuart Azzopardi and Maurice Galea was only slightly divergent.

Dr Sciriha stated that the PCAB should consider legal points but it should not limit itself to legal details because the overriding consideration should be that justice would be done and that it could be achieved if a mistake was rectified even for the benefit of the contracting authority. Dr Sciriha ended his deliberations by stating that the considerable deposit made by the appellants to lodge this objection reflected the validity of the objection, and he was convinced that the PCAB would find the arguments brought forward by all the parties concerned as valid ones and surely not trivial or vexatious.

Dr Adrian Delia, legal representative of Bonnici Brothers Ltd, disagreed that the PCAB should look into the price offered by his client. He argued that the hearings were concerned to discuss the exclusion of the bid made by Asfaltar Ltd and not to go into the whole tendering process of public procurement or into the principles of justice, fairness and so forth. At this point Dr Delia recited from the letter that the Contracts Department sent to Asfaltar Ltd:

*Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the tender submitted by you was not financially compliant. It was observed that the tender submitted did not contain cash-flow payment schedules and the Day Work Schedule.*

Dr Delia stated that all the points raised by the appellants were aimed at deviating attention from these two omissions for which there was no defence. He referred to the statement by Dr Sciriha that at no stage did his client admit that the day work and cash flow payments schedules were missing and quoted from the reasoned letter of objection of Asfaltar Ltd, namely:

*“Therefore, before one proceeds to deliberate whether the tenderer failed to submit a day work schedule, one must first decide whether a day work schedule was in fact required. For a day work schedule to be required there must first arise unforeseen works not covered by the bill of quantities. Nowhere does it result that these unforeseen works did arise and therefore tenderers were not required to submit a day work schedule. If a tenderer chose to submit a day work schedule in regard to works covered by the bill of quantities, he was free to do so but alternatively, tenderers who were not required to submit a day work schedule should not be penalised for not submitting such a day work schedule.”*

Dr Delia referred to a decision previously taken by the PCAB (Case No. 33) wherein the appellant Company admitted to the non-submission of documents required in the tender documentation and the same legal advisor proceeded by quoting excerpts from the same decision including the following:

*The Board could neither excuse the Appellant from what he wrongly considers to be a genuine oversight nor accept his view that the error committed was a trivial one. According to the Board, the instructions which were expected to be followed by tenderers regarding presentation of the three separate tender packages were clear ...*

Dr Delia added that even from the evidence given by Architect Sandra Magro one would find that Asfaltar Ltd did not submit these two documents. In fact, she had explained how, according to her, one could still extract certain information from that already given. He stressed that these two documents were neither presented as a matter of fact nor as a matter of opinion. Dr Delia added that Asfaltar Ltd was not discriminated against and so no injustice was committed.

Dr Delia disagreed that one should go by the general feeling of the whole tendering process and that one should not go into details. He maintained that the main issues were two and they were very clear, i.e.

- a. whether these requirements were requested
- and
- b. if such requirements were submitted or not

Dr Delia noted that, at one point the appellant Company realised that these two documents were in fact requested, so much so, that the appellants argued that the two documents could be drawn up from the information already submitted. Dr Delia remarked that Architect Azzopardi stated that within a few hours or so one could draw up the missing documents by extracting the information from that already submitted by Asfaltar Ltd. On the other hand, Architect Galea, a person with considerable experience, had explained why the day work rates were required and what they represented and explained also the purpose of the cash flow payments during the project. Dr Delia remarked that, contrary to what Dr Sciriha had stated, the 3-year *cash flow projections* and the *company's credit facilities with the bank* – requirements requested in the administrative grid in envelope 2 - were not equivalent to *cash flow payments* during the project because the latter was not referring to whether a company was financially sound or not but it was referring to the payments that the contractor would be submitting for settlement to the contracting authority on a monthly basis. He added that Architect Galea had also indicated that the payment provisions (found in para. (a) to (d) - page 9 of the tender dossier) could not replace the *cash flow payments* during the project. Dr Delia insisted that if this requirement was not clear enough to the appellants they could have sought a clarification but they did not.

Dr Delia then moved on to discuss the role of the supervisor as provided for in Article 35 - page 128 of the tender document - and stated that the fact that there was going to be a supervisor on site did not mean that the tenderer could do away with the submission of documents requested in the tender dossier. Without going into the merits of whether modifications included unforeseen works, Dr Delia quoted from section 35.5 (page 128), namely:

- a. where work is of a similar nature and executed under similar conditions to work priced in the bill of quantities or price schedule, it shall be valued at such rates and prices contained therein;
- b. where work is not of a similar character or is not executed under similar conditions, the rates and prices in the contract shall be used as the basis for valuation in so far as is reasonable, failing which a fair valuation shall be made by the supervisor;

Dr Delia asked how could the supervisor apply the contract rates as indicated in (b) above in the absence of the day work schedule in the contract. He concluded by stating that the supervisor was no substitute to the day work schedule which Asfaltar Ltd failed to submit.

Dr Delia disagreed that the PCAB should compare the bill of quantities of Bonnici Brothers Ltd with that of Asfaltar Ltd because what was being questioned was whether the submission of Asfaltar Ltd was compliant with regard to envelope 3. With regard to the tender document not having provided a format for the cash flow payments, Dr Delia remarked that the objection did not refer to the submission of the

cash flow payments in the wrong format or not in the preferred format but that no schedule whatsoever was submitted.

Dr Delia contended that with regard to the day work schedule, in his evidence Architect Aquilina did not say that the rates were the same but that he used the rates in the bill of quantities as a base to draw up the day work rates and added that it was beside the point whether they were the same rates or not because, after all, nothing precluded anyone from quoting the same rates. He argued that, if a tenderer did not indicate the day work rates, then, the supervisor would have no rates applicable to unforeseen works because the supervisor could not assume that the rates applicable were those in the bill of quantities.

Dr Delia disagreed that the PCAB should also consider (a) the technical competence of the tenderers and (b) the prices submitted, because those had nothing to do with the reasons for rejection. Moreover, in order to consider the price quoted by Asfaltar Ltd, it had first to submit all the information requested in envelope 3, something which it did not do.

Dr Delia remarked that the fact that this objection involved a considerable amount of money by way of deposit did not, in any way, mean that the task of the PCAB became more onerous because the deposit was governed by section 83 (1) of the Public Contracts Regulations and not by the complexity of the case.

Dr Delia contended that, at no time, was it demonstrated that there was an un-level playing field or that the appellant Company was discriminated against or that there was lack of transparency in the process. He stated that it had not been demonstrated that the Adjudication Board had ruled that the schedules were not submitted when in fact they were submitted.

According to Dr Delia the price has nothing to do with this objection and should not be considered by the PCAB because in the 3-envelope system one had to first consider whether the bid bond was there and then to see if one was administratively and technically compliant. He added that when the Adjudication Board came to the third envelope it found that, out of four documents requested, only two were submitted by Asfaltar Ltd and fairness had nothing to do with it. At that point, Dr Delia quoted from a sentence of the Commission of the European Communities dated 22<sup>nd</sup> June 1993 C243/89, viz:

*It must be stated first of all that the observance of the principle of equal treatment to tenderers requires that all the tenderers comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers. The principle of equal treatment of tenderers which lies at the heart of the directive which required that tenderers accord with the tender conditions must be fully respected.*

Dr Delia argued that this principle would not have been respected had a tenderer who did not comply with all the tender conditions been allowed to continue participating in the process. Another judgement that he quoted from was that dated 25<sup>th</sup> April 1996 C87/94:

*In the present case it is sufficient to find that the principle of equal treatment of tenderers and transparency of the procedure had not been observed.*

Dr Delia stated that, in the case in hand, all tenderers were treated the same way and, in case one was contending that it was not the case, then, that someone, had to indicate where this was not so.

Regarding the question raised by Dr Sciriha as to whether the principles of justice, equity and transparency were followed, Dr Delia maintained that these principles were followed in this particular case because whoever did not adhere to the law had to be penalised otherwise one would have acted against the principle of equity had the tenderer that submitted all that was requested of him or her been penalised by cancelling the award which he or she had already won according to the rules.

Dr Delia claimed that during the hearing he had demonstrated that there was a tenderer who had submitted everything by the book whereas, on the other hand, there was an admission by Asfaltar Ltd that they did not submit all the information requested.

Dr Duncan Borg Myatt, legal representative of the Contracting Authority (ADT), declared that there was general agreement that the provisions of the tender document were legally binding. He added that a worrying aspect that transpired during the hearing was that, at one point, the appellants referred to information contained in the minutes of the Adjudication Board which was confidential information.

At that point it was clarified by Dr Sciriha that his clients had requested the Contracts Department in writing, which letter was formally acknowledged, to furnish him with that part of the minutes relative to their bid and that his clients were given that information in an official manner. Dr Schiriha stated that he was going to produce a document to that effect.

Dr Delia objected to Dr Sciriha submitting documents and evidence at that stage of the hearing.

Dr Borg Myatt added that the appellant Company made reference to the minutes of the Adjudication Board and to Architect Mario Ellul and, consequently, there was a breach of various provisions of the tender document, such as article 24.11 which stated that:

*After the public opening of the Tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the signing of the Contract by the Contracting Authority and the successful Tenderer.*

Dr Borg Myatt stated that such information could have been made available to the PCAB for the purpose of the hearing but not to the appellant Company who challenged a witness on the contents of those minutes.

The Chairman, PCAB, remarked that the fact that a tenderer was in possession of confidential information, such as the minutes of the Adjudication Board, was bad

enough - but to get possession of such information in an official manner was even worse. The PCAB's Chairman added that it was worrying that a tenderer was officially furnished with a copy of an internal document and remarked that once this issue was mentioned then the PCAB had to consider it in its deliberations because the PCAB was obliged to make recommendations on issues that had a bearing on how the tendering process in general should be conducted. The Chairman, PCAB, recalled an instance when someone claimed that he did not give the information but that he allowed another person to see that information by looking over his shoulder. This is highly ridiculous to say the least, commented the PCAB's Chairman.

Dr Delia drew the attention of the PCAB that if, at that stage, the appellant Company mentioned a fact that was not proof in itself, then that should not be part of the process.

Dr Borg Myatt then remarked that no one had contested the fact that the day work schedule and the cash flow payments were not submitted. He added that the Adjudication Board had to stick to the requisites laid down in page 29 of the tender document and, as a consequence, it could not fail to note these shortcomings. Dr Borg Myatt remarked that, during the hearing, the PCAB had given the possibility to all parties concerned to demonstrate if the missing documents could be compiled from the information already submitted by the tenderers - in fact, four architects gave their expert opinion in this respect, namely, Paul Buhagiar, Sandra Magro, Stuart Azzopardi and Maurice Galea. Dr Borg Myatt observed that the outcome of their evidence was that two architects had a certain opinion whereas the other two had another opinion. According to the ADT's legal advisor that was proof that the Adjudication Board had acted in a responsible and judicious manner.

Dr Borg Myatt remarked that the tender document was clear that the day work schedule and the cash flow payments had to be submitted. He added that, from the hearing, it emerged that Asfaltar Ltd did not submit any hourly or daily rates but, according to Architect Azzopardi, if one were to take the 'rates make up' and apply them to the 'works programme' one could arrive at those rates. However, Dr Borg Myatt pointed out that the notes to Volume 4 para. (a) and (b) laid down what kind of information was being requested in order to facilitate checking by the contracting authority. Although he conceded that there was no specific grid as to how to present this information, still, continued Dr Borg Myatt, one was requested and expected to submit the information required in some form. Dr Borg Myatt remarked that the Adjudication Board had embarked on no crusade to discriminate against a tenderer or to favour any other - the Adjudication Board arrived at its decisions in a rational manner.

Dr Borg Myatt agreed with Dr Delia that the cash flow payments referred to in page 29 had nothing to do with the cash flow statements submitted in envelope 2. He argued that, once this tender was being financed out of EU funds, it was found necessary to have a structured pattern of how payments were to be made to the contractor during the course of works, keeping in mind that total payments were going to be in the region of Lm 3 million (equivalent to € 7 million – approximately). Dr Borg Myatt stated that the cash flow payments were requested in the tender dossier but not submitted by the appellants.

In conclusion, Dr Borg Myatt stated that the main issue was that the appellant Company did not submit the *day work rates* and the *cash flow payments* and that the Adjudication Board had no option but to disqualify the tenderer for the sake of justice and equity.

Dr Delia remarked that during the hearing it was stated that a clarification could have been sought, however, it should be made very clear that, with regard to the financial package, the Adjudication Board did not have that opportunity, in fact, section 52 (2) stated that:

*Contracting authorities may invite the candidates or tenderers to supplement or clarify the certificates and documents submitted in terms of subregulations (1) and regulation 49, and the matters referred to in regulations 50 and 51.*

Dr Delia noted that regulations 50 and 51 dealt with technical capacities, ie envelope 2. He then quoted from the proviso to regulation 82 (2) which stated that:

*Provided that the Director of Contracts or, with his authorisation, any contracting authority, shall have the right to seek clarifications on points of a technical nature to enable a proper evaluation of any tender, which, however, would at that stage have already been declared to be basically compliant.*

According to Dr Delia, the Adjudication Board could not seek a clarification regarding the fact that these two documents were not submitted because that was not legally permissible.

Dr Sciriha intervened to state that on the 22<sup>nd</sup> September 2008 his clients wrote to the Director of Contracts requesting the latter to be given that part of the adjudicating report that concerned their offer and an acknowledgment was issued on the same day. He contended that his clients acted openly and transparently.

Dr Sciriha reiterated that in this case the overriding consideration was that justice should be done by awarding the tender to the bidder that submitted the most advantageous offer. He added that he had expected the other side to base its defence on the substance of the issue and not small details.

Dr Sciriha remarked that it was customary of the defence lawyer, in this case Dr Delia, to quote from his clients' *letter of objection* only that part that suited him. However, Dr Sciriha stood by the legal arguments laid down in his *letter of objection* and by the arguments he put forward during the hearing sessions which were the result of matters that came to light after presenting his objection.

Dr Sciriha reiterated that it seemed odd to him that some of the most experienced contractors happened to fail in submitting the day work rates and the cash flow payments except for one contractor.

Dr Delia observed that it had not been established that all the tenderers did not submit these requirements since there were tenderers who were disqualified at an earlier stage and hence their third envelope was not opened.

The Chairman, PCAB, remarked that it was usual practice of the PCAB to call to public hearing sessions the Chairman and all the members of an Adjudication / Evaluation Board. He therefore asked Architect Buhagiar how was it that the Chairman of the Adjudication Board which evaluated and recommended the outcome of such a tender valued at about Lm3 million, namely, Engineer Paul Cardona, and some other members of the Adjudication Board (excluding Mr Vincent Micallef Pule who had turned up to the previous hearings) did not attend any of the four meetings held on this case.

The PCAB's Chairman added that even if Ing. Cardona was often abroad on business, still he did find the time to adjudicate this tender but, apparently, he did not find the time to attend these hearing sessions. The Chairman, PCAB, concluded that it was unfair for anyone to let Architect Buhagiar shoulder all the responsibility, arguing that the Chairman's absence showed a measure of disrespect towards the tenderers, the tendering process itself and the PCAB. The Chairman asked Dr Borg Myatt to communicate this to the Malta Transport Authority.

At this stage the public hearing was brought to a close and the PCAB proceeded with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 03.10.2008, and also through their verbal submissions presented during the public hearings held on the 29.10.2008, 14.11.2008, and 20.11.2008 respectively, had objected to the decision taken by the General Contracts Committee;

---

• *having noted all the arguments brought forward by the appellant Company's legal advisor on behalf of his clients, particularly, those concerning:*

- the fact that the 'day work schedule' referred to a situation of a rare event, arguing that, once it did not result that there were any unforeseen works, the day work schedule would never have been resorted to
- the 'cash flow payments schedule'
- the fact that, according to the appellants' legal advisor, the notes to Volume 4 indicated that the day work schedule was "to be provided by the tenderer in the rare event that unforeseen works not covered by the bill of quantities" arose which implied that the day work schedule had to be provided when the unforeseen works arose and not before
- the claim made by Dr Galea wherein the latter stated that the tender document already provided the necessary controls with regard to variation, explaining that the tenderer had no discretion in such cases because, according to the tender document, that remained at the Contracting Authority's discretion
- the fact that the term 'schedule' was never mentioned anywhere in the tender document
- the fact that, according to Dr Galea, the bank guarantee was not equivalent to a cash flow payments schedule albeit adding that the tender document

did not provide the format that the cash flow payments had to be presented in

- pre-financing wherein Dr Galea argued that
    - the Contracting Authority knew that it had to pay the pre-financing payment
    - the tenderer had to indicate the timeline / phases in which the works were scheduled for execution
    - the tender document established the procedure how payments were to be effected
  - the fact that Dr Galea claimed that the Contracting Authority could easily assess when and how payments would fall
  - the fact that Dr Galea maintained that his client Company had submitted all the rates required
  - the fact that the PCAB should not deliberate on the basis of the papers produced or whether certain forms were or were not in the documentation submitted but it should take into account the general feeling of the entire process
  - the need for the tender to be awarded to a competent contractor and whose bid was the cheapest or rather the tenderer who offered the best value for money
  - the fact that, according to Dr Sciriha,
    - the appellants never admitted that they did not submit the requested schedules
    - the day work schedule and the cash flow schedule were not the main issues but one had to concentrate on the bill of quantities
    - the fact that Architect Aquilina had confirmed that, in real terms, the rates quoted by the awarded tenderer were the same as those it had quoted in the bill of quantities, reinforced his contention that the appellants had satisfied the tender condition
    - the tender document made no reference to the term 'schedule' and, as a result, in the absence of a given format, then one could present it in various forms
    - since the tender document referred to cash flow payments and not to a cash flow schedule, the fact that the tenderer had credit facilities to undertake these works together with other information about the financial situation of the tender and the submission made by Asfaltar Ltd as a whole, should suffice to enable the PCAB to be satisfied that the appellant Company was financially compliant
    - a tender should be adjudicated on substance and not on details
    - his clients were being penalised for adhering to the grid that featured in the tender document
    - albeit he could not comment on the prices because he did not have all the information, yet he was convinced that the PCAB would look into the value-for-money aspect of this tendering process
    - it seemed odd to him that some of the most experienced contractors happened to fail in submitting the day work rates and the cash flow payments except for one contractor
-

- *having considered the Contracting Authority's legal advisor's interventions and submissions, particularly, those concerning:*
    - the issue of a mistake found in the evaluation grid which, erroneously, indicated that there were certain documents which were not submitted by the appellant Company at tendering stage, an issue which was sorted out during the hearing when Dr Borg Myatt stated that Asfaltar Ltd had in fact submitted the forms provided in Volume 1, Section 2 that were previously indicated as missing, adding that this did not influence the decision to reject the appellant Company because the Adjudication Board was aware of the correction
    - the fact that the appellant Company was rejected for the non-submission of (a) the cash flow payments schedule and (b) the day work rates schedule
    - the fact that no one had contested the fact that the day work schedule and the cash flow payments were not submitted
    - the fact that during the hearings, the PCAB had given the possibility to all parties concerned to demonstrate if the missing documents could be compiled from the information already submitted by the tenderers and four architects were equally divided as to whether this was possible or not
    - the cash flow payments referred to in page 29 which had nothing to do with the cash flow statements submitted in envelope 2
    - the main issue, which was that the appellant Company did not submit the day work rates and the cash flow payments, and that the Adjudication Board had no option but to disqualify the tenderer for the sake of justice and equity
- 

- *having taken cognizance of Dr Delia's cross-examinations, observations and submissions made during the hearing sessions held in connection with this appeal, particularly:*
  - the fact that, according to Dr Delia, the appellant Company was trying to cover up the missing documents
  - the fact that, according to the awarded tenderer's legal advisor, Dr Delia observed that what was being said was meant to illustrate what the appellant Company had submitted whereas the hearing was concerned with what the appellant Company had not submitted. Also, argued Dr Delia, in this instance, one could say that it was not a question of submitting an incomplete schedule but that Asfaltar Ltd had submitted no schedule at all
  - the issue regarding cash flow payment where Dr Delia remarked that the schedule was (a) requested and (b) mandatory
  - the fact that, whether the request for a work schedule was reasonable or not should have been clarified with the contracting authority beforehand
  - the fact that, according to Dr Delia:
    - he disagreed with Dr Sciriha that the PCAB should look into the price offered by his client

- the hearings were concerned with the detailed discussion entered into to evaluate the reasons leading to the exclusion of the bid made by Asfaltar Ltd and not to go into the whole tendering process of public procurement or into the principles of justice, fairness and so forth
- case study amply demonstrates that tenderers are expected to abide by instructions given in the tender dossier
- Asfaltar Ltd did never present the requested schedules neither as a matter of fact nor as a matter of opinion
- the appellant Company was not discriminated against and, as a consequence, no injustice was committed
- contrary to what Dr Sciriha had stated, the 3 year cash flow projections and the Company's credit facilities with the bank – requirements requested in the administrative grid in envelope 2 – were not equivalent to cash flow payments during the project because the latter was not referring to whether a Company was financially sound or not but it was referring to the payments that the contractor would be subscribing for settlement to the contracting authority on a monthly basis
- the supervisor's role, referred to in Article 35 (page 128) of the tender document, was not meant as if the tenderer could do away with the submissions of document as requested in the tender dossier. Indeed, argued Dr Delia, the very fact that the article referred to earlier states that "*where work is not of a similar character or is not executed under similar conditions, the rates and prices in the contract shall be used as the basis for valuation in so far as is made by the supervisor*", leads one to question how would the supervisor be in a position to apply such rates in the absence of the duty work schedule in the contract
- the objection did not refer to the appellants' submission of the cash flow payments (i) in the wrong format or (ii) not in the preferred format, but that no schedule whatsoever was submitted
- it was beside the point whether the rates in the bill of quantities and those quoted in the awarded tenderer's day work schedule were the same as, after all, nothing precluded anyone from quoting the same rates
- the fact that the objection involved a considerable amount of money by way of deposit did not, in any way, mean that the task of the PCAB became more onerous because the deposit was governed by section 83 (1) of the Public Contracts Regulations and not by the complexity of the case
- nowhere during the hearing sessions was it ever demonstrated that the Adjudication Board had ruled that the schedules were not submitted when, in fact, they were submitted
- the price has nothing to do with this objection and should not be considered by the PCAB because in the 3-envelope system one had to first consider whether the bid bond was there and then to see if one was administratively and technically compliant

- the Adjudication Board could not seek a clarification regarding the fact that these two documents were not submitted because that was not legally permissible
  - it had not been established that all the tenderers did not submit these requirements since there were tenderers who were disqualified at an earlier stage and hence their third envelope was not opened
- 

- *having considered these and other issues, the PCAB ...*
  - initially observed that the fact that only one tenderer seemed to have understood what the Contracting Authority meant by the *day work schedule* might have been an indication that things were not laid down in a clear manner
  - initially took note of part of Asfaltar Ltd's letter of objection wherein it was stated that for "a day work schedule to be required there must first arise unforeseen works not covered by the bills of quantities", adding that nowhere "does it result that these unforeseen works did arise and therefore tenderers were not required to submit a day work schedule."
  - took cognizance of *Architect Magro*'s testimony, particularly,
    - her claim that an architect would find no difficulty to arrive at the rates of items of plant and classes of labour for road works from the rates make up and that no specific format for the day work schedule was given in the tender document
    - her claim that the day work rates schedule presented by Bonnici Brothers Ltd could not be an exhaustive one
  - also took note of *Architect Aquilina*'s statement wherein the latter confirmed that although the rates in the bill of quantities (e.g. in cubic or square metres) were quoted differently from the day work rates (hourly or on a daily basis), basically, Bonnici Brothers Ltd quoted the same rates in both instances
  - thoroughly reflected on *Architect Buhagiar*'s testimony, especially,
    - his explanation regarding the rates make-up which referred to the breakdown of the rates applicable to items in the bill of quantities in terms of the amount of labour, material and plant involved whereas, according to Mr Buhagiar, what was being requested in the day work schedule were the individual rates for plant and labour applicable to 'unforeseen' works not covered by the bill of quantities
    - his insistence that the rates of the items in the bill of quantities was one thing and the day work rates schedule was another
    - his statement that it was the Adjudication Board that decided and that it did so unanimously
  - reflected on the fact that rates quoted in the bill of quantities may differ from the day work rates
  - thoroughly considered and duly reflected on the evidence given by *Architect Cassar*, particularly,

- the fact that he was in a position to produce a set of rates from those submitted by the appellant Company
  - the fact that he was in a position to produce such rates in about 10 hours
- deliberated on how much, in reality, one could reasonably, draw the same conclusion arrived at by the appellants' legal advisor in so far as an outright and unequivocal rate schedule is concerned, a schedule, which had to be, supposedly, submitted and not extracted from the breakdown of such rates submitted
- thoroughly considered and duly analysed the evidence given by Architect Azzopardi, who
  - positively stated that he would be able to work out the rates for different classes of labour and construction plant from the rates make up and the programme of works submitted by Asfaltar Ltd
  - explained how the site supervisor could change the rates in view of the fact that, according to the same witness, the said supervisor would be in a position to calculate such rates
  - explained his interpretation of the terms 'modification', 'variation' and 'unforeseen'
  - claimed that the list of classes of labour and construction plant that a contractor was asked to submit could hardly ever be exhaustive
  - said that he was not in a position to comment on Asfaltar Ltd's non submission of a cash flow payment schedule as he was not instructed by the appellant Company (Asfaltar Ltd) to examine this issue
  - claimed that with, regard to the day work schedule, he would need *the programme of works* along with *the rates make up* to be in a position to work the rates of a labourer on a particular job
- thoroughly considered, and duly reflected on, the evidence given by Architect Galea, a witness summoned by the awarded tenderers' legal representative wherein the witness:
  - stated that the cash flow payments schedule was tied to the programme of works and was required because it quantified the payments and established the date the payments would fall due
  - disagreed with Architect Azzopardi regarding the different purpose of the rates in the bill of quantities and the day work rates, claiming that the latter would normally apply to odd jobs not included in the bill of quantities
  - stressed on the need for a Contracting Authority to be supplied with both rates
  - stressed on the distinction between the day work rates and the rates offered in the bills of quantities, namely, that both rates served different purposes and that the former would normally be higher because they would include mobilisation and demobilisation rates

- disagreed with Architect Azzopardi in so far as the fact that the latter had stated that he would be able to calculate the rates in question by basing his workings on the rates make up in relation to the programme of works because, on a large project, it usually happened that the programme of works would have been better had a template been provided in the tender document
- remarked that the tender document was quite clear in requesting the list

reached the following conclusions, namely, the PCAB ...

1. concludes that the appellant Company did actually admit to the non-submission of requested schedules albeit they submitted that they had been included in another form;
2. feels that, in spite of the fact that the lack of a specific format in which the required schedules could be presented, may have, *prima facie*, posed a problem as far as the participating tenderers' overall understanding of what was really required, yet this could have easily been resolved by way of a normal clarification request by the same tenderers;
3. feels that it is amply clear that both contended schedules were requested, as well as mandatory and, as such, unless otherwise authorised to do so, no participating tenderer had the right or a discretionary power to hand pick what had to be submitted or not, as such right and power remain, as usual, the sole right and power of the contracting authority and, definitely not that of a participating tenderer, and this despite of the perceived importance or reasonableness that one may attribute to such a request, as well as, the level of substance vis-à-vis format;
4. feels that the appellant Company has, mistakenly, confused cash flow payments with a tenderer's credit worthiness;
5. fails to agree with those architects who testified that it is easy for anyone 'in the trade' to arrive at the requested rates from other data submitted;
6. decides that, regardless of whether anyone 'in the trade' could, possibly, arrive at such rates following various other ancillary computation, remains unacceptable to the overall evaluation process as it is never an Adjudication Board's remit to take such initiative – the onus of submission of all relevant data and requested documentation which could easily be assessed without additional human intervention, remains with the participating tenderer. As a matter of fact, the PCAB always desists from encouraging such initiatives in order to ensure that overall transparency, fairness and equity will continue to prevail;
7. feels that the distinction made by the contracting authority as regards bills of quantities vis-à-vis the individual rates applicable to 'unforeseen' works not covered by the bills of quantities was justified;

8. 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 tenderers, and (b) had no option but to disqualify the tenderer

As a consequence of (1) to (8) 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 refunded.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*29 December 2008*