PUBLIC CONTRACTS APPEALS BOARD

Case No. 189

CT 2633/2009
NEGOTIATED PROCEDURE FOR THE RECONSTRUCTION OF PART OF XLENDI ROAD, XLENDI, GOZO

The closing date for this call for tenders - a negotiated procedure (works) published under the three package system – with a contracted estimated value of € 4,218,351, was 9.10.2009.

Three (3) different tenderers submitted their offers.

On 11.01.2010 Messrs Polidano Bros. filed an objection against the decision by the Contracts Department to reject its tender after having been found to be administratively non-compliant.

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 03.03.2010 to discuss this objection.

Present for the hearing were:

Polidano Brothers Ltd

Dr Jesmond Manicaro	Legal Representative
Dr Noel Camilleri	legal Representative
Prof Ian Refalo	Legal Representative
Mr Charles Polidano	Representative

JPF Joint Venture

Dr Kenneth Grima	Legal Representative
Dr Carmelo Galea	Legal Representative
Mr Mark John Scicluna	Architect
Mr Victor Hili	Representative
Mr Paul Magro	Representative

Ministry for Gozo

Dr Tatiane Scicluna Cassar	Legal Representative
Dr Alex Perici Calascione	Legal Representative
Mr Joseph Portelli	Director, Projects & Development
Ms Rita Cutajar	Director EU Affairs

Adjudication Board

Ms Ivana Farrugia	Chairperson
Mr Angelo Portelli	Member
Mr Godwin Sultana	Member
Ms Mariella Xuereb	Member
Mr Mario Camilleri	Secretary

Contract Department

Mr Francis Attard	Director General

After the Chairman's brief introduction the appellant was invited to explain the motives of the objection.

Dr Jesmond Manicaro, legal advisor of Polidano Brothers Ltd, the appellant Company, started by contesting the admissibility of the negotiated procedure in the circumstances of this case. He then quoted from Article 71 (1) of the Public Contracts Regulations:

"A contracting authority may award its public works contracts by negotiated procedure, after prior publication of an EU contract notice:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable in terms of regulations 27 (*that dealt with the award criteria. i.e. if it was the lowest price or the most economically advantageous tender*) 30(1) (*that dealt with sub-contracting and conditions for performance*), 31 (*referring to joint and group tendering*), 46 (*relating to variances*), 60 (*relating to information*) and 62 (*relating to entitlement to carry out a service activity*) in response to an open or restricted procedure or a competitive dialogue in so far as the original terms of the contract are not substantially altered. In such cases a contracting authority may refrain from publishing an EU contract notice where it includes in the negotiated procedure all and only the tenderers who satisfy the criteria of regulations 49 to 52 and who during the preceding open or restricted procedure have submitted tenders in accordance with the formal requirements of the tendering procedure … "

Dr Manicaro asked if the negotiated procedure was resorted to on any of the grounds mentioned in regulations 27, 30 (1), 31, 46, 60 and 62.

Dr Tatiane Scicluna Cassar, legal adviser of the Ministry for Gozo, declared that it was untenable for the appellant to question at this stage whether it was regular to go for the negotiated procedure when the appellant (i) was informed by Contracts Department letter dated 12 October 2009 and even attended a meeting during which the negotiated procedure was launched and explained, (ii) participated in the negotiated procedure, thus accepting its conditions, and (iii) only lodged his objection when his tender was disqualified during the negotiated procedure. Dr Scicluna Cassar contended that if the tenderer wished to object to the negotiated procedure he should have done so the moment the negotiated procedure was launched and not in the course of the process when his offer had been rejected. She added that the tender document stipulated that, in submitting a tender, the tenderer accepts in full and without restriction the special and general conditions governing the contract and, as a consequence, the appellant Company's participation meant that the appellant Company accepted all those conditions.

Mr Francis Attard, Director General (Contracts), under oath, gave the following evidence:

- the public call for tenders was advertised in the Government Gazette whereas the negotiated procedure was not published;

- the decision that the original call for tenders was cancelled was made public and all interested parties had the opportunity to appeal from that decision but the fact was that no one filed an objection;

- in the case in question no tender was fully compliant and the evaluation committee recommended that the tender be cancelled and, should no appeal be lodged to challenge the tender cancellation, a negotiated procedure would be initiated by inviting each one of the tenderers who had submitted a bid;

- when a negotiated procedure was launched, the tenderers who had participated were called to a tenderers' briefing where the contracting authority explained the shortcomings observed in the previous tender submissions – where each tenderer would already have been informed of the reason/s for the refusal of one's offer – and also explained what they were expected to submit. During the tenders' briefing tenderers had all the opportunity to ask for any clarification and, at the end, they were handed over a new tender document and the interested tenderers were invited to submit the bid by a given date;

- the tender document given out at the tenders meeting was the same as the original one and, had there been some alterations, these would have been explained to the bidders at the tenderers' meeting;

- the benefit derived from a negotiated procedure was that a shorter period would be given to tenderers to submit their offer, in fact the regulation stipulated a minimum of 15 days, though, since this contract was rather extensive and complex in nature the period must have been longer than that, whereas a new call for tenderers would have had a publication period of 52 days;

- the negotiated procedure was launched because, in the original call for tenders, all offers received were found to be administratively/technically irregular or non-compliant and that occurred prior to the opening of the third packet which contained the price; and

- the negotiated procedure, although open only to tenderers who had submitted an offer in response to the original call for tenders, was considered as a fresh competitive process where tenderers could ameliorate their original offer.

Dr Kenneth Grima, legal adviser of JPF Joint Venture, an interested party, pointed out that regulation 71 (1) stated that a negotiated procedure could be launched "*in the event of irregular tenders or***"** and that meant that there was no need to enter into the merits of regulations 27, 30 and so forth because the fact that all the tenders received were irregular was sufficient ground to move on to the negotiated procedure. He added that it was a fact that none of the tenderers had appealed from the decision that one's offer was found to be irregular. Dr Grima continued that, following the tenderers' meeting, one of the tenderers did not submit a bid, two tenderers submitted a tender but both were, eventually, found, once again, non-compliant with one of them, the appellant Company, lodging an appeal and the fourth one was his client who had submitted a regular tender. Dr Grima declared that the process was transparent and fair to one and all.

Dr Manicaro argued that Regulation 71 (1) laid down that regulations 27, 30 (1), 31, 46, 60 and 62 had be satisfied – all of them - in order to activate the negotiated procedure and that it was evident that regulation 27 had not been met since the third package had not been opened by the time that the tender had been cancelled.

The PCAB intervened to remark that the price criterion was subject to tenderer(s) having been found compliant administratively and technically, which evidently, was not the case.

Dr Manicaro then went on to quote again from Reg. 17 (1):

> "…. In such cases a contracting authority may refrain from publishing an EU contract notice where it includes in the negotiated procedure all and only the tenderers who satisfy the criteria of regulations 49 (*Qualitative selection criteria*), 50 (*Evidence of financial and economic standing*), 51 (*Evidence of technical capacity*) to 52 (*Supplemental Information*) and who during the preceding open or restricted procedure have submitted tenders in accordance with the formal requirements of the tendering procedure"

Dr Manicaro argued that the evaluation committee should not have gone into the financial statements of his client during the negotiated procedure because once his client had qualified to participate in the negotiated procedure that meant that he had already satisfied regulations 49 to 52.

Dr Scicluna Cassar reiterated that if the appellant wished to object to the negotiated procedure he should have done so prior to taking part and not after participating and after having his offer rejected. Mr Attard corroborated this and added that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure.

Dr Manicaro conceded that a negotiated procedure could be initiated either in case tenders were irregular or the submissions were unacceptable in terms of the regulations mentioned in Reg. 71 (1) but stuck to his contention that the fact that tenderers were admitted to the negotiated procedure meant that they had already satisfied regulations 49 to 52 otherwise the negotiated procedure could not have been resorted to.

Dr Manicaro stated that, by way of letter dated 6th January 2010, the Department of Contracts had informed his client that his tender for the above-mentioned contract had been ruled administratively non-compliant for, among other things, the following reason:

> *"Form 4.4 requested certified statement of accounts. Following legal advice, although the accounts presented have been endorsed and stamped by a certified public accountant it was expected that a covering accountant's report should be submitted certifying the accounts. The accounts submitted were only stamped and signed by a certified accountant."*

Dr Manicaro then referred to a press release which he claimed was issued by the Ministry for Gozo which stated that the tender document requested the company's

accounts for the previous 3 years signed and certified by a public accountant. Dr Manicaro claimed that the type of accounts that his client submitted with this tender had been submitted with previous tenders and had been accepted. He even queried if the accounts presented by JPF Joint Venture included the covering accountant's report.

The Chairman, PCAB, remarked that the accountant on his own could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification.

Dr Scicluna Cassar quoted section 4.1.2 (page 7):

> *"Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant…"*

Dr Scicluna Cassar explained that, in the 2005 financial statements, the appellant indicated in the contents page, reference to pages1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the 'notes to the financial statements' and 'the auditor's report'. She added that the same applied to the financial statements presented for 2006 and 2007.

The Chairman PCAB remarked that a financial statement should always be submitted in its entirety. He added that in accounting practice the accounts were verified not by an accountant but by an auditor and that the auditor could even qualify those accounts by adding his remarks thereon.

Ms Ivana Farrugia, Architect and Chairperson of the evaluation committee, under oath, stated that tenderers had to fill in Form 4.4 covering the annual turnover and the assets and liabilities and they had also to supply the evidence requested at section 4.1.2 quoted earlier on by Dr Scicluna Cassar. Moreover, Ms Farrugia referred to paragraph 4.4.4 of Form 4.4 which stated

> "*Please attach copies of the company's previous 3 years certified statements of account from which the following basic data could be abstracted; …"*

Ms Farrugia informed the hearing that the evaluation committee was made up of architects and a secretary, none of whom with professional accounting experience. However, on checking the submission made by the appellant Company, they observed that (a) the financial statements he submitted were incomplete in the sense that 'the notes to the financial statements' and 'the auditor's report' were missing and (b) the accounts were only stamped and signed by the accountant – who, according to Dr Scicluna Cassar acted also as company secretary. Ms Farrugia remarked that, in the circumstances, the evaluation committee sought the advice of the Contracts Department, who, in turn, directed that expert advice should be sought, preferably, from within the public service. Ms Farrugia declared that the committee was advised that the accounts required some sort of third party verification.

Dr Grima pointed out that he had checked with the Malta Financial Services Authority (MFSA) but could not find the appellant company's audited accounts for the 3 years requested in the tender document. Dr Grima claimed that the appellant Company omitted the auditor's report simply because the accounts had not been audited.

At this stage, the PCAB verified that the individual companies forming JPF Joint Venture had in fact submitted the audited accounts with the tender submission of JPF joint venture.

Dr Manicaro, once again, referred to a letter dated 6th January 2010 sent to his client by the Department of Contracts and quoted:

> *"Lighting report Form 4.6.12 was not submitted and on verification of the submitted information it was found that no confirmation was given with regards to 'the division of the road in four sections… each section will be sub-divided into at least 2 circuits thereby giving a total of 8 circuits'… The main cabling shall be 4 core … The terminal block inside the pole shall be equipped with a fuse cut-out of not more than 2 Amperes to act as protection to luminaire."*

Dr Manicaro remarked that the Form 4.6.12 submitted by his client was not identical to that provided in the tender document but claimed that that information had been included in a separate report. Dr Manicaro argued that, in itself, the negotiated procedure implied that the contracting authority should have called on his client to discuss and to negotiate on such matters but, in effect, his client was never approached to forward any clarification.

Ms Farrugia explained that Form 4.6.12

(i) laid down how the street lighting works had to be carried out and required the tenderer to endorse the form so as to bind himself to abide by those instructions, *and*

(ii) requested the tenderer to submit a street lighting report

Ms Farrugia remarked that the appellant submitted (a) a signed sheet of paper entitled Form 4.6.12 but without any of the instructions given in Form 4.6.12 provided in the tender document and (b) a street lighting report. Ms Farrugia explained that although the tenderer had not submitted the form in the requested format, which in itself was an infringement with regard to administrative compliance, the evaluation committee went on to check the street lighting report with a view to verifying whether the information omitted in the form had, at least, been included in the report under review. Ms Farrugia stated that, on checking the street lighting report, the evaluation committee found certain information missing as indicated in Contracts letter dated 6th January 2010 referred to earlier on. Ms Farrugia confirmed that the evaluation committee's main concern was not that the appellants did not submit the form in the format provided in the tender document but that the appellants had not submitted all the information that had been requested of them.

Ms Farrugia verified that the appellant had not endorsed Form 4.6.12 in its original submission but she stressed that the negotiated procedure requested the tenderers to make a fresh and complete submission irrespective of what they had submitted in the original offer, i.e. it did not involve adding up to what they had originally submitted.

At that stage the PCAB examined the form 4.6.12 as submitted by the appellant Company and as provided in the tender dossier.

Ms Farrugia pointed out that, contrary to what the appellant seemed to imply, the negotiated procedure did not allow the evaluation committee to negotiate with the bidders during the tender evaluation process.

Dr Manicaro stated that the European Court of Justice (ECJ) made reference to what was called 'the material advantage test' which meant that if the contracting authority requested clarifications or additional information which did not prejudice the position of the other tenderers then the contracting authority was duty bound to ask for that information. He argued that, if the contracting authority would not seek clarifications of this kind, then the contracting authority would end up disqualifying many tenders to the detriment of competition and price.

The Chairman PCAB remarked that the kind of clarifications that the evaluation committee could ask for during the adjudication process was the same both in the case of a normal call for tenders, as well as, in the case of a negotiated procedure. He added that the evaluation committee could not ask for documents and information that should have been submitted by all tenderers in the first place.

Dr Scicluna Cassar remarked that the submission of Form 4.6.12 was a mandatory requirement and that section 20.4 of the tender dossier (page 20) laid down that:

> *"The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority, or if the tender documents are not filled in properly*."

Dr Manicaro then moved on to the last shortcoming that led to the rejection of his client's offer and read out the reason given by the Contracts Department, i.e.:

> *"The following drawings were not provided: A3.1 (railing) A1.1a, A1.1b, A1.2a, A1.2b, A1.3a, A1.3b, A1.4a, A1.4b, A1.5a, A1.5b, A1.6, A3.1 (Section through the road)"*

Dr Manicaro did not contest the fact that, through an oversight, these drawings were not included in his client's submission. He explained that these drawings were provided with the tender *dossier* and the tenderer had just to endorse them.

Dr Manicaro cited a European Court of Justice (ECJ) case the Commission vs Denmark (C243 in the 1993 European Commission Report) which drew a distinction between fundamental and non fundamental conditions. Dr Manicaro also referred to another ECJ case (B211/02) where the 'Court of First Instance' stated that the Commission's decision to reject the tender without first seeking clarifications was

clearly disproportionate and, thus, initiated a manifest error of assessment. He added that the purpose of the pertinent directive was to allow for unrestricted and undistorted competition whereas it, sometimes happened, that the contracting authority would end up with only one compliant tenderer out of four or six tenderers

Dr Scicluna Cassar remarked that, out of 21 drawings, the appellant Compnay submitted only 8 and she pointed out that these drawings were mandatory requirements so much so that Form 4.6.11 (pg 64) stated that "*Tenderers are to include a signed copy of all tender drawings provided by the MGOZ and any other drawings prepared by the Tenderer.*" Dr Scicluna Cassar stated that section 14.3 indicated that the tender must comprise a list of duly completed documents, among them, the 'drawings' referred to at section 14.3.2.8 (pages 16 & 17).

Ms Farrugia argued that, irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as requested in the tender document.

Dr Scicluna Cassar reiterated that:

(i) with regard to the admissibility of the negotiated procedure, the appellant should have raised his objection prior to taking part in this procedure - because his participation meant that he had accepted the negotiated procedure - and not after taking part in the process and after having been disqualified due to non-compliance;

(ii) the financial statements submitted by the appellant were incomplete in such a way that the "auditor's report" and "the notes to the accounts" were omitted, intentionally or not. Besides, the accounts were only signed and rubberstamped by the company secretary which did not constitute verification by an independent auditor;

(iii) Form 4.6.12 was not submitted as requested and, more importantly, the accompanying street lighting report did not cover all the areas included in the form provided in the tender document and hence that amounted to a deletion or alteration of the tender document; and

(iv) only 8 out of 21 drawings had been submitted when the tenderer was not at liberty to omit any of these mandatory documents.

On his part Dr Grima maintained that once the tenders were irregular then the contracting authority had enough grounds to initiate the negotiated procedure and therefore it acted correctly. He added that the tenderer was not at liberty to alter the tender document in any way or to refrain from submitting information but, on the contrary, the tenderer had to submit all mandatory information and in the requested form.

Dr Manicaro explained that his client was raising his objection to the negotiated procedure at this stage because his client thought that, once he was allowed to

participate in the negotiated procedure, then his submission was in order as far as regulations 49 to 52 were concerned. He added that his client had expected the contracting authority to consult him and to ask him for clarifications during the negotiated procedure.

Dr Manicaro remarked that the accounts submitted by his client were the same set of accounts that had been provided and accepted in connection with other calls for tenders. Dr Manicaro claimed that his client's accounts were verified by a certified accountant as laid down in the tender document and again referred to the press release by the Ministry for Gozo stating that the bidders were not obliged to deposit their audited accounts at the Malta Financial Services Authority. Dr Manicaro argued that the company accounts were requested so as to ascertain the financial standing of the company, however, there were other means to verify the financial standing of a firm, such as, through a bank statement or a letter from the bank.

Dr Manicaro insisted that the street lighting report had in fact been submitted but that the contracting authority had failed to seek any clarifications from his client in this regard. He considered the information requested in this form and report as rather basic and not fundamental.

Dr Manicaro did not contest the fact that through an oversight some of the drawing had not been submitted but pointed out that all the drawings had been submitted with the original submission. Moreover, Dr Manicaro mentioned the pronouncements by the ECJ (a) with regard to disproportionate action in rejecting a tender and (b) that in the light of the principle of good administration it was considered both practical and necessary for the contracting authority to seek information with a view to ensure effective, genuine and undistorted competition for public contracts. Dr Manicaro alleged that the compliant tenderer (JPF Joint Venture) had been awarded about 95% of the contracts in Gozo – Dr Scicluna Cassar intervened to reject the insinuation that there was some kind of bias in favour of the compliant tenderer in the award of tenders.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 20.01.2010 and also through their verbal submissions presented during the public hearing held on the 03.03.2010, had objected to the decision taken by the General Contracts Committee;

- having taken note of, amongst other things, the appellant Company's legal representative's (**a**) reference to issues related to the admissibility of a negotiated procedure in this particular instance and whether, in particular, the negotiated procedure in question was resorted to on any of the grounds mentioned in regulations 27, 30 (1), 31, 46, 60 and 62, (**b**) claim that the Department of Contracts had informed his client that his tender for the above-mentioned contract had been ruled administratively non-compliant due to, among other things, having submitted accounts that were only stamped and signed by a certified accountant, (**c**) remark that the accounts submitted by his client were the same set of accounts that had been provided and accepted in connection with other calls for tenders, (**d**) mentioning of the European Court

of Justice (ECJ) reference to what was called 'the material advantage test' implying that if the contracting authority requested clarifications or additional information which did not prejudice the position of the other tenderers then the contracting authority was duty bound to ask for that information, (**e**) admittance that, through an oversight, drawings that were considered mandatory in the tender dossier were not included in his client's submission and (**f**) citation of a European Court of Justice (ECJ) case the Commission vs Denmark (C243 in the 1993 European Commission Report) which drew a distinction between fundamental and non fundamental conditions and another case (B211/02) where the Court of First Instance stated that the Commission's decision to reject the tender without first seeking clarifications was clearly disproportionate and thus initiated a manifest error of assessment;

- having taken note, *inter alia*, of the contracting authority's (**a**) declaration that it was untenable for the appellant Company to question, at this stage, whether it was regular to go for the negotiated procedure when the appellant Company (1) was informed by a letter, dated 12 October 2009, sent by the Contracts Department (2) attended a meeting during which the negotiated procedure was launched and explained, (3) participated in the negotiated procedure, thus accepting its conditions, and (4) only lodged an objection when the said Company's tender was disqualified during the negotiated procedure, (**b**) reference to the fact that whilst 4.1.2 (page 7) stated that the tenderer has to provide "…*Evidence of financial and economic standing in accordance with Article 50 of LN 177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by a financial statement for the years 2005, 2006 and 2007 verified by a certified accountant*…", in the financial statements, as submitted by the appellant Company, e.g. the 2005 financial statements, the appellant Company indicated in the contents pages, pages 1 to 33 but, in fact, submitted only pages 1 to 21 thereby omitting, intentionally or not, the 'notes to the financial statements' and 'the auditor's report' - adding that the same applied to the financial statements presented for 2006 and 2007, (**c**) remark wherein emphasis was placed on the fact that the submission of Form 4.6.12 was a mandatory requirement and that section 20.4 of the tender dossier (page 20) laid down that *"... The tender will be rejected if it contains any modification, addition or deletion to the tender documents not specified in a modification issued by the Central Government Authority, or if the tender documents are not filled in properly*." and (**d**) remark that, out of 21 drawings, the appellant Company submitted only 8, pointing out that these drawings were mandatory requirements, so much so, that 'Form 4.6.1' (pg 64) stated that "*Tenderers are to include a signed copy of all tender drawings provided by the MGOZ and any other drawings prepared by the Tenderer."*

- having also taken note of the DG Contracts' testimony wherein, *inter alia*, he gave a thorough insight as to what prompted a negotiated procedure and the 'modus operandi' followed in this particular instance;

- having noted DG Contracts' remark wherein he corroborated a point raised by the contracting authority's legal advisor who argued that if the appellant Company wished to object to the negotiated procedure it should have done so prior to taking part and not after participating and after having its offer

rejected, stating that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure;

- having heard JPF Joint Venture's (an interested party) issues raised during the hearing, particularly, those relating to the fact that (**a**) since all the tenders received were judged to have been irregular, there was sufficient ground to move on to the negotiated procedure, (**b**) following the tenderers' meeting, one of the tenderers did not submit a bid, two tenderers submitted a tender but both were, eventually, found, once again, non-compliant with one of them, the appellant Company, lodging an appeal and the fourth one (his client) who had submitted a regular tender, (**c**) he had checked with the Malta Financial Services Authority (MFSA) but could not find the appellant Company's audited accounts for the 3 years requested in the tender document and (**d**) the appellant Company omitted the auditor's report simply because the accounts had not been audited;

- having also heard the testimony given by the Chairperson of the adjudication board wherein, amongst other things, she stated that (**a**) the financial statements the appellant Company had submitted were incomplete in the sense that 'the notes to the financial statements' and 'the auditor's report' were missing ***and*** the accounts were only stamped and signed by the accountant, (**b**) following advice sought from the Contracts Department, the committee was advised that the accounts required some sort of verification, implying an audited set of accounts, (c) with regards to the street lighting issue, albeit Form 4.6.12 laid down how the street lighting works had to be carried out and required the tenderer to endorse the form so as to bind himself to abide by those instructions, as well as, requesting the tenderer to submit a street lighting report, yet, the appellant submitted (1) a signed sheet of paper entitled 'Form 4.6.12' but without any of the instructions given in 'Form 4.6.12' provided in the tender document and (2) a street lighting report, (**d**) with regards to as to why the adjudication board had found that the tenderer had not abided by the contracting authority's terms and conditions as per its published tender *dossier*, the evaluation committee's main concern was not that the appellant Company did not submit the form in the format provided in the tender document but that the appellants had not submitted all the information that had been requested of them, (**e**) contrary to what the appellant Company seemed to imply, the negotiated procedure did not allow the evaluation committee to negotiate with the bidders during the tender evaluation process and (**f**) in the case relating to the mandatory drawings that had to be submitted by tenderers, irrespective of the fact that the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the appellants, these would have been bound only by the 8 drawings that they submitted and not by the 21 drawings provided as requested in the tender document

reached the following conclusions, namely:

1. The PCAB feels that if the appellant Company had wished to object to the negotiated procedure, the same appellant Company should have done so the

moment the negotiated procedure was launched and not in the course of the process when its offer had been rejected.

2. The PCAB feels that the 'modus operandi' followed by the Contracts Department in dealing with the 'negotiated' procedure was correct.

3. The PCAB opines that (a) an accountant, *per se*, could not certify that the accounts gave a true and fair view of the financial situation of the company but that it was the auditor who could issue such certification and (b) unless otherwise instructed by or agreed upon with the contracting authority, a financial statement should always be submitted in its entirety in the same format as provided to MFSA.

4. The PCAB cannot agree with the appellant Company's statement wherein it was argued that the evaluation committee should not have gone into its financial statements during the negotiated procedure because, once a tenderer had qualified to participate in the negotiated procedure, that meant that the said Company had already satisfied regulations 49 to 52. The PCAB agrees with the DG Contracts' interpretation of the issue wherein the latter claimed that tenderers who participated in the original tender were not obliged to take part in the negotiated procedure and that the negotiated procedure is, *per se*, a new process.

5. The PCAB retains the examples provided by the appellant Company, in so far as the clarification procedure to be followed is concerned, as not in line with the spirit of the appeal discussed during this hearing and concludes that the kind of clarifications that the evaluation committee could ask for during the adjudication process is the same, both in the case of a normal call for tenders, as well as, in the case of a negotiated procedure, adding that the evaluation committee could not ask for documents and information that should have been submitted by all tenderers in the first place, these being regarded as mandatory.

6. The PCAB agrees with the adjudication board's conclusion, namely that, irrespective of the fact as to whether the appellant Company had submitted all the drawings in its original submission, if the tender were to be awarded to the said appellant Company, the latter would have been bound only by the 8 drawings that it would have submitted and not by the 21 drawings provided as requested in the tender document

As a consequence of (1) to (6) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should not be reimbursed.

Alfred R Triganza	Anthony Pavia	Edwin Muscat
Chairman	Member	Member

14 March 2010