

PUBLIC CONTRACTS APPEALS BOARD

Case No. 144 and Case No. 145

Case No. 144 - Objection 1

Advert No. 373/2007 - CT2676/2006 - MG 33/2005

Tender for the Supply, Installation, Testing and Commissioning of Slaughter - Line Equipment and Ancillary Services at the Civil Abattoir Xewkija, Gozo

Objection filed by Alberta Fire Fighting and Security Equipment Ltd (Notice of Objection dated 27.10.2008 and filed one day after)

Case No. 145 - Objection 2

Advert No. 373/2007 - CT2676/2006 - MG 33/2005

Tender for the Supply, Installation, Testing and Commissioning of Slaughter - Line Equipment and Ancillary Services at the Civil Abattoir Xewkija, Gozo

Objections filed by General Maintenance Ltd (Notice of Objection dated 28.10.2008 and filed on the same day)

This call for tenders was published in the Maltese Government Gazette on 26.10.2007 and issued by the Contracts Department following a request transmitted to the latter by the Ministry for Gozo. The closing date of the said call was 18.12.2007.

The estimated contract values of this tender was €1,897,365

Five (5) different tenderers submitted their offers.

Following the decision taken by the General Contracts Committee to exclude both bidders from the above-captioned tendering process for having been considered administratively non-compliant, Messrs Alberta Fire Fighting and Security Equipment Ltd and Messrs General Maintenance Ltd respectively, filed appealed against these decisions.

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 the 18 March 2009 to discuss these objections.

Present for the hearing were:

Alberta Fire Fighting and Security Equipment Ltd

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Advisor
Ms Liz Barbaro Sant	Director
Mr Martin Rizzo	Engineer

General Maintenance Ltd

Dr Franco Vassallo	Legal Representative
Dr Daniele Cop	Legal Representative
Mr Marco Camilleri	Managing Director
Mr Jimmy Calleja	Commercial Manager

Ministry for Gozo (Contracting Authority)

Dr Tatianne Cassar	Legal Representative
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Adjudicating Committee

Mr Joseph Portelli	Chairman and Director (Ministry for Gozo)
Eng. Lawrence (Renzo) Curmi	Member
Eng. Jeffrey Muscat	Member
Dr Frank Galea	Member
Mr Mario Camilleri	Secretary

Camray Co Ltd / Technostar Due SRL Joint Venture (Camray Ltd)

Dr Michael Sciriha	Legal Representative
Dr Franco Galea	Legal Representative
Mr Brian Miller	Senior Manager

Department of Contracts

Mr Francis Attard	Director General
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At the beginning of the hearing Dr Adrian Delia, legal representative of Alberta Fire Fighting and Security Equipment Ltd, Dr Franco Vassallo, legal representative of General Maintenance Ltd, and Dr Tatianne Cassar, representing the contracting authority (Ministry for Gozo), formally agreed that despite the fact that two separate appeals had been filed with regard to this tender, namely those by Alberta Fire Fighting and Security Equipment Ltd and General Maintenance Ltd, all the evidence in respect of both appeals would be heard in a 'joint' hearing. Nevertheless, in agreement with all interested parties, the PCAB established that two separate decisions would be published by the Public Contracts Appeals Board.

After the Chairman's brief introduction, the appellants were invited to explain the motives of their objections.

Dr Delia submitted that, as explained in his reasoned letter of objection, the objection filed by his client was based on three issues, namely

- a. the allegation that it had not submitted one of the samples requested
- b. the request by the Contracts Department to renew the bid bond, and
- c. the relevance of the 'alleged' missing panel sample of 150mm minimum thickness

Dr Delia quoted from the relevant extract of the adjudication report:

...with respect to Alberta Fire Fighting and Security Equipment Ltd "2 samples submitted" and "not fully in accordance with clause 25.1 of the tender documents". The missing sample was submitted after the closing time and date of the tender.

Dr Delia also referred to the advice given on the 26 February 2008 by the Contracts Department to the Adjudicating Committee relating to the non-submission of all samples by the given date and time, where the Adjudicating Committee was advised that the offer should not be considered further.

The advice given the Contracts Department in fact read as follows:

Once a clarification was submitted by the Department of Contracts to all Prospective Bidders indicating where to submit the samples, the onus of responsibility to deliver the samples to the correct location was clearly that of the bidders. Hence, it is felt that on the basis of clause 25.1 which states that "Tenders unaccompanied by Samples ... on the closing date and time of tender shall not be considered for the award of this contract" the offers should not be considered further.)

Dr Delia submitted that his client was not accepting the statement that there was a missing sample, so much so, that when the contracting authority drew his client's attention that one of the samples was missing his client had declared that all the samples were submitted. However, it was also submitted that his client had stated that if the contracting authority wanted another sample Alberta Fire Fighting and Security Equipment Ltd would have supplied another one. In fact, continued Dr Delia, his client submitted another sample.

Dr Delia further explained that on the 18 December 2007, ten minutes prior to the closing time of the tender, an email was sent by the Ministry for Gozo to Alberta Fire Fighting and Security Equipment Ltd, *inter alia* stating ...

“Mr Farrugia kindly note that the samples box delivered contained panels of thickness 20mm and 100mm together with a plastic sheet”

Dr Delia then read out his client’s reply to that email

“Dear Mr Portelli, Further to our conversation with regard to the list of samples for wall panelling, we have also submitted the sample of thickness 150mm. Kindly confirm whether this sample was received by your good selves together with the other samples and if not please confirm if ...”

At this stage, it was clarified that the samples were delivered by Alberta Fire Fighting and Security Equipment Ltd, through GozoExpress, at the Gozo Abattoir and not at the Ministry for Gozo.

Mr Joseph Portelli, Director (Projects and Development) at the Ministry for Gozo and Chairman of the Adjudicating Committee, confirmed that the missing sample was received six days after the closing date of tender, namely on the 24 December 2007.

Dr Delia remarked that it was on the 26 February 2008 that the Contracts Department advised the Adjudicating Committee that the offer should not be considered further. He added that on the 13 June 2008 the Department of Contracts requested Alberta Fire Fighting and Security Equipment Ltd to renew its bid bond for a further six months. Dr Delia stated that his client was at that stage unaware of the fact that the Contracts Department had advised that the appellant Company’s offer should not be considered further and that the said Company became aware of its exclusion on the 22 October 2008. Dr Delia stated that his client had extended the bid bond up to September 2008 and claimed that in itself that was evidence that his client’s offer was still under consideration.

Dr Delia first explained that three samples were requested and then referred to the clarifications issued by the Contracts Department to all prospective tenderers via telefax dated 11 December 2007 (closing date of tender 18 December 2007), which formed an integral part of the tender document, particularly, to the following:

Question: The tender document requests for the supply of a sample of sandwich panel thickness 20mm (sample No. 1). We would like to know if we can make our offer and supply the sample with thickness of 50mm, instead of thickness 20mm. Please note that 20mm sandwich panel is never used in slaughtering houses.

Answer: The tenderer is referred to clause 1.8.8 in Vol 3 of the tender Document which states that ‘Sandwiched panels for wall cladding shall have a minimum thickness of 20mm...’. Panels with a thickness of 50mm conform to the specifications and are therefore acceptable.

Dr Delia contended that with this clarification, the specifications of the samples were changed such that one could have supplied a panel of 50mm instead of 20mm. Moreover, Dr Delia argued that once these were sandwiched panels and the minimum thickness was 20mm then if one supplied a panel of 50mm it was above the minimum requested and, moreover, if, for example, one were to put two panels of 50mm together then one would have a 100mm panel and that, technically, was acceptable. Dr Delia maintained that his client submitted the three samples requested, however, given what was indicated in the clarification his client was technically compliant anyway.

Dr Delia referred to Regulation 82 (2) and (3) of the Public Contracts Regulations which laid down what would happen in case of disqualification of a tender, particularly, that any decision that leads to discarding should be published, something which not only did not take place in this case but that months after the closing date of the tender his client was requested to renew its bid bond.

Dr Tatianne Cassar declared that the tender of Alberta Fire Fighting and Security Equipment Ltd was discarded because the third sample requested was not submitted. Dr Cassar referred to clause 21.1 (pg 18) of the tender document where it was stated that tenderers were requested to submit the samples at the Department of Corporate Services at the Ministry for Gozo. Dr Cassar stated that on the 17 December 2007 the appellant delivered the samples, through Gozo Express couriers, at the Gozo Abattoir but were redirected to the Ministry for Gozo in six boxes sealed with tape and that the tape sealing was intact. Dr Cassar remarked that when the sample box was opened (on the 18 December) it transpired that one sample was missing which rendered the tender administratively non-compliant. At that point, she also referred to clause 25.1 which stated, among other things, that "*Tenders unaccompanied by ... Samples ... on the closing date and time of tender shall not be considered for the award of this contract*".

Dr Cassar explained that when the appellant was asked to renew the bid bond the adjudicating process was still in course and hence, by that time, the Adjudicating Committee had not concluded its report. The fact that by that time the appellant was not informed that his tender was deemed administratively non-compliant did not in any way imply that his tender was compliant. Dr Cassar stated that it was the Contracts Department and not the Ministry for Gozo that requested the appellant to extend the bid bond.

Dr Cassar also clarified that the contract in question could not be split into lots but had to be awarded to one tenderer.

Dr Cassar argued that it was the contracting authority that had to consider what was relevant or not in the tender specifications and not the tenderers. She remarked that with the same argument put forward by Dr Delia, in the sense that it was not necessary to submit the third sample because it could be made up by joining together panels from any of the other two samples submitted, then even the second sample could have been omitted.

Dr Cassar concluded that the offer submitted by Alberta Fire Fighting and Security Equipment Ltd was administratively non-compliant.

Mr Portelli declared that on the 17 December 2007 Alberta Fire Fighting and Security Equipment Ltd delivered six boxes sealed with tape and that one of them was marked only “wall panelling” in which he, in the presence of Engineer Muscat, found two 20cm x 20cm samples of sandwich panels and a piece of plastic – the latter was not requested, according to Mr Portelli. Mr Portelli referred to the receipt dated 17 December 2007 that he issued to Alberta Fire Fighting and Security Equipment Ltd indicating the receipt of 6 sample boxes with the third item having been referred to as “wall panelling”.

Dr Franco Galea, representing Camray Ltd, exhibited the receipt issued by the contracting authority dated 18 December 2007 to his client where the three samples of wall panelling submitted were acknowledged and indentified by their thickness. He noted that, apparently, the receipt issued by the contracting authority on 17 December 2007 to Alberta Fire Fighting and Security Equipment Ltd indicated the receipt of samples of ‘wall panelling’ but did not indicate the number of samples and their thickness.

Dr Galea argued that it was the responsibility of the tenderer to ensure that all the samples requested did reach the Ministry for Gozo by the closing date and time of the tender and any shortcoming on the part of the courier service was an issue that had to be settled between Alberta Fire Fighting and Security Equipment Ltd and Gozo Express.

Dr Galea then referred to clause 17 (page 16) of the tender dossier titled ‘Period of Validity of Tenders’ where 17.1 stated that

Tenders must remain valid for a period of 6 months after the deadline for submission of tenders...

and 17.2 stated that

In exceptional circumstances the Contracting Authority may request that tenderers extend the validity of tenders for a specific period. ..

Dr Galea remarked that since the contracting authority was still carrying out the evaluation process, the Contracts Department requested all the tenderers to renew their bid bond at which stage a tenderer could opt not to renew the bid bond which would automatically lead to exclusion. Dr Galea explained that the decisions reached during each stage of the tendering process were not communicated to tenderers piecemeal but that the Adjudicating Committee issued such decisions collectively in the relative evaluation report.

With regard to what was relevant or not, Dr Galea stood by what Dr Cassar had said in the sense that it was up to the contracting authority to decide on what was relevant or not and that it was certainly not up to tenderers to do so. He added that if anything needed to be clarified, a clarification should have been sought at the opportune time and not consider that the issue as irrelevant. Dr Galea maintained that the tender dossier was categorical with regard to exclusion for not submitting the required samples.

The Chairman PCAB remarked that one of the points that had to be established was whether the 'missing' sample had in fact been delivered and, if so, if it could have been mislaid somewhere.

Dr Franco Vassallo, legal representative of General Maintenance Ltd, remarked that his client submitted two of the three requested samples of wall panelling and that in form 4.7 a note was inserted against sample no. 3 that read:

This thickness was not available but similar to no. 2 but size 150mm colour white along with a general note stating: These materials were used at the Marsa Abattoir in Previous Contract.

He added that his client had offered the contracting authority to view all the materials at the Marsa Abattoir since it was the same client, the government.

Mr Joseph Portelli, under oath,

(i) confirmed that he issued the receipt dated 17 December 2007 wherein he acknowledged the receipt of 6 boxes, among them, item no. 3 'Wall Panelling' and that at the time of issue of receipt the said box had not been opened;

(ii) explained that on the 18 December 2007, a few hours prior to the closing time of the tender, he had informed Alberta Fire Fighting and Security Equipment Ltd by telephone and via email dated 18 December 2007 (dispatched at 9.47 am) that he had received two out of three samples. He added that Alberta Fire Fighting and Security Equipment Ltd denied over the phone and in writing that it had delivered only two out of three samples;

(iii) confirmed that the boxes containing the samples submitted by all tenderers were opened some time before the closing time of the tender because the Ministry of Gozo had to draw up a list indicating the samples received and to communicate that list to the Department of Contracts for inclusion in the Schedule of Tenders. He explained that in Alberta Fire Fighting and Security Equipment Ltd's case the box containing the samples was received the day before the closing date and so it was not the time to open it and that explained why the receipt issued to Alberta Fire Fighting and Security Equipment Ltd did not list the number of samples received whereas the other tenderers delivered the samples some time before the closing time and hence were opened on receipt and the receipt issued to them listed the samples received;

(iv) stated that when he opened the box containing the samples of Alberta Fire Fighting and Security Equipment Ltd and found two out of three samples requested, he felt that he should inform Alberta Fire Fighting and Security Equipment Ltd about it.

The Chairman PCAB asked Mr Portelli whether he would have accepted the delivery of the missing sample by Alberta Fire Fighting and Security Equipment Ltd had the delivery of the samples been made by the bidder himself, not through a courier, just before the closing time after he, i.e. Mr Portelli, would have drawn the bidder's attention that one sample was missing. It took a while for Mr Portelli to answer this

question and when he eventually did, he stated that if the 'missing' sample was delivered in time and in a sealed box he felt that it would have been acceptable. The Chairman PCAB remarked that it appeared that Mr Portelli acted with good intentions, however, he advised strongly against communicating with tenderers on such issues because that could amount to negotiation. The Chairman PCAB argued that it could have been the case that, for instance, Alberta Fire Fighting and Security Equipment Ltd had an agent in Gozo who could have delivered the missing sample in time or else that the tenderer had made the delivery himself and when the contracting authority would have drawn his attention to the missing sample he could have furnished one there and then if he had it in his van. The Chairman PCAB wondered how the other tenderers would have reacted had such a thing taken place!

Mr Portelli remarked that were that to be the case he would probably have sought the advice of the Contracts Department.

Mr Portelli continued that:

(a) when Alberta Fire Fighting and Security Equipment Ltd informed him that they would deliver the sample found missing, he informed Alberta Fire Fighting and Security Equipment Ltd by telephone that he could offer no guarantee that that sample would be taken into consideration; and

(b) three samples were to be submitted, 20mm, 100mm, and 150mm, however, in view of the clarification issued one could have submitted a sample of 50mm instead of 20mm, as was the case with two of the tenderers. Yet, remarked Mr Portelli, three samples still had to be submitted.

Ing. Renzo Curmi, a member of the Adjudicating Committee, explained that in the tender document it was laid down that 20mm was the minimum thickness and that did not exclude that a tenderer could submit a sample thicker than 20mm. He added that they accepted a sample of 50mm instead of 20mm because it was above the minimum set out in the tender conditions and because a clarification to that effect had been issued to all the tenderers.

Dr Galea intervened to remark that the clarification issued formed an integral part of the tender documentation and therefore there was a level playing field among all tenderers.

On his part Dr Delia observed that in Form 4.7 there was no mention of minimum thickness but simply 20mm, 100mm and 150mm and he argued that when the clarification made reference that 20mm was a minimum then the specifications set out in Form 4.7 were consequently altered.

Dr Cassar noted that the tender document (page 174) indicated that the minimum thickness was 20mm.

Once again, Dr Galea intervened to highlight the fact that Alberta Fire Fighting and Security Equipment Ltd did not submit the third sample.

Dr Delia asked Mr Portelli to consult page 174 of the tender document and to indicate where it was stated that a sample of 150mm was requested and whether page 174 or Form 4.7 was applicable in this respect. Mr Portelli replied that both page 174 and Form 4.7 formed part of the same tender document.

On her part, Dr Cassar interjected and drew the attention of Dr Delia that page 181 of the tender document clearly indicated that the sandwiched panels for the construction of the chillers were to have a minimum thickness of 150mm and added that the tender document should be interpreted as a whole and not piecemeal.

At 10.18 am the Chairman PCAB suspended the hearing to consult with PCAB members. At 10.35 am the hearing resumed.

On cross examination, Mr Portelli testified that:

(a) the samples were received sealed with tape, he issued a receipt to the courier who delivered the samples, and that he opened the samples in the presence of Ing. Muscat some time before the closing time and indicated his findings in the list that was communicated to the Department of Contracts. He added that he saw no purpose in conducting any investigations into the claim by Alberta Fire Fighting and Security Equipment Ltd that it had submitted the third sample along with the other two samples;

(b) when the Adjudicating Committee was checking the offers with regard to administrative compliance it had indicated that Alberta Fire Fighting and Security Equipment Ltd had not submitted one of the samples, something which had already been recorded in the list submitted by the contracting authority to the Contracts Department at the closing time of the tender and consequently in the schedule of tenders published by the Contracts Department;

(c) the Adjudicating Committee had requested in writing the advice of the Contracts Department as to whether the two tenderers that failed to submit one of the three requested samples, one of whom submitted the missing sample a few days after the closing date of tender, qualified for further consideration by the Adjudicating Committee in view of the provisions of clause 25.1. The advice given by Contracts Department was that such offers should not be considered further;

(d) tenderers who did not submit all samples were not considered further and that, after evaluating all the tenders, the Adjudicating Committee had informed the Contracts Department of this by the submission of the relative evaluation report which Mr Portelli signed on the 8 August 2008;

(e) one of the boxes submitted by Alberta Fire Fighting and Security Equipment Ltd was marked 'wall panelling' and there was nothing in writing that indicated that the three requested samples had been inserted in that box and Alberta Fire Fighting and Security Equipment Ltd had made only a verbal claim that it had submitted all the samples;

(f) Alberta Fire Fighting and Security Equipment Ltd had informed him that it had to import the 'missing' sample from Germany;

(g) the requirement of a panel sample of 150mm thickness was indicated in the samples schedule at Form 4.7 and also in page 181 of the tender document;

(h) the samples were requested because those items were going to be used on the project and, therefore, a visual inspection thereof had to be carried out. He added that, although the inspection of the samples was a technical matter, the submission of the samples was a matter of administrative compliance;

(i) (after consulting the submission by Alberta Fire Fighting and Security Equipment Ltd) confirmed that the Form 4.7 (page 58 of the tender document) was not included in the tender documentation submitted by Alberta Fire Fighting and Security Equipment Ltd but a note was inserted that read: *Samples have been sent by courier as requested;* and

(j) the bids by Alberta Fire Fighting and Security Equipment Ltd and General Maintenance Ltd were not considered further once they were found administratively non-compliant.

The PCAB observed that the reason for exclusion was for the non-submission of samples and not for the non-submission of Form 4.7 (last bullet note of clause 14.3.2 at page 14 refers).

Engineer Curmi, under oath, gave the following evidence:

(i) he explained that the 20mm and the 100mm panelling were grouped together for specifications purposes as they were both meant to be fixed to the wall whereas the 150mm was the type of panelling meant for the cold room (page 181 of the tender document refers);

(ii) confirmed that when a request was made as to whether one could offer a panel of 50mm instead of 20mm, that request was granted because it was thicker than the minimum requirement set out in the specifications in clause 1.8.8 on page 174;

(iii) explained that the samples were requested so as to ascertain that the bidder could supply them as requested and to inspect them visually to ensure, for example, that they were scratch resistant. Through experience they knew that panels with a smooth surface tended to get scratched easily;

(iv) the specifications were drawn up by three officers and that two technical members sat on the Adjudicating Committee, namely himself and Ing. Jeffrey Muscat, attached to the Ministry for Gozo;

(v) he was not responsible for the project of the Abattoir in Malta, which Dr Vassallo claimed to have been carried out by his client General Maintenance Ltd, and stated that the Malta Abattoir was not under the responsibility of the Ministry for Gozo;

(vi) he admitted that this was the first time that he worked on an abattoir project but added that his team included a Danish technical officer who had extensive knowledge on such projects. Furthermore, he also claimed that the use of such panelling was not

limited to abattoirs but was also used in the construction of chillers in other establishments;

(vii) with regard to the claim by appellants that one could get, say, a 100mm panel by gluing together two panels of 50mm, Ing. Curmi declared that that was only acceptable if the work was carried out by the manufacturer and according to European standards. He proceeded by arguing that it was not acceptable for one to glue such panels together without the required certifications. He added that these panels were not manufactured in Malta and that, as a consequence, no one in Malta was capable of joining such panels together; and

(viii) with regard to the argument put forward by Dr Delia that the submission of one 160mm panel sample would have satisfied the three minima of 20mm, 100mm and 150mm set out in Form 4.7, Ing. Curmi expressed the opinion that such a tenderer would not have been administratively compliant. He contended that the tender document had to be taken into consideration in its entirety, ie the forms, grids, clauses and so forth, altogether, and added that the tender document stipulated that three samples had to be submitted.

Dr Michael Sciriha, also representing Camray Ltd, requested that the representative of Alberta Fire Fighting and Security Equipment Ltd who was responsible for packing up and sealing the samples would, under oath, declare what he/she actually put in the box marked 'wall panelling'.

Following an exchange of claims by the parties concerned, the Chairman PCAB observed that the way things developed (i) it resulted that six boxes were sent and six boxes were received, (ii) the fact that Alberta Fire Fighting and Security Equipment Ltd offered to send the 'missing' sample to the contracting authority at a later stage was in itself a sort of admission otherwise Alberta Fire Fighting and Security Equipment Ltd should have kept on claiming that all three samples had been delivered and insisting that it was up to the contracting authority to trace the 'missing' sample and (iii) what had to be established was whether the sample was delivered in time. At that stage, the PCAB declared that it had enough evidence to deliberate on this issue and that on its part there was no need for further witnesses to be summoned.

Dr Delia contended that, since this was a public tender, the samples should have been opened in public and not in the presence of two public officers. He added that the exchange of emails showed that his client was not reluctant to submit any of the samples requested but that the said Company was prepared to submit all the samples requested. Dr Delia argued that once his client satisfied the minimum thickness requested then, from the technical point of view, there was no reason to exclude Alberta Fire Fighting and Security Equipment Ltd. Dr Delia contended that as a sign of cooperation but not of admission, his client had offered, which offer was accepted by the contracting authority, to resubmit the sample and a receipt was issued to that effect. He contended that if that was deemed incorrect, action could have been taken, but, none was taken. Dr Delia recalled that Mr Portelli had stated that he did not guarantee that the sample delivered after the closing date/time would be taken into account but Dr Delia stressed that the sample was not refused and that a receipt was issued on its delivery.

Dr Delia then moved on to the fact that his client was requested to renew the bid bond and argued that it was incorrect to declare, as Dr Galea had said, the his client could not have been informed earlier on of his exclusion. Dr Delia contended that the fact that on the 13 June 2008 his client was requested to extend his bid bond was in itself a confirmation that his client's tender was still under consideration.

With regard to the sample, Dr Delia remarked that Ing. Curmi, the technical member on the Adjudicating Committee, had confirmed that these panels were not produced locally and that it was acceptable to join two panels together provided that that was carried out by the manufacturer and according to certified standards. Dr Delia informed the PCAB that his client imported these panels and that the same tenderer did not indicate that the panels would be joined together locally. Dr Delia submitted that, if the Adjudicating Committee felt that a clarification was required in this regard, the committee had the right and the duty to request such a clarification especially when this was an administrative requirement to satisfy a technical need. Dr Delia argued that since the minimum thickness requirement was 20mm, technically speaking, a bidder would have been technically compliant if the said bidder would have submitted one sample of 20mm and then join several of them together to obtain the 150mm thickness.

Dr Vassallo, representing General Maintenance Ltd, submitted whether it was legally admissible to use an administrative argument to exclude a tenderer on a technical requirement. Dr Vassallo argued that if that was admissible then the contracting authority was correct but if not it was not correct to resort to exclusion. He referred to regulation 51 of the Public Contracts Regulations and declared that the samples cannot be used to exclude a tenderer on administrative grounds otherwise there would be room for abuse. Dr Vassallo contended that samples were submitted to demonstrate whether that tenderer could supply that particular product, no more and no less. Dr Vassallo declared that his client was the only tenderer that had experience in the construction of abattoir facilities. Dr Vassallo claimed that his client had submitted a 50mm panel, instead of 20mm, a sample of 100mm and added that with regard to that of 150mm thickness what one had to do was to put a panel of 50mm and a panel of 100mm together, besides, the same materials were used by General Maintenance Ltd on the Marsa Abattoir contract.

Dr Vassallo referred to the Public Procurement Regulations which, he claimed, made a distinction between exclusion criteria and award criteria, particularly article 27 which made it clear that a tenderer had to be excluded if that tenderer failed to prove that one was capable of carrying out the contract. Dr Vassallo contended that the exclusion of a tenderer on administrative compliance considerations was illegal and ran against the Public Procurement Regulations. Dr Vassallo questioned whether one could use an administrative argument to restrict competition. He maintained that his client was 100% compliant. Dr Vassallo could not understand how one could identify something that was missing as was indicated in clause 14.3.2 (page 15).

At this point, the Chairman PCAB questioned whether administrative compliance was sufficient to provide one with technical comfort.

Dr Cassar, referred to clause 25.1 of the tender document (page 19) which clearly indicated that tenders unaccompanied by samples on the closing date and time of

tender shall not be considered for the award of this contract and added that tenderers were well aware of this provision and that, as a result, all tenderers were on a level playing field.

Dr Cassar stated that one of the appellants, Alberta Fire Fighting and Security Equipment Ltd, did not provide any proof that it had in fact delivered all the samples requested by the closing date and time – the box was marked ‘wall panelling’ with no list of the contents - whereas the evidence heard at the hearing pointed to the fact that one of the samples had not been submitted. Dr Cassar added that with regard to the contention by Alberta Fire Fighting and Security Equipment Ltd that the boxes containing the samples should have been opened in public, Dr Cassar noted that Alberta Fire Fighting and Security Equipment Ltd did not deliver its samples itself but hired a courier for the purpose, thus shedding responsibility on third parties, and that in violation of clause 21.1 the samples were addressed to and delivered at the Gozo Abattoir instead of at the Ministry for Gozo. Dr Cassar argued that the Ministry for Gozo received the third sample from Alberta Fire Fighting and Security Equipment Ltd after the closing date without prejudice and without giving any assurance that it would be considered acceptable.

Dr Cassar had nothing to add to what had already been said as to why Alberta Fire Fighting and Security Equipment Ltd had been requested to renew the bid bond.

Dr Cassar then moved to remark that it was up to the contracting authority to decide on the relevance of what it was requesting in the tender document and that it was certainly not up to the tenderers to decide what was relevant and what was irrelevant. Dr Cassar maintained that Dr Delia’s claim that the third (missing) sample could have been produced by joining panels together to get the required thickness contradicted his initial contention that Alberta Fire Fighting and Security Equipment Ltd had submitted all the three requested samples and, in her view, that almost amounted to an admission that Alberta Fire Fighting and Security Equipment Ltd did not deliver the third sample in the first place.

With regard to the other appellant, General Maintenance Ltd, Dr Cassar submitted that the tenderer was aware of the fact that a sample had not been submitted so much so that in order to explain this omission it inserted a note stating that sample no. 3 was similar to sample no 2 except for the thickness. Dr Cassar stated that General Maintenance Ltd misinterpreted clause 14.3.2 at page 14-15 which, amongst other things, stated that ... “*Any missing samples will be identified*” because the missing samples were to be identified by the party responsible for the receipt of the samples and not by the tenderer that submitted them.

Dr Cassar referred to Regulation 50 (5) of the Public Contracts Regulations and remarked that that was irrelevant as it dealt with economic and financial standing. With regard to Regulation 51, Dr Cassar said that this provided for evidence of technical capacity and agreed with Dr Vassallo’s submission that the samples were needed to ascertain the technical capacity of the tenderer, which, in her view, confirmed the relevance why samples had to be submitted because first one had to submit the samples and then check them to establish the technical capacity. Dr Cassar contended that if a tenderer was unable to submit a sample with the tender documentation then, in itself that meant that the tenderer would not be able to furnish

that item which was required for the execution of the contract. Dr Cassar stated that the contracting authority had every right to request the samples and to check those samples which it considered necessary to execute the works requested in the tender.

The Chairman PCAB remarked that, as things turned out, only one tenderer had been considered administratively compliant and asked Ing Curmi whether the PCAB could assume that at that stage the Adjudicating Committee had determined that the remaining tenderer was technically competent to execute this contract. Ing. Curmi confirmed that the Adjudicating Committee had carried out the technical evaluation with regard to the remaining tenderer and that the declarations and literature submitted conform to specifications. Ing. Curmi added that although the remaining tenderer did not work on the only other abattoir in Malta, i.e. that located at Marsa, it was a consortium with one of the partners being a foreign firm responsible for the supply of the abattoir equipment and that this firm had worked on more ambitious projects overseas. Ing. Curmi declared that, albeit the Adjudicating Committee did not go overseas to inspect the projects carried out by this firm, yet the Adjudicating Committee felt comfortable with its technical capabilities. With regard to the electrical and mechanical aspect of this contract Ing. Curmi said that the local firm involved had undertaken more extensive contracts. Ing Curmi stated that the Adjudicating Committee went through all the technical literature and it sought and obtained the necessary clarifications as was the practice with tenders of this kind. Ing Curmi also remarked that, as in the case of any other contract, should the contractor not live up to his declarations and obligations then the usual penalties would be imposed.

Dr Vassallo remarked that his client was contending that his tender should not have been excluded and was requesting that it should be reintegrated in the tendering process to be considered further. Dr Vassallo then quoted from page 86- Volume1 Section 5: 'Administrative, Technical and Financial Evaluation Grids' of the tender document:

“Before beginning the technical analysis of the tenders, the evaluation committee will check that each tenderer substantially complies with the requirements of these tender documents as per ADMINISTRATIVE EVALUATION GRID. An admissible Tender is one which conforms to the requirements and specifications described in the tender documents with no substantial deviations or reservations. Substantial deviations and reservations are those which in any way influence the scope, quality or execution of works, or restrict the rights of the Contracting Authority or the obligations of the tenderer under the Contract in a manner inconsistent with the tender documents, or rectification of which would unfairly affect the competitive position of other tenderers presenting admissible tenders. If a tender does not comply with the requirements of the administrative evaluation grid – here Dr Vassallo added the word ‘substantially’ -, it will be rejected by the evaluation committee when checking admissibility.”

Dr Cassar argued that the tender document laid down that three samples were required and whether that was substantial or not was beside the point.

On his part Dr Delia claimed that Reg. 82 (5) of the Public Contracts Regulations stated that “... *The review is to be effected by the public contracts appeals board before the next stage of the adjudication process is commenced.*” He claimed that the final decision with regard to exclusion rested with the PCAB.

Dr Sciriha submitted that Alberta Fire Fighting and Security Equipment Ltd was contending that it had submitted the samples as requested in the tender document whereas General Maintenance Ltd admitted that it did not submit all the samples requested. Dr Sciriha contended that the onus of proof that the samples were submitted as requested rested with Alberta Fire Fighting and Security Equipment Ltd and added that the Chairman of the Adjudicating Committee, under oath, had declared that in the presence of Ing. Muscat two out of three samples were delivered by Alberta Fire Fighting and Security Equipment Ltd and that during the hearing Alberta Fire Fighting and Security Equipment Ltd submitted no proof to the contrary.

Dr Sciriha also mentioned clause 27.1 which clearly provided that “*tenders which are incomplete ... will be rejected*” whereas clause 23.2 provided that “... *Late tenders will be rejected and will not be evaluated.*” He added that the Adjudicating Committee considered the two tenders as incomplete.

Dr Sciriha also referred to section 17 of the tender document and argued that the bid bond did not render the tender admissible.

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

Following thorough deliberation, the PCAB felt that, considering the amount of overlap with regards to facts submitted by all interested parties, verbally and during the said hearing, as well as the relevance to both appeals of submissions and statements made by the witnesses who were summoned to the stand, the PCAB decided to treat all in a holistic manner listing its decision motives separately if and where required for it to do so.

This Board,

- having noted that the appellants, in terms of their ‘motivated letters of objection’ dated 29.10.2008 (*Case No. 144*) and 03.11.2008 (*Case No. 145*) respectively, and also through their verbal submissions presented during the public hearing held on the 18.03.2009, had objected to the decision taken by the General Contracts Committee;
- having noted the advice given by the Contracts Department to the Adjudicating Committee for the latter not to consider further both tenders (offers submitted by Alberta Fire Fighting and Security Equipment Ltd and General Maintenance Ltd’s respectively);
- having considered the fact that whilst Alberta Fire Fighting and Security Equipment Ltd claimed that it had not accepted the statement that there was a missing sample, yet no evidence was provided to the contrary, so much so that another sample was submitted six days after the closing date of tender;

- having also considered Dr Delia’s argument that extension of a bid bond for a further six months implied that his client’s offer was still under consideration;
- having noted (a) Dr Cassar explanation given to those present for the hearing that when the appellant was asked to renew the bid bond the adjudicating process was still in course and hence, by that time, the Adjudicating Committee had not concluded its report and (b) Dr Galea’s reference to clause 17 (page 16) of the tender dossier titled ‘Period of Validity of Tenders’ where 17.1 stated that *“Tenders must remain valid for a period of 6 months after the deadline for submission of tenders...”*
- having also considered the fact that, albeit in good faith, Mr Portelli may have gone too far in feeling the need to inform Alberta Fire Fighting and Security Equipment Ltd about the fact that he had found only two out of three samples requested;
- having heard Mr Portelli reply to a direct question by the PCAB that if the ‘missing’ sample was delivered by Alberta Fire Fighting and Security Equipment Ltd in time and in a sealed box, he felt that it would have been acceptable;
- having also noted Dr Delia’s and Dr Vassallo’s argument that if, for example, one were to put two panels of 50mm together then one would have a 100mm panel and that, technically, this was acceptable, as well as, Dr Cassar’s counter argument that if one were to think in this manner, not even the second sample would have been necessary as even this could be produced by joining together panels from any of the other samples submitted;
- having taken full cognizance of Dr Cassar’s claim that the contract in question could not be split into lots but had to be awarded to one tenderer;
- having reflected on Dr Galea’s claim that if Alberta Fire Fighting and Security Equipment Ltd were so sure that the third sample was delivered by Gozo Express, notwithstanding the fact that the contracting authority was itself certain that no third sample was ever dispatched to its premises, then such issue had to be settled between Alberta Fire Fighting and Security Equipment Ltd and Gozo Express;
- having taken note of the fact that whilst in Form 4.7 of the tender specifications there was no mention of minimum thickness but simply 20mm, 100mm and 150mm, yet it was also a fact that the tender document (page 174) indicated that the minimum thickness was 20mm and that in page 181 of the tender document there is also stated that the sandwiched panels for the construction of the chillers were to have a minimum thickness of 150mm;
- having also heard that a panel sample of 150mm thickness was indicated in the samples schedule in Form 4.7 and also in page 181 of the tender document;
- having also noted all of Mr Portelli’s testimony, particularly, the point raised as regards the fact that the samples were requested because those items were going to

be used on the project and, therefore, a visual inspection thereof had to be carried out, adding that, in his opinion, although the inspection of the samples was a technical matter, the submission of the samples was a matter of administrative compliance;

- having reflected on Ing Curmi's testimony, especially the fact that (a) that the 20mm and the 100mm panelling were grouped together for specifications purposes as they were both meant to be fixed to the wall whereas the 150mm was the type of panelling meant for the cold room (page 181 of the tender document refers), (b) he was not responsible for the project of the Abattoir in Malta, which Dr Vassallo claimed to have been carried out by his client General Maintenance Ltd, stating that the Malta Abattoir was not under the responsibility of the Ministry for Gonzo, (c) although this was the first time that he worked on an abattoir project yet he did so knowing that his team included a Danish technical officer who had extensive knowledge on such projects, (d) whilst the appellant was claiming that one could get, say, a 100mm panel by gluing together two panels of 50mm, Ing. Curmi declared that that was only acceptable if the work was carried out by the manufacturer and according to European standards, adding that it was not acceptable for one to glue such panels together without the required certifications;
- having noted Dr Vassallo's submission regarding the fact as to whether it was legally admissible to use an administrative argument to exclude a tenderer on a technical requirement, claiming that (a) samples cannot be used to exclude a tenderer on administrative grounds otherwise there would be room for abuse (b) samples were submitted to demonstrate whether that tenderer could supply that particular product, no more and no less;
- having also noted Dr Vassallo's claim that article 27 of the Public Procurement Regulations made it clear that a tenderer would have to be excluded if such tenderer fails to prove that one is capable of carrying out the contract;
- having deliberated upon the fact as to whether administrative compliance was sufficient to provide one with technical comfort;
- having taken note of Dr Cassar's statement that clause 25.1 of the tender document (page 19) indicated clearly that tenders unaccompanied by samples on the closing date and time of tender shall not be considered for the award of this contract, adding that tenderers were well aware of this provision and that, as a result, all tenderers were on a level playing field 'ab initio' and if they were, knowingly, not abiding by specifications they should have stated so there and then and sought clarification and not take it upon themselves to reason out things in a manner which is solely in tune with what they feel is pertinent;
- having also considered Dr Cassar's argument that General Maintenance Ltd was aware of the fact that a sample had not been submitted so much so that, in order to explain this omission, it inserted a note stating that sample no. 3 was similar to sample no 2 except for the thickness;

- having established during the hearing that, as things turned out, only one tenderer had been considered administratively compliant and having been reassured by Ing Curmi that the Adjudicating Committee had carried out the technical evaluation with regard to the remaining tenderer and that the declarations and literature submitted conform to specifications;
- having taken cognizance of Dr Vassallo’s statement in respect of the content of page 86- Volume1 Section 5: ‘Administrative, Technical and Financial Evaluation Grids’ of the tender document, particularly the phrase ‘substantial deviations’, as well as, Dr Cassar’s counter argument that the tender document laid down that three samples were required and that whether that was ‘substantial’ or not was beside the point;
- having reflected on Dr Sciriha’s reference to clause 27.1 which clearly provided that “*tenders which are incomplete ... will be rejected*” whereas clause 23.2 provided that “*... Late tenders will be rejected and will not be evaluated*”, adding that the Adjudicating Committee considered the two tenders as incomplete;

reached the following conclusions, namely:

1. The PCAB acknowledges that, in full consideration of what emerged in both Cases 144 and 145 respectively, it is unacceptable for any tenderer to expect that any or all of the mandatory clauses and specifications are not adhered to on any pretext, regardless of the presumed validity of their reason for not doing so, unless the apposite effort is made by the said tenderer to formally clarify as to whether the reasoning it wants to follow is acceptable to whoever has ownership of the contents of the tender document, namely the contracting authority;
2. The PCAB feels that, with regards to Case 144, the contracting authority was right in requesting an extension of the bid bond considering that when the appellant was asked to do so the adjudicating process was still in course and hence, by that time, the Adjudicating Committee had not concluded its report;
3. In line with (1) above, and pertinent to both Cases 144 and 145 respectively, the PCAB cannot expect any tenderer to, arbitrarily, decide not to submit a sample unless authorised to do so considering (a) such request to be the sole prerogative of the contracting authority and (b) the respective relevance and extent of real scope for request to be beyond the realms of the tenderer. Furthermore, in these instances, the tenderer is expected to adhere to requests by (i) implementing rather than (ii) assuming an interrogative role, accepting, in the process, that one may seek clarification but, definitely, not desist from complying to tender terms and conditions unless by formal agreement amongst the contracting authority and all the participating tenderers;
4. The PCAB feels that abiding by the terms and conditions of the tender dossier is obligatory and the onus as to whether one is deviating substantially or not is, very often subjective – however, one sure thing is that such ‘subjectivity’ remains, depending on reasonability, the prerogative of the contracting authority. As a consequence, the PCAB cannot support General Maintenance Ltd’s (Case 145) claim that it, arbitrarily, decided not to send a sample of the

150mm thickness, as requested in the tender document, expecting the contracting authority's representative/s to go and view all the materials at the Marsa Abattoir since it was the same client, the government.

As a consequence of (1) to (4) above, this Board:

1. cannot uphold the objection (Case No. 144) as lodged by appellants
2. cannot uphold the objection (Case No. 145) as lodged by appellants

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that deposits paid by both appellants (Case Nos.144 and 145 respectively) to be able to file the objection should not be refunded.

Furthermore, the PCAB recommends that the remaining participant will proceed to the next stage, the financial evaluation.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

9April 2009