

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 233

**Advert No: CT/A/006/2010 – CT 2520/2009**

### **Tender for the Civil Works and Embellishment of the Żewwieqa Waterfront, Ghajnsielem Gozo**

This call for tenders was published in the Government Gazette on 29 January 2010. The closing date for this call for offers was 11 March 2010.

The estimated value of this tender was Euro 5,008,059 (excl. of VAT).

Four (4) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on 5 August 2010 following the decision taken by the Contracts Department to disqualify its offer since it was not administratively compliant

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 Monday, 11 October 2010 to discuss this objection.

Present for the hearing were:

#### **Polidano Bros Ltd**

Dr. Henri Mizzi	Legal Representative
Dr Steve Decesare	Legal Representative
Dr Jesmond Manicaro	Legal Representative
Mr Claudio Grech	
Mr Antoine Portelli	

#### **Witness**

Mr John Zarb	PricewaterhouseCoopers
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#### **Road Network JV**

Dr Adrian Delia	Legal Representative
Arch David Bonnici	Representative
Mr Manuel Bonnici	Representative
Dr Kenneth Grima	Legal Representative
Arch Mark John Scicluna	Representative
Mr Edward Schembri	Representative
Ms Itianne Schembri	Representative
Dr John Refalo	Legal Representative

Arch Malcolm Gingell	Representative
Arch Sandra Magro	Representative
Mr Paul Magro	Representative

Dr Carmelo Galea	Legal Representative
Mr Victor Hili	Representative

**Ministry for Gozo**

Dr Titianne Scicluna Cassar	Legal Representative
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**Evaluation Board**

Mr John Cremona	Chairperson
Mr Reno Grech	Secretary
Arch Mariella Xuereb	Member
Arch Godwin Sultana	Member
Arch Angelo Portelli	Member

**Department of Contracts**

Mr Bernard Bartolo	Assistant Director (EU Unit)
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The representatives of *Bugeja Brothers (Gozo) Ltd* and *Gatt Tarmac Ltd* on behalf of GRV JV were informed about the date of the hearing but none of them attended.

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellants' representative was invited to explain the motives of the objection.

Dr Kenneth Grima, legal representative of Road Network JV, an interested party, complained that the Department of Contracts had refused to furnish him with the reasons for the rejection of the bid made by Polidano Bros Ltd, the appellant company, when he had the right to take part in the hearing as an interested party.

Dr Henri Mizzi, legal advisor of the appellant company, argued that the hearing concerned the disqualification of his client and, as a result, legally, no other party had a say in that except his client and the contracting authority which had to justify the disqualification.

Dr Adrian Delia, also representing Road Network JV, submitted that the regulation under which the appellant joint venture made its request did identify the interested parties and, according to the practice adopted, the interested parties were entitled to have access to the grounds for rejection and to documentation submitted during the hearing but the interested parties did not have access to tender documentation that went beyond the scope of the appeal so as to avoid any fishing expeditions.

The Chairman PCAB remarked that, for the sake of transparency and accountability and within the parameters of the regulations, the PCAB gave interested parties the opportunity to air their views during the hearing.

Dr Mizzi explained that, according to the evaluation report, his client's tender had been disqualified because the (i) 2007 accounts were not audited as requested in the tender and (ii) 2008 accounts were drawn up by the company's consultants who, inter alia, made the following comment, namely

*"We have not audited these financial statements and accordingly express no assurance thereon"* whereas the tender document specified at clause 4.2.3 that: *"in the case that the year 2008 is unavailable, this must be clearly stated and certified by a recognised commercial bank"*

It was stated that this certification was not submitted.

Following this Dr Mizzi made the following submissions, namely, in respect of:

#### The 2007 Accounts

- the firm's auditors, Deloitte, did carry out the audit process even if they reported a disclaimer of opinion

#### The 2008 Accounts

- these accounts were not audited and the tender document stated that these accounts should not necessarily be audited. His client submitted the 2008 accounts certified by the accountants and, *per se*, that was

more meaningful than the requested certification by a commercial bank, which was not involved in any way in the drawing up of the company's accounts. Once again, contended Dr Mizzi, his client had satisfied the tender requirements

### Alternative Evidence

- If, for the sake of the argument the tenderer did not submit the requested documentation one had to refer to Regulation 50 (5) of the Public Procurement Regulations 2005 which stipulated that:

*“In the event that a candidate or tenderer is, for any valid reason, unable to provide the references requested by a contracting authority, its economic and financial standing may be substantiated by any other document which the contracting authority considers appropriate.”*

As a consequence, claimed Dr Mizzi, if the document requested was not submitted and that same requirement could be satisfied with the submission of another document, then, the contracting authority was obliged to request alternative documents while, admittedly, it was at the discretion of the contracting authority whether to accept that document or not keeping in view that, at the end of the day, what had to be established was the financial and economic standing of the tenderer. The obligation on the part of the contracting authority to give the tenderer the opportunity to submit alternative evidence was to apply in exceptional circumstances.

### Substantiality

- The Instructions to Tenderers (ITT) clearly stated that a tender which was in conformity with the requirements and specifications laid down in the tender documents with no substantial deviations or reservations must not be disqualified. The ITT was clear also as to what deviations might lead to the disqualification of a tender and clause 28.2 of the ITT exhaustively listed what might be considered to be a 'substantial deviation' and that left no room for interpretation. Moreover, the adjudicating board did not have the power to disqualify his client on the basis of alleged shortcomings.

The value of the tender was about €5m and the scope of regulation 50 was to establish that the tenderer had the financial capacity to execute the contract. In this regard, his client had a credit facility with the bank of €3m, which was more than the €2.5m requested in the tender. Moreover, when one considered the financial figures in the balance sheet, it clearly emerged that his client had the required financial standing to execute this contract.

Dr Mizzi claimed that, even if there were shortcomings on the part of his client, those shortcomings were not substantial and hence it was not justified to disqualify his clients' offer.

The appellant company's legal advisor proceeded by stating that the evaluation board was duty bound to evaluate the financial information submitted, even if the data might not have been 100% in order, to see if it could form an opinion as to whether the tenderer was financially sound to undertake this contract.

Dr Titianne Scicluna Cassar, legal representative of the Ministry for Gozo, the contracting authority, made the following submissions:

(i) the appeal concerned clause 4.2.3 of the tender document which read as follows:

*“They must provide appropriate statements from banks showing they have access to sufficient credit and other financial facilities to cover the required cash flow for the duration of the contract. The tenderer must have access to a credit facility issued by a recognized commercial bank of not less than €2,500,000. Evidence of financial and economic standing in accordance with Article 50 of LN177/2005 showing that the liquid assets and access to credit facilities are adequate for this contract, confirmed by audited accounts for the years 2006, 2007 and 2008 verified by a certified accountant. In the case that year 2008 is unavailable this must be clearly stated and certified by a recognized commercial bank. All evidence must be provided using Form 4.4, Financial Statement, in Volume 1, Section 4 of the tender documents.”*

(ii) at administrative compliance stage the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority. Contrary to what the appellant company had claimed, Dr Scicluna Cassar contended that if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier

(iii) the tender requested a credit facility of up to €2.5m which requirement the appellant satisfied and even exceeded

(iv) the 2006 audited accounts, even if with a qualified auditor's opinion, had been submitted and met the tender conditions

#### The 2008 Accounts

- These were not audited but they were admissible according to the tender document. However, these accounts were accompanied by the

accountant's certificate when the tender conditions requested a certificate from a recognised commercial bank that the 2008 audited accounts were not available. The adjudicating board had no discretion to go into the scope of asking for the bank's certificate but all that it had to do was to check if it was submitted or not. The other bidders had submitted audited accounts for 2008.

#### The 2007 audited accounts

- These accounts were accompanied by a 'disclaimer of opinion' which, after listing the reasons, read as follows:

*“Because of the significance of the matters discussed in the preceding paragraph, we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion as to whether the financial statements give a true and fair view of the financial position of the company as of 31<sup>st</sup> December 2007 and of the company's financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standards. Accordingly, we do not express an opinion on the financial statements.”*

Contrary to what the appellant seemed to imply, the 'disclaimer of opinion' was quite relevant and the following quotes were cited:

#### *“International Standard on Auditing 705 - Disclaimer of Opinion*

*9. The auditor shall disclaim an opinion when the auditor is unable to obtain sufficient appropriate audit evidence on which to base the opinion, and the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive.*

*27. When an auditor disclaims an opinion due to an inability to obtain sufficient appropriate audit evidence, the auditor shall amend the introductory paragraph of the auditor's report to state that the auditor was engaged to audit the financial statements. The auditor shall also amend the description of the auditor's responsibility and the description of the scope of the audit to state only the following: “Our responsibility is to express an opinion on the financial statements based on conducting the audit in accordance with International Standards on Auditing. Because of the matter(s) described in the Basis for Disclaimer of Opinion paragraph, however, we were not able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion”*

The difference between ‘we audited’ and ‘we were engaged to audit’ was illustrated by Dr Scicluna Cassar when the latter quoted from the book by Robert B. Davies titled ‘Use of Disclaimers in Audit Reports discerning between shapes of opinion’:

*“In the introductory paragraph the first phrase changes from ‘we have audited’ to ‘we were engaged to audit’ in order to let the user know that an audit was commissioned but does not mention that the auditor necessarily completed the audit. Additionally, since the audit was not completed and/or adequately performed the auditor refuses to accept any responsibility ..... the scope paragraph is omitted in its entirety since effectively no audit was performed and the final paragraph changes completely stating that an opinion could not be formed and expressed because of the situation mentioned in the previous paragraph.”*

Another quote from the same author stated that *“lending institutions and governments typically reject financial statements if the auditor disclaimed an opinion and will request the auditee to correct the situation the auditor mentioned and obtain another audit report.”*

In terms of the new regulations, on the 6 May 2010, the Contracts Department had requested the appellant to resubmit proper audited accounts but the appellant company claimed that it had submitted all that was requested and attached two letters dated 10 May 2010, one from Deloitte, who performed the 2007 accounts audit, and the other from PricewaterhouseCoopers, which letters did not alter the substance of the accounts submitted. Moreover, it was noted that the 2007 audited accounts were not filed at the Malta Financial Services Authority (MFSA).

Since the 2007 audited accounts were not effectively submitted and the 2008 accounts were not accompanied by the bank’s certificate then the adjudicating board had to refer to Clause 28.3 (page 24) which stated that *“If a tenderer does not comply with the requirements of the evaluation grid, it will be rejected by the evaluation committee when checking admissibility.”*

Dr Scicluna Cassar concluded that if the auditor was not in a position to verify or not even to express an opinion on the accounts for the various reasons listed, then one could not expect the adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts.

Dr Adrian Delia, legal representative of Road Network JV, an interested party, submitted the following remarks:

- (a) he agreed with what Dr Scicluna Cassar had stated with regard to the ‘disclaimer of opinion’ expressed by the auditor on the appellant company’s 2007 accounts
- (b) he disagreed with the appellant company’s interpretation of Reg. 50 (5) that the contracting authority was duty bound to ask for alternative evidence to prove financial and economic standing because the regulations, even as recently amended, listed what the contracting authority, as a general rule, might request to establish financial and economic standing and granted the contracting authority some elbowroom by allowing it to ask whatever it deemed fit to ask for this purpose
- (c) with regard to Reg. 28 (2), Dr Delia stated that it had to be kept in mind that clause 4.2.3 of the tender document referred to a mandatory requirement as indicated by the repeated use of the term ‘must’ as to what had to be submitted and what had to be submitted as a substitute
- (d) if the tenderer disagreed with the requirement of having the bank certifying that the 2008 audited accounts were not available then the tenderer had all the opportunity to clarify that matter with the contracting authority prior to the closing date of the tender and, if acceded to, the contracting authority would have to inform one and all of the change in tender conditions - that was a legal provision which could not be disputed, claimed that Dr Delia. On the other hand, Dr Delia continued, if a tenderer would be allowed to submit other documents in substitution of those requested in the tender *dossier* then that tenderer would be effectively altering the tender conditions and specifications.

Dr Kenneth Grima, also representing Road Network JV, raised the following points:

- (i) with regard to the issue of ‘substantiality’ he recalled that the PCAB had always held that mandatory documentation had to be submitted and that it was up to the contracting authority and not up to the tenderer to decide on what was substantive or not
- (ii) the fact that the tender in question was valued at about €5m rendered it more important for the contracting authority to ascertain that the bidder was financially sound to undertake these extensive works. For one of the three years in respect of which the company’s accounts were requested, i.e. for 2007, no audited accounts were effectively submitted and that had to be seen in the light that the 2008 accounts were also unaudited in May 2010, i.e. the closing date of the tender – even though they were admissible according to the tender conditions. On the other hand, his client had submitted the audited accounts with regard to the three years requested
- (iii) the contracting authority could not do away with the serious reservations expressed by the auditor in the appellant company’s

2007 financial statements and the adjudicating board could not interpret the 2007 accounts in any other way.

Dr Jesmond Manicaro, another legal representative of Polidano Bros Ltd, the appellant company, stated that it was not mandatory for the 2008 accounts to be audited, even though the other tenderers had submitted 2008 audited accounts, and, as a consequence, that far, his client was compliant. He added that the bank had informed his client that it was not in a position to issue the certificate requested in the tender and hence his client submitted a certificate from an accounting/auditing firm, in its accounting capacity, which he considered as more appropriate in the circumstances.

The Chairman PCAB remarked that even if, from a professional point of view, he did not endorse the requirement of the bank's certificate as stipulated in the tender document, the tenderer should have asked for a clarification as to whether he could provide a certificate from the accountants rather than from the bank. He added that, technically speaking, one could not seriously take into consideration financial statements with a 'disclaimer of opinion'.

Mr John Zarb, partner at PricewaterhouseCoopers, accountant/auditor and senior lecturer at the University of Malta, under oath, gave the following evidence:

- a) it turned out that, over the years, the rate of expansion of Polidano Group by far exceeded the administrative capacity of the organisation
- b) in November 2009 Polidano Bros Ltd engaged PricewaterhouseCoopers to undertake a process to update and 'clean' the books of the Group that would lead to the restructuring and consolidating of Polidano Group

#### The 2008 Accounts

Mr Zarb stated that the firm he represented signed the accounts for 2008 and, as indicated in the report dated 8 May 2010, which he read out, it did not audit those accounts. Admittedly, the accountant's report did not provide the same comfort of an audit report but it did provide a certificate from an accountants firm which was more valid than that of a bank because this accounting firm was engaged in a long and rigorous exercise of updating the appellant company's accounting records and system. The appellant company had explained to the contracting authority that a process was at an advanced stage whereby the 2008 accounts had been drawn up and were soon to be audited, something which materialised in July 2010

#### The 2007 Accounts

These accounts were audited by Deloitte but, for reasons stated earlier, it could not express an opinion on the 2008 financial statements. Mr Zarb said that an auditor could qualify the audit either because there was something wrong with certain aspects of the accounts or because the auditor was not in a position to do the job

properly or if there were serious doubts about the accounts that the auditor could not resolve in any way. He gave a couple of examples about a 'qualified opinion' and a 'disclaimer of opinion', e.g. Global Funds Ltd and Gozo Ferries Ltd.

### Disclaimer of Opinion

According to Mr Zarb, there were grades as to how grave the disclaimer was, namely either one did not agree with the accounts or one had doubts about them or there was 'a limitation of scope' about the accounts. The disclaimer of opinion rendered those accounts pervasive and it was the worst kind of qualification that an auditor could make to the financial statements

- c) the financial statements would have been used to assess whether the size of the firm was compatible with the size of the contract that the same company was bidding for
- d) the audit process entailed a number of procedures that had to be carried out and in the case of a 'disclaimer of opinion' that would mean that the auditor was unable to carry out some of these procedures as outlined in the 2007 auditor's report
- e) the 2007 audited accounts submitted were the only ones available and those were the same set of accounts that were presented to the shareholders. The law provided for audited accounts with a 'disclaimer of opinion' and all that the tender requested was audited accounts for 2007. At the end of an audit, one could either confirm that the accounts were *true and fair* or one could *qualify* the accounts on specific issues or one could not express an opinion because of doubts and doubts were a part of life stated Mr Zarb
- f) the 2008 accounts contained corrected comparative figures in respect of 2007 and that was the result of the corrective action taken since November 2009. The 2008 accounts showed that the firm had a turnover of €60m and that the profits of €2.996m previously reported in the 2007 audited accounts should have read €4.51m (page 5 of the accounts)
- g) Mr Zarb said that it was the practice of PricewaterhouseCoopers not to have the accounts of a client signed by any individual employee but that the accounts should bear the stamp of the organisation so that the exercise would have the backing of the whole organisation
- h) to the observation made by Dr Scicluna Cassar that the audited accounts of 2008 were presented to the MFSA whereas the audited accounts for 2007 had not been filed at the MFSA, Mr Zarb remarked that the 2008 audited accounts filed at the MFSA contained the 2007 corrected comparative figures

- i) to questions put forward by Dr Delia Mr Zarb declared that (1) PricewaterhouseCoopers was not in any way involved in the 2007 audited accounts as presented with the tender documentation, (2) he had advised the appellant company that the accountant's report on the 2008 accounts was more relevant than the bank's certificate requested in the tender (this was reflected in letter dated 10<sup>th</sup> May 2010 sent to the Contracts Department)
- j) the adjudicating board had to establish if the tenderer had the financial muscle to carry out this contract and he opined that, from the financial data submitted by the appellant company, the adjudicating board was in a position to determine that the said appellant company was capable of undertaking large projects.

At this point Dr Delia intervened and referred to clause 4.2 which stated that:

*“In order to be considered eligible for the award of the contract, tenderers must (emphasis added) provide evidence that they meet or exceed certain minimum qualification criteria. This evidence must be provided by tenderers in the form of the information and documents described in Sub clause 4.1 and in whatever additional form tenderers may wish to utilise.”*

Dr Delia remarked that

- the 2006 audited accounts were in order, even if qualified
- the 2007 audited accounts were ‘pervasive’ - or meaningless - because of the ‘disclaimer of opinion’
- the 2008 audited accounts contained amended comparative figures for 2007
- according to clause 4.2.3 the bank, was only required to confirm that the 2008 audited accounts were not available and not to certify those accounts and that should not have been so difficult to do given that the bank was going to extend a credit facility of €2.5m to the appellant company

Moreover, Dr Delia drew the attention of the PCAB that the evidence given by Mr Zarb had to be taken into account only as far as it was relevant to the situation at the closing date of the tender and certainly not as to the state of affairs at the time of the hearing.

Dr Scicluna Cassar drew the attention of Mr Zarb to the long list of shortcomings listed by the auditor in the 2007 report which prompted the auditor to issue a ‘disclaimer of opinion’. She then quoted from IAS 705 as follows:

“13. If the auditor is unable to obtain sufficient appropriate audit evidence, the auditor shall determine the implications as follows:

- (a) If the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be material but not pervasive, the auditor shall qualify the opinion; or
- (b) the auditor concludes that the possible effects on the financial statements of undetected misstatements, if any, could be both material and pervasive so that a qualification of the opinion would be inadequate to communicate the gravity of the situation, the auditor shall:
  - (i) Withdraw from the audit, where practicable and possible under applicable law or regulation; or (Ref: Para. A13-A14)
  - (ii) If withdrawal from the audit before issuing the auditor's report is not practicable or possible, disclaim an opinion on the financial statements.”

Mr Zarb remarked that that provision was under the title '*Consequence of an Inability to Obtain Sufficient Appropriate Audit Evidence Due to a Management-Imposed Limitation after the Auditor Has Accepted the Engagement*' which situation did not apply to this case. He added that, legally, the audit had been carried out and that it was not mandatory to file the accounts at the MFSA. Mr Zarb stated that, once the audited accounts for 2008 with the corrected comparative figures for 2007 corrected were filed with MFSA on the 29 July 2010, there was no point to file the 2007 audited accounts with MFSA. He declared that there were no significant differences between the 2008 accounts submitted with the tender document and the 2008 audited accounts submitted in July to MFSA.

The Chairman PCAB remarked that, according to the evaluation report, Polidano Bros Ltd failed with regard to the 'Selection Criteria – Financial and Economic Standing' clause 11 (c) (Clarification 6) where it appeared (i) there was no problem with the financial projections for the two years ahead, (ii) the financial statement had still to be discussed, (iii) the issue of the audited accounts had been exhausted and (iv) there was no problem with the minimum annual turnover of €4m.

Mr John Cremona, chairman of the adjudicating board, submitted the following remarks:

- (i) the adjudicating board had met 14 times to discuss this tender. The adjudicating board had to stick to the requirements requested by the contracting authority in the tender document and that the board was not at liberty to depart from mandatory requirements otherwise it would effectively be altering the tender conditions and specifications
- (ii) during its deliberations the adjudicating board concluded that not all the mandatory documentation submitted by the appellant company was in order in the sense that: (a) since the 2008 accounts were not audited the bank had to certify that fact, which certification was not forthcoming and (b) since the auditor could not express an opinion on the 2007 accounts the adjudicating board could not take the contents of those accounts into consideration. If the appellant company was

unable to obtain the bank's certificate, then the tenderer had the opportunity to clear that issue before the closing date of the tender, as it did in the case of other issues

- (iii) no accountant sat on the adjudicating board but, whenever it was felt necessary, the board sought appropriate advice from the attorney general. The adjudicating board was not required to evaluate in depth the financial data submitted by tenderers but the adjudicating board required the audited accounts and the financial projections so as to compare the basic financial data with the financial figures given in Form 4.4 'Financial Statement' (page 45 of the tender). The adjudicating board could not check the figures given by the appellant in Form 4.4 because the financial data in the 2007 audited accounts was not reliable given the 'disclaimer of opinion' along with the other problem mentioned with regard to the 2008 accounts
- (iv) the other participating tenderers had submitted audited accounts in respect of the 3-year period indicated

At this point Mr Cremona gave the following additional evidence under oath:

- (a) the adjudicating board first had to undertake a quantitative and then a qualitative exercise so as to establish if the documentation requested had been submitted by the tenderers and, if in the affirmative, whether the documents satisfied the purpose why they were requested in the tender document. It turned out that the 2007 audited accounts presented by the appellant company did not provide the comfort required because of the auditor's 'disclaimer of opinion' whereas the 2008 accounts were acceptable, even if not audited, but were not accompanied by the requested bank's certificate. On checking with the MFSA the adjudicating board learned that the 2007 and 2008 accounts had not been filed
- (b) the adjudicating board had to stick to the tender conditions and specifications and any departure therefrom had to be approved by the Contracts Department through a clarification which would have been communicated to all bidders. The adjudicating board, through the Director of Contracts, by letter dated 6 May 2010 had even drawn the attention of the appellant company to the shortcomings noted in its submission with regard to the evidence of the financial standing of the tenderer and it was given up to the 10 May 2010 to rectify its position, however, by letters of reply dated 10 May 2010, the appellant company confirmed that the 2006 and 2007 audited accounts submitted with the tender were the ones available and that the accountant's report was more relevant than the bank's certificate
- (c) once the accounts for 2007 and 2008 as presented by the appellant company were not considered in order for the purposes of clause 4.2.3 then the adjudicating board saw no point in considering their contents

- (d) Reg. 50 (5) was taken into consideration by the adjudicating board but it was up to the contracting authority to accept alternative documents to those requested in the tender document and the proper way to do that was for the tenderer to make a request and if it were acceptable to the Contracts Department then it would have been communicated to all bidders by way of a clarification
- (e) part of the tender submission consisted in the filling in of Form 4.4 'Financial Statement' which figures therein had to be supported by the audited accounts. While the declaration in Form 4.4 was the responsibility of the tenderer it still had to be supported by the requested documents which documents had to be in order
- (f) the adjudicating board had to (1) determine if the conditions stipulated in the tender document had been met by the tenderers in the form of turnover, cash flows, credit facility by the bank and so forth and (2) see that the financial data given in Form 4.4 corresponded with the supporting documentation, among them, the audited accounts. The adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in Form 4.4. The tender requested three main requirements, i.e. a minimum annual turnover of €4m for the years 2006/7/8 in relation to road works, civil engineering works, building embellishment and finishing works in respect of which tenderers had to submit the relative list of works accompanied by certificates; credit facilities to the tune of €2.5m; and evidence of financial and economic standing as per Article 50

Dr Delia pointed out that this tender was not going to be adjudicated on the basis of the most economically advantageous tender (MEAT) but, in this case, the bidder had to meet the minimum requirements as laid down in the tender document and one did not have to be a professional accountant to establish that.

Dr Scicluna Cassar stressed the importance of the audited accounts in the evaluation process since the main financial data extracted from them had to be reflected in 'Financial Statement' at Form 4.4.

Dr Mizzi reiterated that Reg. 50 (5) allowed the tenderer to submit alternative evidence to that requested in the tender document and that the adjudicating board was obliged to consider that alternative evidence but was at liberty to decide whether it was satisfactory or not.

Dr Mizzi maintained that:

- (i) an audit process could lead to different conclusions and that, although the 2007 audit report was the way it was, one had to acknowledge that his client had satisfied the tender requirement for the submission of the 2007 audited accounts
- (ii) the 2008 the accounts - which included the revised comparative figures for 2007 - did not have to be audited and, therefore, that far his client was

compliant. The problem arose with regard to the tender requirement of a certificate by the bank that the 2008 audited accounts were not available instead of which his client submitted a report by the accountants which, in the circumstances, he considered more relevant. The adjudicating board had to take that alternative evidence into account in terms of Reg. 50 (5)

(iii) the accounts, even as presented, was evidence of a firm with a turnover of €61m in 2008 and €36m in 2007 and total equity of €7m in 2008 and €32m in 2007

(iv) the evaluation process should have gone beyond the checking process and that the inclination of the evaluation process should be towards the inclusion rather than to the exclusion of bidders for the sake of wider competition. It was unfair to exclude his client, a construction company of such a stature, and then admit bidders with relatively very limited financial standing just because they had submitted their audited accounts

On her part, Dr Scicluna Cassar submitted that:

- (a) in spite of what had been stated by the appellant company's legal representative with regard to the extensive profile of his client, the fact remained that the said company was unable to submit a proper set of audited accounts for 2007 because the one submitted carried the 'disclaimer of opinion' which, effectively, meant that they were not audited
- (b) the adjudicating board had only the audited accounts for 2006 to work on because the 2008 accounts was also not compliant since the bank's certificate had not been produced
- (c) the financial data requested was a matter of substance for the adjudication process but, on the other hand, were quite straightforward so much so that the information was submitted by the other tenderers except for the appellant company

Dr Grima reiterated that, whenever a tenderer did not submit mandatory information, one had, invariably, been disqualified and rightly so! He added that, in this case, the appellant company was given the opportunity to rectify its shortcomings but the appellant company stood by its original submission as it considered that all that had been requested was in fact submitted in order. Dr Grima recalled that the PCAB has always upheld that the contracting authority had the right to request whatever information it deemed fit and that it was not up to the tenderer to omit or to substitute the information requested. Dr Grima pointed out that it had been confirmed at the hearing that the last set of audited accounts of Polidano Bros Ltd, which was one of the leading construction companies in Malta, dated back years before. He concluded that the readmission of the appellant company would be unfair on the other bidders who had made a submission in line with the tender conditions and specifications.

Dr John Refalo, also representing Road Network JV, argued that what had to be decided upon was whether the adjudicating board had acted correctly and within the law when it had decided that the appellant company was not compliant with the tender

requirements. He added that the tenderer was obliged to provide the minimum requirements requested in the tender and that if it failed to do that then the adjudicating board had no other option but to declare the tenderer as non-compliant. Dr Refalo stated that, in the case under reference, the appellant company had submitted financial evidence which was not reliable in view of the disclaimer of opinion expressed by the auditor.

Dr Delia concluded by putting forward the following arguments:

- (i) the appeal did not concern the adjudication process even if the appellant company was suggesting a kind of evaluation exercise that would somehow justify the reinstatement of its bid
- (ii) the role of the PCAB was not to replace the adjudicating board but to see whether the adjudicating board acted correctly in accordance with regulations and tender conditions
- (iii) that certain documentation was not submitted and/or was not submitted in order was not subject to an opinion but it was a matter of fact and the 2007 audited accounts with a 'disclaimer of opinion' were meaningless for the purpose of the evidence requested in Reg. 50. The audit process had to satisfy a series of criteria but the 2007 accounts had failed to satisfy a number of these criteria so much so that a 'disclaimer of opinion' had to be put on record
- (iv) the fact that the (comparative) figures for 2007 were corrected in the 2008 audited accounts showed that the original figures contained in the 2007 audited accounts were incorrect and hence constituted false evidence
- (v) in case no. 189 the PCAB had opined that "*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.*"

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 5 August 2010 and also through their verbal submissions presented during the public hearing held on 11 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' (a) introductory submissions wherein, inter alia, it was claimed that as regards (1) the 2007 accounts, the firm's auditors, Deloitte, did carry out the audit process even if they reported a disclaimer of opinion – (2) the 2008 accounts, these accounts were not audited and since the tender document stated that these accounts should not necessarily be audited these were simply certified by the accountants and, *per se*, that was more meaningful than the requested certification by a commercial bank, which was

not involved in any way in the drawing up of the company's accounts, (b) claim that, in line with Regulation 50 (5) of the Public Procurement Regulations 2005, if the document requested was not submitted and that same requirement could be satisfied with the submission of another document, then, the contracting authority was obliged to request alternative documents, (c) claim that the Instructions to Tenderers (ITT) clearly stated that a tender which was in conformity with the requirements and specifications laid down in the tender documents with no substantial deviations or reservations must not be disqualified, (d) claim that, since the value of the tender was about €5m and the scope of regulation 50 was to establish that the tenderer had the financial capacity to execute the contract, the fact that they had a credit facility with the bank of €3m, which was more than the €2.5m requested in the tender should have sufficed, (e) claim that the evaluation board was duty bound to evaluate the financial information submitted, even if the data might not have been 100% in order, to see if it could form an opinion as to whether the tenderer was financially sound to undertake this contract and (f) claim that it was unfair for a construction company of such a stature to be excluded because of formal trivialities and, at the same time, have a system where this admits bidders with relatively very limited financial standing just because they would have submitted audited accounts;

- having also taken note of the contracting authority's representative's (a) claim that, at administrative compliance stage, the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority, (b) remark that, contrary to what the appellant company, had claimed, if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier, (c) claim that (1) the 2006 audited accounts, even if with a qualified auditor's opinion, had been submitted and met the tender conditions, (2) the 2008 accounts were not audited but they were admissible according to the tender document, yet these accounts were accompanied by the accountant's certificate when the tender conditions requested a certificate from a recognised commercial bank that the 2008 audited accounts were not available and it was not the adjudicating board's remit to ask for the bank's certificate and (3) whilst the 2007 accounts were accompanied by a 'disclaimer of opinion', yet acting in terms of the new regulations governing public procurement, on the 6 May 2010, the Contracts Department had requested the appellant company to resubmit proper audited accounts but the appellant company claimed that it had submitted all that was requested, (d) statement that since the 2007 audited accounts were not effectively submitted and the 2008 accounts were not accompanied by the bank's certificate then the adjudicating board had to refer to Clause 28.3 (page 24) which stated that "*If a tenderer does not comply with the requirements of the evaluation grid, it will be rejected by the evaluation committee when checking admissibility.*", (e) submission that if the auditor was not in a position to verify or not even to express an opinion on the accounts for the various reasons listed, then one could not expect the

adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts, (f) emphasis on the audited accounts in the evaluation process since the main financial data extracted from them had to be reflected in 'Financial Statement' at Form 4.4, (g) reiteration of the fact that the adjudicating board had only the audited accounts for 2006 to work on because the 2008 accounts was also not compliant since the bank's certificate had not been produced and (h) emphasis on the fact that the financial data requested was a matter of substance for the adjudication process but, on the other hand, were quite straightforward so much so that the information was submitted by the other tenderers except for the appellant company;

- having considered Mr Cremona's testimony, especially, his comments regarding the fact that (a) the 2007 audited accounts presented by the appellant company did not provide the comfort required because of the auditor's 'disclaimer of opinion' whereas the 2008 accounts were acceptable, even if not audited, but were not accompanied by the requested bank's certificate, (b) the adjudicating board had to stick to the tender conditions and specifications and any departure therefrom had to be approved by the Contracts Department through a clarification which would have been communicated to all bidders, (c) the adjudicating board, through the Director of Contracts, by letter dated 6 May 2010 had even drawn the attention of the appellant company to the shortcomings noted in its submission with regard to the evidence of the financial standing of the tenderer and it was given up to the 10 May 2010 to rectify its position, however, by letters of reply dated 10 May 2010, the appellant company confirmed that the 2006 and 2007 audited accounts submitted with the tender were the ones available and that the accountant's report was more relevant than the bank's certificate, (d) once the accounts for 2007 and 2008 as presented by the appellant company were not considered in order for the purposes of clause 4.2.3 then the adjudicating board saw no point in considering their contents, (e) Reg. 50 (5) was taken into consideration by the adjudicating board but it was up to the contracting authority to accept alternative documents to those requested in the tender document and the proper way to do that was for the tenderer to make a request and if it were acceptable to the Contracts Department then it would have been communicated to all bidders by way of a clarification and (f) the adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in Form 4.4 - 'Financial Statement' – wherein the figures listed in the said 'Form' had to be supported by audited accounts;
- having taken cognizance of the points raised by Dr Delia, especially (a) the one relating to the a mandatory requirement as indicated by the repeated use of the term 'must' as to what had to be submitted, (b) the comment made with regards to the fact that if a tenderer would be allowed to submit other documents in substitution of those requested in the tender *dossier* then that tenderer would be effectively altering the tender conditions and specifications, (c) remark that (1) 2006 audited accounts were in order, even if qualified, (2) 2007 audited accounts were 'pervasive' - or meaningless - because of the 'disclaimer of opinion', (3) 2008 audited accounts contained amended comparative figures for 2007 and (4) according to clause 4.2.3 the

bank, was only required to confirm that the 2008 audited accounts were not available and not to certify those accounts and that should not have been so difficult to do given that the bank was going to extend a credit facility of €2.5m to the appellant company, (d) his remark regarding the fact that the evidence given by Mr Zarb had to be taken into account only as far as it was relevant to the situation at the closing date of the tender and certainly not as to the state of affairs at the time of the hearing and (e) his claim that the consideration that certain documentation was not submitted and/or was not submitted in order was not subject to an opinion but it was a matter of fact and the 2007 audited accounts with a 'disclaimer of opinion' were meaningless for the purpose of the evidence requested in Reg. 50;

- having also noted Dr Grima's (a) remarks relating to the issue of 'substantiality', (b) comment referring to the fact that the contracting authority could not do away with the serious reservations expressed by the auditor in the appellant company's 2007 financial statements and the adjudicating board could not interpret the 2007 accounts in any other way and (c) emphasis on the fact that the readmission of the appellant company would be unfair on the other bidders who had made a submission in line with the tender conditions and specifications;
- A. having considered Mr Zarb's (a) explanation as to what led to the engagement of PricewaterhouseCoopers to undertake a process to update and 'clean' the books of the Group that would lead to the restructuring and consolidating of Polidano Group, (b) reference to the fact that, whilst it was true that an accountant's report did not provide the same comfort of an audit report, yet it did provide a certificate from an accountants firm which was more valid than that of a bank in view of the fact that the accounting firm would have been engaged in a long and rigorous exercise of updating the company's accounting records and system, (c) reference to the fact that the appellant company had explained to the contracting authority that a process was at an advanced stage whereby the 2008 accounts had been drawn up and were soon to be audited, something which materialised in July 2010, (d) explanations regarding the scope behind and the corresponding significance of issues such as 'qualified opinion', 'disclaimer of opinion', 'limitation of scope' and so forth, (e) claim that (1) the 2007 audited accounts submitted were the only ones available and those were the same set of accounts that were presented to the shareholders and since the law provided for audited accounts with a 'disclaimer of opinion' these were submitted as such as all that the tender requested was audited accounts for 2007, (2) the 2008 accounts (A) contained corrected comparative figures in respect of 2007 and that was the result of the corrective action taken since November 2009 and (B) that the firm had a turnover of €60m and that the profits of €2.996m previously reported in the 2007 audited accounts should have read €4.51m (page 5 of the accounts), (f) remark that the adjudicating board had to establish if the tenderer had the financial muscle to carry out this contract and he opined that, from the financial data submitted by the appellant company, the adjudicating board was in a position to determine that the said appellant company was capable of undertaking large projects, (g) remark that, legally, the audit had been carried out and that it was not mandatory to file the

accounts at the MFSA and (h) declaration that there were no significant differences between the 2008 accounts submitted with the tender document and the 2008 audited accounts submitted in July to MFSA,

reached the following conclusions, namely:

1. The PCAB agrees with the fact that the 2008 accounts, albeit not audited, were still admissible in the format as submitted according to the tender document.

However, although it is still not convinced as to the effectiveness of this requirement and, theoretically, whilst agreeing with the contracting authority in the latter's submission that an accountant's report does not provide the same comfort as that provided by an audit report, yet also tends to agree with the appellants' claim, namely that, at least in this context, a certificate from an accountants firm may tend to be more valid than that, possibly, provided by a commercial bank.

However, factually, this Board acknowledges the fact that these accounts were accompanied by the accountant's certificate when the tender conditions specifically requested a certificate from a recognised commercial bank.

The PCAB has repeatedly pronounced itself that, despite one's reservations as to the mandatory submission of a particular document or set of documents, unless otherwise agreed with the pertinent contracting authority via the Department of Contracts, one cannot simply renege on submitting such document / documents in an arbitrary manner and then expect for its submission to proceed in a normal manner with the evaluation process.

2. The PCAB feels that, with regards to the obligation of the contracting authority to request alternative documents, contrary to what the appellant company had claimed, if the tenderer was not in a position to submit any of the documents requested, the onus rested with the tenderer to seek a clarification prior to the closing date of the tender and that it was definitely not the other way round in the sense that the adjudicating board was obliged to request evidence other than that requested in the tender dossier.
3. This Board notes that, albeit the 2007 accounts were accompanied by a 'disclaimer of opinion', yet, acting in terms of the new regulations governing public procurement, on the 6 May 2010, the Contracts Department had requested the appellant company to resubmit proper audited accounts. Nevertheless, despite such request, the appellant company claimed that it had submitted all that was requested.

The PCAB concurs with the stand taken by the adjudicating board, namely that once the accounts for 2007 and 2008, as presented by the appellant company, were not considered in order for the purposes of clause 4.2.3, then the adjudicating board was presented with no alternative but to desist from considering further their contents.

Additionally, this Board also agrees with the contracting authority's claim that if, unless otherwise agreed between all parties concerned, one were to allow any tenderer to submit other documents in substitution of those requested in the tender *dossier*, then that tenderer would be, effectively, altering the tender conditions and specifications.

4. The PCAB disagrees with the issues raised by the appellant company in connection with the fact that tender documents with no substantial deviations or reservations must not be disqualified. Apart from the fact that such financial data is indispensable for any adjudicating body to enable it to reach reasonable and justified conclusions, it remains the prerogative of a contracting authority to establish which documents it deems *substantial* or not.

This Board acknowledges that it seems that the information, as requested in the tender specifications, was quite straightforward and attainable, so much so that, as transpired during the hearing, the information, as requested, was submitted by all the other tenderers except for the appellant company.

5. With regards to the argument brought forward by the appellant company wherein, *inter alia*, it was stated that the fact that the said appellant company is the beneficiary of a credit facility of Euro 3 million sanctioned by its bankers should have sufficed for the adjudicating board to establish the solidity of the company, especially, in consideration of the fact that this goes beyond the limit requested in the same tender document which required a credit limit of Euros 2.5 million, this Board opines that credit facilities on their own are not enough proof of a going concern of a commercial entity. Undoubtedly, whilst it is a fact that during the evaluation stage such credit facilities should not be overlooked yet, likewise, these should not serve to be as the sole benchmark during an adjudicating process.
6. Furthermore, the PCAB feels that the remark made by the appellant company's representatives regarding the fact that the evaluation board was duty bound to evaluate all financial information submitted even if data might have not been fully in order as somewhat unreasonable. This Board agrees with the claim submitted by the contracting authority's representatives wherein it was stated that, at administrative compliance stage, the adjudicating board had the task to verify that the documentation requested had been submitted but it had no discretion to do away with any of the mandatory data requested by the contracting authority. Also, it is even true that the level of comfort provided in the tenderer's submission was not one of the best one could have longed for. One cannot but agree with the contracting authority's claim that, in the circumstances, if the auditor was neither in a position to verify nor in a position to express an opinion on the accounts for the various reasons listed, then one could not expect the adjudicating board to arrive at the financial and economic standing of the tenderer from the 2007 accounts as submitted with the offer. At this point one cannot but highlight the fact that the adjudicating board had only the audited accounts for 2006 to work on because, administratively, the 2008 accounts was also not compliant since the bank's certificate had not been produced.

It is a fact that, in this tender, the adjudicating board was not required to evaluate the financial standing of the tenderer beyond the requirements in

Form 4.4 - 'Financial Statement' – wherein the figures listed in the said 'Form' had to be supported by audited accounts.

This Board argues that, whilst, during the hearing, it was amply manifested that the appellant company has embarked on an intensive accounting campaign to get its books in order, yet it is also a fact that, upon closing date of this tender, the said appellant company was not in a position to provide what was requested in the tender specifications, so much so, that the 2008 accounts had only been drawn up and audited in July 2010, some four months after closing date of the call of the tender under review.

Whilst it is encouraging from an operational and commercial perspective, the declaration made by the appellant company that there were no significant differences between the 2008 accounts as submitted with the tender document in March 2010 and the 2008 audited accounts as submitted in July 2010 to the MFSA, is meaningless for the purpose of this tender considering the delay in the availability of such results which had to be submitted way back in March 2010 rather than in July 2010.

7. The PCAB maintains that the comment made by the appellants' representative wherein, *inter alia*, it was stated that it is unfair for a company of such stature to be excluded because of formal trivialities and, at the same time, have a system where this admits bidders with relatively very limited standing just because they would have submitted audited accounts as, possibly, logically, sound. However, this Board also maintains that all entities, regardless of their size, should abide by the terms and conditions of a tender as such conditions should never discriminate amongst participating bidders, regardless of their stature.

As a consequence of (1) to (7) 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