

PUBLIC CONTRACTS APPEALS BOARD

Case No. 230

Adv. CT/019/2010; CT/2689/2009

Framework Agreement for the Supply of Ready Mixed Concrete for General & Maritime use in Malta (2010 – 2011)

This call for tenders was published in the Government Gazette on 8 January 2010. The closing date for this call for offers was 2 March 2010.

The estimated value of this tender was Euro 880,000.

Four (4) tenderers submitted their offers.

Vassallo Concrete Services Ltd filed an objection on the 2 July 2010 following the decision by the Contracts Department to award the tender in caption to Zrar Ltd and Polidano Bros. Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 6 October 2010 to discuss this objection.

Present for the hearing were:

Vassallo Concrete Services Ltd

Dr Massimo Vella	Legal Representative
Mr Pio Vassallo	Representative
Mr Denis Vassallo	Representative

Zrar Ltd

Dr John Gauci	Legal Representative
Perit Rueben Aquilina	Representative
Mr Emmanuel Bonnici	Representative

Polidano Bros Ltd

Dr Jesmond Manicaró	Legal Representative
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Ministry for Resources and Rural Affairs (MRRA)

Dr Victoria Scerri	Legal Representative
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Evaluation Board

Mr John Vella	Chairman
Mr Joseph Casaletto	Secretary
Ray Farrugia	Member
Mr Emanuel Buttigieg	Member
Mr Oliver Debono	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant company's representative was invited to explain the motives of the objection.

Dr Massimo Vella, legal representative of Vassallo Concrete Services Ltd, the appellant company, explained that by letter dated 24th June 2010 the Contracts Department informed his client that the company did not provide in its offer evidence of delivery and services effected in the past three years with sums, dates and recipients, whether public or private and that the tender was recommended to be awarded to Zrar Ltd and Polidano Bros Ltd. Dr Vella stated that paragraph 3.6 (ii) of the Instructions to Tenderers provided as follows:

“Tenderers who have never been awarded this contract or who have been awarded a previous contract but not in the last five years, are to provide a list of the principal deliveries effected in the past three years with sums, dates and recipients, whether public or private. Evidence of delivery and services provided shall be given:

Where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority;

Where the recipient was a private purchaser, by the purchaser's certification on an official letter head of the purchaser”

Dr Vella remarked that his client had supplied private purchasers and hence the company provided four purchaser's certificates on official letterhead of the respective purchaser which were submitted as part of its tender documentation. Dr Vella stated that these certificates demonstrated that his client had effected various consignments over a period of time, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Contrators Ltd.

The appellant company's legal representative claimed that the submission of these certificates satisfied the provisions laid down in para. 3.6 (ii) with regard to evidence of previous experience

Mr John Vella, chairman of the adjudicating board, referred to the same provision quoted by Dr Vella and underlined the wording:

“...are to provide a list of the principal deliveries effected in the past three years with sums, dates and recipients, whether public or private.”

Mr John Vella stated that the tenderer had to furnish the list of principal deliveries backed by the purchaser's certification on an official letter head.

The chairman of the adjudicating board explained that by letter dated 2nd March 2010 Vassallo Concrete Services Ltd informed the contracting authority that the firm had started its operations in March 2009 and it therefore followed that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year

period requested in the tender document. Mr John Vella added that para. 3.6 ended with the following sentence underlined and in bold print:

“Furthermore, non compliance with point i or ii above will result in disqualification of the tender.”

Mr John Vella stated that, from the four certificates provided by the appellant company, it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company. Mr John Vella concluded that, in the light of the above, the adjudicating board had no option but to declare the appellant company’s offer as non-compliant in terms of para. 3.6 (ii) of the ‘Instructions to Tenderers’ of the tender document

Whilst the Chairman PCAB asked whether the tender conditions took into account companies that might be undergoing a restructuring process whereby an existing firm would be taken over lock, stock and barrel by a new firm, Mr Edwin Muscat, another PCAB member, asked if the tender conditions allowed for new firms to participate in this tendering process.

Dr Victoria Scerri, representing the Ministry for Resources and Rural Affairs (MRRRA), stated that, from the legal point of view, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the adjudicating board could not take into account the credentials of another firm which was totally separate from the firm submitting the tender. Dr Scerri submitted that this was a basic principle in commercial law, namely that each company had its own legal personality, and this principle had been constantly upheld by our courts.

Dr Vella referred the PCAB to a letter dated 2nd March 2010, which his client submitted with his company’s tender submission, where the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd was clearly explained, which letter stated, among other things, as follows:

“Our company Vassallo Concrete Services Limited (Company Registration No 46055) is a limited liability company between Vassallo Builders Group Limited (Company Registration' No C2448) in partnership with the same shareholders of Vassallo Concrete Supplies Limited (Company Registration No C 7651). Although Vassallo Concrete Services Limited only started its operations in March of 2009, the Vassallo Concrete Supplies (not Services) Limited has been in the business supplying concrete to various Government Departments and private contractors since 1978.

The Vassallo Concrete Services acquired all the assets and good will built up over the 30 years operation of the previous Vassallo Concrete Supplies Limited. Although in the last five years Vassallo Concrete Supplies Limited was not awarded this period type of contract for the supply of concrete in the past it was awarded this contract on a number of occasions which it delivered successfully.”

Dr Vella maintained that a company was not made up solely of its memorandum and articles of association but it was, essentially, made up of its personnel, with their experience and knowhow, machinery, equipment and premises - he claimed that all these were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd. The appellant company's legal advisor added that the reference letters themselves made a distinction between supplies made by Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd. Dr Vella contended that one could not discard the years of experience that the latter company had acquired over so many years when all assets and experience had been put at the disposal of this new company.

Dr Scerri pointed out that the relationship explained by Dr Vella did not have any legal relevance in the case in question. She added that our courts had upheld that a company was a unique entity which could not be associated with any other company and, from the legal point of view, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company. Dr Scerri argued that the two companies referred to by the appellant company were legally two completely different companies.

Dr Vella mentioned the concept of the corporate veil instances where two companies joined forces to execute a contract and the setting up of a company for the sole purpose of carrying out a specific project.

Dr Scerri rejected outright the arguments put forward by Dr Vella because, legally, these were two different companies. At this point Dr Scerri quoted from a court ruling dated 29th April 2010 handed down by the First Instance of the Civil Court wherein it was ruled that:

“Meta soċjetà tkun kostitwita skont il-liġi hija tassumi personalità ġuridika distinta u separata minn dik tal-membri tagħha u għalhekk isegwi illi kull soċjetà illi għandha personalità ġuridika u distinta, għandha d-drittijiet u l-obbligi tagħha li huma separati u distinti minn dawk tal-membri tagħha. Dan allura jfisser li anke jekk is-soċjetà attriċi u s-soċjetà ARS għandhom l-istess azzjonisti waħda ma tistax tithallat mal-oħra peress illi dawn għandhom personalità ġuridika distinta mill-membri tagħha. L-istess jgħodd fil-kaz ta' sister companies li jappartjenu lil parent company komuni jew lil holding company komuni. Is-soċjetajiet sussidjarji li jaqgħu taħt l-istess parent company għandhom ukoll il-personalità ġuridika distinta u separata taqgħom u għalhekk waħda ma tistax taqgħmel tajjeb għall-oħra sakemm ma jkunx hemm ftehim f'dan is-sens.”

Dr Jesmond Manicaro, representing Polidano Bros Ltd, remarked that these were two separate companies whereas, for example, the concept of the joint venture was another thing because in that case one could hold responsible the companies individually and collectively. He argued that the experience of the shareholders or of the workers of a newly set up company did not matter because the fact remained that it was a new company. Dr Manicaro pointed out that Dr Vella's assertion that the transfer of personnel and equipment from one company to another were a guarantee of success did not always come true because it was not unheard of that a successful

firm failed or else suffered a setback on joining forces with another company. Dr Manicaro stressed that the contracting authority requested a minimum of 3 years previous experience to assess the track record of the bidder and that it was clear that one year experience was not considered sufficient to provide comfort. Dr Manicaro remarked that it was a fact that doing business was tough for start-ups.

Mr John Vella reiterated that the appellant company was found to be non-compliant because it did not submit the list requested at para. 3.6 (ii) and because the appellant company could not satisfy the three years previous experience requirement.

Dr John Gauci, representing Zrar Ltd, referred to Reg. 51 (2) of the Public Procurement Regulations which provided as follows:

“51 (2) Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given”

Dr Gauci stated that in the tender document the contracting authority was requesting evidence of the technical abilities of the economic operator, namely of the bidder and not of any other company. Dr Gauci pointed out that the regulations did provide for new companies to participate in such tenders, however, to do that it had to rely on the technical abilities of an experienced operator as provided for in Reg. 51 (3):

“An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.”

Dr Gauci stressed that, in such a case, it was not the tenderer that had to make the undertaking but the undertaking had to be made by the company that would be putting its resources at the disposal of the ‘new’ economic operator. Dr Gauci stressed that such an undertaking had to be made at the tendering stage.

Dr Vella stated that all that Reg. 51 (2) requested was evidence of technical abilities that may be furnished through various means among them the past deliveries. He added that his client did provide these certificates from suppliers. However, Dr Vella conceded that what his client perhaps had failed to do was to make a list of these four suppliers. Nevertheless, Dr Vella proceeded by saying that he felt that this minor shortcoming should in no way disqualify his client since the information was there anyway. Dr Vella noted that the argument seemed to be shifting during the course of the hearing in the sense that whereas, initially, any relationship between Vassallo Concrete Supplies Ltd and Vassallo Concrete Services Ltd was being discarded entirely now the objection that was being raised seemed to concern proof of an

undertaking by a company to put its resources at the disposal of the tenderer. Dr Vella maintained that, in fact, his client had submitted a declaration in his tender submission dated 2nd March 2010 wherein details were given as regards the relationship between Vassallo Concrete Supplies Ltd and Vassallo Concrete Services Ltd. Dr Vella remarked that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company. As a consequence, proceeded Dr Vella, his client had no need for the undertaking mentioned in Reg. 51 (3). Dr Vella remarked that, in other words, what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd.

Mr John Vella stated that the adjudicating board did consider the letter dated 2nd March 2009 submitted by the appellant company in its tender submission and he went on to read as part of its contents:

“We are pleased to submit our tender for the supply of ready mixed concrete as per advert no CT 019/2010 issued by the department of contracts.

Our company Vassallo Concrete Services Limited (Company Registration No 46055) is a limited liability company between Vassallo Builders Group Limited (Company Registration' No C2448) in partnership with the same shareholders of Vassallo Concrete Supplies Limited (Company Registration No C 7651). Although Vassallo Concrete Services Limited only started its operations in March of 2009, the Vassallo Concrete Services Limited has been in the business supplying concrete to various Government Departments and private contractors since 1978.

The Vassallo Concrete Services acquired all the assets and good will built up over the 30 years operation of the previous Vassallo Concrete Supplies Limited. Although in the last five years Vassallo Concrete Supplies Limited was not awarded this period type contract for the supply of concrete in the past it was awarded this contract on a number of occasions which it delivered successfully.

In accordance with Article 3.6 of the Instructions to Tenderers, the required confirmations and details of deliveries and of some of the clients of both these companies can be found in our technical bid marked Doc A. ”

Mr John Vella reiterated that the appellant company was disqualified because it did not submit the list of deliveries.

Dr Manicaro pointed out that, in the letter just quoted, it was stated that Vassallo Concrete Services Ltd acquired the assets of the other company and not the shareholding. He added that the new company, Vassallo Concrete Services Ltd, was set up in partnership between JLB Vassallo Enterprises Ltd, which was formed in 2008, and Vassallo Builders Ltd.

Dr Vella argued that here one was talking about various companies of the Vassallo Family and he claimed that what took place in this case was ‘a transfer of undertaking’ whereby one company transferred all its assets to the other company.

Dr Manicaro remarked that restructuring would take place in a group of companies which was not the case here.

Dr Vella stated that the reason for exclusion now seemed to refer to the non-submission of the list of deliveries when his client had submitted four certificates on the appropriate letterheads with all the requested details, such as, the purchaser, the quantity purchased, the number of years and so forth. Dr Vella said that it was not fair to exclude a tenderer for omitting the list referred to in para. 3.6 (ii).

Dr Gauci disagreed with the notion that the appellant company would present any agreement/documentation at this stage because any undertaking had to be entered into and submitted at tendering stage.

Mr Ray Farrugia, a member of the adjudicating board, under oath, remarked that the tender document referred to the list of the deliveries and to the certificate by the purchasers. Mr Farrugia remarked that in the tender submission the appellant company did not submit any list of deliveries made by the two companies that were being mentioned. The same adjudicating board member said that, had the appellant company made such a list available, the adjudicating board would have certainly considered it in its deliberations keeping in view also the requirement of an undertaking by the company that would be putting its resources at the disposal of the tenderer.

Dr Manicaro remarked that the adjudicating board could not decide on documents that were not made available to it at adjudication stage.

On his part, Dr Vella insisted that the four certificates of deliveries submitted did represent evidence for the purposes of clause 3.6 (ii) of the tender document.

Dr Scerri stated that it was legally incorrect for the appellant company to use the terminology 'and its predecessor' in the certificates presented because Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still 'alive'.

Mr Pio Vassallo, also representing the appellant company, under oath, referred to the letter of the 2nd March 2010 submitted with the tender as to the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd. Mr Vassallo mentioned also the transfer of assets agreement between these two companies which had not been submitted with the tender documentation and, at this point the PCAB intervened and ruled that this should not be taken into account at that stage. Mr Vassallo confirmed that Vassallo Concrete Supplies Ltd had ceased operations and that its assets had been transferred to the new company.

Dr Vella explained that a company could cease trading even though it was not struck off the register of companies.

Dr Scerri remarked that no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd and, once again, she objected to the fact that this company had been referred to in the certificates presented as the predecessor of Vassallo Concrete Services Ltd.

Dr Manicaro remarked that it could well have been a transfer of undertaking but the point remained that the pertinent declaration should have been submitted at tendering stage for the board to take it into account during evaluation.

Dr Vella insisted that the adjudicating board had the necessary documentation to carry out its evaluation since it had the declaration dated 2nd March 2010 regarding the relationship between the two companies and the evidence of technical abilities in the form of four certificates by purchasers which also indicated the link between the two companies. Dr Vella reiterated that, in this case, his client was not going to rely on any other entity in terms of resources.

Dr Gauci concluded that the declaration made by the company submitting the tender was insufficient because Reg. 51 (3) required from the tenderer “*an undertaking by those entities to place the necessary resources at the disposal of the economic operator.*” In the absence of that, Dr Gauci remarked that there should have been a declaration that there had been a transfer of the business.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 8 July 2010 and also through their verbal submissions presented during the public hearing held on 6 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ representatives’ (a) remark that they had supplied private purchasers and hence the company provided four purchaser’s certificates on official letterhead of the respective purchaser which were submitted as part of its tender documentation, (b) reference to the fact that they had effected various consignments over a period of time, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Contractors Ltd and that the submission of the said certificates satisfied the provisions laid down in para. 3.6 (ii) reference with regard to evidence of previous experience, (c) reference to a letter dated 2nd March 2010, which the appellant’s representative had submitted with the company’s tender submission, where the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd was clearly explained, (d) remark that a company was not made up solely of its memorandum and articles of association but it was, essentially, made up of its personnel, with their experience and knowhow, machinery, equipment and premises claiming that all these were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd, (e) reference to the fact that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company and, as a result, they had no need for the undertaking mentioned in Reg. 51 (3), (f) claim that what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd, (g) reference to the fact that what took place in this case was ‘a transfer of undertaking’ whereby one company transferred

all its assets to the other company and (h) contention that a company could cease trading even though it was not struck off the register of companies;

- having also taken note of the contracting authority's representative's (a) claim that para. 3.6 (ii) stated that "...are to provide a list of the principal deliveries effected in the past three years with sums, dates and recipients, whether public or private." And that this provision also ended with the following sentence underlined and in bold print "Furthermore, non compliance with point i or ii above will result in disqualification of the tender.", (b) reference to the fact that by letter dated 2nd March 2010 Vassallo Concrete Services Ltd informed the contracting authority that the firm had started its operations in March 2009 and it therefore followed that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year period requested in the tender document, (c) remark that from the four certificates provided by the appellant company, it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company, (d) contention that, from the legal point of view, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the adjudicating board could not take into account the credentials of another firm which was totally separate from the firm submitting the tender, (e) claim that the relationship explained by Dr Vella did not have any legal relevance in the case in question adding that our courts had upheld that a company was a unique entity which could not be associated with any other company and, from the legal point of view, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company, (f) reference to the fact that the experience of the shareholders or of the workers of a newly set up company did not matter because the fact remained that it was a new company, (g) emphasis placed on the fact that the appellant company was disqualified because it did not submit the list of deliveries and that the tender document referred to the list of the deliveries and to the certificate by the purchasers and that in the tender submission the appellant company did not submit any list of deliveries made by the two companies that were being mentioned, (h) claim that, had the appellant company made such a list available, the adjudicating board would have certainly considered it in its deliberations keeping in view also the requirement of an undertaking by the company that would be putting its resources at the disposal of the tenderer and (i) claim that it was legally incorrect for the appellant company to use the terminology 'and its predecessor' in the certificates presented because Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still 'alive' and that no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd;
- having considered Dr Manicaro's comments, especially his (a) remark that the transfer of personnel and equipment from one company to another were a guarantee of success did not always come true because it was not unheard of that a successful firm failed or else suffered a setback on joining forces with another company, (b) reference to the fact that it was stated that Vassallo Concrete Services Ltd acquired the assets of the other company and not the

shareholding adding that the new company, Vassallo Concrete Services Ltd, was set up in partnership between JLB Vassallo Enterprises Ltd, which was formed in 2008, and Vassallo Builders Ltd, (c) remark that the adjudicating board could not decide on documents that were not made available to it at adjudication stage and (d) argument that it could well have been a transfer of undertaking but the point remained that the pertinent declaration should have been submitted at tendering stage for the board to take it into account during evaluation;

- having taken cognizance of Dr Gauci's reference to the fact that the regulations did provide for new companies to participate in such tenders, however, to do that it had to rely on the technical abilities of an experienced operator as provided for in Reg. 51 (3) with the latter undertaking at the tendering stage that it would be putting its resources at the disposal of the 'new' economic operator,

reached the following conclusions, namely:

1. The PCAB feels that with regards to the claims made by the appellant company's representatives relating to previous experience, this has to be taken within the context that one has to agree with what was argued by the appellant company, namely that
 - (a) all personnel, with their experience and knowhow, machinery, equipment and premises were taken over by Vassallo Concrete Services Ltd from Vassallo Concrete Supplies Ltd,
 - (b) what effectively took place was a change in the name of the company and, as a result, Vassallo Concrete Supplies Ltd could hardly be termed as a new company in the business considering that it took over the operations of Vassallo Concrete Supplies Ltd and
 - (c) what happened in this case was 'a transfer of undertaking' whereby one company transferred all its assets to the other company.

Having thoroughly deliberated on the above, as well as the fact that, by letter dated 2nd March 2010, Vassallo Concrete Services Ltd had informed the contracting authority that the firm had started its operations in March 2009, this Board concludes that these factors alone provide ample proof that this firm could not produce evidence of deliveries for 2007 and 2008 to cover the 3 year period requested in the tender document. Indeed, this Board agrees with the evaluation board's claim that the relationship between companies, as explained by the appellant's legal advisor, did not have any legal relevance in the case in question upholding the thesis that a company is a unique entity which could never be associated with any other company and, legally, the fact that there were family ties between the shareholders of one company and the shareholders of another company did not in any way connect one company with the other company.

Also, solely within the context of the requirements of this tender, albeit it may be important from an operational perspective - although not

necessarily so due to the fact that the transfer of personnel and equipment from one company to another does not amount to an outright guarantee of success - yet, contractually, the shareholders' experience or of the workers of a newly set up company did not matter because the fact remained that it was a new company and, as a consequence, it was not in a position to submit the requested documentation covering the listed time frame.

2. The PCAB also opines that with reference to the fact that, over a period of time, the appellant company's claims, namely that it
 - (a) had delivered various consignments, namely, 26,000 cu.mtrs over 36 years to Vassallo Builders Ltd, 1000 cu.mtrs over 6 years to Caruana ContraActive Co. Ltd, 2000 cu.mtrs over 7 years to V. & C. Contractors Ltd and 1200 cu.mtrs over 7 years to PSV Turnkey Contrators Ltd and
 - (b) indeed submitted the requested certificates and thus satisfied the provisions laid down in para. 3.6

it was evident that the firm had provided supplies for only 1 year, since it started operations in 2009, whereas the supplies for previous years were made by another company. Furthermore, the evaluation board was also correct in disqualifying the appellant company due to the fact that it, rightfully, argued that the tenderer did not submit any list of deliveries requested in the tender document. Indeed, it would have been a different scenario had the appellant company made such a list available pertinently accompanied by an undertaking by the company that the latter would be putting its resources at the disposal of the tenderer, the recently set up company.

This line of thought endorses the argument raised by the contracting authority which submitted that the appellant company's claim that Vassallo Concrete Supplies Ltd had ceased operations and that the new company, Vassallo Concrete Services Ltd, was adequately equipped to undertake this contract without having to rely on the resources of any other company and, as a result, the undertaking mentioned in Reg. 51 (3) was, in their opinion, not required, was arbitrarily and erroneously made. As a consequence, this Board acknowledges that the evaluation board could thus not decide on documents that were not made available to it at adjudication stage.

3. The PCAB also claims that it was legally incorrect for the appellant company to use the terminology 'and its predecessor' in the certificates presented because, unlike the impression that the appellant company may have tried to instil during the hearing, Vassallo Concrete Services Ltd did not replace Vassallo Concrete Supplies Ltd once the latter was technically still 'alive' and, it transpired that, at least by the closing date of the tender in question, no process had been initiated with regard to the dissolution of Vassallo Concrete Supplies Ltd.
4. The PCAB agrees that, legally, the tender was submitted by Vassallo Concrete Services Ltd and, as a consequence, the evaluation board could not take into

account the credentials of another firm which was totally separate from the firm submitting the tender.

5. In the light of the above, the PCAB thus considers the reference made by the appellant company to a letter explaining the relationship between Vassallo Concrete Services Ltd and Vassallo Concrete Supplies Ltd, as a simple self-generated supporting document which, unfortunately, offers no formal legal comfort.

As a consequence of (1) to (5) 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 said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 November 2010