

PUBLIC CONTRACTS APPEALS BOARD

Case No. 149

Advert. No. 177/2008 – CT/2169/2008

Tender for Mdina Bastions Ground Investigation Works and Monitoring System – MDN 02

This call for tenders was, for a contracted value of € 395,000 was published in the Government Gazette on 08.08.2008. The closing date for this call for offers was 14.10.2008.

Three (3) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', ABC Appalti Bonifiche Costruzioni s.a.s. / Harrison Group Environmental Ltd Joint Venture filed an objection on 09.03.2009 against the award of the tender in caption to G.D. Test Srl (Leader) & Ballut Blocks Services Ltd

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 22.04.2009 to discuss this objection.

Present for the hearing were:

ABC Appalti Bonifiche Costruzioni s.a.s./Harrison Group Environmental Ltd Joint Venture (ABC Joint Venture)

Dr Chris Borg	Legal Representative
Mr Alfred Scerri	Representative (Terracore Services Ltd)

G.D. Test Srl (Leader) & Ballut Blocks Services Ltd. (G.D. & Ballut Ltd)

Dr Massimo Vella	Legal Representative
Mr Alberto Morino	G.D. Test Srl Representative
Mr Paul Vella	Ballut Blocks Serv Ltd Representative
Eng Josef Gatt	Ballut Blocks Serv. Ltd Representative
Eng. Manuel Scerri	

Ministry for Resources and Rural Affairs

Dr Victoria Buttigieg	Legal Representative
Eng. Raymond Farrugia	Director General

Evaluation Committee:

Mr John Vella	Chairperson
Eng Norbert Gatt	Member
Mr John Valentino	Member
Ms Chanelle Busuttill	Member
Mr Joseph Casaletto	Secretary

Department of Contracts

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant Company was invited to explain the motives of the objection.

Dr Chris Borg, legal representative of ABC Appalti Bonifiche Costruzioni s.a.s./Harrison Group Environmental Ltd Joint Venture (ABC Joint Venture), explained that the joint venture that he represented was made up of three elements, ABC General Engineering, Harrison Group International Environmental and the sub-contractor Terracore Services Ltd, a local firm.

Dr Borg also stated that the objection was raised for the following reasons:

- a. The bid bond
 - b. The negotiated price
 - c. Reason/s given for appellants' offer being non compliant
 - d. Criteria for award
- a. The tender could not be awarded as recommended because the recommended tenderer did not have a valid bid bond. Dr Borg referred to clause 18 (1), (2) and (4) of the tender conditions and then quoted as follows:

18.4 – Any tender not accompanied by an admissible tender guarantee will be rejected by the Central Government Authority (it was later established, during the same public hearing that this referred to the Contracts Department.)

Dr Borg further stated that, originally, the validity period of the bid bond was up to 23rd February 2009 which was, subsequently, extended up to 5th March 2009 as per last paragraph of letter from the Contracts Department dated 24th September 2008 which was communicated to all tenderers. Dr Borg stressed that the wording used, both in the tender document and in the correspondence sent by Contracts Department, made it very clear that a valid bid bond was a mandatory requirement, i.e. it did not allow any room for the exercise of any discretion, and, as a consequence, a tender not accompanied by an admissible bid bond would have led to outright rejection.

Dr Borg contended that the recommended tenderer did not present an admissible tender guarantee, so much so, that in the published notice of tenderers there was a note against the recommended tenderer that the bid bond was valid up to 23rd February 2009. Dr Borg argued that, on this count alone, the recommended tenderer had to be disqualified, let alone be recommended for award and this in view of the fact that the bid bond was a mandatory requirement.

- b. As regards the question of price, the appellant Company quoted €362,000, AX Group quoted €385,000 and the recommended tenderer quoted €427,000. Dr Borg stated that, regardless of the prices tendered, the evaluation committee still intended to award the tender for the price of about €395,000 to the recommended tenderer, albeit this was still the highest price. Dr Borg stated that, whilst all were aware that the contracting authority retained the right not to award the tender to the cheapest offer, yet, Dr Borg argued that the price offered by the recommended tenderer was scaled down from €427,000 to €395,000 and this was due either

- (i) because the tenderer altered the submission, which, if this were to be the case, would be illegal in terms of clause 24.1 of the tender conditions which stated, inter alia, that “*No tender may be altered after the deadline for submission*”

or

- (ii) because some kind of negotiation would seem to have taken place between the evaluating committee and the tenderer

Dr Borg felt that, if the contracting authority felt that it should negotiate the price with the recommended tenderer, then why didn't it also negotiate with his client regarding the few technical aspects which the evaluating committee felt were somewhat deficient. He considered that it was discriminatory to negotiate only with one of the three parties concerned and, hence, in the prevailing circumstances, there was not a common level playing field for all participating tenderers.

- c. Dr Borg quoted from a letter dated 25th February 2009 sent by the DG (Contracts) wherein his client was informed that the bid was considered “*not compliant since the scope of the works was reduced impinging on the key requirements of the works being procured*”. Dr Borg remarked that, according to his client, the offer submitted was not lacking in any of the technical requirements. Furthermore, it was also claimed that the scope of works was not reduced in any manner, so much so, that, along with all the documentation submitted, there was also included a fully priced bill of quantities. He added that, when on the 26th February 2009 his client requested the reasons behind the Contracts Department's disqualification of their tender, except for an acknowledgement, such reasons were not forthcoming. As a consequence, his client had to resort to filing this objection still in the dark as to the reasons behind the tender being rejected.

Dr Borg maintained that the joint venture that he represented was experienced in this line of work, namely, ABC Appalti had executed a number of contracts with the same Department, even works at Mdina related to the project in question, Harrison Group was a well established firm in the UK and has worked for a good number of years on local public contracts, and Terracore Ltd has been involved in ground investigation works for over 20 years.

- d. Dr Borg pointed out that, according to clause 31 of the tender conditions, technical quality and price carried 70% and 30% of the marks respectively. Dr Borg contended that, at least, on the basis of price, his client should have scored full points, namely, 30 points and this for being the cheapest. At this stage he questioned how could it be possible that, when it came to the various aspects of technical quality, his client seemed to have failed miserably. Dr Borg requested that his client should be given the opportunity to see the technical evaluation in his regard.

The Bid Bond

Dr Buttigieg, legal adviser obo the contracting authority and Mr John Vella, Chairman of the evaluating committee, remarked that, with regard to the validity date of the bid bond, besides clause 18, one had to take into account also of clause 17.1 which, among other things, provided that

“...tenders must remain valid for a period of 150 days after the deadline for submission of tenders indicated in the contract notice, the tender document or as modified in accordance with clauses 10.3 and/or 22”

Mr Vella explained that, in this case, the bid bond

- a. should have, originally, been valid up to 27th February (30th September 2008 plus 150 days) and not 23rd February 2009
- b. then the deadline for the submission of tenders was extended up to the 9th October 2008 and, as a consequence, the validity of the bid bond had to be shifted to, latest, the 8th March and not 5th March 2009 ... again 3 days short, and
- c. the deadline for the submission of tenders was extended again until 14th October 2008 and therefore, when adding 150 days, the bid bond should have been made to be valid up to 13th March 2009

Mr Vella added that these extensions were communicated by the Contracts Department to all tenderers with the difference that, in the case of the first extension, namely a letter dated 9th October 2008, the bid bond's validity date was indicated as the 5th March 2009. Needless to say, that this was happening when it had just been established that it should have been the 8th March 2009. Furthermore, in the case of the second extension, namely in respect of the letter dated 14th October 2008, no validity date was explicitly indicated albeit, in terms of clause 17.1, it had to be up to 13th March 2009.

The Chairman PCAB asked whether the tenderers were somehow informed, at any stage, of the shortcomings in their bid bond because bidders had the right to be informed with the reasons for exclusion. He added that it was neither fair nor correct to come up with such shortcomings for the first time at the appeal hearing. Dr Buttigieg admitted that the appellant Company was not informed about this but added that it was laid down in the tender conditions.

The PCAB also queried as to why the tenders were evaluated when a proper *bid bond* was not in place. The Chairman PCAB added that, in examining why the appellant Company was disqualified one had to examine also whether the recommended tender merited further consideration. Dr Buttigieg stated that, in their declaration, tenderers had undertaken to observe the tender conditions.

Dr Borg refused the accusation that his client did not present a proper bid bond and, for this purpose, he referred to a letter sent to the Contracts Department whereby Paribas Bank extended the bid bond up to the 5th of March 2009. Mr Vella

corroborated what Dr Borg had just declared but added that that was not the reason why the appellant Company was rejected.

Engineer Norbert Gatt, a member of the evaluation committee, confirmed all that had been said about the bid bond extensions and added that, as things turned out, both the appellant Company and the recommended tenderer were deficient with regard to bid bond requirements. However, he proceeded by adding that none of them was eliminated on the basis of these shortcomings.

Dr Borg maintained that the recommended tenderer should have been disqualified on two counts, namely for not submitting a bid bond which was neither valid up to the 5th March nor valid up to 150 days after the closing date of the tender. Dr Borg conceded that if both bidders were not in line in this respect then both of them should have been eliminated. On the other hand, Dr Borg could not help note that in the 'summary of tenders received' a note was inserted against the recommended tenderer that the bid bond was valid up to the 23rd February 2009 while no shortcomings were attributed to his client with regard to his bid bond.

Engineer Gatt intervened to recall that in certain other cases when there was something wrong with the bid bond, the General Contracts Committee (GCC) did indicate to the evaluating committee that tender/s had to be rejected due to bid bond irregularities. Yet, he continued that, in this case, the GCC did insert a note in the sense that the bid bond was valid up to 23rd February 2009 but it did not indicate consequent exclusion. Mr Gatt added that the evaluation committee verified that the original bid bonds were submitted and then moved on to the following stage since it had to consider the wider picture, namely that there were EU funds involved and targets had to be met.

Mr Francis Attard, Director General (Contracts), under oath, declared that if a bid bond did not meet the validity period requested then that bid bond was not admissible. Mr Attard added that, preferably, both letters issued by the Contracts Department, whereby the closing date for submission of tenders was extended twice, should have indicated the new validity date of the bid bond. However, on the other hand, the non-mention of such a date did not, in any way, alter the provisions set out in clauses 17 and 18 of the tender conditions. Mr Attard explained that the evaluation committee had the responsibility to make recommendations and the Contracts Department could then point out to the evaluation committee any inconsistencies but, certainly, the Department did not undertake a re-evaluation of the tenders. When his attention was drawn to the provisions of clause 18.4, Mr Attard agreed that, although at the end of the day the decision to reject a tenderer would be issued by the Contracts Department (the Central Government Authority), yet, until that time the evaluation committee had to adjudicate and report on all the documents submitted by tenderers, including the bid bond. Mr Attard could not recall, there and then, whether the evaluation committee had brought to his attention any deficiencies in the bid bonds. Mr Attard explained that at tender opening stage the pages would be initialled, the schedule of tenderers drawn up and immediately made public, the bid bond would be opened and the committee would note if the bid bond was valid or not. However, proceeded the DG Contracts, at that stage, no decision would be taken with regard to the rejection of tenders.

Mr Attard concluded that, in his view, a tender without a valid bid bond had to be rejected and that it was not a question that with regard to bid bond requirements, since both tenderers were found deficient then that constituted a level playing field - it was not a matter that two wrongs made a right.

Dr Borg argued that clause 18.3 repeated the 150 days validity period from the deadline for submission of tenders set out in clause 17.1 but added that...

“in exceptional cases, before the period of validity expires, the Central Government Authority may ask tenderers to extend the period for a specific number of days”

something which, he claimed, the Contracts Department did in their first letter dated 26th September 2008 but failed to do in its second letter dated 6th October 2008.

Dr Borg’s contention that no evidence could be traced that the second extension had been communicated to his client was satisfied with the presentation of an email dated 6th October 2008 signed by Ing. Vincent Cassar, who acted on behalf of the appellants, and which was sent to Mr Bernard Bartolo, Asst. Director Contracts Department, wherein the former referred to the receipt of the communication whereby date for the submission of tenders was extended up to 14th October 2008. On his part, Dr Buttigieg stated that the fact that the appellant Company was present at the tender opening stage was proof in itself. The Chairman PCAB rebutted that although the Contracts Department would have been more correct to indicate the bid bond validity date, ultimately, the tenderer had to abide by the conditions of tender, which stated 150 days from the deadline of the submission of tenders.

Dr Massimo Vella, representing G. D. & Ballut Ltd, referred to an original document that he had in hand issued by *Banca Monte dei Paschi di Siena*, his client’s Bank, on the 23rd February 2009, i.e. the expiry date of his client’s bid bond. Dr Vella claimed that the bid bond was extended up to the 13th March 2009 which proved that his client had a bid bond valid up to the required date. Dr Vella conceded that the document that he had in hand had not been submitted to the contracting authority or to the Contracts Department and so the evaluating committee was not aware of it.

The Award Price

Dr Buttigieg explained that, once the price offered by the preferred tenderer was above the Department’s estimate, the authority of the Contracts Department was sought to enter into negotiations with that bidder to reduce the price.

Mr Attard remarked that, in that type of tenders, provision was made such that if the most advantageous offer was above the amount budgeted the contracting authority reserved the right to negotiate with the preferred bidder to revise the scope of works with the aim of reducing the offer to the budgeted amount – clause 32.2 at page 23 of the tender document.

Ing Norbert Gatt clarified that through the negotiations undertaken with the preferred bidder the scope of works was not limited in any way but what happened was that the

price of ten items was revised in such a way that the total price offered became within the budgeted amount, in other words, there was a revision of price and not a revision of works.

Dr Borg contended that since his client's tender was the lowest in price, it had first to be proven that his client's offer was not technically admissible prior to negotiating with a bidder that tendered a higher price because as stated in 32.2 namely "*should the lowest technically admissible tender exceed the available budget*". He added that, as things stood, negotiations were carried out with the tenderer who was not compliant and who offered the highest price.

Ing Gatt continued to explain that the adjudication was carried out on the basis of the most economically advantageous tender (MEAT) and referred to the evaluation report submitted on the 3rd December 2008, particularly to the evaluation grid and pointed out that:

- a. AX Construction Ltd had administrative and other shortcomings such that it was rejected outright. ABC Joint Venture was also administratively deficient but as already explained the evaluating committee opted to consider still from the technical point of view
- b. technically, ABC Joint Venture, scored an average (of the individual scores given by the three technical members of the evaluation committee) of 60.33 which did not reach the threshold of 70 points and, hence, the bid was technically non compliant whereas the offer of G.D. & Ballut Ltd had an average score of 88.33 and, as a result, was found to be technically compliant
- c. nobody doubted the expertise of Terracore Services Ltd, part of the appellant Company's consortium, in hole drilling, but only 10 points were allocated to that aspect of the tender. However, the appellant Company did not score high marks, especially, with regard to 'quality of equipment and instrumentation' which was considered the most important aspect of this contract – it carried 25 marks and the monitoring equipment had to stay in place for 5 years – because the appellant presented the same equipment that it had used on a contract that it had been awarded some 8 years before when such equipment was being constantly upgraded. Moreover, the c.v. of the key expert indicated that he did not have the required experience for the proposed works
- d. the contracting authority had requested the list of projects undertaken by tenderers and the appellants first presented a long list of such projects which works were not confirmed by the respective contracting entity. Eventually, most of the projects were dropped from the list, most of which were in connection with monitoring operations which were the main item of this contract. On the other hand, the preferred tenderer, which was also an Italian firm, did produce this kind of information

- e. the evaluation committee, apart from its technical experts, was aided by Politecnica, an Italian firm that some one and a half years ago had been awarded a public service contract to provide expert geo-technical advice to government. Mr Gatt added that Politecnica had signed the declaration that it had no conflict of interest in the tendering process.

At this stage Mr Alfred Scerri, representing the appellant Company, alleged that there was a conflict of interest because Politecnica had worked on the Hagar Qim project with Ballut Blocks Services Ltd, one of the firms making up the preferred consortium. The following statements were made:

Dr Vella, representing G.D. & Ballut Ltd, formally requested that the alleged connection between Politecnica and Ballut Blocks Services Ltd made by the appellant Company had to be substantiated.

Dr Borg, representing ABC Joint Venture, declared that his client had information that Politecnica, or an associated company, had connections with a company associated with Ballut Blocks Services Ltd in connection with the Hagar Qim Project.

Ing. Josef Gatt, representing Ballut Blocks Services Ltd, under oath, testified that Cannobio, which was awarded the *Hagar Qim* Project, had engaged Messrs Martin Xuereb and Associates as technical consultants, who, in turn, had engaged the technical assistance of Politecnica. Furthermore, Ballut Blocks Services Ltd were sub-contracted by Cannobio to carry out the civil works of the project. He added that Ballut Blocks Services Ltd had no dealings with Politecnica. Ing Gatt explained that Ballut Blocks Services Ltd undertook this subcontract after the Hagar Qim tender was awarded. As a matter of fact, at tendering stage, Cannobio had approached someone who was present at the hearing, a sub-contractor of Attard Brothers Ltd, to submit a quotation. However, after the award of the said tender, Cannobio approached Ballut Blocks Services Ltd to give a quote for the civil engineering works.

In concluding, Dr Borg reiterated that, in his view, his client's bid bond was a valid one because the last bid bond validity date communicated to the tenderers was the 5th March 2009 and, moreover, the notice of tenderers schedule carried no comments with regard to his client's bid bond but only indicated that the recommended tenderer had the bid bond valid up to the 23rd February 2009. Dr Borg argued that it was not a matter that two wrongs making a right because if one did not have the bid bond in place that tenderer had to be disqualified.

With regard to the technical aspect of the tender, Dr Borg maintained that his client submitted a coherent tender, the contractors were experienced and with a good track record. He added that, whereas he had full confidence in the technical members of the evaluation committee, he could not say the same with regard to the foreign consultants, whose input had a great bearing on how his client's offer was technically assessed. Dr Borg argued that, as things stood, the recommended tenderer should have been rejected and negotiations undertaken with his client.

Dr Vella contended that, technically, the appellant Company did not reach the threshold and hence was non compliant and, as a consequence, it followed that the appellant Company could not be awarded the contract. Dr Vella brushed aside the

allegation made by the appellants with regard to conflict of interest on the part of the foreign consultants because these allegations were not proved. However, on the other hand, satisfactory explanations were furnished by his client as to how things stood. Dr Vella stressed that, due to technical non-compliance, there was no way that the appellant Company could be awarded the tender and, as a direct result, the purpose of the appeal was to cancel the process with the likely consequence that the timeframe tied with EU funding would be disturbed.

Dr Vella invited the PCAB to consider the substance of the case in the sense that

- out of the three bidders, only one bidder was technically competent
- and
- in spite of the fact that, at the closing date of tenders, his client did not have a valid bid bond, yet, earlier on, he had produced an original document issued by the *Banca Monti Paschi di Siena* that showed that, as a matter of fact, his client had a bid bond valid up to the 13th March 2009, which, according to Dr Vella, went further than the bid bond presented by the appellant Company.

Once the original bid bond extension in the possession of Dr Vella had not been presented to the contracting authority/evaluation committee, the PCAB considered its submission at that late stage as irrelevant.

Dr Buttigieg explained that various extensions were issued with regard to the validity date of the bid bond and since none of the bidders presented a valid bid bond then a level playing field was maintained when the decision was taken to move on to the technical evaluation. Dr Buttigieg added that the main contention presented by the appellant Company concerned the bid bond and she felt that the PCAB should not disqualify the recommended tenderer on that count, all the more, when the technical experts of the evaluation committee had demonstrated that the appellants were not found technically competent and so could not be awarded the tender. Dr Buttigieg concluded that the cancellation of the tender could jeopardise EU funding.

Ing Norbert Gatt explained that the funds from the EU for the project were available up to 2013 but one had to keep in mind that after the monitoring contract a further two tenders for works would have to be issued, which works would be monitored by means of this contract.

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

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 09.03.2009, and also through their verbal submissions presented during the public hearing held on the 22.04.2009, had objected to the decision taken by the General Contracts Committee;

- having taken note of all the documentation presented;
- having during the public hearing heard and, subsequently, thoroughly deliberated upon, all points raised by all witnesses and other interested parties' representatives;
- having noted that, with regards to the bid bond,

(a) the appellants' legal representative argued that

- i. the recommended tenderer did not have a valid bid bond, so much so, that in the published notice of tenderers there was a note against the recommended tenderer that the bid bond was valid up to 23.02.2009 when this should have been extended up to 05.03.2009 as per last paragraph of a letter dated 24.09.2008, sent by the Contracts Department to all participating tenderers
- ii. the wording used, both in the tender document and in the correspondence sent by Contracts Department, made it very clear that a valid bid bond was a mandatory requirement and that, as a consequence, a tender not accompanied by an admissible bid bond would have led to outright rejection

(b) the contracting authority's representative claimed that with the deadline for the submission of tenders being finally extended until 14.10.2008 the bid bond should have been made to be valid up to 13.03.2009

(c) whilst in the first extension the bid bond's validity date (05.03.2009 - albeit it was claimed that it should have been 08.03.2009) was indicated, in the second extension the bid bond's validity date (13.03.2009) was not mentioned

(d) Dr Buttigieg admitted that the appellant Company was not informed about the shortcomings in their bid bond

(e) the tenders were still evaluated regardless of the fact that a proper bid bond was not in place

(f) Ing. Norbert Gatt, a member of the evaluation committee, confirmed that, as things turned out, (1) both the appellant Company and the recommended tenderer were deficient with regard to bid bond requirements and that, notwithstanding, none of them was eliminated on the basis of these shortcomings, (2) unlike what occurred on previous occasions, in this instance, the GCC did indicate to the evaluating committee that tender/s had to be rejected due to bid bond irregularities and (3) the evaluation committee verified that the original bid bonds were submitted and then moved on to the following stage since it had to consider the wider picture, namely that there were EU funds involved, and targets had to be met

- (g) Dr Borg conceded that if both bidders were not in line in this respect then both of them should have been eliminated
 - (h) DG (Contracts) declared that (1) if a bid bond did not meet the validity period requested then that bid bond was not admissible and that, in his opinion, a tender without a valid bid bond had to be rejected, (2) whilst it would have been better had both letters issued by the Contracts Department included the new validity date of the bid bond, yet the non-mention of such a date did not, in any way, alter the provisions set out in clauses 17 and 18 of the tender conditions
 - (i) Dr Massimo Vella, although claiming that in his possession he had a document, dated 23.02.2009, issued by *Banca Monte dei Paschi di Siena*, wherein it was evident that his client's bid bond was extended up to the 13.03.2009, nevertheless, he also conceded that the document that he had in hand had not been submitted to the contracting authority or to the Contracts Department and so the evaluating committee was not aware of it
- having also noted that, in so far as the *negotiated price* is concerned,
 - (1) the appellant Company argued that
 - (i) albeit it had quoted a price of €362,000 (the cheapest) and the recommended tenderer quoted €427,000 (the highest), yet the evaluation committee still intended to award the tender for the price of about €395,000 to the recommended tenderer following some kind of negotiation
 - (ii) if the contracting authority felt that it should negotiate the price with the recommended tenderer then this opportunity should have also been given to them
 - (2) DG Contracts testified that in those type of tenders, provision was made such that, if the most advantageous offer was above the amount budgeted, the contracting authority reserved the right to negotiate with the preferred bidder to revise the scope of works with the aim of reducing the offer to the budgeted amount
 - (3) Ing Norbert Gatt explained that, through the negotiations undertaken with the preferred bidder, the scope of works was not limited in any way but what happened was that the price of ten items was revised in such a way that the total price offered became within the budgeted amount - in other words, there was a revision of price and not a revision of works.
 - having established that
 - a. the appellant Company contended that the issues raised relating to the reasons given by the DG (Contracts) for their offer being non compliant remained unclear and

baseless, especially when (1) their offer was not lacking in any of the technical requirements, (2) the scope of works as proposed by the appellant Company was, contrary to what the DG (Contracts) had stated, not reduced in any manner, whatsoever, so much so, that, along with all the documentation submitted, there was also included a fully priced bill of quantities, (3) the joint venture that was represented by the appellants has the necessary experience in this line of work, as well as, international recognition within it, accumulated over 20 years or more of ongoing activity

- b. according to the evaluation grid, Ing Gatt stated, technically speaking, the tender submitted by the recommended tenderer was considered to be the most economically advantageous tender with apposite justifications to corroborate this claim being given during the hearing

- e. having taken cognizance of the points made by the appellants' legal representative with regards to criteria for award adopted by the evaluation committee which, according to clause 31 of the tender conditions, technical quality and price carried 70% and 30% of the marks respectively with the appellants claiming that they should have scored full points, namely, 30 points and this for being the cheapest, questioning how come it was possible that, when it came to the various aspects of technical quality, the same appellants ended up attaining a relatively low score from the evaluation committee

- f. having reflected on the testimony given by Ing. Gatt regarding the basis upon which the evaluation committee decided to score with regards to the technical validity of the participating tenderers' respective offers

reached the following conclusions, namely,

1. The PCAB cannot comprehend why the tenders in question still continued to be evaluated despite the fact that a proper *bid bond* was not in place and this when compliance with tender document specifications relating to this particular issue (the bid bond) is mandatory;
2. Furthermore, the PCAB opines that whilst pragmatism is to be encouraged, yet, one cannot become overzealous and, in the process, refrain from observing mandatory requirements, regardless of the fact that, in particular cases, there are EU funds involved and targets have to be met;
3. Also, the PCAB feels that being pragmatic does not imply that an evaluation committee can, arbitrarily, decide that two wrongs make a right;

4. The PCAB feels that the vague reasons given to the appellant Company for it being excluded from being further evaluated cannot be considered justifiable;
5. The PCAB does not agree in principle with certain 'modus operandi' adopted by the evaluation committee and feels that there were a number of technical errors for the PCAB to allow this adjudication process to continue as, in doing so, this Board would be creating a precedence or two which, eventually, could be misinterpreted as being the norm in similar circumstances.

As a consequence of (1) to (5) above this Board decides that, albeit it upholds certain points raised in the appellant Company's objection yet, the tenders in question, as submitted, did not fulfil critical mandatory requirements.

The PCAB recommends that this tender be cancelled.

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 April 2009