

PUBLIC CONTRACTS APPEALS BOARD

Case No. 139

Advert No CT/WSC/T/8/2008 - CT 2048/2008 - WSC 1252/07 Period Contract for the Supply of Ductile Iron Pipes

This call for tenders, covering a two year period contract, was published in the Government Gazette on 8 February 2008.

The closing date for this call for offers was 3 April 2008 and the estimated contract value was € 2,967,553.

Three (3) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', Messrs Ragonesi & Co Ltd as agent and on behalf of Saint-Gobain PAM of France filed an objection on 6 October 2008 against the award of the tender in caption to Messrs Sertubi Spa locally represented by J.P. Baldacchino & Co Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened two public hearing on 12.11.2008 and 17.11.2008 respectively to discuss this objection.

Present for the hearing were:

Saint-Gobian PAM of France/ Ragonesi & Co Ltd

Dr Franco Vassallo - Legal Advisor
Dr Daniele Cop - Legal Advisor
Mr Roberto Ragonesi

Sertubi Spa of Italy/ JP Baldacchino & Co Ltd

Dr Patrick J Galea - Legal Advsior
Mr Anthony Baldacchino
Mr Adrian Baldacchino

Water Services Corporation

Ing Mark Perez
Mr Anthony Camilleri

Adjudication Board

Ing. Charles Camilleri
Ing. Nigel Ellul

Department of Contracts

Mr Francis Attard

After the Chairman's brief introduction, Dr Franco Vassallo, the legal representative of Ragonesi & Co Ltd, the appellant Company, acting as agent and on behalf of Saint-Gobain PAM of France, was invited to explain the motive of their objection.

Dr Vassallo, commenced his intervention by stating that the first point that must be established was whether there was a valid bid bond throughout the adjudication process. Dr Vassallo declared that if there was a valid bid bond they would withdraw their appeal, there and then, unconditionally. However, he went on to allege that the answer given by Mr Francis Attard, Director General Contracts, to a legitimate question made by his clients was unclear. The appellant Company's lawyer explained that the reply given to his clients' e-mail, dated 11 September 2008, in which they asked whether there was a valid bid bond throughout the adjudicating process, was that the Department would like to inform them "*that the established procedures have been followed*" and that a "*valid bid bond is in place.*"

Dr Vassallo said that Ragonesi & Co Ltd had asked whether the only remaining tenderer had extended the validity of the bid bond prior to its extension because the Water Services Corporation (WSC), for reasons known solely to it, did not award the tender within the 150 day time limit quoted in the tender document. Dr Vassallo explained that when, on 11 August 2008, WSC asked tenderers to extend the validity period of their tender, his clients opted not to extend the bid bond offered. The reason given was that his clients' principals could not maintain their prices quoted 150 days earlier due to the fact that the prices of metals and alloys had shot up.

The appellant Company's legal advisor contended that this issue was important because it could give rise to a very dangerous situation and chaos where a bidder, knowing that his prices were competitive, would be allowed to re-activate an expired bid bond. He sustained that, to his knowledge, this was not good public procurement practice.

He conceded that a public authority might not divulge information if such information:

- impeded law enforcement
- was contrary to public interest
- prejudiced the legitimate commercial interests of economic operators, whether public or private
- might prejudice fair competition between them

However, Dr Vassallo said that they believed that

- (i) the assertion made by Mr Francis Attard in his position as Director of Contracts was vague
- (ii) the only interpretation they could make was that they were not on a fishing expedition and
- (iii) a bid bond must be valid throughout the whole adjudication process.

The appellants' legal representative contended that if the bid bond was not valid throughout the adjudicating process they were creating a very dangerous precedent because this would be quoted against them in future tenders.

At this instance, he invited his colleague, Dr Daniele Cop, to intervene to highlight the importance of 'transparency' in public tenders.

Dr Cop said that the *Principle of Transparency* was enshrined in the European Community Law which underlined the whole procurement procedure. She maintained that, in this particular case, this principle was important because it, essentially, implied that everybody knew the rules of the game. She explained that the rule of the game in relation to a bid bond was that the validity period of the bid bond and the tender itself were intrinsically linked. Dr Cop argued that, as a consequence, the period of the bid bond had to be the same period of validity of the tender and, therefore, if one allows an extension to the validity of the bids, this would mean that the validity of the bid bond has to run in parallel in order to ensure continuity.

She also insisted that the rules of the game are that an extension is always under the same terms and conditions under which the tender is issued. Dr Cop maintained that, if it were possible for one to keep a bid valid, even if there is a gap between the validity of the bid bond and the validity of the tender, then that would, effectively, mean that there is a change in the terms and conditions and any interested party is obliged to know about this change in the rules of the game.

Dr Patrick Galea, representing the awarded tenderer, namely, Messrs Sertubi Spa (locally represented by J.P. Baldacchino & Co Ltd.), in his first intervention emphasised that, contrary to what had been stated until then, the position was amply clear in that there was a bid bond in place and that it was renewed prior to the expiration. He said that they had documentary evidence from the bank to reinforce their claim.

During these proceedings Mr Francis Attard, Director General (Contracts) and Ing Mark Perez, Water Services Corporation took the witness stand and gave their testimony under oath.

On cross-examination by the PCAB, Mr Attard, testified that he recalled that Mr Ragonesi had gone to his office and requested details as to whether the bidder had followed the procurement procedure. He replied that he could only provide generic information and then it was up to him to decide whether the public procurement procedure was followed or not. Mr Attard also said that he had told him to communicate such request in writing. In fact, continued Mr Attard, Mr Ragonesi sent an e-mail and he replied with the answer quoted above.

In reply to specific questions by the PCAB, Mr Attard declared that

- (i) before sending that reply he had verified the documentation in the WSC's file and ensured that the procurement procedure had been followed and that the recommended tenderer had a valid bid bond throughout the procurement process;

- (ii) he could not submit a direct reply because, knowing that the question was being made by a bidder, he was bound by the confidentiality of information
- (iii) he assumed responsibility for what he had written
- (iv) the bid bond was in place during the whole duration of the validity period / evaluation process.

On cross-examination by Dr Vassallo, the witness confirmed that it was a 150 day tender and that WSC had requested bidders to extend their bid bond.

At one point the PCAB referred the witness to an email dated 15 October 2008 sent by Mr Stefan Vella, Procurement & Stores Office, WSC to Mr Marco Saliba HSBC under the subject 'Renewal of Bank Guarantee 8820080506 for Euro 74,000 on Account of Banca Agricola Mantovana obo Sertubi Spa', which, inter alia, specified that:

“This guarantee had an original expiry for the 31st August 2008. On the 5th of September we received an extension from HSBC of same up to the 15th November.

As this bid bond is in a centre of a dispute of an appeal filed in by a competitor of Sertuba SpA with the Department of Contracts, we kindly ask you to send us documentary evidence when you received instructions from Banca Agricola Mantovana Spa (or new owner Monte dei Paschi Siena) when instructions to extend the guarantee have been received.”

When his attention was drawn that there was a gap of 5 days, Mr Attard replied that he had seen documentary evidence which showed that the bid bond was extended prior to the end of August 2008, being the expiry date of tender.

At this point, Mr Adrian Baldacchino, representing J P Baldacchino & Co Ltd, confirmed that their foreign principals, namely, Sertubi SpA had extended the guarantee on the 29th August 2008. To corroborate this, the same Company representative exhibited a copy of the *Swift Message* sent by the HSBC which confirmed that on the 29 August 2008 (three days before expiration) the local bank had received instructions from its Italian counterpart to renew the said guarantee. Mr Baldacchino insisted this was a proof that the bid bond was in place at any time and that it was never interrupted.

With regard to the contents of the said *Swift Message*, Dr Vassallo said that, according to the specimen of the bid bond in the tender dossier, the bid bond was issued by a bank and not by Serbuti SpA, albeit, it seemed that they did not give any instructions to their bankers to do so, at least within the stipulated time frame. He explained that the scope of the bid bond was to serve as a guarantee that was supplemented by a cash deposit. Dr Vassallo contended that the specimen specifically stated that the bid bond was being issued by a bank and, as a consequence, assumed that the bid bond was issued by the local HSBC office. Dr Vassallo added that the local HSBC office entered into a contractual commitment so that if their clients defaulted and the Department of Contracts or the WSC made a claim, they had a right to claim up to the

31 August 2008. He further sustained that, as a result, it followed that they did not care about instructions given and what they really cared about was that a valid bid bond was in place. Dr Vassallo pointed out that the WSC did not have a valid bid bond because it was not in their hands on 1 September 2008. Dr Vassallo insisted that, without that document in hand, the one dated 15 October 2008 was inadequate since it did not represent a guarantee but an undertaking.

When Dr Vassallo asked Mr Attard to state whether on 1 September 2008 he was in possession of a bid bond that was extended for 60 days, the reply given was in the negative. However, the witness explained that, normally, bidders were asked to extend their bid bond prior to the expiration of the adjudication date. He also stated that those tenderers who decided not to renew their bid bond would be automatically disqualified.

Dr Vassallo insisted that it was a condition that a valid bid bond must exist throughout the whole adjudication process. He sustained that a bid bond / bank guarantee had a value only if it was physically delivered prior to the expiration date. The appellants' lawyer contended that, in spite of the fact that the foreign bank had given instructions to the local bank the WSC could not submit any claim for default once the bid bond was not physically in their possession. At this point Dr Vassallo asked Mr Attard to state whether he was correct to state that there was no bid bond in place in the WSC file prior to the expiration of the original bid bond, that is, 31 August 2008. The Director General Contracts replied that he had seen documentation that covered the validity of the bid bond prior to the end of August 2008.

Dr Vassallo reiterated that their position was that they agreed that the Director of Contracts or a client had the right to extend the validity of any tender. Also, he said that if the WSC asked the tenderers to extend the validity of their offer, this was not to be carried out by a simple verbal communication but should have been carried through by means of a written undertaking backed by a bid bond.

At this stage, the appellant Company's legal advisor referred to Clause 15 of the tender conditions which specified that:

“Offers, which on the closing time and date fixed for the submission of the tender, are not accompanied by the mandatory Bid Bond, will be disqualified.”

As a consequence, the appellants' lawyer maintained that any tender that was not accompanied by a bid bond was automatically disqualified. Dr Vassallo claimed that it would be illegal if a contracting authority changed the rules of the game half way through the process and accepted that a bidder did not need to have a valid bid bond. He said that his interpretation of the law and of banking documents was that, until the bid bond was substituted in the pertinent file, such an offer would not be there any more. As a result, Dr Vassallo argued that the WSC, at least up to the 5th September 2008, did not have a valid bid bond in place.

When the PCAB drew Dr Vassallo's attention that it was stated that the bid bond was in place at the closing date of submission of tenders, Dr Vassallo made reference to Clause 13 which specified that:

“Each tender must be accompanied by a valid and original Bid Bond issued by a Bank This Bid Bond must be valid for a period of 150 days from the date set for the submission of tender. The Bid Bond shall be forfeited if the Tenderer withdraws his tender before the stipulated period of 150 days or if the Tenderer fails to provide the Performance Bond within fifteen (15) days of the receipt of Letter of Acceptance.”

The appellants’ legal representative said that a valid bid bond was in place for 150 days for both tenderers. However, he contended that a valid bid bond must be in place even if there is an extension because, otherwise, in case of a default, the client, namely, in this case, the Contracting Authority would have nothing to claim.

At this point, Mr Adrian Baldacchino stressed that the WSC, being the beneficiary, could have at any time checked that the bid bond was open and even submitted a claim.

Dr Galea said that if it could be established that at any time, in substance, nobody was at risk then he would submit that there was continuity and that both parties have honoured their obligations.

Dr Vassallo replied that he did not agree with this statement because, at least, up to 15 October 2008, the WSC did not have a document in place and, in his opinion, an extension was not a letter but a Bank Guarantee extending the validity of the tender. He insisted that the extension must be of the same format and strength as to the one originally asked for otherwise they would be changing the rules of the game.

Dr Galea insisted that it had to be established whether there was any breach and what would have happened if there was the possibility of a claim. He was of the opinion that it was not a question of when it was delivered because, if the WSC had access to it, then all parties have honoured their obligations. Dr Galea sustained that he failed to see how the rules of the game were in any way being shifted because the bid bond had to be extended prior to the expiration of the period of the original offer. He claimed that it was important for the PCAB to hear the opinion of representatives of the WSC’s and HSBC’s respectively.

Replying to a question by the PCAB, Dr Vassallo said that when his clients were asked to renew the bank guarantee prior to the expiration, they communicated to the Contracting Authority and informed them that they were deciding not to extend their bid because of the turmoil in the world market.

On taking the witness stand Ing Mark Perez, a representative of the WSC, was cross-examined by the PCAB. When he was referred to HSBC’s letters dated 15 October 2008 which was addressed to the Chairman, WSC, Ing Perez explained that the specimen of the original bid bond with all the details and conditions were included in the tender document. However, he said that, whenever an extension was requested, the Bank did not send a similar document with a different date but the normal practice was that the Bank would send a letter informing them that the expiry date of the guarantee had been extended.

The PCAB referred the witness to HSBC's letter dated 05.09.2008 which was received at the Chairman's Office, WSC on 15.09.2008 and at the Administrator WSC's office on 30.09.2000. His attention was drawn to the fact that there appeared to be a gap of 5 days during which the WSC was not covered by the bank guarantee taking into consideration the fact the guarantee had expired on 31.08.2008 and HSBC had informed the WSC that the guarantee was extended on 05.09.2008. Ing Perez replied by stating that their interpretation was that this type of letter was just a note of information and that the guarantee was in place.

Answering a specific question by the PCAB, the witness said that if he was a member of the Adjudication Board he would have consulted the person in their office who was responsible for bid bonds and, rightly or wrongly, would have interpreted it as a bid bond being in place. When his attention was drawn to the fact that, in such instances, exact dates were important and that these were not subject to interpretation, Ing Perez said that, at this point, he could only state that the best person who could elaborate was Mr Stefan Vella who was responsible for the handling of guarantees and because he had the exact information. With regard to the PCAB's remark that in case a foreign bank instructed the local bank to extend a guarantee but the local bank for one reason or another issued the guarantee a bit late, Ing Perez replied that it was the Bank that could comment on this issue.

Dr Vassallo intervened by stating that on the basis of Ing Perez's argument, it was given to understand that a tender would be considered valid even if it was not accompanied by a bid bond and, say, after 15 days after closing date of tender, the Bank would write to the WSC informing them that a bid bond was in place at closing date. Ing Perez replied that it was not the competence of the WSC or the Adjudication Board to verify the validity of bid bonds on the closing date of tenders because the procedure of the opening and the scheduling of tenders submitted was carried out by the General Contracts Committee (GCC).

The PCAB said that the understanding was that

- (i) the adjudication of tenders was carried out by the Adjudication Boards
- (ii) the GCC based its decisions on the Adjudication Board's recommendations *and*
- (iii) if such an anomaly is encountered during the adjudication process, it remains the Adjudication Board's responsibility to draw the GCC's attention.

Mr Attard confirmed that the PCAB's understanding in regard was correct, adding that Adjudication Boards might also request the GCC to seek clarifications. However, he said, that their usual stand was that Adjudication Boards had to adjudicate on the basis of the published tender conditions.

The PCAB made reference to the 3rd paragraph of an email dated 20.10.2008 which was sent by Mr Roberto Stroligo from Sertubi SpA to Mr Stefan Vella (WSC) wherein it was stated that:

“In the mean time, according to the request of the HSBC BANK MALTA PLC we would like to ask you what we have to do with the operative Bid Bond (74,000.00 euro, issued on the 14th March 2008 and extended before the expiring, on 29th September 2008 up to the 15th of November ‘08.”

Dr Galea intervened to ask the Board to establish the date when the foreign Bank had extended the ‘Bid Bond’. The PCAB said that the question was not only when the bank extended the *guarantee* but when the bank guarantee was physically in possession of the WSC.

Dr Vassallo, after making reference to the ‘Bid Bond’ wherein it was stated that:

“This guarantee expires on 31 August 2008 and unless it is extended by us or returned to us for cancellation before that date any demand made by you for payment must be received at this Office in writing not later than the aforementioned expiry date.”

asked Ing Perez to state under which document the WSC would have claimed on 04.09.2008 once they did not have the relevant document in their possession. The witness replied that since the WSC requested an extension they would have asked the Bank if there was an extension in place. Dr Vassallo insisted that they should not ask the Bank but they should have it in their file.

On cross-examination by Dr Galea, Ing Perez said that HSBC and his work colleague, Mr Vella, knew whether the WSC would have been at risk if there was a claim. With regard to the renewal of a bid bond, the witness said that they simply receive a letter from the Bank informing them that the guarantee had been extended. When asked to state whether there was any breach in the continuity of the guarantee or from the moment of expiration, the reply given was in the negative.

During the proceedings it was established that on 13.08.2008 the appellant Company informed the WSC that they were not going to renew their bid bond and to extend the validity of their offer up to the end of October, 2008 due to the increase in raw material prices. Dr Vassallo declared that if Ragonesi & Co Ltd were awarded the contract and then defaulted, the WSC would have claimed the bid bond and the bank would have paid without any questions being asked whatsoever because it was a contract between the Bank and the WSC. Ing Perez confirmed that *Saint Gobain* did not extend their tender.

Dr Galea formally submitted that in view of this evidence, the appellants had no interest in submitting this plea because they were not contenders any more. Dr Vassallo replied that this was not a private plea because it concerned a public tender funded by public money and they, as a Company, had a direct interest.

Ing Perez’s attention was also drawn to the fact that there were two (2) Adjudication Board’s reports, wherein, at first, they recommended the award of the contract to Tenderer No 2, Saint Gobain PAM SA, and in the latter they recommended the award of the contract to Tenderer No 1, Sertubi SpA.

Mr Nigel Ellul, Chairperson of the Adjudication Board, said that there were two reports because, initially, they were going to choose the cheapest offer but then they realised that they needed more time because they were not going to issue the results within the stipulated period of 150 days.

The PCAB maintained that knowing that there was an escalation in prices they should have accelerated the process so that the taxpayer would not pay € 500,000 more.

In reply to a specific question by the PCAB about the present market prices of raw material, Mr Baldacchino said that, although the prices had since gone down, they were still high.

At this stage those present agreed to postpone the hearing for another session which was scheduled for Monday, 17 November 2008, at 16.30 hours in order to hear the views of Mr Marco Saliba (HSBC) (to confirm the letter sent on 5 September 2008 and the *modus operandi* of bid bond extensions) and Mr Stefan Vella (WSC) (to establish what he had in his file between the 31 August up to the 15 September 2008).

Further public hearing held at the Department of Contracts on Thursday, 17 November 2008 at 16.30 hrs.

Besides those present for the first hearing held on 12.11.2008, the people mentioned hereunder joined the floor for this session.

Water Services Corporation

Mr Stefan Vella

HSBC Malta plc

Mr Marco Saliba

At the beginning of the 2nd session Dr Galea asked the PCAB whether they had received his letter dated 13 November 2008. The Chairman PCAB, whilst confirming that it was received on Friday 14 November 2008, drew Dr Galea's attention that, for fairness sake, it should have also been sent to all interested parties. The PCAB gave a copy of this letter to the representatives of the appellants and the WSC.

Dr Vassallo said that Dr Galea's letter was implying that Messrs Ragonesi & Co Ltd had no *locus standi* in these proceedings because they were no longer participating in the tender. He insisted that his clients had a *locus standi*, primarily because it was a public tender and, in its very nature, it entailed an element of publicity and of public interest and, secondly, because public funds were involved. Furthermore, he pointed out that Messrs Ragonesi & Co Ltd had gone up to the second stage (the technical evaluation).

The appellants' legal advisor said that the fact that they opted not to extend their bid bond did not mean that they were not interested in the tender, so much so, that his clients continued to follow the outcome of the tender. Apart from this, the appellants' lawyer contended that Messrs Ragonesi & Co Ltd had a direct interest, not only in the proceedings but, primarily, the result itself because if the PCAB found an irregularity as they were alleging, although the result would not be an award of the tender to Messrs Ragonesi & Co Ltd, the Director of Contracts' recommendation to award the contract to Sertubi SpA would be declared null and void.

Dr Galea replied by stating that the *locus standi* in these proceedings before the PCAB was based on the fact that the appellant Company was no longer a tenderer and, being a party as a member of the general public, they had other remedies open because, as far as he was aware, the right of appeal before this Board was open only to those who were still directly interested and in the running for a tender.

Dr Vassallo made reference to Part 8 Appendix B (reproduction of Regulation 83 of the Public Contracts Regulation 2005) wherein it was specified that:

“Any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement may, within ten calendar days of the publication of the decision, file a notice of objection at the Department of Contracts or the contracting authority involved as the case may be.”

Dr Galea sustained that the proper interpretation of '*any person having or having had an interest*' was qualified by the condition that such person remained a tenderer.

However, the recommended tenderer's lawyer said that, regardless, from their end they would agree to proceed with the hearing leaving it up to the PCAB to deliberate on their interpretation of Regulation 83 of the Public Contracts Regulation 2005 - Part 8 Appendix B.

At this point the Chairman, PCAB, called Mr Marco Saliba, Team Leader, Guarantees, at the Trade and Supply Chain - HSBC Malta plc, to the witness stand. Before giving his testimony under oath, the witness declared that he was authorised by his clients to disclose any information about the guarantee.

On cross-examination by Dr Galea, Mr Saliba confirmed that they had received instructions from their clients in Italy to extend the guarantee on 29 August 2009 and declared that the guarantee was continuous and always operative.

He also said that 5 September 2008 was not the date of extension but the date when HSBC Bank Malta plc notified the WSC that the guarantee was being extended from the expiry date, that is, 31 August 2008 to 15 November 2008.

The witness said that when there was a request for an extension, the Bank's practice was that they informed the beneficiary that the guarantee had been extended. He explained that the practice in similar circumstances, that is, an extension of a tender, implied a procedure wherein they receive a swift message from abroad and the Bank would inform the beneficiary that the guarantee had been extended to a certain date.

At this stage, the witness exhibited a true copy of the original Swift Message received by HSBC.

When Dr Galea asked Mr Saliba to state whether, if on 02.09.2008 or 03.09.2008, the beneficiary made a claim

- a. the Bank would have honoured it *and*
- b. whether, in such case, the guarantee would have remained operative from the date of expiration

the reply given was in the affirmative.

HSBC's representative, in reply to a specific question, said that he did not know of any time limit within which they had to inform the beneficiary.

Replying to a question by the PCAB, Mr Saliba confirmed that the WSC was only informed about the extension of the guarantee through that letter. Although this implied that there was a period between the 29 August and 5 September where the WSC was not really aware whether the guarantee was extended or not, the witness pointed out that the documentary evidence available showed that the guarantee was extended from the expiry date.

When asked by Dr Vassallo to state whether they received a letter from the WSC or the Department of Contracts asking them to extend the validity of the original guarantee, the reply given was in the negative. He said that it was the customer,

through the Foreign Bank, who asked them to extend the validity of the bid bond. The witness explained that the message was received in their system and this was issued on the next working day.

Mr Saliba said that, in this particular case, the message was sent from Italy and received by HSBC on the 29 August 2009 and they took out the message from the Swift the next working day which was a Monday. Dr Vassallo intervened to ask whether there was any reason why, in spite of the fact that they received instructions on Friday, yet the bank guarantee extension was issued on 5 September 2008 when the next working day was 1 September 2008. The witness said that he did not want to answer this question because he wanted to seek legal advice. Dr Vassallo retorted, questioning the witness whether he was scared that by giving an answer he might be exposing the Bank to contractual damages by their client. Mr Saliba replied that he did not know the reason why, however, he said that there was no particular reason.

In reply to a specific question by Dr Vassallo, HSBC's representative said that, normally, they typed the letter and sent it on the same day.

At this point, Dr Vassallo referred the witness to a letter dated 15.10.2008 which was sent by HSBC to the Chairman WSC which stated that:

“We hereby confirm that the instruction to renew the above-mentioned guarantee from the Italian bank reached our Bank on Friday 29th August 2008 via swift message. Thereafter, we proceeded to notify you of the extension of the said guarantee as per our extension letter copy of which is annexed herewith. From the text of the enclosed letter it is clear that guarantee no. 8820080506 never expired but its validity was extended till 15th November 2008.”

The appellants' legal representative asked Mr Saliba to state what provoked the Bank to write this letter. The witness said that this was a reply to a query received from the WSC because they wanted to know whether the guarantee was continuous. Mr Saliba also confirmed that the beneficiary had to present the original guarantee to pay a claim.

When the PCAB asked the witness what would have happened if, in a hypothetical scenario, on 1st September 2008 Sertubi SpA would have asked HSBC to withdraw that guarantee and, in the meantime, the WSC had requested payment thereof, Mr Saliba replied that the customer could not withdraw the guarantee once it was extended.

In reply to various hypothetical questions by the PCAB, the witness replied that

- (i) Sertubi SpA could not retreat the Guarantee on 1 September 2008 because they had already extended it, however, he said that, although he had never come across such a situation before, he did not think that this could happen
- (ii) if the WSC claimed the guarantee before 5 September 2008, HSBC would have been obliged to pay because, although the notification was not issued, the guarantee had already been extended – the authority to extend the guarantee was received by HSBC before expiry date and

- (iii) in case of a claim, they could have presented the original guarantee because, although it had expired, they already had instructions from the Bank that the guarantee had been extended.

When Dr Galea asked the witness to state what would have been HSBC's position if the WSC would have presented the original guarantee on 2 September 2008, the reply given was that, once they would have been instructed to extend the validity, they would have paid.

Mr Saliba wanted to place emphasis on the fact that he was also confirming that the responsibility and commitment of the Bank to pay was never interrupted.

Dr Vassallo said that, on 5 September 2008, the Bank wrote a letter wherein it was stated that:

“At the request of our abovementioned customer(s) we hereby extend the expiry date of this guarantee to 15 November 2008.”

The appellants' representative explained that he understood that HSBC issued a guarantee because they had collateral with another bank (a bank was guaranteeing another bank) and so the Bank guaranteed that HSBC could issue a parallel guarantee. In actual fact, HSBC was doing a guarantee with the WSC and the Banca Agricola Mantovana SpA was doing a guarantee with HSBC.

Dr Vassallo clarified that on 4 September 2008 the guarantee to the WSC had not yet been issued but Banca Agricola Mantovana Spa had extended their guarantee with HSBC – known as 'counter guarantee' or 'back-to-back guarantee'. He said that the guarantee of Banca Agricola Mantovana Spa to HSBC was different from the guarantee between HSBC and the WSC. He maintained that Banca Agricola Mantovana Spa did not extend the guarantee to the WSC but to HSBC and, as a result, the latter had to act on the instructions of Banca Agricola Mantovana Spa. However, HSBC did not issue the extension letter to the WSC before expiry date.

However, when Dr Galea asked Mr Saliba to state whether there was any moment where HSBC was not obliged to honour the guarantee to the beneficiary, the reply given was in the negative.

At this stage, the Chairman, PCAB, drew the attention of those present that, without referring to this case in particular, the manipulation of dates in the banking procedure was inadmissible and unacceptable. With regard to the gap of 5 days, he said that, normally, when a bank received instructions, the notification was issued on the same day. He claimed that such a situation could not occur if not due to negligence or oversight on the part of the operator. The PCAB's Chairman concluded his intervention by hoping that this anomalous situation was not the normal practice but the exception to the rule because if not carried out in a meticulous and scrupulous manner, any deviation from the norm could turn out to be highly troublesome.

Dr Vassallo said that, although in the previous hearing he reserved the right to summon Mr Stefan Vella (WSC), that there was no need to call him to testify.

In his concluding remarks Dr Vassallo said that they agreed that the instructions given by the Italian Bank were given to HSBC to extend the guarantee before expiry date but the local bank notified the beneficiary (the WSC) after that date.

He sustained that the PCAB had no choice but to uphold their appeal because, otherwise, this could create a very dangerous precedent where tenderers would start quoting this decision when filing a tender without a bid bond. He contended that, instead of filing a bid bond with their tender, tenderers would start filing a letter issued by a bank stating that at the submission of tender they had received instructions from a foreign bank to guarantee that if the beneficiary decided to make a claim they would have honoured it.

Dr Vassallo said that he believed that transparency, which was lacking in this case, was the most important element in the tendering process since it had to be ensured that public finance was being spent according to the rules of the game. The appellants' lawyer said that he was surprised that a person responsible for guarantees said that the guarantee was in place. He argued that it was not in place because, if the instructions given by the Italian Bank were given to the Maltese Bank before expiry date and they were acted upon 5 days after that date, it was obvious that the original guarantee issued by HSBC had expired. Dr Vassallo submitted that, if this were to be the case, this would result in a breach of the contract because the bid bond had to be alive throughout the whole bidding process.

Dr Cop said that, by definition, a 'bank guarantee' ('bid bond') was issued in favour of a third party which was the contracting Authority and, without that physical document, you could not enforce that guarantee. She contended that, in this case, they had an expired bid bond and, as a consequence, unless the beneficiary presented the original bid bond with an extension letter, they could not enforce the guarantee unless they had the physical document in hand. Dr Cop emphasised that there was no extension letter in place between the 29 August and the 5 September 2008 and therefore, within that period, there was no possibility for the WSC to enforce the guarantee.

Dr Galea said that they had a confirmation by the witness from HSBC that the guarantee was never interrupted while the appellants' lawyer stated that there was late notification. He contended that he believed that there was a distinction between the actual

- a. extension of the bid bond which, in this case, had been established
- and*
- b. administrative process of giving notice of extension

The recommended tenderer's representative said that nobody had mentioned any time limit within which the 'notice' had to be issued and nobody had quoted any article from the regulations whereby it was stated that the beneficiary had to be advised of the extension between so many specific numbers of days.

Dr Galea disagreed with his colleagues' submissions that there was no bid bond in place because it was made very clear that a bid bond was in place all through the process.

He concluded his verbal submission by stating that JP Baldacchino & Co Ltd and their principals have done nothing wrong because they did what was objectively required of them. Dr Galea contended that they did not see why the PCAB should, apart from other submissions, not consider this appeal as null. Furthermore, he said that on the other hand, the nullity of this tender, as his colleague was requesting, would have very serious implications, more so, in this case wherein it had been established that nothing wrong was done by the tenderer. Dr Galea said that he did not see why his clients should be penalised considering the fact that they were in no way negligent and they gave the instructions in accordance with recognised procedures.

Dr Vassallo said that this was not a question of fault but it was a question of rules because, without such rules, chaos would prevail. The appellants' lawyer argued that, if one were to apply the rules, it would result that, unfortunately, the tenderer did not have a valid bid bond throughout the process. He said that they submitted this appeal because the Director General (Contracts) did not give a clear answer to Messrs Ragonesi & Co Ltd. In actual fact, from these proceedings, it resulted that even the WSC had doubts because they queried HSBC on the matter.

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 10.10.2008, and also through their verbal submissions presented during the public hearings held on 12.11.2008 and 17.11.2008 respectively, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that the appellant Company representatives admitted that the appellants opted not to extend the bid bond offered due to the fact that their principals could not maintain the prices they had quoted 150 days earlier due to the fact that the prices of metals and alloys had shot up in the meantime;
- having also noted Dr Cop's intervention, particularly the one relating to the fact that the validity period of the bid bond and the tender itself were intrinsically linked and that if one were to allow an extension to the validity of the bids, this would mean that the validity of the bid bond has to run in parallel in order to ensure continuity;
- having heard the arguments brought forward by the awarded tenderer's legal representative, especially, the one related to the fact that, as far as they were concerned, their bid bond was valid as it remained in place as it was renewed prior to the expiration;
- having also heard Mr Attard's testimony including the fact that, before writing a formal reply to the appellant Company, he had verified the documentation in the WSC's file and ensured that the procurement procedure had been followed and that the recommended tenderer had a valid bid bond throughout the procurement process;

- having heard evidence given by Mr Vella, a WSC employee;
- having considered the content of the copy of the *Swift Message* sent by the HSBC which meant to confirm that on the 29 August 2008 (three days before expiration) the local bank had received instructions from its Italian counterpart to renew the said guarantee;
- having taken note of Dr Vassallo's claim that, effectively, the WSC did not have a valid bid bond because it was not in their hands on 1 September 2008 and that it was a condition that a valid bid bond must exist throughout the whole adjudication process;
- having also considered Mr Attard's statement which placed emphasis on the fact that, it is normal praxis in public contracts, that those tenderers who decided not to renew a bid bond would be automatically disqualified from any public tender;
- having noted Dr Vassallo's (a) argument relating to the fact that the WSC, at least up to the 5th September 2008, did not have a valid bid bond in place, claiming that, albeit that both tenderers had a valid bid bond for 150 days, a valid bid bond must be in place even if there is an extension because, otherwise, in case of a default, the client, namely, in this case, the Contracting Authority would have nothing to claim, (b) claim that, at least, up to 15 October 2008, the WSC did not have a document in place;
- having also noted Dr Vassallo's claim that an extension was not a letter but a Bank Guarantee extending the validity of the tender, insisting in the process that the extension must be of the same format and strength as to the one originally asked for as, otherwise, one would be changing the rules of the game;
- having heard Ing Perez's testimony who, *inter alia*, stated (a) that whenever an extension was requested, the Bank did not send a similar document with a different date but the normal practice was that the Bank would send a letter informing them that the expiry date of the guarantee had been extended and (b) that he interpreted the contents of HSBC's letter dated 05.09.2008 as a note of information and that the guarantee was in place, (c) that it was not the competence of the WSC or the Adjudication Board to verify the validity of bid bonds on the closing date of tenders because the procedure of the opening and the scheduling of tenders submitted was carried out by the General Contracts Committee (GCC), (d) that HSBC and his work colleague, Mr Vella, would have known whether the WSC would have been at risk if there was a claim;
- having established that there were two Adjudication Board's reports, wherein, at first, the said Board had recommended the award of the contract to Tenderer No 2, Saint Gobain PAM SA, whilst in the second letter they recommended the award of the contract to Tenderer No 1, Sertubi SpA;
- having heard Mr Nigel Ellul, Chairperson of the Adjudication Board, explain that there were two reports because, initially, they were going to choose the cheapest offer but then they realised that they needed more time because they were not going to issue the results within the stipulated period of 150 days;

- having also established that albeit the international prices had since gone down, yet they were still considered to be on the high side;
- having also taken cognizance of a letter sent by Dr Galea wherein he implied that Messrs Ragonesi & Co Ltd had no *locus standi* in these proceedings because they were no longer participating in the tender;
- having taken note of Mr Saliba's testimony wherein, *inter alia*, he declared (a) that HSBC Malta had received instructions from their clients in Italy to extend the guarantee on 29 August 2009, stating that the said guarantee was continuous and always operative, (b) that 5 September 2008 was not the date of extension but the date when HSBC Bank Malta plc notified the WSC that the guarantee was being extended from the expiry date, that is, 31 August 2008 to 15 November 2008, (c) whilst claiming that if on 02.09.2008 or 03.09.2008, the beneficiary made a claim the Bank would have honoured it *and* that, in such case, the guarantee would have remained operative from the date of expiration, yet also stated that he did not know of any time limit within which they had to inform the beneficiary, (d) it was the customer (Sertubi SpA), through the Foreign Bank, who asked them to extend the validity of the bid bond, (e) whilst claiming that he did not know the reason why in spite of the fact that HSBC Malta received instructions on Friday, yet the bank guarantee extension was issued on 5 September 2008 when the next working day was 1 September 2008, yet he also stated that normally, HSBC designated staff members typed similar letters and sent them on the same day, (f) that if, hypothetically, the WSC would have presented the original guarantee on 2 September 2008 HSBC Malta would have paid once they would have been instructed to extend the validity;
- took also cognizance of the appellants' legal advisor's (a) remark regarding the fact that, whilst they agreed that the instructions given by the Italian Bank were given to HSBC to extend the guarantee before expiry date, yet, the local bank notified the beneficiary (the WSC) after that date, (b) observation regarding the possibility that unless the said appeal was upheld, in future, tenderers would start filing a letter issued by a bank stating that at the submission of tender they had received instructions from a foreign bank to guarantee that if the beneficiary decided to make a claim they would have honoured it *and* (c) comment on the fact that, in his opinion, in this case, transparency was lacking providing no comfort at all to the local taxpayer that public finance was being spent according to the rules of the game;
- took note of Dr Cop's comment wherein she (a) claimed that in this case the contracting Authority had an expired bid bond and, as a consequence, unless the beneficiary presented the original bid bond with an extension letter, they could not enforce the guarantee unless they had the physical document in hand, (b) she also emphasised that there was no extension letter in place between the 29 August and the 5 September 2008 and therefore, within that period, there was no possibility for the WSC to enforce the guarantee;
- noted Dr Galea's concluding remarks;

reached the following conclusions, namely:

1. The PCAB feels that, according to article 83 of the Public Contract Regulations, a notice of objection may be filed by any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement. As a result, the PCAB concludes that the regulation is therefore clear and it is irrelevant whether the tenderer is still a tenderer or not;
2. Contrary to what was argued by one of the witnesses during the hearing, the PCAB concludes that the adjudication of tenders is arrived at following the Adjudication Board's recommendations upon which the General Contracts Committee bases its decisions;
3. The PCAB maintains that, knowing that there was an escalation in prices, the Adjudication Board should have accelerated the process so that the taxpayer would not pay € 500,000 more;
4. The PCAB feels that it is very clear that during the period 31.08.2008 to 05.09.2008 the WSC did not have the comfort of a valid letter of extension from HSBC;
5. The PCAB remains doubtful as to the proper procedure followed by the parties in question and finds that the legal repercussions which could have ensued had something gone wrong and the guarantee would have been called in, could have been damaging to any of the interested parties at the wrong end of the issue at that moment in time;
6. The PCAB concludes that the arguments raised by the appellant Company, as well as the documents presented during the hearing, provided more comfort when compared to those raised by the other interested parties. Furthermore, certain issues which transpired during the hearing as a result of testimony given by summoned witnesses, which occasionally was contradicting, cast doubt on the proper conduct of events thus giving the PCAB reason to understand and conclude that one of the pivotal issues of public tendering, namely, transparency, was actually not thoroughly followed.

As a consequence of (1) to (6) above this Board finds in favour of appellants and recommends the annulment of the tender in question.

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

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

29 December 2008